



# RONAN DALY JERMYN

S O L I C I T O R S

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### 1. Welcome

I'm glad to introduce the Spring/Summer edition of our Newsletter. There are a number of interesting articles on legal topics in this edition which I hope you will find of benefit. You will see that four new Solicitors have joined us in recent months. This further strengthens the team here at 12 South Mall and brings our overall numbers at RDJ to 90 people. As a firm we are very conscious of the need for ongoing development and improvement of our resources to ensure that we can continue to deliver quality service to our clients. Our continued growth reflects our commitment to that development and improvement. I hope that you enjoy this edition of the newsletter and if you have any comments or suggestions on the contents or format, we would be delighted to hear from you.

*John Dwyer Managing Partner*



### 2. European Legal 500

The European Legal 500 for 2003 has just been published. The Legal 500 is the definite independent guide to Law firms across Europe and each year it rates the performance of legal firms in each European country. We are delighted to report an excellent rating for RDJ in this year's guide. The firm was rated amongst the top ten in the country and special mention was made of the firm's performance in the areas of commercial property, mergers and acquisitions, banking and finance, construction law, media law and employment law. The guide noted that "The leading firm in Cork, Ronan Daly Jermyn, is an increasing threat to Dublin's status as M & A hegemony". A full copy of the guide can be viewed on our website.

### 3. Appointment of German Consul

Pictured L to R: John Dwyer, Managing Partner, RDJ, Garvan Corkery, RDJ, Michael Corkery former German Consul and His Excellency Gottfried Haas, Ambassador of the Federal Republic of Germany to Ireland.



In December 2002 Garvan Corkery was appointed Honorary Consul of the Federal Republic of Germany to Ireland at Cork. Garvan's appointment as Consul comes in

succession to his father, Michael. Garvan will combine his duties in this new role with his practice as Partner in our Commercial Department.

## 4. E-mail Monitoring in the Work Place

### Introduction

In recent years, technological innovation in the work place has increased rapidly, resulting in a phenomenal increase in the use of e-mail and the internet as modes of communication. There has been a corresponding increase in the adoption by employers of sophisticated privacy invasive technologies to monitor employees' electronic habits.



Last July, a new Websense study in the UK found that one quarter of UK Companies have dismissed employees for internet misconduct. Around 71% of firms in the UK have dealt with internet misuse in the workplace. 69% of all internet related dismissals were associated with on line pornography while 26% were connected to the use of chat rooms and 23% with the use of personal e-mails.

A similar study last March by Amarach Consulting in Ireland found that almost one in four internet users in Ireland say their use of the internet in the workplace is restricted or monitored

It is now accepted that e-mail is a formal written mode of communication and the electronic Communications Act, 2000 applies the laws of defamation to electronic communications.

The internet is a world wide medium so the audience for a potential defamation action is huge. E-mails do not pass directly from the sender to the recipients - they pass through at least four different links. At any stage during that process it is possible that a defamatory e-mail may be "published" to a third party. Internal e-mails can also cause problems both within and outside an organisation. So far, the only internet libel case in Ireland was a criminal one in which Judge Elizabeth Dunne in Dublin Circuit Court jailed a man who sent e-mails alleging that a former teacher was a paedophile. On a guilty plea, he was jailed for two and half years for criminal libel.

Most of the cases in respect of internet and e-mail use and abuse have taken place in the UK and the U.S. and they all lead to the same conclusion – that how to deal with employee e-mail and internet use is one of the most difficult issues to face employers in recent years. The purpose of this article is to examine to what extent an employer can monitor employee e-mails and internet usage.

### The Law Relating To Monitoring Employee E-mail and Internet Usage

Private usage of an employer's e-mail and internet facilities is now widespread and most employers are prepared to accept such private usage –provided that it is reasonable and does not impact adversely on an employee's productivity. However, due to the potential for liability on the part of the employer resulting from abuse of these facilities, most employers want to ensure that they can monitor internet and e-mail use. So what

of an employee's right to privacy? In this regard, we can look to the law relating to the monitoring of employee telephone calls.

