



# RONAN DALY JERMYN

S O L I C I T O R S

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### 1. *Welcome*

Welcome again to our Newsletter.



**John Dwyer**  
*Managing Partner*

In addition to containing our usual range of articles on different legal issues this edition includes a tribute to our late Partner David Browne. Sadly David passed away on the 30th August last. His support, cheerfulness, attention to work and his sense of humour are missed by us all here in RDJ.

As ever I hope you find some or all of the various articles are informative and should you require further details on any of the issues addressed please feel free to contact the relevant RDJ Solicitor who will be more than pleased to assist you.

### 2. *SLA Presidency*

One of our Partners, James O'Sullivan, has been appointed the new President of the Southern Law Association. James is pictured above receiving his chain of office from outgoing President Fiona Twomey. The Southern Law Association is the representative body for Solicitors in Cork City and County. We wish James every success for the term of his presidency which runs for 12 months to November 2004.



### 3. *U.C.C.*

After a competitive tender process, RDJ were confirmed earlier this year as legal advisers to UCC. The appointment runs for a term of 5 years. The firm has a long association with the University and is very pleased to act as advisers to the University on its legal requirements.



#### 4. Chairman of the Disciplinary Tribunal



Our Senior Partner, Frank Daly, has been appointed by the President of the High Court to be Chairman of the Disciplinary Tribunal. The Tribunal is a division of the High Court and deals with complaints against Solicitors for disciplinary reasons.

Ronan Daly Jermyn are delighted that Frank has received such a prestigious appointment. Frank will combine his duties in this new role with his practice as head of the RDJ Commercial Department.

#### 5. Section 150 of the Companies Act 1990



Section 149 of the Companies Act 1990 (the "1990 Act") provides that any person who was a director of a company at the date of, or within 12 months of, the commencement of its winding up, where the liquidator certifies that the company is unable to pay its debts, can be restricted by the court from acting as a director or secretary of any company for 5

years unless the person concerned can prove that he acted honestly and responsibly in relation to the conduct of the affairs of the company or unless the person concerned was nominated by a financial institution and had not given a guarantee to that institution for any loan to the company concerned. Section 56 of the Corporate Enforcement Act 2001 now provides that a liquidator must seek a release from the Director of Corporate Enforcement if he does not wish to seek a restriction order under Section 150 where the company is insolvent.

Does the "person" to which the sections (149 and 150) refer have to be an Irish resident? Judge Finlay Geoghegan considered this point at a hearing in the High Court on the 3rd February 2003.

The liquidator, for whom this firm acted, gave evidence on affidavit that at the time of the winding up of the company, two persons who were recorded in the Companies Registration Office as resident in England were directors of the company. The liquidator stated on affidavit that he wrote by registered post to the addresses registered in the Companies Office of the directors but the letters were returned "not known at this address". The liquidator employed an investigator who called to the address given and he was told that neither of the directors had ever lived there. One of the former directors suggested another address for the directors but the same result ensued. The liquidator also certified that the company was insolvent.

The Judge then considered whether "person" within the meaning of Section 150 meant an Irish resident. She concluded it didn't and restricted both directors from being, directly or indirectly, a director or secretary or to be concerned with, or to take part in, the promotion or formation of any company (in Ireland) but with liberty to the directors to apply to the court on notice to the liquidator.

**Nicholas Comyn**, Commercial Department

If you require any details on this case or any insolvency matter, please contact Nicholas Comyn or Jennifer Cashman.

#### 6. Voluntary transfer of a site from parent to child



Stamp Duty is charged on the full market value of a site on its transfer, even where a person voluntarily transfers the site to another.

However, section 206 of the Finance Act 2001 introduced an exemption from stamp duty where a site was being transferred from a parent to a child for the purpose of constructing a residence on the site. The exemption only applies if a number of criteria are met:

1. The value of the site being transferred must not exceed €254,000.
2. The purpose of the transfer is to enable the child to construct a dwellinghouse thereon which will be occupied by the child as his/her principal private residence.
3. Only one such transfer of a site can be made to a given child so as to be exempt from stamp duty even if the value of the site being transferred is far below €254,000.
4. The site can only be transferred to a child of the Transferor, ie if the site is being transferred into the joint names of the child and any third party, even that child's spouse, then the transfer will attract stamp duty in the normal way.

