

The Bar Review

Law Library, Dublin



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RESOLVING DISPUTES THROUGH ARBITRATION

at a glance

EUROPEAN PROVISIONS IMPLEMENTED INTO IRISH LAW UP TO 04/10/96

Information compiled by Grainne Yallop, Law Library, Four Courts, Dublin 7.

European communities (hygienic production and placing on the market of raw milk, heat-treated milk and milk-based products) regulations, 1996 S.I.9/1996 (DIR 92/46, DIR 94/71, DIR 92/47, DIR 89/362) Revokes SI 124/1990 Date signed: 15.1.96	credit act, 1995 Date signed: 23.9.96	S.I.243/1996 (DIR 94/65) Revokes SI 215/1994 commencement date: 14.8.96
European communities (access to railway infrastructure) regulations, 1996 S.I.204/1996 (DIR 91/440) Commencement date: 1.7.96	European communities (feedingstuffs) (tolerance of undesirable substances and products) (amendment) regulations, 1996 S.I.275/1996 (DIR 96/6, 74/63) Date signed: 19.9.96	European communities (trade in bovine breeding animals, their semen, ova and embryos) (amendment) regulations, 1996 S.I.233/1996 (DIR 77/504, 91/74, 94/28, 87/328, 88/407, 90/120, 89/556, 93/52, 93/60(DEC 84/247, 84/419, 86/130, 94/515, 86/404, 88/124, 94/113) Amends SI 112/1996 Date signed: 1.8.96
European communities (additives in feedingstuffs) (amendment) (no.2) regulations, 1996 S.I.252/1996 (DIR 96/7, 70/524) Amends SI 49/1989 Date signed: 22.8.96	European communities (fishery products) (health and hygiene rules for production and placing on the market) regulations, 1996 S.I.170/1996 (DIR 91/493, 92/48) Revokes SI 223/1967, SI 27/1973, SI 156/1979, SI 117/1983 Commencement date: 10.6.96	European communities (aquaculture animals and fish) (placing on the market and control of certain diseases) regulations, 1996 S.I.253/1996 (DIR 91/67, 93/54, 93/53) Commencement date: 26.8.96
European communities (air-traffic management equipment and systems) (standards) regulations, 1996 S.I.221/1996 (DIR 93/65/EEC) Date signed: 18.7.96	European communities (introduction of organisms harmful to plants or plant products) (prohibition) (amendment) (no.2) regulations, 1996 S.I.266/1996 (DIR 94/13, 96/14, 96/15) Amends SI 125/1980 Date signed: 10.9.96	Health (official control of food) approved laboratories order, 1996 S.I.242/1996 (DIR 89/397, 93/99) Revokes SI 335/1991 Commencement date: 1.9.96
European Communities (authorisation, placing on the market, use and control of plant protection products)(amendment) regulations, 1996 S.I.159/1996 (DIR 95/35, 95/36, 96/12) Amends SI 139/1994, SI 200/1995 Commencement date: 1.7.96	European communities (marketing of fertilisers) regulations, 1996 S.I.270/1996 (DIR 96/28) Amends SI 13/1978 Commencement date: 1.10.96	Health (official control of food) regulations, 1996 S.I.241/1996 (DIR 89/397, 93/99) Commencement date: 1.9.96 Article 17 commencement date 1.11.98
European communities (consumer credit act, 1995) (amendment) regulations, 1996 S.I.277/1996 (DIR 87/102, 90/88) Amends Consumer	European communities (materials and articles intended to come into contact with foodstuffs) (amendment) regulations, 1996 S.I.226/1996 (DIR 95/3) Amends SI 307/1991 Commencement date: 16.9.96	Supervision of credit institutions, stock exchange member firms and investment business firms regulations, 1996 490 S.I.267/1996 (DIR 95/26) Commencement date: 10.9.96
	European communities (minced meat and meat preparations) regulations, 1996	

1996 ACTS UP TO 04/10/96

Information compiled by Sharon Byrne, Law Library, Four Courts, Dublin 7

1/96 DOMESTIC VIOLENCE ACT COMMENCED ON SIGNING - 27/02/96	COMMENCED ON SIGNING 16/03/96	COMMENCED BY SI.192/96
2/96 JOHNSTOWN CASTLE AGRICULTURAL COLLEGE (AMEND.) ACT COMMENCED ON SIGNING - 28/02/96	6/96 TRADE MARKS ACT SIGNED 16:03:96	11/96 HARBOURS ACT SIGNED 20:05:96
3/96 COMMISSIONERS OF PUBLIC WORKS (FUNCTIONS AND POWERS ACT COMMENCED ON SIGNING - 28/02/96	7/96 SOCIAL WELFARE ACT SIGNED 03:04:96	12/96 POWERS OF ATTORNEY ACT COMMENCED BY S.I. 195/1996
4/96 VOLUNTARY HEALTH INSURANCE (AMEND.) ACT COMMENCED ON SIGNING 06/03/96	8/96 IRISH STEEL LIMITED ACT COMMENCED ON SIGNING 30/04/96	13/96 CIVIL SERVICE REGULATION (AMENDMENT) ACT COMMENCED BY S.I. 197/1996
5/96 BOVINE DISEASES (LEVIES)(AMEND.) ACT	9/96 FINANCE ACT COMMENCED ON SIGNING 15/05/96	14/96 DUMPING AT SEA ACT COMMENCED ON SIGNING 19/06/96
	10/96 WASTE MANAGEMENT	15/96 HEALTH (AMENDMENT) ACT SIGNED 26/06/96

1996 ACTS UP TO 04/10/96 (continued)

16/96 PROTECTION OF YOUNG PERSONS (EMPLOYMENT) ACT SIGNED 26/06/96	COMMENCEMENT ON SIGNING 10/07/96	26/96 COURTS ACT COMMENCEMENT ON SIGNING 31/07/96
17/96 REFUGEE ACT SIGNED 26/06/96	22/96 BORROWING POWERS OF CERTAIN BODIES ACT SIGNED 10/07/96	27/96 METROLOGY ACT SIGNED 31/07/96
18/96 PENSIONS (AMENDMENT) ACT COMMENCEMENT ON SIGNING 03/07/96	23/96 HEALTH (AMENDMENT)(NO.2) ACT COMMENCEMENT ON SIGNING 15/07/96	28/96 NATIONAL STANDARDS AUTHORITY OF IRELAND ACT SIGNED 31/07/96 COMMENCEMENT TO BE BY SI
19/96 COMPETITION (AMENDMENT) ACT COMMENCEMENT ON SIGNING 03/07/96	24/96 TRANSPORT (DUBLIN LIGHT RAIL) ACT COMMENCEMENT ON SIGNING 15/07/96	29/96 CRIMINAL JUSTICE (DRUG TRAFFICKING) ACT SIGNED 31/07/96 COMMENCED BY SI 275/1996
20/96 TRANSNATIONAL INFORMATION AND CONSULTATION OF EMPLOYEES ACT SIGNED 10/07/96 COMMENCEMENT BY SI 276/1996	25/96 DISCLOSURE OF CERTAIN INFORMATION FOR TAXATION AND OTHER PURPOSES ACT COMMENCEMENT ON SIGNING 30/07/96	30/96 PROCEEDS OF CRIME ACT (This was changed from organised crime (restraint and disposal of illicit assets) bill SIGNED 04/08/96
21/96 AN BORD BIA (AMENDMENT) ACT		