Until 1997, the issue of monitoring employee telephone calls without consent had not been dealt with by the Courts. However, in the case of *Halford –v- United Kingdom 24 EHRR 523 (1997)*, the European Court of Human Rights upheld Ms Halford's complaint that her right to respect for private and family life, guaranteed by Article 8 of the European Convention on Human Rights, had been infringed. In this case, Ms Halford was employed by the Merseyside Police Authority as Assistant Chief Constable and had been refused promotion to Deputy Chief Constable on eight occasions. She therefore commenced sex discrimination proceedings against her employer and had been granted permission to use her office private line to communicate with her legal advisors. However, having granted her that permission, her employer then tapped her phone line. The European Court of Human Rights upheld her complaint and awarded damages for the infringement of her right to privacy.

Therefore, it has been established beyond doubt by this case that employees' private telephone calls made on the employer's system are private and that employees are entitled to a reasonable expectation of privacy in relation to those calls.

There is no analogous case relating to e-mail usage – although undoubtedly such a case will be forthcoming in the not too distant future. In the United States, it has become established that employers are entitled to demand an employee's consent to e-mail monitoring. Once the consent is granted, the reasonable expectation of privacy argument does not arise.

The position in Europe is not so clear. The Data Protection Directive 95/46/26 provides that, before personal data can be used, an employee's consent must be obtained. "Data" in this regard clearly includes monitoring of e-mail and internet usage. Furthermore, the Data Directive 97/66/EC prohibits listening, tapping, storage or other kinds of interception or surveillance of communications without the consent of the users concerned. Consent, therefore, is a key issue in relation to monitoring of employee e-mails and internet usage. The next question, then, is what constitutes consent?

### Consent – e-mail and internet policies in the workplace

It is undoubtedly the case that employers cannot monitor e-mail and internet usage without their employees' knowledge and consent. The first step then, for each employer, is to introduce a Policy relating to e-mail and internet usage in the workplace. The policy must clearly state the rules attached to use of the employer's e-mail and internet facilities and must also leave employees in no doubt that regular monitoring of e-mails and internet use will occur.

This Policy must be communicated to each and every employee – usually by inclusion in the employer's Staff Handbook, although the Policy can be circulated independently. In smaller organisations, employees can be requested to acknowledge receipt of the Policy by signing a copy and returning it to a designated person within the organisation. Once the employees have acknowledged receipt of the Policy in this manner and have not raised any objection to the Policy, their consent to subsequent monitoring by the employer in

accordance with the Policy is implied. Where it is not practicable to seek individual signatures from employees acknowledging receipt of the Policy, circulation of the Policy and the failure of the employees to raise any objections to the Policy arguably amounts to implied consent. While that takes care of the issue of consent, an argument can still be made by an employee that the monitoring undertaken by the employer was unreasonable in the circumstances and that will be a question for the Courts to decide in due course.

#### Recent developments on e-mail and internet policies

A recent decision from the Employment Appeals Tribunal highlights the importance of having a comprehensive e-mail and internet usage policy in place in all employer organisations. In the case of *Mehigen –v- Duiflin Publications Limited (Case number UD582/2001)*, the Claimant was dismissed from his employment following the discovery by his employer of pornographic images attached to an e-mail on his PC at work. The EAT, having heard all of the evidence, was satisfied that the proper procedure was followed by the employer in terms of investigating the matter and giving the Claimant an opportunity to put his version of events to his employer. However, the EAT heard evidence that there were no systems in place in the Company to secure against breaches of e-mail/internet usage and heard that there was no written Company policy regarding e-mail usage. This absence of a written policy appears to have been the factor that led to a decision in favour of the Claimant, albeit with a finding of contribution on the part of the Claimant to his own dismissal.

The following is a relevant extract from the EAT's decision:-

*"Clearly, the Employment Appeals Tribunal or any other third party will be heavily influenced by the existence of a written e-mail and internet policy where the employer reserves the right to dismiss for breach of the policy. It is unlikely that the use of the internet for unauthorised purposes will amount to a sufficient reason justifying an employer from dismissing an employee without notice in the absence of a clear written statement to this effect in the Company's policy. An exception to this perhaps, would be in a situation where an employee was using the Company's facilities to download obscene pornography from the internet.*

*The Respondent failed to have in place clear policies and a code of practice on employee use of e-mail and the internet. The consequences of its misuse should have been made absolutely clear to all employees. After much discussion, the Tribunal decided that the onus was on the employer to have a clear policy in place to deal with use of e-mail and the consequences of its misuse/abuse. Because of this, the Tribunal has to hold the dismissal unfair".*

The Claimant was awarded €2,000 under the Unfair Dismissal Act and a sum for unpaid notice.