Where a person voluntarily transfers a property to another, the Transferor is ordinarily liable to pay Capital Gains Tax based on the full market value of the property. This could deter a parent from transferring a site to a child in accordance with Section 206 of the Finance Act 2001.

Under Section 93(1)(a) of the Finance Act 2001, a parent can now get an exemption from Capital Gains Tax, where it transfers a site to a child where the child intends to build its principal private residence thereon. The same 4 criteria listed above apply and if met, then no Capital Gains Tax liability will accrue to the parent.

However, clawback provisions do apply and the tax liability that the parent was exempt from will accrue to the child in the event that the child disposes of the site received from its parent within three years from the date of the transfer and the land being disposed of does not contain a dwellinghouse which was constructed by the child since the time of the acquisition of the land.

The child is entitled to transfer the land from its name into the joint names of himself and its spouse, without triggering the clawback provisions. Under section 141 of the Finance Act, 1999, transfers of property between spouses are exempt from stamp duty provided that the spouses are living together.

The above relief applies for transfers after the 6th December 2000.

**Zelda O'Callaghan**  
Commercial Property Department

## 7. New Partner and New Solicitor



L-R Adrian Wall & John Dwyer

Adrian Wall was appointed a Partner to the Firm in recent months. Adrian joined us in April 2001 from Matheson Ormsby Prentice in Dublin and has made an excellent contribution to the success of RDJ in his time with us. Adrian practices in the Commercial Department of the firm and specialises in Corporate, Company and Intellectual Property Law.

Sinead Corcoran joined RDJ in November 2003 having graduated from the Law Faculty at University College Cork in 1998, with a first class honours degree. She qualified as a solicitor in 2001. Having trained with McCann FitzGerald in Dublin, she went on to work in the Commercial Department of that firm. Sinead further strengthens the team in the RDJ Commercial Department.



## 8. Domestic Violence (Amendment) Act, 2002



The concept of the Barring Order was first introduced into Irish Civil Law in Section 22 of the Family Law (Maintenance of Spouses and Children) Act 1976 which excluded the violent spouse from the family home for a period of three months. Prior to that the only remedy available to victims was by way of a criminal complaint to the

Gardai to initiate assault proceedings, or to seek a civil remedy in either the Circuit Court or High Court.

The focus of the legislation from 1976 to 1981 was a short sharp shock for the perpetrator of Domestic Violence. The Family Law (Protection of Spouses and Children) Act 1981 extended the length of a Barring Order to up to one year and introduced the interim Protection Order which sought to protect the person seeking the remedy of the Barring Order from the date of issuing of the proceedings until the determination of the proceedings by the Court.

Up to this point the legislation only protected the family based on marriage and tended to focus largely on violence perpetrated against women. The Domestic Violence Act 1996 came into force on the 27th March 1996 and introduced the Safety Order and the Interim Barring Order. The Act is gender neutral and

extended the category of persons who could apply for relief to include parties in a non-marital relationship. The Act repealed in its entirety the 1981 Act and the aims of the 1996 Act as set out in the preamble are to:-

1. protect a spouse and any children or other dependent persons, and persons in other domestic relationships, whose safety or welfare is at risk because of the conduct of another person in the domestic relationship,
2. increase the powers of An Garda Siochana by providing for arrest without warrant in certain circumstances, and,
3. provide for the hearing at the same time of applications to Court for other orders relating to connected matters such as custody and access, maintenance, and child care orders, etc.

Proceedings can be brought in either the District Court or Circuit Court. The reliefs available under the legislation are:

- A Barring Order, which puts the Respondent (the person against whom the proceedings are taken) out of the family home for up to three years.
- A Safety Order, which is in effect a long term Protection Order and can last up to five years.
- A Protection Order, which is an interim measure only, and
- An Interim Barring order, which has proven to be the most controversial relief.