BILLS IN PROGRESS AS AT 07/10/96

Information compiled by Sharon Byrne, Law Library, Four Courts, Dublin 7

ADOPTION (NO.2) BILL, 1996 - COMMITTEE - DAIL	STAGE - DAIL	INDEPENDENT REFERENDUM COMMISSION BILL, 1996 - 2ND STAGE - DAIL
CIVIL LIABILITY (AMENDMENT) BILL, 1996 - PASSED IN SEANAD	MALICIOUS INJURIES (REPEAL OF ENACTMENT) BILL, 1996 - 1ST STAGE - DAIL	MARRIAGES BILL, 1996 - 2ND STAGE - DAIL
CONTROL OF HORSES BILL, 1996 - COMMITTEE - DAIL	MERCHANT SHIPPING (LIABILITY OF SHIPOWNERS AND OTHERS) BILL, 1996 - REPORT - SEANAD	MISUSE OF DRUGS BILL, 1996 - 2ND STAGE - DAIL
CRIMINAL ASSETS BUREAU BILL, 1996 - COMMITTEE - DAIL	TELECOMMUNICATIONS (MISCELLANEOUS PROVISIONS) BILL, 1996 - 2ND STAGE- DAIL	PROCEEDS OF CRIME BILL, 1995 - 2ND STAGE - DAIL
CRIMINAL JUSTICE (DRUG TRAFFICKING) BILL, 1996 - REPORT - DAIL	UNIVERSITIES BILL, 1996 - 1ST STAGE - DAIL	SEXUAL OFFENCES (JURISDICTION) BILL, 1995 - COMMITTEE - DAIL
CRIMINAL JUSTICE (MISCELLANEOUS PROVISIONS) BILL, 1996 - COMMITTEE- DAIL	PRIVATE MEMBERS BILLS IN PROGRESS - 07/010/96	SOCIAL WELFARE (CHARTER OF RIGHTS) BILL, 1995 - 2ND STAGE - DAIL
CRIMINAL LAW BILL, 1996 - COMMITTEE - DAIL	CHILD SEX TOURS BILL, 1995 - COMMITTEE - SEANAD	SOCIAL WELFARE (MEANS TESTING) BILL, 1996 - 2ND STAGE- DAIL
COMMITTEES OF THE HOUSES OF THE OIREACHTAS (COMPELLABILITY, PRIVILEGES AND IMMUNITIES OF WITNESSES) BILL, 1995 - COMMITTEE - DAIL	CRIMINAL JUSTICE (MENTAL DISORDER) BILL, 1996 - 2ND STAGE - DAIL	SOCIAL WELFARE (SUPPLEMENTARY WELFARE ALLOWANCE APPEALS) BILL, 1995 - 2ND STAGE -DAIL
ELECTORAL BILL, 1994 - COMMITTEE - DAIL	CRIMINAL LAW (SEXUAL OFFENCES)(NO.2) BILL, 1995 - 2ND STAGE - DAIL	
EMPLOYMENT EQUALITY BILL, 1996 - 1ST STAGE - DAIL	CONTROL AND REGULATION OF HORSES BILL, 1996 - 2ND STAGE - DAIL	
EUROPEAN PARLIAMENT ELECTIONS BILL, 1996 - 1ST STAGE - DAIL	CRIMINAL LAW (SEXUAL OFFENCES)(NO.2) BILL, 1995 - 2ND STAGE - DAIL	
FAMILY LAW (DIVORCE) BILL, 1996 - COMMITTEE - DAIL	DEFAMATION BILL, 1995 - 2ND STAGE - DAIL	
GARDA SIOCHANA BILL, 1996 - COMMITTEE - DAIL	ELECTORAL (AMENDMENT) BILL, 1996 - 2ND STAGE - DAIL	
HEALTH (AMENDMENT) BILL, 1996 - REPORT - DAIL	FREEDOM OF INFORMATION BILL, 1995 - COMMITTEE - SEANAD	
IRISH TAKEOVER PANEL BILL, 1996 - 1ST		

ABBREVIATIONS

BR = Bar Review
CPLJ = Conveyancer & Property Law Journal
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GILS = Gazette of the Irish Law Society
IFLR = Irish Family Law Reports
ILT = Irish Law Times
IPELJ = Irish Planning and Environmental Law Journal
ITR = Irish Tax Review
JISLL = Journal of Irish Society of Labour Law
MLJI = Medico Legal Journal of Ireland
P & P = Practice & Procedure

ACCESSIONS LIST

Information compiled by Joan McGreevy, Law Library, Four Courts, Dublin 7

Albors-Llorens, Albertina Private parties in European Community law Oxford Clarendon Press 1996	Department of the Environment Local Government (planning and development) regulations, 1994 [Dublin] Department of the Environment 1994	Keane, Adrian The modern law of evidence London Butterworths 1996
Ashton, Gordon R The elderly client handbook London Law Society 1994	Devine, Rosemary Index to the local and personal acts 1850-1995 London HMSO 1996	Kerr, Anthony The acquired rights directive Dublin Irish Centre for European Law 1996
Asprey, Michele M Plain language for lawyers Sydney Federation Press 1996	Dooley, Edna Homicide in Ireland 1972 - 1991 Dublin Stationery Office 1995	Kessler, James Drafting trusts and will London Sweet & Maxwell 1995
Barav, A Yearbook of European law. 1994 Oxford Clarendon Press 1995	Doyle Court Reporters Personal injury judgments Hilary & Easter terms 1996 Dublin Doyle Court Reporters 1996	Korah, Valentine R & D and the EEC competition rules regulation 418/85 Oxford ESC 1986
Bernstein, Ronald Essentials of rent review London Sweet & Maxwell 1995	European Commission Proposal for a 13th Parliament and directive on company law concerning takeover bids European Council Official Publications Luxembourg Office for 1996	Law Society. Civil Litigation Committee Group actions made easier London Law Society 1995
Beswick, Simon Buying and selling private companies and businesses London Butterworths 1996	European Law Students' Association Guide to legal studies in Brussels in 1996 Europe Law Books 1996-1997	Moore, Alan VAT acts 1996-97 Dublin Butterworths 1996
Bird, Roger Child maintenance Bristol Family law 1996	Findlater, Jantien Milk quotas in Ireland Dublin Irish Centre for European Law 1996	Moore, Alan Tax acts 1996-97 Dublin Butterworth 1996
Campbell, Dennis Professional liability of lawyers London LLP 1995	Finlay, Thomas A Violence at Lansdowne Road Dublin Stationery Office 1995	O'Cuinneagain, Mel Tax guide 1996-97 Dublin Butterworths 1996
Carmody, Patricia A study of Irish female prisoners Dublin Stationery Office 1996	Fordham, Edward Wilfrid Notable cross-examinations Westport Greenwood 1951	Parry, David Hughes Parry & Clark the law of succession London Sweet & Maxwell 1996
Casey, James P The Irish law officers Dublin Round Hall Sweet & Maxwell 1996	Grayson, Edward Sport and the law London Butterworths 1994	Salinger, Freddy R Factoring law and practice London Sweet & Maxwell 1995
Cassidy, Constance The licensing acts 1833-1995 Dublin Round Hall Sweet & Maxwell 1996	Haynes, John M The fundamentals of family mediation Sydney Federation Press 1996	Simons, Garrett Security for costs Bar Council of Ireland 1996
Costello, Declan Report of the Committee on Fundraising Activities for Charitable and Other Purposes Dublin Stationery Office 1990	Hervey, Tamara Sex equality law in the European Union Chichester Wiley 1996	Spon-Smith, Robin The Law Society's guide to oaths and affirmations London Law Society 1996
Cotter, Barry, P Defective and unsafe products London Butterworths 1996	Incorporated Law Society of Ireland Conveyancing handbook Incorporated Law Society of Ireland 1990	Stone, Julie Complementary medicine and the law Oxford University Press 1996
Council of Europe European convention on transfrontier television Strasbourg Council of Europe 1990	Incorporated Law Society Objections and requisitions on title Incorporated Law Society of Ireland 1996	Stone, Marcus Cross-examination in criminal trials London Butterworths 1995
Dawson, Andy The internet for library and information service professionals London Aslib 1995	Interdepartmental Committee on Non-Irish Nationals Dublin Stationery Office 1993	Tiley, Ed Windows 95 unleashed Indianapolis Sams 1995
Department of Education Code of practice for safety at sports grounds Dublin Stationery Office 1996	Jacobs, Francis G The European Convention on Human Rights Oxford Clarendon Press 1996	Tritton, Guy Intellectual property in Europe London Sweet & Maxwell 1996
Department of the Environment Engineering in Ireland A guide to road safety Dublin Stationery Office 1996	Jones, Michael A Medical negligence Sweet & Maxwell 1996	Tudor, Owen Davies Tudor on charities London Sweet & Maxwell 1995
		Whitaker, T K Report of the Constitution Review Group Dublin Stationery Office 1996