This case clearly highlights the importance of having a clear, concise and written e-mail and internet usage policy in place in all employer organisations.

**Jennifer Cashman, Solicitor**  
Employment Unit

## 5. Social and Affordable Housing

**Social Housing** is rented housing provided either by the Local Authority or by a Voluntary or Co-operative Housing Body.



**Affordable Housing** is owner occupier, or shared ownership housing provided at a price below market value.

### Social Housing under the Planning and Development Act 2000

The concept of Social and Affordable Housing was established by the Planning and Development Act, 2000 and section 96 (3) of that Act sets out the manner in which the developers of residential developments are required to cede land at the market value of the land to the Planning Authority.

The developer may be required under section 96 (3) to transfer the ownership of certain residential land to the planning authority; or to build and transfer on completion a certain number and description of houses to the planning authority or to persons nominated by the authority; or to transfer a certain number of fully or partially serviced sites to the authority or to persons nominated by the authority.

The Act goes on to provide that the developer shall be compensated by the Planning Authority for any land transferred under section 96.

The Planning Authority is required to have regard to the following matters:

- (i) The proper planning and sustainable development of the area to which the application relates;
- (ii) The housing strategy and the specific objectives of the development plan which relate to the implementation of the strategy;
- (iii) The need to ensure the overall coherence of the development plan to which the application relates.

The Social and Affordable Housing provisions do not apply to a residential development of 4 houses or less or for housing on 0.2 hectares of land or less. Before applying for planning permission in respect of such a development, a person may apply to the planning authority for a certificate stating that the provisions of Social and Affordable Housing do not apply.

Under section 95 of the 2000 Act, the planning authority has discretion as to the percentage of land zoned for residential use to be reserved for the provision of Social and Affordable Housing, which is subject to a maximum ceiling of 20%.

### Affordable Housing under the 2000 Act

Under the 2000 Act "Affordable Housing" is defined in terms of an "eligible person" who is "...a person who is in need of accommodation and whose income would not be adequate to meet the payments on a mortgage...".

In determining whether an applicant is eligible for Affordable Housing the Planning Authority must take into account the following:

- (a) The accommodation needs of eligible persons
- (b) The current housing circumstances of eligible persons
- (c) The financial circumstances of eligible persons
- (d) The period for which the eligible persons have resided in the area of the development plan
- (e) Whether eligible persons own houses or lands in the area of the development plan or elsewhere
- (f) Such other matters as the planning authority considers appropriate

### Social Housing Provisions under the Planning and Development (Amendment) Act 2002

The Planning & Development (Amendment) Act 2002 amended the 2000 Act with regard to inter alia the provision of Social and Affordable housing. Section 3 of the 2002 Act substitutes a new section 96 for section 96 of the 2000 Act.

The 2002 Act removes any discretion that the Planning Authority had under the 2000 Act and now provides under section 3 (2) that the Planning Authority must impose provisions for Social and Affordable Housing in a relevant residential or mixed (including residential) planning permission.

The three types of conditions which the Planning Authority could impose under the 2000 Act are re-iterated again under the 2002 Act together with additional options as follows:

- (i) the transfer to the Planning Authority of the ownership of any other land within the functional area of the planning authority.
- (ii) The building and transfer on completion to the ownership of the Planning Authority, or to the ownership of persons nominated by the authority, in accordance with paragraph (i) above.
- (iii) The transfer of such number of fully or partially serviced sites on land in accordance with paragraph (i) above, as the agreement may specify to the ownership of the Planning Authority, or to the ownership of persons nominated by the authority.
- (iv) A payment of such an amount as specified in the agreement to the planning authority.
- (v) A combination of a transfer of land within the site of the developer, but for a lesser amount than is specified in the housing strategy and in addition the doing of one or more of the things referred to in options (i) to (iv) above and any of the three options under the 2000 Act.
- (vi) A combination of the doing of two or more of the options referred to at (i) to (iv) above and any of the three options under the 2000 Act.

A further related article re Withering Permissions can be viewed on our website [www.rdj.ie](http://www.rdj.ie).

**Zelda O'Callaghan, Solicitor**  
**Commercial Property Team**

## 6. Health and Safety Issues

### Are you aware of the powers of the Health & Safety Authority?



Extensive powers have been given to Inspectors under the 1989 Safety Health and Welfare at Work Act which many Employers are unaware of and which we feel they should be aware of in the event of an Inspector visiting their premises.