Until Wednesday 9th October 2002 the District Court could give interlocutory (i.e. temporary) relief in the form of an Interim Barring Order pursuant to Section 4 of the 1996 Act, pending the determination of the barring proceedings. This relief was, in exceptional cases, available ex-parte and could be made at the date of the institution of the Barring proceedings or at any time before the determination of the issue. This provided a rapid response which went a step beyond the Protection Order, actually putting the Respondent out of the family home. It was deemed necessary in a situation where immediate and serious violence was feared when the Respondent was served with the Protection Order and summons. The criteria for the making of the Interim Barring Order also went beyond that of the criteria for a Barring Order. Under Section 4(1) the Court had to satisfy itself that -

- there was an immediate risk of significant harm to the applicant or any dependent person if the Order was not made immediately, and that
- the granting of a Protection Order would not be sufficient to protect the applicant or any dependent person.

The Supreme Court, however on the 9th October 2002 in the decision of *D.K. -v- Crowley and Others* held that Section 4 was repugnant to the Constitution. The Court in general acknowledged the constitutionality of interim and emergency relief as long as certain safeguards were in place to protect the rights of the respondent. The Court concluded that:-

“it is not the existence of a jurisdiction to grant interim barring orders on an ex parte basis which creates a serious constitutional difficulty. It is the manner in which the legislation has provided for the granting of such orders”.

The Court held that:

“the procedures prescribed by subsection (1), (3) and (4) (of Section 4) of the 1996 Act, in failing to prescribe a fixed period

of relatively short duration during which an Interim Barring Order made *ex parte* is to continue in force deprive the Respondents to such applications of the protection of the principle of *audi alteram partem* in a manner and to an extent which is disproportionate, unreasonable and unnecessary”.

The Court declared that Section 4(3) was invalid having regard to the provisions of the Constitution.

In answer to this decision the legislature passed the Domestic Violence (Amendment) Act 2002 in remarkably quick time and amended Section 4(3) of the 1996 Act in its entirety. The new Section 4(3) states that “An Interim Barring Order may be made *ex parte* where, having regard to the circumstances of the particular case, the Court considers it necessary or expedient to do so in the interests of justice”. The Section further provides that:-

- (a) Application for such an Order shall now be grounded on an Affidavit or Information sworn by the Applicant.
- (b) A note of the evidence shall be prepared either by the Judge or the Applicant’s solicitor or as otherwise declared by the Judge and this, together with a copy of the Order, shall be served on the Respondent as soon as practicable.
- (c) The Order shall only be effective for eight working days, unless further confirmed by the Court.

The criteria for the making of the Order remain unchanged and are as specified in Section 4(1) of the 1996 Act.

The new legislation sought to redress the balance which the Supreme Court held was significantly lacking in the previous legislation, i.e. to provide the necessary emergency protection for the victims of Domestic Violence without ignoring the rights of the respondent to fair procedures. It will be interesting to see how the new requirements impact on the number of Interim Barring Orders sought or granted in the country’s courts on an *ex parte* basis.

For further information on the area of Domestic Violence and the Supreme Court decision mentioned herein please refer to the extended version of this article on our website.

#### **Deirdre O’Riordan**

*Family Law Unit/Private Client Department*

## **9. Challenging Wills**



Challenges to the validity or otherwise of a person’s Will are being dealt with more often by the courts in recent years. They take many different forms and are based on varying legal grounds. Not all proceedings to challenge a Will before the courts are successful. Those of us who have Wills should be aware that the courts will operate on the premise that the

Will is valid and the onus is on the claimant to prove otherwise. However, this is not a *carte blanche* for anyone, for example, to “cut” their spouse out of the Will. The area of the rights of surviving spouses is not dealt with in this article. The courts take the fact that someone went to the trouble of making a Will very seriously and will protect a person’s ability to do this if at all possible.

There are a few main grounds upon which a challenge to a Will can be made:-

### **1. Legal Requirements**

The Succession Act of 1965 has several strict requirements regarding the content and format of a Will. A Testator must also have sufficient testamentary capacity.