Combating Child Exploitation

Muireann O'Briain, S.C., has been active in investigating and researching the problems associated with child exploitation and abuse internationally. She spoke to the Bar Review about her work and of the initiatives currently taking place in Ireland in this area.

"I got involved when I was approached by a voluntary organisation involved in the area who felt they needed professional help in suggesting legal changes in different countries. The movement to combat child sex abuse really started in Thailand and then moved to the Philippines and this reflects the amount of children prostituted through tourism in those countries in particular. Although, initially it was an Asian area campaign, as more people got to hear about it is now worldwide. The movement which I am involved in is ECPPAT (End Child Prostitution, Pornography and Trafficking) which has the status of an international NGO since August 1996.

"The reasonably wide terms of reference of the NGO reflect the fact that the various issues of prostitution, pornography and trafficking are all inter related. For example, when you look at the issue of child prostitution you quickly realise how big a role trafficking has to play. Children are being trafficked from country to country in order to provide them for prostitution. Pornography is also hugely relevant to the issue because by showing children pictures of other children being abused, it breaks down the child's defences and they begin to think this is normal. Also, it is suspected of encouraging people to abuse children and of course for every piece of pornography you have, there is an abused child. The production of child pornography requires children who are victims of sexual abuse.

So, what does ECPPAT wish to see done about these issues?

"Basically, our aim is to make people in general and governments in particular more aware of the problems which they have on their doorstep and encourage them to do something about it. At the moment, ECPPAT works very well with and closely with certain governments. For example, we have very close relationships with the Thai

Attorney General's office and the Philippine government is also working with us. In fact, a NGO group drafted the recent Philippine law Republic Act 76/10 which was introduced in the early 1990's. ECPPAT also works closely with Interpol which, as an international organisation is very useful, given the international dimensions of so many of these crimes.

"Another aspect of international co-operation in this area is reflected in the fact that overseas development aid is now invested in training people to work in this field in countries like Thailand and the Philippines. Such training can be invaluable in helping to ensure that correct and effective investigations and prosecutions are brought about.

Also concerning international co-operation, Interpol currently maintains a data base of convicted paedophiles. Europol now also has a mandate under the third pillar of the Maastricht treaty to create such a database covering trafficking in people as well as in drugs. Since Interpol has a membership of 177 countries while Europol is restricted to membership of the EU, I believe it would be preferable to pool the resources and work together rather than duplicate and possibly waste very valuable resources in this area.

In the context of the importance of international co-operation and dialogue, what does ECPPAT think Ireland could or should be doing?

"Many European countries, including Ireland, are now looking at the laws on their statute books from the point of view of their efficacy in combating this crime. They are either introducing new laws or using laws which they have had on their statute books but haven't used previously. In the Scandinavian countries, for example, they already had extraterritorial jurisdiction but did not rely on it in relation to sex offences. In other countries such as France and Belgium such legislation was introduced for the first time.

"In Ireland extraterritorial jurisdiction for such offences will be introduced with the passing of the Criminal Law Jurisdiction bill which will make it possible for Irish people who go abroad and commit offences against children to be prosecuted here. It will also allow tour operators who promote sex tours for children to be prosecuted. Also, the Sex Tours bill here is specifically geared to targeting the advertisement of such tours etc. These are very welcome developments which should help make a change in ensuring these crimes are dealt with effectively.

What else could be done here to help deal with the problem?

One of the ways in which child exploitation can be traced and combated is through tracing users of child pornography. In this country our censorship laws are not up to date laws regarding pornography. Possession of child pornography is not an offence here, it is only prohibited to possess it for resale. If the mere possession of it were criminalised this would, I believe, assist in finding child abusers. The New Zealand customs demonstrated this some years ago when they undertook a specific project relating to child pornography to coincide with the international year for children.

As part of this project, instead of destroying such pornography they began to trace where it came from, where it was being sent to, who was in the pictures, who was taking them and eventually they traced whole paedophile networks in this way.

Of course today, the big challenge is the opportunity which the Internet poses for such pornography to be distributed worldwide and it is very difficult to trace who is using it.

Another very worthwhile way of combating this is through education of young people themselves. At the World Congress against Commercial Sexual Exploitation of Children in Sweden this summer, a children's forum was also held and the verdict from the young people there was that they be told not only how to stay safe but also to be educated to the fact that these acts against them are crimes. This need was echoed by a woman at a conference on mandatory reporting which I attended in Dublin later this year whose daughter had been abused.

"This has now been suggested to the Association for Secondary school Teachers in Ireland and will hopefully be incorporated into sex education in this area. For children to believe that a crime has been committed against them will help them feel less guilty when coping with the effects of the abuse.

"Indeed education can also help potential abusers too. It is commonly assumed that child abuse is a paedophile problem but in fact this is not entirely the case. Research carried out in the Goa, Caribbean and Dominican Republic, has shown that many men abuse children on holiday only. They close off the abhorrence which they would otherwise feel and even believe they are helping their victims by giving them money.

"The issue of education should then target the abuser as well as the victim and I believe that the current legislation going through the Dail will have an important educative role in this regard as well as a very practical role in the fight against such crimes and to protect children."

On-line: An i Electronic Legi

Cian Ferriter, Special Projects Manager, considers electronic legal research as a research tool for lawyers.

Most lawyers are now aware of the growing impact of computerisation on all aspects of legal practice and the legal system. Over the coming issues of the Bar Review, On-Line will profile this impact by looking at, *inter alia*, e-mail and communications, litigation support systems, voice-operated word processing and practice management software.

We start this month with an introduction to one of the most significant examples of the impact of computerisation in the legal world - electronic legal research.

Electronic legal research involves searching electronic books known as databases. It involves a somewhat different methodology than conventional index-based research but has arguably greater benefits. The questions and answers below address the questions most frequently asked by newcomers to the field.

What is a legal database?

The term database covers any electronic collection of information. A legal

database is an electronic collection of legal information, such as law reports, statutes, journals, books, forms and precedents etc. held in such a form that the information can be easily searched or "retrieved". It is in essence an electronic book of legal materials.

How is a legal database stored?

The database may be stored on a CD-ROM (a compact disk similar to a music CD), a "floppy" disk (a small square disk inserted into the computer) or on the hard disk of a computer (the internal storage space of the machine). If the database is held on a machine away from your office machine or network, you can access it "on-line" ie by requesting and transmitting information down a telephone line connected to the "remote" machine which stores the material you wish to access. This is how information is retrieved from on-line legal databases such as LEXIS with which most readers may be familiar.

How do I locate the information I'm looking for in a database?