His powers are extensive and allow him to enter, inspect, examine and search at all times any place that he has reasonable cause to believe is a place of work

If he has grounds to suspect that he might be obstructed in carrying out his duties he can bring along a member of an Garda Siochana

Where he has reasonable cause to believe that an offence is being carried out at a place of work, he is entitled to use **reasonable** force where necessary to enter the premises **provided** he has a warrant from a Judge of the District Court

He can require the productions of books and records and copy any of them.

He can require any person whom he has reasonable cause to believe might assist him in his enquiries to answer either alone or with another such questions as he thinks fit and then ask them to sign a declaration of the truth of the answers they have given. However no one can be compelled to answer any question that might lead to evidence that might incriminate them.

He can direct that a place of work or any part of it be left undisturbed whilst his enquiries are ongoing.

He can direct that any article or substance found in a workplace which appears to him to have caused or which might likely cause danger to safety or health be dismantled or be subjected to testing. He can detain any such article or substance for further testing.

He is entitled to take sample of the atmosphere in any place of work.

He is entitled to serve an **Improvement Direction** where he believes that any work activity is likely to involve a risk to the safety and health of people engaged in that activity. This direction is issued to the employer and will request the submission of an improvement plan within a specified time scale. This plan must suggest measures to comply with the improvement direction. If the Inspector is not happy with the plan he can direct that it be revised and re-submitted within a specified time.

He can serve an **Improvement Notice** on the owner of a workplace. This is most common when an Inspector believes that there is a breach of the Safety Health and Welfare at Work Act or where an employer has failed to submit an acceptable improvement plan. Where such a notice is served, the person so served with it has 14 days to appeal it. An Appeal is heard

by a Judge of the District Court and he can either confirm the notice, confirm the notice with modifications or cancel the notice having heard the evidence of both sides.

If an inspector believes that any work activity is likely to involve risk of serious personal injury he may serve a **Prohibition Notice**. This notice directs that the activity specified must cease until matters set out in the notice have been remedied. Such a notice is effective either from the date of service of it or from a date specified in the notice itself. The person served with such a notice has seven days to appeal it and again the appeal is heard by the District Court. A request can be made to have a stay put on the notice until such time as the appeal is heard.

Employers and business owners should also be aware that where an offence by a body corporate (Limited Companies generally) is proved to have been committed with the connivance of or to have been attributable to any neglect on the part of any **Director, Manager, Secretary or other similar officer of the body corporate**, that person as well as the body corporate can be guilty of the offence. It is worth noting that in 2001 eighteen people received criminal convictions under this provision.

As will be seen, the powers are very extensive and all employers should be aware of them in the event of a visit from an Inspector.

*James O'Sullivan, Partner  
Litigation Team*

## 7. New Solicitors

Pictured below are the four latest Solicitors to join the RDJ Team.

**Marianne Crowley** was a legal apprentice with the Firm and qualified in 2002. She returns to the Firm after a break travelling in Australia. Marianne is working in the Commercial Department.

**Paula O'Sullivan** joins us from the Family Law Centre and is working with Rosemary Horgan in the Family Law Team.

L-R Marianne Crowley, Paula O'Sullivan,  
Juli Rea, Louise Duggan



**Juli Rea**, is practising in the areas of residential conveyancing and probate with our Private Client Team and joins the firm from Arthur Comyn & Co.

**Louise Duggan** has joined the Commercial Property Team. She returns to her home city of Cork having previously practised with Firms in Dublin and Galway.

## 8. Employment & Medical Disability

A recent case before the Equality Tribunal considered the refusal of a position based on a finding of a medical condition at a pre-employment medical examination. The Complainant (who was a full time bus driver with Bus Eireann for over 15 years driving a school bus on a rural route during the school year) applied in 1999 for a position as a seasonal driver for the months of July and August in Cork City but was refused the position on medical grounds. His application had been successful but was subject to a medical examination. This examination by the employer's Chief Medical Officer (CMO) found that he suffered from bundle branch block which is an abnormality of the electrical impulses in the heart and on this basis his application was refused. He made a claim to the Director of Equality Investigations which could not proceed as the provisions of the Employment Equality Act 1998 only came into force from 18th October 1999.

In March 2001 he again applied for the same seasonal position. In the meantime following the diagnosis by the CMO the employee had been referred by his own GP to various consultants whose views were that his right bundle branch block was congenital and he was said to be asymptomatic with an excellent prognosis. A consultant cardiologist who examined the employee stated that the problem was a normal variant and it should not in any way prevent him from driving a bus or a school bus.