### **2. Section 117 Claims**

This affords children access to the courts to claim against the estate/validity of the terms of a Will of a deceased parent. The definition of “children” is quite wide and includes, for example, adopted and non-marital children. The case law dealing with these types of proceedings are most informative about the approach taken by the courts.

### **3. Proprietary Estoppel and Legitimate Expectation**

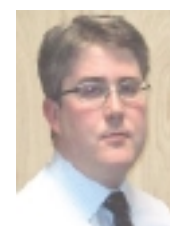
Claims for Proprietary Estoppel can be brought by persons who claim to have acted to their detriment on the strength of a belief that they have or would be given a right to the Testator’s property. A claim for Legitimate Expectation is similar in nature. The courts decide these claims on the basis of the facts involved and there is much case law in the area.

#### **Deirdre Wilson**

*Private Client Department*

*The above grounds are more fully discussed in a series of 3 articles, the full text of which appears on our web-site [www.rdj.ie](http://www.rdj.ie). If you do not have web access, do not hesitate to contact Deirdre Wilson or Juli Rea in our Probate Unit.*

## **10. Directors’ Duties - Another New Frontier**



A forum for company directors was recently co-hosted by the firm and Deloitte & Touche. Garvan Corkery and Adrian Wall of our commercial department spoke on Directors’ duties and on the experience so far with the Office of the Director of Corporate Enforcement. The event offered directors an opportunity to catch up on their obligations under Company Law in the context of developments in recent years, particularly in the area of compliance and enforcement.

Consideration was also given to the Companies (Auditing and Accounting) Bill 2003, scheduled for enactment in Winter 2003/Spring 2004, which will bring with it further changes in audit practice and corporate compliance, and to the expected convergence between Irish generally accepted accounting principles and International Accounting Standards.

The Companies (Auditing and Accounting) Bill 2003 will establish the Irish Auditing and Accounting Supervisory Authority to regulate auditors, and will require the establishment of audit committees in companies over a specified size.

As currently drafted, the Bill will also introduce the Directors' Compliance Statement. The Statement will be required for all companies other than small companies which are eligible for the exemption from the requirement to have their accounts audited, and certain specialised securitisation vehicles. The Statement will describe the policies and procedures of a company with regard to compliance with the Companies Acts, tax laws and all other laws affecting the business.

Directors will have to identify their arrangements for implementing and reviewing the effectiveness of these policies and procedures. The report will contain an express acknowledgement by the directors that they are responsible for securing compliance by the company with the relevant obligations. The document will form part of the company's annual public filing.

Given the already large and increasing volume and complexity of legislation, the proposal is, in the view of many, unduly burdensome (particularly for smaller companies, all of whom will be covered by the blanket application of the law). It seems likely, on one view, that the provision will bring little enough additional benefit to the shareholders and employees of companies or to the public generally, while it will impose significant additional costs on businesses. The provision will also discourage people from taking up directorships, thus reducing the pool of experience and talent available for the direction of both businesses and not-for-profit organisations.

At a minimum, the Bill could be amended first to raise the turnover thresholds below which the statement is not required, so as to remove small and medium sized companies from its scope, and at the time of going to print it is understood that further concessions may come on this front. Another helpful amendment would be to limit the Compliance Statement to Tax laws and the Companies Acts.

The extension of the compliance statement to 'any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements', as proposed, would make it an extremely broad ranging document, compliance with which would involve a disproportionate burden on the resources of companies and their directors.

Whatever form the compliance statement finally takes, directors will have to identify clearly the range of 'relevant obligations' which it covers, and to develop or revise their compliance policies and procedures for each of these obligations. Once agreed, the policies and procedures will have to be implemented, and their effectiveness monitored regularly.

In advance this legislation, we have established a Corporate Compliance group, which brings together specialist lawyers in such areas as Company Law, Employment, Competition Law, Environmental Law and Health & Safety, and are preparing a 'health check' programme to help companies and their directors to address the new requirements in a systematic manner.