Information is located and retrieved in a database by "searching" the database, ie giving the search software attached to the database instructions as to what it is you want to find. First you decide the material you wish to look in and then decide what it is you want to search for there. Thus, if you want to find recent English cases dealing with

Introduction to Legal Research

Mareva injunctions, you would call up eg. the All England's database on your computer and type in the words "Mareva injunction" in the search panel on your screen.

What are the advantages of electronic legal research over conventional index-based research?

You can search through huge amounts of information very quickly, rendering your search more comprehensive and less time-consuming than wading through volumes of paper indexes.

Most importantly your research can be more focused than index-based research because you can search for particular keywords or combinations of words that would not be indexed in paper indexes. For example, if you want to see if there have been any cases involving the streptococcal virus being contracted in hospitals, instead of looking in volumes of paper indexes under, say, local government and negligence, you could enter the keywords "streptococcal" and "hospital" (or broader, or analogous, terms if you wished) and your search would lead you to relevant materials.

Legal databases also take up a lot less space than their paper equivalents. A typical CD-ROM will hold about 250,000 pages of material. The All England Law Reports from 1936 to 1996 (over 150 volumes of reports) are all on one CD. We are moving towards

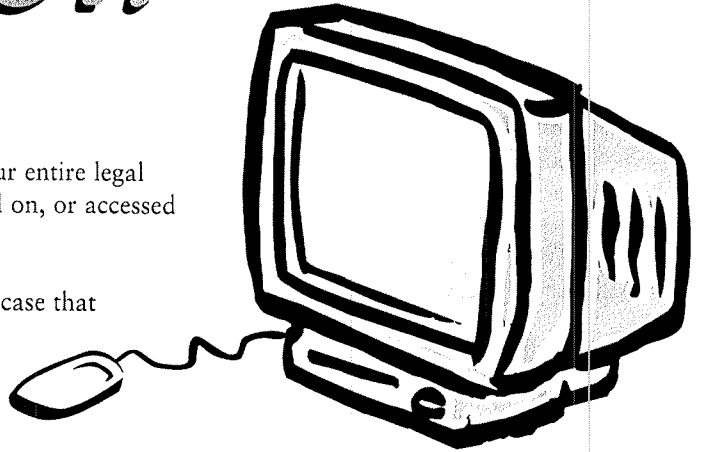
a scenario where your entire legal library could be held on, or accessed from, one machine.

It's also often the case that extraneous materials thrown up by your computer search are useful for other cases you're involved in.

What are the disadvantages of electronic legal research?

You have to spend time learning a new skill. Search software is still relatively limited and you have to take care that the search terms entered are likely to retrieve the precise materials you are looking for. It can be difficult to read from computer screens - the resolution of the text is quite a bit lower than that

Legal databases also take up a lot less space than their paper equivalents. A typical CD-ROM will hold about 250,000 pages of material. The All England Law Reports from 1936 to 1996 (over 150 volumes of reports) are all on one CD. We are moving towards a scenario where your entire legal library could be held on, or accessed from, one machine.



of printed text, and some readers may miss the comforting tactility of leafing through a book. It is also quite expensive to acquire the computer equipment needed to access databases. The principal disadvantage at the moment however is that there are not enough legal materials, and in particular, Irish legal materials, available electronically.

So, what Irish materials are available electronically?

The Law Library's JILL database contains synopses (and not the full text) of all Irish written judgments, reported and unreported, since 1983. The on-line legal database, LEXIS provides the full text of the Irish Reports, ILTR and Frewen since 1950, the ILRM since 1980 and most unreported cases since mid-1985. Butterworths intend to publish Irish tax cases on CD-ROM in 1997. The Valuation Tribunal provide their judgments electronically to the Law Library and the Labour Court also has a database of its decisions since 1980.

Neither the Irish Reports nor the ILRM are yet available on CD-ROM. It

is hoped that the Law Reporting Council will follow the example of its counterparts in most other common law jurisdictions and produce an electronic version of the Irish Reports. Ideally there should be a database of the full-text of all Irish written judgments. The Bar Council will be working for the attainment of that goal this year.

There are no Irish statutes yet available electronically. The Attorney General's office is co-ordinating an ambitious and much welcome project to publish electronically the full text of all Irish statutes in force (including pre-1922 statutes) and many Statutory Instruments. It is hoped to complete this project in 1997. The Law Library's OPAC system (the library's computer catalogue) has an index of all SIs since 1986 with details of repeals, amendments and parent statutes.

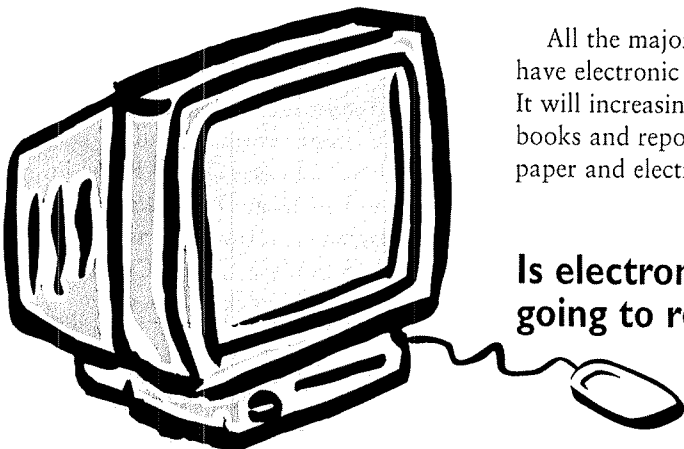
Sweet & Maxwell's electronic Legal Journals Index contains details of all articles published in Irish legal journals since 1986, as does the Law Library's OPAC system. No Irish legal journal is yet published electronically.

What other legal materials are available electronically?

The following is a selection of some of the other legal materials available electronically:

English materials:

All England reports 1936-1996
Weekly Law Reports 1971-1996
Industrial cases Reports 1981-1996
Jordan's Family Law cases



Printed paper is a very useful technology in its own right - it is easy to handle, easy to read and useful for annotating. Electronic material, on the other hand, is manipulable and less durable and less secure than printed materials.

The big product awaited here is the electronic Law Reports, a full text CD-ROM set of the official English Law reports from 1865 to date. This is due for release before Christmas of this year.

European Materials:

The CELEX database is the official European Commission database which contains the full text of the European Court Reports from 1954 to date, the treaties and almost all the regulations and directives. Given the complexity of researching European materials using conventional paper indexes, the CELEX database is an absolutely essential starting point for any practitioner engaging in European research.

US and Commonwealth materials:

The LEXIS database contains large quantities of US, Canadian, Australian and New Zealand case law and legislation. Materials from the US, Canada and Australia can also be accessed through the World Wide Web on the Internet.

All the major legal publishers now have electronic publishing departments. It will increasingly be the case that books and reports are published in both paper and electronic format.

Is electronic publishing going to replace paper publishing?

No. While it is very much the case that we

are living through a period of transition from paper publishing to electronic publishing, it is unlikely that paper publishing will ever cease, although it may diminish considerably. Printed paper is a very useful technology in its own right - it is easy to handle, easy to read and useful for annotating. Electronic material, on the other hand, is manipulable and less durable and less secure than printed materials. Durability, security and freedom from manipulation are always going to be key concerns in the legal world. It is rather the case that technology will be used to distribute text electronically and search text electronically while text will be read from the printed page. As a lawyer, having located and scanned through material on a database you will find yourself printing out the materials for a more thorough read or for inclusion in your court submissions.

However as society's technological infrastructure becomes more pervasive, and people become more culturally attuned to reading from screens, it is likely that a lot of information may be published only electronically. It remains to be seen what proportion of legal materials will be published in electronic format only.

How do I access these electronic materials?