Notwithstanding his condition he was retained by Bus Eireann in his position as a school bus driver and was responsible for the transfer of up to 70 school children to and from school each day. However Bus Eireann required that he would undergo a medical examination each year and be fit to continue on each occasion.

Again in relation to his second application for the position of seasonal bus driver, Bus Eireann relied upon the medical diagnosis as a reason to refuse the application. The employee then brought a claim under the Employment Equality Act 1998 to the Equality Tribunal claiming that Section 6 of that Act which provides that discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated on one of the discriminatory grounds which include disability. The Equality Officer dealing with the case held that the employee's condition constituted a disability for the purpose of the Employment Equality Act 1998.



Bus Eireann firstly pleaded that the matter could not be brought before the Equality Tribunal on the basis that it had already been complained of in 1999 and had been refused on the grounds that it related to an incident prior to the introduction of the Employment Equality Act 1998. The Equality Officer held that this would make in effect a nonsense of the Employment Equality Act 1998 and that the second application in effect would stand on its own merits.

Bus Eireann argued that his medical condition made his employment in a position as a seasonal bus driver a potential danger.

The Equality Officer pointed out that in the first place an employer is not required to employ any person who is not competent to carry out the duties of the position. However the Equality Officer pointed out that the employer is under an obligation to do all that is reasonable to accommodate such a persons needs by providing special treatment or facilities unless the provision would give rise to a cost, other than a nominal cost.

The employee continued to be responsible for the daily transport of up to 70 school children between September and June each year which position he claimed was a highly responsible one and that involved a significant level of stress. He had been required to undergo a medical examination each year and had passed same on each occasion.

The CMO of Bus Eireann stated that the full time position held by the employee was significantly less stressful than the seasonal position would be in that driving in a city was in itself more stressful and would have imposed greater physiological demands on the complainant. The CMO was unable to produce any objective studies. No risk assessment had been undertaken.

The Equality Officer held that the position being adopted by Bus Eireann was inconsistent. Bus Eireann had not introduced any procedures to monitor the potential development of such a condition among existing city bus drivers who were not as a matter of routine required to undertake a medical examination each year.

The Equality Officer held that Bus Eireann had not given any consideration to its obligations for reasonable accommodation.

The Equality Officer awarded the employee a sum of €6,000 in compensation for the effect of the discrimination and ordered that Bus Eireann would take steps to develop objective and variable criteria for determining the relevance of particular medical conditions to employment and service, take steps to develop policies to meet its obligation and to provide reasonable accommodation for a person with disabilities and reconsider the employee's application for position of seasonal bus driver in the light of the outcome of those developments.

*Fergal Dennehy, Partner  
Litigation Team*

## 9. Does Your Business Need A Competition Law Compliance Programme?

Competition law aims to ensure that equal playing conditions are maintained for all competitors in the market regardless of the industry in which they operate. In broad terms the competition law code in Ireland seeks to achieve this aim by prohibiting the following:



1. Agreements or arrangements between businesses which have as their object or effect the prevention, restriction or distortion of competition. This could be an agreement between competitors to fix prices or to share markets or an agreement between a supplier and its distributors to sell the product produced by the business at a particular price.
2. The abuse of a dominant position by a business which operates in a particular market or part of that market. Dominance is not solely indicated by the market share of the business in question and a number of indicators need to be considered before dominance can be confirmed. Dominant companies are prohibited from entering into particular types of arrangements and engaging in certain conduct.
3. Certain mergers, acquisitions and joint ventures which substantially lessen competition.
4. Certain state aids which are granted contrary to EU rules.

Since the introduction of the Competition Act 2002 and the increased resources which have been given to the Competition Authority, it has become increasingly important to ensure that your business complies with the above prohibitions. The size of your business is irrelevant when it comes to engaging in anti-competitive behaviour. It could occur, for example, where two small shopkeepers in West Cork agree to sell their products at certain prices or where a plc. forces its distributors not to sell into particular markets.