Any queries on the issues noted in this article can be addressed to Garvan Corkery at +353 21 4802730 & [garvan.corkery@rdj.ie](mailto:garvan.corkery@rdj.ie) or to Adrian Wall at +353 21 4802717 & [adrian.wall@rdj.ie](mailto:adrian.wall@rdj.ie).

**Garvan Corkery**  
Commercial Department

## 11. Understanding the employment relationship

### Introduction

Most employers at some stage utilise the services of individuals who are stated to be self employed and who are described as "contractors". The understanding, of employer and contractor alike, is that these individuals are independent contractors and are not employees.

However, it is becoming quite clear that there are increasing numbers of individuals who would generally be considered as "self employed" when the indicators are that the status of "employee" is more appropriate as it reflects the reality of the relationship. Therefore, great care must be exercised by employers and contractors alike to ensure that the legal framework of the arrangement clearly reflects the true legal position of that relationship.

### The Law

In determining whether an individual is an employee or an independent contractor, Irish Courts now adopt, as the governing test, the "in business on one's own account test". A leading case in this area is the Supreme Court decision in **Denny -v- Minister for Social Welfare (1998)**, where the Supreme Court held that, in order to determine whether an individual is self employed, it must be established whether he/she is "engaged in business on his/her own account". The Supreme Court held that this is demonstrated, for example, where it is possible to make a profit or sustain a loss. The case concerned a supermarket demonstrator who was employed under a yearly contract. The employer argued that there was no full time engagement and that the individual was not an employee.

The contract simply provided that "*Kerry Foods may at its absolute and sole discretion and on such occasions as it thinks fit retain the services of the demonstrator*". The contract also provided that the demonstrator was not a full time permanent employee and actually described her as "self employed". However, when looking at the relationship, the Supreme Court discovered that the demonstrator did not really appear to be in business on her own account. If she could not do the job, only a person approved by Kerry Foods could do it for her. She had to wear a uniform provided and she provided no equipment personally.

In the circumstances, the Supreme Court reasoned that the inference that a person is engaged in business, in his or her own account, can be more readily drawn where he/she provides the necessary premises or equipment or some other form of investment; where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her. In considering all of the circumstances, the Supreme Court found that the demonstrator in this case was an employee and not an independent contractor.

This case has been followed by the Employment Appeals Tribunal in many similar cases which have come before it. For example, in a recent determination, the Employment Appeals Tribunal held that an individual who was engaged as a Financial Director of a hotel chain was in fact an employee and in doing so, referred to the Denny decision, outlined above.

Similarly in the case of **McMahon -v- Securicor Omega Express Limited**, the Employment Appeals Tribunal was faced with the question as to whether or not a courier engaged by Securicor was an employee or an independent contractor. In this case, the EAT found the courier to be an employee on the following basis:-

- Significant control was exercised over him;
- The rate set per delivery was essentially set by the Respondent;
- The courier carried little risk and in particular, was not required to have insurance for goods;
- No opportunity was provided for the courier to make a profit and he was therefore akin to a piece-work employee.

The Employment Status Group was set up under the Programme for Prosperity and Fairness specifically due to the growing concern that there are increasing numbers of individuals categorised as self employed when a review of the reality of the relationship would indicate that the employee status would be more appropriate to the relationship. It issued a Code of Practice for determining employment status.

The purpose of the Code of Practice issued by the Group is to eliminate misconceptions and provide clarity. It is specifically stated in the Code of Practice that the Code is not meant to bring individuals who are genuinely self employed into employment status. As practitioners, we have been advised that this Code of Practice will be of persuasive authority before the various employment adjudicative bodies when the question of employee - versus - independent contractor comes up for consideration. In line with the *Denny* decision, the Code of Practice specifically states that the overriding consideration will always be whether the person performing the work does so "as a person in business on their own account".