All of the above databases are available in the Law Library either through the Information desk or on the public computer terminals available around the library. Members in Church Street can access the materials by subscribing to the Church Street Network. The library will shortly be offering access from members' homes and offices to a range of databases via its dial-in network.

How can I learn to master electronic legal research?

The library will shortly be offering extensive electronic legal research training to all members. If you are interested in receiving this training please leave your name with the staff at the Information Desk.

Cian Ferriter, Special Projects Manager.

The Refugee Act, 1996

Jack Hickey, Barrister, welcomes the reform of the law governing admission of refugees into Ireland which will be introduced when the Refugee Act, 1996 is brought into force at the discretion of the Minister for Justice.

The Refugee Act was signed by the President on the 26th June, 1996 and is to be brought into force at the Minister for Justice. It is a particularly welcome piece of legislation which is designed to bring Irish law on the treatment of refugees more into line with that of other developed countries.

Principally, the Act is designed to replace the 'Von Arnim' procedures which govern present Government policy concerning the granting of refugee status here and the rights to which refugees are currently entitled. Under these procedures, immigration officers are required to permit entry to persons seeking refugee status owing to a well founded fear of being persecuted. Such persons must be allowed stay in Ireland until they have had an opportunity to present their case for refugee status to the Minister for Justice and a decision as to their status made. Applications must be made to the Minister only from whom there is no right of appeal. Also when a person is declared to be a refugee under these procedures, there is a lack of clarity as to the rights to which they are then entitled.

The 1996 Act provides a more comprehensive definition of the conditions which must be satisfied before refugee status is granted and also provides for the establishment of an independent administrative structure consisting of a Refugee Applications Commissioner and a Refugee Appeal Board who will hear all applications for refugee status.

Section 2 of the 1996 Act defines a refugee as a person who, owing to a well founded fear of being persecuted on the grounds of race, religion, nationality or membership of a particular social group or political opinion, is unwilling to return to the country of their nationality. Those

seeking refugee status must be granted temporary residence and the opportunity to present their case to the Refugee Applications Commissioner unless the Gardai or immigration officer is of the opinion that they are a threat to national security or they have a criminal record or are a suspected war criminal. An unfavourable decision from the Refugee Applications Commissioner may be appealed to the Refugee Appeal Board.

Central to the new structure is the role of the Commissioner and Appeals Board in ensuring transparency and independence in the system. Although appointed by the Minister, the Act specifies that the Commissioner shall be independent in the exercise of his functions. The Commissioner's remit is to investigate each application for refugee status and in this respect may direct an authorised officer to interview the applicant and may make written requests for information from the Departments of Justice and Foreign Affairs to assist him in the discharge of his duties. The Commissioner is also required under the Act to provide each applicant with a statement in writing setting out the procedures involved in the application and of the applicants various rights and duties, including informing the applicant of the right to appeal to the Refugee Appeals Board.

The Appeal Board is an independent body consisting of a chairperson and number of members. It may conduct oral hearings and request the attendance of witnesses and expert witnesses.

If either the Commissioner or the Appeals Board is satisfied that the person deserves refugee status and makes a recommendation to that effect, the Minister for Justice must declare the applicant to be a refugee unless she is satisfied that such a person presents a threat to national security. Once declared to be a refugee a person is effectively entitled to the same rights in all respects as an Irish citizen for so long as the declaration that they are a refugee remains in force. The declaration of refugee status may be revoked if it comes to the attention of the Minister that

- (i) the refugee posed a threat to national security or public policy, or
- (ii) the refugee gave false or misleading information to the Commissioner or the Refugee Appeal Board, or
- (iii) the refugee has re-acquired his or her nationality, acquired a new nationality or the circumstances in connection with which he or she has been recognised to be a refugee have ceased to exist.

The application of the new legislation in Ireland is likely to be undermined however by the fact that the Minister has signalled her intent to put the Dublin Convention of 1990 before the Oireachtas for ratification. Under the Convention, the Department of Justice will be entitled to call upon another EU member state through which the applicant has passed to process their application for refugee status. If the particular member state so agrees, the application for refugee status will then be dealt with in that state.

Of particular interest in terms of the general development of refugee law will be the interpretation of the term 'programme refugee' under the Act. A 'programme refugee' is defined as a person who does not fall within the definition of refugee as set out in the Act but who may be given temporary protection at the discretion of the Government. Is the term likely to be interpreted, for example to include those who flee their own country not for political, but for health reasons, say in a Chernobyl type situation? The effect of these and other aspects of the Act will of course only become apparent when the Minister makes the necessary order bringing it into force. The Minister's promise of a comprehensive Legal Aid Scheme which should, in order to guarantee full efficacy of the provisions in the Act, provide for legal advice to be available to every applicant for refugee status will also be highly relevant to how the Act will work in practice.

Jack Hickey, Barrister.

Eurowatch

The European Court of Justice has found in *Gillespie and Ors. V. Northern Health and Social Services Board and Ors* ¹, that while the principle of equal pay in Article 119 of the Treaty of Rome (and in more detailed form in Directive 75/117) does not require that women should continue to receive full pay during maternity leave nor does it lay down specific criteria for determining the amount of benefit payable to them during that period, the amount payable must not be so low as to jeopardise the purpose of maternity leave.

Cathrina Keville, Barrister notes the case and its outcome.

17 female employees of various Northern Ireland health services took maternity leave during 1988 and, under a collective agreement, received certain benefits during this time which were better than those available under relevant general legislation. In November 1988, certain pay increases, including backdated pay were negotiated within the health services for all employees apart from those on maternity leave. This situation arose because the method of calculating the benefit payable to those on maternity leave made no provision for an increase in the benefit payable in the event of a subsequent pay increase.

The plaintiffs instituted proceedings before a Northern Ireland industrial tribunal claiming to have suffered discrimination on the grounds of sex. The case was dismissed by the tribunal. An appeal was brought to the Northern Ireland Court of Appeal who considered that since the case involved an interpretation of Art. 119 of the Treaty, as well as the provisions of certain directives (75/117 and 76/207) the proceedings should be stayed pending the resolution of certain questions by the ECJ under Article 177.

The questions referred to the ECJ concerned whether a woman is entitled to full pay while absent on

maternity leave or, if not so entitled, should particular criteria be used to calculate the amount of pay to which she is entitled.

The ECJ stated that the purpose of Article 119 of the Treaty is to eliminate, for the same work or work of equal value; all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. Benefits received by women on maternity leave was considered to be remuneration for the purposes of Article 119 as the benefit is paid by virtue of the employment relationship. The ECJ also stated that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations, (*Finanzamt Koein - Altstadt v. Schumacker*, 1995 ECR I.225, pp30)

The ECJ then drew attention to Council Directive, 92/85 of 19 October, 1992 which provides for, inter alia, the safety and health of female workers especially before and after giving birth. This directive provides for a continuous period of maternity leave of at least fourteen weeks, including compulsory maternity leave of at least two weeks, and maintenance of a payment to and/or an adequate allowance for female workers covered by the directive. However, the court said that this directive does not apply to the present case, the facts of which occurred in 1988. Therefore, it was for the national legislature to set the

amount of benefit to be paid during maternity leave. In this case, neither Article 119 nor Directive 75/117 required that women should continue to receive full pay during maternity leave or that specific criteria be laid down to determine their entitlements.