Many businesses have chosen to implement competition law compliance programmes so as to highlight the possible breaches of competition law which may occur in their particular business structures. The aim of a competition law compliance programme is to produce a list of "dos and don'ts" for businesses in so far as competition law is concerned. They are tailor-made for each business so as to take into account the market share of the business and the types of agreements which it makes, both with its competitors and with its distributors, suppliers, etc. The preparation of a competition law compliance programme requires an initial competition law audit of a business by a lawyer specialising in competition law which will result in the compilation of the list of "dos and don't" for the business. This list will need to be updated as the business grows or changes.

If your business is of a significant size, the compilation of the list of "dos and don'ts" will usually involve interviews with field staff who are selling the products or delivering the services provided by the business and who are meeting competitors of the business. It would also usually involve a review of the business's standard documents such as the standard contracts which it has with its suppliers and customers. Any audit would

also entail an analysis of the particular industry in which the business operates as there are practices which are unique to each industry. The most common matters which are dealt with in the list of "do's and don'ts" are pricing, distribution, trade associations, information exchanges, rebates, refusals to supply, market sharing, joint advertising with competitors and conditions of sale.

The advantages of competition law compliance programmes are manifold. A compliance programme can reduce the possibility of fines, periodic payments and prison sentences. A maximum fine for breaches of competition law can amount to 10% of a business's annual turnover and there are provisions under both EU and Irish law for the imposition of such fines. In addition, failure to pay the fines can lead to the imposition of periodic penalty payments under both Irish and EU law. Breaches of the 2002 Competition Act can also result in prison sentences being imposed.

In addition, if an agreement is considered to have the object or effect of restricting, preventing or distorting competition, then it is considered to be void which means that it cannot be enforced by any party to the agreement. Sometimes if the clause which is void can be isolated from the rest of the agreement then it can be "severed out" and the rest of the agreement can be enforced. Finally, failure to comply with competition law can lead to actions for damages at both an EU and Irish level and to injunctive proceedings. It can also have adverse effects on the reputation of the business which is found to be in breach.

**Lynn Sheehan, Solicitor**  
*EU/Competition Unit*

## 10. Genesis Enterprise Programme

Fergal Dennehy and Adrian Wall recently gave a workshop-style presentation to the participants on this year's Genesis Enterprise Programme (GEP), a Cork based programme that supports graduate entrepreneurs in developing their businesses. Fergal dealt with employment matters while Adrian focussed on company law and financing issues

Pictured L to R: Fergal Dennehy, RDJ, Drew O'Sullivan, GEP Programme Manager and Adrian Wall, RDJ



## 11. Guardianship of Children and the Rights of Unmarried Fathers

The category of unmarried father has expanded significantly in the last ten years. This specific category is no longer limited to the traditional stereo-type father who did not reside with the mother of his child but now more often than not includes unmarried couples living as a de-facto family unit. This living arrangement alone does not however place an unmarried father in a stronger legal position than any other unmarried father. Legally there is little recognition of the fact that a couple may have, in all but name, exhibited the characteristics of a married couple in an exclusive committed relationship. The reality is that natural fathers whether cohabiting or not, have no automatic "rights" in relation to their child. They have to take positive steps to assert their position, if necessary, through the Irish Courts.



Many fathers only realise on the breakdown of their relationship that they have no specific or automatic rights in relation to their children. Such rights do not develop by the mere fact of cohabitation. Couples who commence living together are frequently unaware of the limited and fragile nature of their legal position as a result of their unmarried status. These issues do not usually become a cause for concern until the relationship breaks down, at which stage the unmarried father faces a significantly greater challenge than a married father vis a vis his children. A married father on the other hand is the automatic joint guardian and custodian of his children.

In reality the unmarried father is a legal non-entity in the child's life if he is not a joint guardian. The first piece of legislation to put any father's rights on a Statutory footing was the Guardianship of Infants Act 1964. Section 6(1) provided that the "father and mother of an infant shall be guardians of the [child] jointly", this only related to married fathers. It was 1987 before any reference was made to unmarried natural fathers. Section 12 of the Status of Children Act 1987 amended the 1964 Act by the addition of Section 6A which enabled unmarried fathers to apply to the Court to be appointed guardian. Section 12(3) of the 1987 Act also provided for the appointment of the natural father as joint guardian where the mother agreed, provided that;

- (1) she consented in writing and
- (2) the father's name was registered on the Birth Certificate,

This Consent then had to be ruled on in Court by way of Court Order. Section 13 of the 1987 Act also enabled a natural father to apply for access without the necessity of first being appointed guardian. Under this section he may also seek the Court's direction on any question affecting the welfare of the child. The Courts in practice approach such an application for access on the same basis as they would an application by a married parent of a child with the welfare of the child always being the first and paramount consideration.