In summary, the following factors are instructive in determining the status of an individual:-

- The degree of control exercised in the relationship;
- The exposure to financial risk and whether it is possible to make a profit or sustain a loss in the relationship;
- Whether the individual assumes responsibility for investment and management in the enterprise;
- Whether the individual has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks.
- Where the individual has control over what is done, how it is done, when and where it is done and whether or not he or she does it personally or can delegate;
- Whether the individual is free to have other people, on his or her terms, to do the work which has been agreed to be undertaken;
- Whether the individual can provide the same services to more than one person or business at the same time;
- Whether the person provides the material for the job;
- Whether the person provides equipment and machinery necessary for the job, other than the small tools of a trade or equipment which in an overall context would not be an indicator of a person in business on their own account;
- Whether the person has a fixed place of business where

materials, equipment etc can be stored;

- Whether the person provides his or her own insurance cover, and;
- Whether the person controls their hours of work.

In general terms, if the individual does not satisfy the above self employed guidelines, then he or she will normally be considered to be an employee. The fact that an individual has registered as self employed or for VAT under the principles of self assessment does not automatically mean that he or she is self employed. An office holder, such as company director, will be taxed under the PAYE system but the terms and conditions may have to be examined by the Scope Section of the Department of Social, Community and Family Affairs to decide the appropriate PRSI class. It should also be noted that a person who is a self employed contractor in one job is not necessarily self employed in the next job and it is possible to be employed and self employed at the same time in different jobs.

There are quite serious consequences arising from the determination of an individual's status. Firstly, if a person is deemed to be an employee and not an independent contractor, notwithstanding the understanding of both parties on entering the relationship, then the individual will be entitled to statutory employment law protections available to all employees. This means, for example, that the individual is entitled to holiday pay, sick pay, annual leave and various other entitlements which would not be a feature of the relationship with an independent contractor.

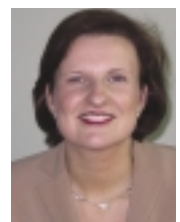
Furthermore, the Revenue Commissioners take a very strict approach as to who qualifies as an independent contractor and who is deemed to be an employee. The Revenue Commissioners take the view that if a contractor works for a Company on a full time basis and if the work of that contractor is under the control, supervision and direction of the Company, then in reality that person is not an independent contractor but is an employee and the Revenue Commissioners may seek employer's PRSI contributions from the Company. This can be sought on a retrospective basis and can have serious consequences for Companies who have been in a relationship with a contractor for some period of time.

### **Suggested Action**

All employers who utilise the services of contractors should have in their possession a copy of the Code of Practice referred to above. Formal written agreements should always be put in place between the employer and the contractor including an acknowledgement that no employment relationship is created between the parties together with an indemnity from the contractor against any losses accruing to the employer in the event that the individual is deemed, be the Revenue or any other adjudicative body, to be an employee.

All employers should also take an opportunity to conduct an audit of their arrangements with contractors to ensure that the reality of the relationship reflects the intention of the parties when entering the relationship.

**Jennifer Cashman**  
*Employment Unit/Litigation Department*



## 12. Employee stress claims



Most employers would be aware that this is now becoming a growing area of litigation both in England and in Ireland. Case law has been led by the English decisions and we are awaiting a leading case in Ireland. The leading case in England as indicated in a previous article is *Hatton -v- Sutherland (2002) 2 ALL ER 1*. The Court of Appeal in that decision

held that a cause of action for damages for psychiatric injury stands in a different position from other cases where physical injury is sustained. The Court were of the view that the crucial question is inevitably foreseeability. The Court expressed a number of principles as follows:-

- Whether a harmful reaction to the pressures of the workplace is reasonably foreseeable in the individual employee concerned. Such reaction will have two components (1) an injury to health which (2) is attributable to stress at work.
- The Court must determine what the reasonable employer should have foreseen. It will be easier to conclude that harm is foreseeable if the employer is putting pressure upon the individual employee which is in all the circumstances of the case unreasonable.
- The most important indications are the signs from the employee and the employer will have to distinguish between signs of stress and signs of impending harm to health. Stress is merely the mechanism which may but usually does not lead to damage to health.
- Unless he knows of some particular problem or vulnerability, the employer is usually entitled to assume that his employee is up to the normal pressures of the job.
- An employer who tries to balance all of those interests by offering confidential help to employees who fear that they may be suffering harmful levels of stress is unlikely to be found in breach of duty, except where he has been placing totally unreasonable demands upon an individual in circumstances where the risk of harm was clear.
- To trigger a duty to take steps the indications of impending harm to health arising from stress at work must be plain enough for a reasonable employer to realise that he should do something about it.