The only guidance that the ECJ gave in relation to the benefit payable was that it should not be so low as to undermine the purpose of maternity leave which is to protect women before and after giving birth. In assessing the adequacy of such benefit the national court must take into account the length of maternity leave and also any other forms of social protection available under national law in the event of justified absence from work. In the case at issue there was no evidence to suggest that the amount of benefit available was such as to undermine the objective of maternity leave. Finally, in relation to the question of whether a woman on maternity leave should receive a pay increase awarded before or during that period, the ECJ held that she was so entitled. The Court reached this conclusion on the basis that the principle of non-discrimination requires that a woman who is on maternity leave and who is still linked to her employer by an employment relationship, must benefit from any pay increase even if backdated, as to deny this increase would discriminate against her in her capacity as a worker since she would have received the pay increase had she not been pregnant.

State Liability for Breach of EC law; British proposals at the Intergovernmental conference to limit the power of the European Court of Justice:

It is hardly surprising in the wake of the recent decisions in *Brasserie du Pêcheur* and *Factortame*² to learn that the British government have submitted a memorandum to the Intergovernmental Conference (IGC) setting out proposed amendments to the Common Fisheries Policy and proposals to limit the powers of the European Court of Justice.

The significance of the judgments in the above mentioned cases³ is that member states may now, in certain circumstances, be liable in damages to individuals who have suffered as a result of national legislation which breaches the provision of community law. This is unsatisfactory from the point of view of the member states as it was not previously envisaged that such liability would attach to them and also because of their consequent potential exposure to claims for damages.

However, it should be noted that the question of whether a disgruntled litigant actually receives damages for a breach of his rights under community law is, at the end of the day one for the national courts to decide, as the ECJ has held that the question of causation must be left for the national courts to determine⁴. Thus, in the *Gallagher* case,⁵ even though the ECJ ruled that there had been a breach by the UK of Mr. Gallagher's rights under a particular directive which led to his loss of employment in the UK, the UK Court of Appeal held that Mr. Gallagher was not entitled to damages from the State because he could not show that the breach probably caused him to be excluded from the UK when he would not otherwise have been so excluded.⁶

It is in this context therefore that the suggestions made in the UK memorandum to the IGC should be considered. The UK proposals in relation to the ECJ are as follows:

Quota hopping is also a problem here in Ireland, as it is in France, Germany and Belgium but the memorandum notes that it is a particularly serious problem in the UK where was found on a recent examination of the fishing register that over 150 fishing vessels were either partially or fully owned by interests in member states other than Britain.

- (1) the retroactive effect of the rulings of the court of justice should be limited
- (2) there should be a possibility of appeal from a ruling.
- (3) damages payable by a member state for an infringement of EU law should be reduced.
- (4) there should be an acceleration of procedures in cases where the British courts are seeking clarification of community law.⁷

In relation to the fisheries policy, the main topic discussed is that of 'quota hopping' ie the practice whereby fishing boats from other member states would circumvent the quota system by registering themselves as eg British fishing vessels, in order to avail themselves of fishing rights in British waters but maintaining little or no economic links with Britain so that the benefit of the British quota is actually lost to the British economy. It seems that it was this practice which gave rise to the UK domestic legislation that was at issue in the *Factortame* case.

The British memorandum states that the practice of 'quota hopping' undermines the purpose of the

Common Fisheries Policy and that the opportunity should be taken at this IGC to amend the situation. Whilst there had been a number of European Commission proposals in relation to solving this problem, on examination, they were shown to be incompatible with certain judgments of the ECJ on this matter. Therefore the conclusion to be drawn is that the problem can only be solved by means of an amendment to the actual Treaty. Such an amendment would be carried out by means of adding a protocol to the Treaty to give full effect to the original Common Fisheries Policy agreed in 1982.

Quota hopping is also a problem here in Ireland, as it is in France, Germany and Belgium but the memorandum notes that it is a particularly serious problem in the UK where was found on a recent examination of the fishing register that over 150 fishing vessels were either partially or fully owned by interests in member states other than Britain.

Therefore, the UK proposes, that in order to ensure that the fishing quotas are given to vessels with a real economic link to the British fishing community, that certain requirements should be fulfilled and that such requirements be set out in a protocol to the Treaty;

- (1) That those wishing to register their fishing vessel must be a resident or have their principle place of business in the member state.
- (2) That the fishing crews must be resident in the member state
- (3) That the fishing vessels must operate from ports in the member state.
- (4) That catches or a proportion of the catches must be landed in the member state and that the proportion will be determined by the member state concerned.

Finally, the British memorandum is also proposing an amendment to the Treaty aimed at ensuring animal welfare.

When is a whiskey not a whisky?

The answer to this question may be when it is a diluted 30% proof French

whisky product which is described as being a blended whisky spirit. This is according to the Scots Whisky Association with whom the Irish Government have joined in a case which they are taking to the European Court of Justice in an attempt to protect the alcoholic strength of real whiskey. They claim that allowing the French product on the European market will affect unfairly the market in whisky which, under certain 1989 regulations must be 40% proof (ie it must have a minimum alcoholic strength by volume of whisky of 40%)⁸.

Shades of Cassis de Dijon,⁹ perhaps? That seminal decision of the ECJ ushered in the principle of mutual recognition by member states of each others standards by holding that where a product was lawfully marketed in one member state then another member state could not use a provision of their domestic law in order to prevent the marketing of the product in that member state.

Cassis de Dijon concerned the legality of the ban on marketing a French blackcurrant liqueur containing between 15 and 20% alcohol on the German market. The ban was due to German domestic legislation which only allowed the marketing of such fruit liqueurs if they contained a minimum alcohol content of 25%. The arguments put up by the German Government against the French in defence of their case, such as defence of the consumer and public health considerations, were given short shrift by the ECJ, who held that proper labelling as to the alcoholic contents and the ingredients used in a product were sufficient to warn the consumer about the product.

It would seem that in the case of the whisky product, adequate labelling would overcome most objections to its marketing in the member states and, in any case, what truly discerning whiskey drinker would be fooled into buying a diluted, blended French whisky spirit instead of the real thing?¹⁰

1. Case 342/93

2. Joined cases C-46/93 and C-48/93, judgment of the European Court of Justice, 6 March, 1996.

3. See also the decisions in Case C-392/93 ex p. British Telecom judgment of the ECJ of March 26 1996 and Case C-5/94 ex p Hedley Lomas judgment of the ECJ of May 23 1996.

4. R. v. Minister for Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd, 23 May, 1996.

5. Case C -175/94 R. v. Secretary of State for Home Department, ex p Gallagher, (1996) 1 CMLR 557

6. R. v. Secretary of State for the for the Home Department, ex p Gallagher, Court of Appeal, 10 June, 1996, reported in the Times Law Report, 4 July 1996. See also 'European Briefing', by Peter Duffy, Solicitors Journal, 5 July, 1996, p. 658. where he says that on the question of causation, Lord Bingham, LCJ applied *Hotson v. Berkshire AHA*, [1987] AC 750, and held that the claimant must show on the balance of probabilities that the injury for which he seeks compensation was caused by the conduct of which he complains.

7. One assumes on the last point if it were to be accepted, that procedures would be accelerated for the courts of all member states and not just the British courts.

8. This matter was reported in the Irish Times, 18 July, 1996. P. 7

9. Case 120/78 Rewe [1978] ECR, 649

10. But that of course begs the question what is the real thing? The Germans were forced to accept the dilution of their famous 'beer purity' requirements or 'Reinheitsgebot' which only allowed beers made in a certain way out of a specific set of ingredients to be marketed in Germany; *Commission v. Germany* [1987] ECR 1227. Thus, if beer is a generic term then it would seem arguable that whiskey may be a generic term also.

Cathrina Keville, Barrister.

Bar Council Conference

to be held on

**Saturday,
2nd November, 1996**

from

9.30 am to 4 pm

in

The Conrad Hotel, Dublin.