Section 6A for the first time gave a natural father the right to apply to be appointed guardian of his child jointly with the natural mother. "Guardianship" is the term used to denote a

collection of rights and duties regarding the upbringing of an infant, e.g. custody, maintenance, education, health, religion and general welfare. Where there is more than one guardian of the infant for example, the consent of the other guardian must be obtained for the issue of a passport in respect of the infant – if a natural father is not a guardian then he has no say in this process. Section 6A does not however grant the natural father an automatic right to be appointed joint guardian but merely a "right to apply" to be so appointed. An application for guardianship is by no means straightforward and is greatly dependant on the views of the natural mother. The Court ultimately bases its decision on what is in the best interests of the child, and on the level of commitment offered by the father to the child. This approach was confirmed and the matters to be taken into account by the Courts were addressed in more definitive terms by the Supreme Court in *WO'R –v- EH*. This case also discussed the weight to be placed on the "blood link" between a natural father and his child. It held however that the blood link was only of particular relevance in certain cases, for example, where they may have lived together in a de facto family unit since the child's birth. All of the circumstances in any given case must be taken into account and the blood link will be relevant in a case where the child was born into an existing family unit but not a conclusive factor in determining an application for guardianship. The welfare of the child will always be the first and paramount consideration. In cases where the parties cohabited the Court did recognise that the natural father would have extensive rights of interest and concern but these were still not put on a statutory footing.

The majority of guardianship applications are brought in the District Court and as a result there are limited cases in which written judgments have been delivered in contested proceedings. The specific circumstances of each case will be examined by the Court but even in the situation where the father was in an exclusive cohabiting relationship with the child's mother he still only has the right to apply!

It took almost another 10 years before the next development was made in this area. The Children Act 1997, while it does not improve or expand on the legal or constitutional rights of unmarried fathers does simplify the method by which a father may become a guardian by removing the necessity of applying to Court from the equation...but again only with the consent of the natural mother. Under Section 4 of the 1997 Act, once the requirements of the Section are complied with and a Declaration completed by the parents this is sufficient for the guardianship rights of a single father to take effect. The Declaration must state that;

- (1) the parties have not married each other,
- (2) they are the father and mother of the child,
- (3) they have agreed to the appointment of the father as guardian and
- (4) they have entered into arrangements regarding custody and access.

The Declaration must be in the standard form prescribed by the Minister for Justice, Equality and Law Reform. Whilst this is a welcome amendment to the law from a natural father's point of view, the problem remains that many parents may not be aware

of this process. The fact that the Declaration does not have to be registered poses the question of how to keep a record of the Declaration, where should it be held, whether the parties should obtain legal advice before signing, and what are the consequences if they do not obtain independent legal advice.

A separate Declaration must be sworn for each child born to the couple and it is advisable that each parent should obtain independent legal advice before swearing.

As can be seen, the non-marital family is not under the Irish Constitution and legislation recognised as a legal unit and does not possess the same rights and privileges as the family based on marriage. Each member of the non-marital unit is dealt with in a separate and distinct manner. The unmarried father, despite the fact that he may co-parent for many years, is still in an inferior position to that of the natural mother and is either dependant on the mother's consent or on the Courts to clarify his position within the family.

There are many categories of cohabiting families in existence in Ireland. The 1996 Census recorded approximately 31,000 family units consisting of cohabiting couples and one can only anticipate that this will show an increase when the 2002 Census results are published. Reform in the areas of property and succession rights of cohabitees has already begun. Such discussions should be extended to parental rights and to the legal recognition of such rights in appropriate cases. Such reform should recognise the reality that in today's society there is a "community of persons conducting a family life outside marriage" and that this does not undermine or belittle the importance or constitutional status of the family based on marriage...nor should it.

A further article regarding recent developments in the re-registration of births is available on our Website at [www.rdj.ie](http://www.rdj.ie).

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## 12. Mahon Point Development

Construction commenced on the new €300m Mahon Point Development earlier this year. It is hoped that the Shopping Centre will be open for business in Spring 2005. A number of high profile tenants including Debenhams and Tesco have confirmed their place in the Centre. The project is being undertaken by O'Callaghan Properties and is the largest commercial project in the Cork area for many years. RDJ are delighted to act for O'Callaghan Properties on the venture.