The English Courts have again considered this matter in a recent decision by the Court of Appeal in a case of *Christine Mary Bonser -v- UK Coalmining Limited (2003) EWCA CIV 1296*. The Bonser case concerned a married woman who was 50 years old. She commenced this employment in January 1995 and it was terminated as a result of a breakdown which she suffered in her health in May 1998. She had worked well for some 20 years in her previous employment in the British coal industry but was made redundant in that before taking up this position. As part of the employment process her new employers, the Defendants in this case, took up references which revealed in one of them the following "Christine would not be particularly good in a highly stressful environment but she is good at dealing with IT users, training and communication". The Plaintiff was appointed as a technical support and training manager and was given originally two areas of responsibility but at a later stage a further area was added.

It was accepted that the Plaintiff was a very hardworking lady who regularly worked beyond the contractual hours and was conscientious to a fault.

The Plaintiff had suffered from depression during her previous employment in 1989 and had been off work for five months. She also suffered from severe pre-menstrual stress and underwent significant hormonal replacement therapy. Her husband had also suffered some illness and had to give up his work which was an added pressure on the Plaintiff.

The Plaintiff alleged that beginning in mid-1996 that she was subjected to an ever increasing workload by an overbearing superior who ignored the increasing stress levels to which she was subjected. She claimed that eventually by the spring of 1997 she had suffered a definable injury to her health which led to her having to give up work in April 1997. The case put forward by the Plaintiff's legal team was that by the time she suffered the breakdown in February 1997 there was still time for remedial steps to be taken by her employer to avert the full disaster which subsequently afflicted her. The Trial Judge found that by the time the illness was manifest it was too late to take any steps to remedy her difficulty. Nevertheless he found in her favour and awarded damages in the sum of Stg£38,056.10. The Trial Judge found that the origin of her difficulties could be traced back to August 1996 when there was time for the pressure to be eased, the result of which would have delayed the onset of her illness by a year and he awarded the general and special damages for that acceleration of one year.

The Judge focused on an event in August 1996 when the Plaintiff said she was feeling in need of a break. She had organised a weeks holiday. A week before she was due to take these holidays her superior informed her that she had to complete a project which on the superior's estimate would have entailed a further 40 hours of work. The evidence at the hearing was that this had an important effect on the Plaintiff and that when she met her superior's manager she started to cry and told him how exhausted she was and how she felt her holiday was under threat. The Plaintiff complained that she was being used to overcome her superior's problems and that it was causing her workload to increase.

The matter was appealed by the Plaintiff's employers to the Court of Appeal and in a unanimous decision the Court of Appeal rejected the findings of the Trial Judge and allowed the appeal. The Court of Appeal took the view that the degree of understandable upset and distress alone does not however impose upon a reasonable employer a need to take steps to avert an imminent psychiatric breakdown. The meeting where the Plaintiff was crying in August 1996 in their view did not sufficiently foretell the breakdown that was to occur in February 1997. The Court said that to the knowledge of her employers she may have become vulnerable to the stress of overwork but not of psychiatric breakdown and there was in those circumstances no foresight on the part of the employer which compelled reasonable steps to be taken to avert the threat of that breakdown. The Court went further to say that it is not enough for employers to have foreseen stress, it must be foreseen that illness would follow that stress.

Of course each case must be decided on its own facts but it certainly shows a willingness on the English judiciary's part not to be willing to expand this growing area of personal injuries litigation. It will be interesting to see what views the Irish Courts will take in this matter as a leading case is still awaited.

**Fergal Dennehy, Litigation Department**

### 13. Clinical indemnity scheme

Following a competitive tendering process RDJ have been appointed to the solicitors panel of the Clinical Indemnity Scheme (CIS) which will be operated by the State Claims Agency. The CIS was established in order to rationalise the current medical indemnity arrangements by transferring to the State, via health boards, hospitals and other health agencies, responsibility for managing clinical negligence claims and associated risks. Fergus Long and Fergal Dennehy are the RDJ Partners acting for CIS and are one of 3 legal teams appointed by the CIS to deal with claims in the Southern Health Board and Mid Western Health Board regions.