**Theme: The Irish Bar -
Meeting the Demand For
Domestic and International
Arbitration Services in
Ireland.**

**(In anticipation of the opening of
Ireland's first, state of the art,
international arbitration centre in
the Bar Council's Distillery Site
development in 1997)**

**Speakers include international and
domestic experts in arbitration law
and practice:**

**Mr. Christopher Koch, of the
International Court of Arbitration
in Paris, Mr. Nael Bounni of the
Chartered Institute of Arbitrators,
Mr. Max Abrahamson, Mr. Rory
Brady, S.C., Mr. Patrick Hanratty,
S.C. Mr. David Byrne, S.C.
Ms. Anne Kelly, Irish Travel
Agents Association,
Mr. Mike Jones, Construction
Industry Federation
and Mr. Michael Horan, Irish
Insurance Federation.**

**Chairman: The Attorney general,
Mr Dermot Gleeson, S.C.**

All members encouraged to attend

**Brochures, with booking form, to
be circulated to individual
members shortly.**

Third Party Rights of Access to and Custody of Children

With marital breakdown has come an increasing number of grandparents whose intimate ties and access to their grandchildren have been summarily cut off. Should grandparents have a right to apply to court for access to their grandchildren? If so, why should other relatives or other significant persons in a child's life not also have such a right?

Marie Martin, Barrister, outlines how this question has been dealt with in other jurisdictions and considers the case for change in the Irish law on this issue.

The issue of grandparent and third party access to children has been considered in a number of jurisdictions and has become particularly pertinent here with the pending introduction of divorce. In the United States for example, each of the 50 states now has provision granting grandparents visitation rights with their grandchildren, over the objection of a parent in at least some circumstances. However there is no uniformity in defining the legitimate rights of grandparents or the conditions for their exercise. For example, while "the best interests of the child" is the general guiding principle for the exercise of the courts jurisdiction, the manner of determining what is, in fact, in the child's best interests differs according to the legislation. Thus in some states, there is a statutory presumption against granting visitation rights if the parents object while in others there is a

presumption that visitation with grandparents is in a child's best interests. However, as yet, no state statute explicitly permits grandparents to petition for visitation with grandchildren who reside in intact family homes. In the U.S. increasing recognition has also been given to the psychological or extended family with standing being granted not only to grandparents but also to step parents, siblings, great grandparents and other third parties having an interest in the welfare of the child.

In England also, there has been a similar recognition of the grandparent - grandchild relationship as a new dimension in family law. Under Section 8 of the Children Act, 1989 grandparents can apply to court seeking contact with their grandchildren. The application for such a contact order is a two stage process; first the grandparent must obtain the leave of the Court to make the application and, if successful, the substantive application is then determined at a subsequent hearing. In an application for leave to apply, the court will look at the nature of the proposed application, for example, whether the contact sought will be frequent, infrequent, direct or indirect.¹ The court will also consider the applicant's connection with the child and any risk that the proposed application might disrupt the child's life in a potentially harmful manner.

There is no presumption in favour of contact with grandparents and the issue of contact is to be determined on the principle that the child's welfare is the paramount consideration². A parent's hostility to contact is a reason for denying contact only in cases where, to compel the hostile parent to accept contact, would put the child at serious risk of major harm³.

The court has a wide and comprehensive power to arrange contact either on a direct or indirect basis. Even where physical contact

might prove a source of tension, because of the limited leisure time available to those living with the child or the competing demands of a non-resident parent, an order for contact by telephone or letter can, nevertheless, provide an important source of cross-generational continuity.⁴

In Australia, the Family Law Reform Act, 1995 contains far reaching amendments to the private law provisions relating to children. This legislation is modelled on the U.K. Children Act, 1989 and, like that Act, replaces the old concepts of 'guardianship', 'custody' and 'access' with those of 'parental responsibility' and parenting orders for 'residence', 'contact' and 'specific issues'. Like the U.K. legislation, the Australian provisions are underpinned by the general philosophy that families should be encouraged to make their own arrangements for post separation parenting, with Court intervention only where necessary.

With divorce legislation pending in this country, is it not time for our own legislators to look at private law remedies relating to children? "Grandparents Obliterated" ("G.P.O.") is a support and campaigning group for people who have 'lost' their grandchildren. This group argues for legislative change to the Guardianship of Infants Act, 1964 in a manner which would include grandparents as suitable guardians in certain circumstances and would also grant them a right to apply for access to their grandchildren. However, the Family Law (Divorce) Bill, 1996 devotes only two sections to the questions of custody of, and access to, children. Section 37 provides that, on divorce, a spouse may be declared unfit to have custody of a dependent child and on the death of the other spouse that spouse shall not be entitled, as of right, to the custody of the child. Section 4 simply provides that the Court upon the grant of a decree of divorce may make orders as to

custody and access under Section 11 of the Guardianship of Infants Act, 1964 without the need for a separate application being made under that Act.

Section 11 (1) of the Guardianship of Infants Act 1964 provides that "any person, being a guardian of an infant may apply to the court for its direction on any question affecting the welfare of the infant and the court may make such order as it thinks proper". In *D. (M) v. D.(G)* [1993] 1 Fam.L.J., 33 Carroll J. construed this section as being concerned with the rights of the child in question and not the right of the adult. It was therefore wide enough to allow access to a non-parent.

The problem is however, that while grandparents may be granted rights of access to grandchildren under Section 11(1) they have no statutory right to apply for such access. The only people with locus standi to issue proceedings under Section 11(1) of the Act are guardians of an infant who are in turn defined in the Act as being a parent of an infant or any guardian appointed by a deceased parent or by the Court where an infant has no guardian. The definition of guardian does not extend to a person acting in loco parentis. Statutory provision was specifically made to enable a natural father who is not a guardian to apply for an access or custody order.

Given that 'the welfare of the infant is the first and paramount consideration' in any proceedings concerning custody, guardianship or upbringing, is there any cogent reason for limiting the class of people who can apply for such a remedy on the child's and their own behalf? Many children have a special relationship with their grandparents and it may be argued that for children of divorcing parents, a grandparent can hold the prospect of continuity and stability at a time of disturbing change.

In Ireland however the granting of third party rights such as these in relation to children may raise constitutional issues. As noted by Duncan and Scully⁵, the principle that married parents have joint and equal parental rights also has the consequence that in disputes between parents over custody and access, the one set of constitutionally guaranteed parental rights cancel out the other. As a result the Court is able, without fear of breaching any parental rights, to regard the welfare of the child as the first and paramount consideration; The Court does not have the same freedom in determining a custody or access dispute between a married parent and a third party where the same equality of constitutional rights between the parties does not apply.

It is arguable that the granting of a statutory right to a third party to apply for custody or access to a child under Section 11 (1), coupled with Section 3 of the Guardianship of Infants Act, 1964 which

Given that 'the welfare of the infant is the first and paramount consideration' in any proceedings concerning custody, guardianship or upbringing, is there any cogent reason for limiting the class of people who can apply for such a remedy on the child's and their own behalf?

gives paramountcy to the welfare of the infant, is incompatible with the constitutional guarantee to respect the inalienable right and duty of parents to provide for the religious and moral, intellectual, physical and social education of their children.

In the U.S., commentators on third party visitation statutes have argued that parents have constitutionally protected rights in child rearing, including the right to raise their children as they see fit, free from state interference. Whilst accepting that states, acting in their role as *parens patriae*, are empowered to regulate and promote the best interests of children, such jurisdiction, it is argued, should only be exercised to prevent physical and emotional harm to children. It should not be utilised to bestow state perceived benefits such as important relationships which the state desires to confer on them.⁶ Others argue that grandparent visitation statutes promote the legitimate legislative purpose of mitigating the potential harm to children caused by the death of a parent or the dissolution of their parents marriage. Such potential harm is not to be presumed without the traumatic interference of a parent's death or dissolution of their marriage. There is therefore no rationale for interfering with the constitutional rights of parents in intact marriages.