### 14. Insol Europe Annual Congress

On the 16th October last, Cork played host to the Annual Congress of Insol Europe which is the European organisation of insolvency professionals from thirty one countries. Ronan Daly Jermyn was privileged to be involved in the organisation of this Congress which attracted in excess of 260 attendees from all corners of Europe to Cork for the four day event. The highlight of the Congress was the gala dinner held in Fota House at which Anuna and Riverdance entertained guests. The theme of the Congress was "Changes In Cross-Border Insolvencies - Europe and Beyond" and featured a lively series of papers and discussions including a paper presented by Ms. Justice Mary Finlay Geoghegan. The Congress was a great success and a great opportunity for Cork to display its legendary hospitality.

### David B. Browne 1952 - 2003



#### An appreciation

David died on the 30th August 2003 with courage, determination and a sense of humour. From the time of his first operation in July 2002 until his final diagnosis in June this year, David fought his illness with great spirit and refused to curtail any of his normal activities. In June when the final prognosis was made, David moved to his beloved Fountainstown with the great support of Edith and his family. From there, and later from St. Patrick's Hospice, he gathered his family and friends together.

As everyone who was privileged enough to be with him in those last few weeks will know, he discussed his life, his impending death, jobs that needed to be done and tidied up, things his

friends needed to deal with, trips he wanted to make and sailing journeys and always had a quip or a wry comment to make. He made his farewells to all of us with great dignity, friendship and love and never wavered in his great faith.

Having obtained a BCL in UCC, David qualified as a solicitor in 1976. He practised initially with a number of Cork firms before entering into partnership with his lifelong friend, John Deane, in 1978 until he became a partner some 20 years later in Ronan Daly Jermyn when the two firms merged. David's main speciality was litigation and he had a straightforward approach to law "if a job has to be done it must be done right, there can be no fudging" and he lived to that principle. In his practice of law, he was precise, well prepared and always considered different angles and carefully looked after his clients.

David exuded a stern exterior in the workplace but the staff in both Deanes and Ronan Daly Jermyn well knew that this was merely appearance and with a little push, he would immediately soften. He loved the practice of law and up to his untimely end, was still arguing or discussing points with different colleagues. He always had a sense of mischief accompanied by mock horror when it was discovered!

On the sporting side, David was a strong rugby supporter. He played with, and followed, Sunday's Well RFC and as he once said "I was a lazy player but a great supporter". He dragged many an unsuspecting friend to Musgrave Park to watch Sunday's Well playing, in so doing testing many a friendship, and he insisted on attending all Munster's home matches last season.

David was also a keen and competitive tennis player but sailing was his main sporting interest. He was a very keen sailor and a competent and exacting skipper who, as in his work, demanded from his crew full attention and detail to the tasks at hand. He made many friends from sailing with whom he loved to race and cruise from Crosshaven around Cork Harbour and the South West of Ireland. From his house in Fountainstown he was a keen observer and commentator on passing boats.

David's charitable work was carried out in a quiet and unobtrusive manner and he was actively involved as the secretary of St. Vincent de Paul Society in his local Blackrock parish.

Most of all, he was a family man. He married Edith on the 5th September 1981 and she was his rock. He was immensely proud of her singing and encouraged people to attend her concerts. They were a wonderfully complementary couple and both were immensely proud of their children, James and Patricia.

Our sincerest sympathies to Edith, James and Patricia and to his sisters, his aunt and immediate family. David will also be a sad loss to his many close friends who will miss his support, his good nature, his caring ways and his mischievous sense of humour.

This newsletter is intended for general interest and guidance only. It is not intended to replace the need for specific legal advice on particular issues, and under no circumstances should information contained in this newsletter be acted upon without first obtaining such specific advice from us, which will not only be more detailed than can be possible in a newsletter, but which will also take into account each client's particular circumstances and requirements together with any change in the law.

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