Under our constitution the child also has natural and imprescriptible rights (Article 42.5) and it may be argued that one such unspecified right is a right to have a close and significant relationship with a family member protected, when such contact is in the child's best interests. Also relevant to this issue is the United Nations Convention on the Rights of the Child, under which the State has undertaken to protect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference, (Article 8).

From a grandparents point of view it is also arguable that denial of a right to apply for access to the grandchildren is a violation of Article 8 of the European Convention of

Human Rights which provides for the right to respect for family life. In the *Marckx*⁷ case, the Court expressed the opinion that 'family life' within the meaning of Article 8 included at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relationships may play a considerable part in family life. 'Respect' for a family life so understood implies an obligation for the State to act in a manner calculated to allow those ties to develop normally.

Family life is changing with increased marital breakdown and family law must change in a manner which reflects and accommodates this new reality. The Family Law (Divorce Bill), 1996 recognises the reality of some of the changes but it does not adequately address the wider issue of family rights, in particular it does not address the rights of grandparents, or other third parties to apply to court for access to, or contact with, children. The needs of children in adjusting to changed family circumstances should be the guiding principle in assessing whether grandparents in particular should have any rights to seek access to their grandchildren. There appears to be no reason in principle why the law should not strive to maintain and promote significant and beneficial relationships on behalf of the child. Given that the courts have power under Section 11 of the Guardianship of Infants Act, 1964 to grant access to a non parent, if that is in the child's best interests, there appears to be no logical reason for prevent such a third party from applying to court for that remedy.

Marie Martin, Barrister.

1. (Re M. (Care: Contact: Grandmother's Application For Leave [1995] 2 FLR 86).
2. (Re A (section 8 order: grandparent application) 1995 2FLR 153)
3. (Re F (contact: grandparents) 1996 1FLR 158).
4. 'Grandparents and the Children Act, 1989', Heather Crook, 1994, Fam. Law. 135.
5. Marriage Breakdown in Ireland, p. 354.
6. Constitutional issues raised by Third Party Access to Children, Shoonmaker, Narwold, Hatch and Goldthwaite. FLQ Vol. 25, 1991, 95.
7. 13 June 1979, *Marckx* case, S 45. Publ. Court A, Vol. 31, p.21.

Book Reviews

The Irish Law Officers: Roles and Responsibilities Of The Attorney General And The Director of Public Prosecutions. Published by Round Hall, Sweet & Maxwell, £45.00.

Professor James Casey is widely acknowledged as one of our foremost scholars and commentators on constitutional law. That richly deserved reputation will be further enhanced by this, his latest work, which is an extension of his earlier work on 'The Office of the Attorney General in Ireland'.

On the office of the DPP, Prof. Casey deals with the twin and associated issues of accountability and independence of the holder of the office. The Prosecution of Offences Act, 1974, which created the office specifies that the DPP should be independent in the performance of his functions. This provision has been subject to some considerable debate and controversy. On the face of it the guarantee of independence to the DPP is identical to Section 4(1) of the Ombudsman Act 1980. However, the Ombudsman and the DPP enjoy significant, but different protection from removal from office. While the Ombudsman has the same protection as a judge appointed under Statute and the Constitution, the DPP by contrast is removable by the Government after consideration of a report from a committee consisting of the Chief Justice, a High Court judge nominated by the Chief Justice and the Attorney General.

In terms of independence in the carrying out of his functions, in England and Wales the DPP discharges his functions under the general superintendence of the Attorney General, while in Ireland, by contrast, Section 2 (6) of the Prosecution of Offences Act, merely requires that the Attorney General and the DPP should consult together from time to time in relation to matters pertaining to the DPP's functions. As Casey states:

'But this does not make the DPP a subordinate of the Attorney, and it is not intended to diminish his independence. Nor is he accountable to the Attorney; the parliamentary secretary to the Taoiseach made this clear in his speech on the second stage of the Bill. Thus the Director's position

is quite different from that of his counterparts in England and Northern Ireland'.

The DPP has insisted, rightly in my view, that he should not be required to publicly explain every individual decision about cases that were or were not prosecuted. However there is a growing viewpoint that the Irish DPP should, like the English DPP publish guidelines in respect of prosecutions as is done in many other common law jurisdictions. A general accounting duty in the form of a report and, possibly, a committee hearing would not be inconsistent with the independence of the DPP if the procedures under which such duties were established, reserve the right of the DPP not to explain in detail the reasons for prosecuting or not prosecuting in any given case.

Turning to the office of the Attorney General, Prof. Casey's book is published in the aftermath of a series of controversies. Readers of this journal in particular, will, generally speaking, have formed their own opinions but Prof. Casey's book still offers valuable insights into the controversies which, as time passes, fall to be seen with the added benefit of hindsight and the perspective of distance.

The Court and Court Officers Act, 1986 is published as an addendum at the beginning of the text. The Act was in Bill form when the book was at final proof stages. The long standing controversy about whether Attorneys General had by right or convention, first refusal on any judicial appointment is put to rest by Section 18 of that Act. Section 18 (1) prohibits the Judicial Appointments Board (established under the Act) from submitting the names of any of its own members, of which the Attorney General is one, for consideration for judicial appointment. However, Section 18 (2) and (3) provide that the Board may recommend the AG for appointment to judicial office and that if the AG wishes to be considered for appointment he or she shall withdraw from any deliberations of the Board concerning his or her suitability for judicial office.

The role of Attorneys General in the appointment of judges under the new system of the Judicial Appointments Board will be very significant. As a member of the Board, one imagines that the AG would have a significant input in preparing short lists of judges for appointment. He would in addition have the ear of the Government in relation to suitable appointees. I do not believe it to be unduly cynical to suggest that the Government will still, via the AG, be able to decide, in

large measure who will be appointed to the bench subject to two moral constraints; (a) that they will have to have regard to alternative suggestions for appointments coming from the Board, and (b) that a judicial appointee who was rejected by the Board would involve a not inconsiderable embarrassment for a Government so minded and the judge so appointed.

I thoroughly recommend Prof. Casey's book as scholarly, readable and authoritative. It is also comprehensive in a way in which no book review can but hint at. In my estimate, every person with a keen interest in constitutional law and its interaction with politics will want to read this book and those who do so will be amply rewarded.

Michael McDowell, S.C.

Property Law by Paul Coghlan Published by Gill and Macmillan. £35.00

In the preface to his book the author acknowledges that it does not purport to be an exhaustive text and, if one bears this in mind it is an extremely useful addition to the ever burgeoning collection of Irish text books on real property and related subjects.

Chief amongst the virtues of this book is the clarity it brings to several areas of otherwise opaque jurisprudence. Throughout the work, in a patient and methodical fashion, the author explains with great care the intricacies of his subject. Every effort is taken to explain, within the natural limitations of this complex subject, each and every point of significance. In particular, wherever reasonably possible, the author illustrates relevant points with simple examples. Areas of law which might otherwise be impenetrable are stripped of their anachronisms, anomalies and puzzles and laid bare in a straightforward, lucid and most definitely logical way. Particularly impressive in this respect is the chapter on Settlements and the description of the Rule in Spencer's Case. It is, in short, difficult to envisage any student who has studied this work failing in his or her exam. There, however, lies the rub. This is a first class book for students and, in particular, for those who are embarking on the subject for the first time. For the practitioner however, its use is limited.

This last point should not be surprising given that the author sets out his stall in his

preface to provide 'a concise account of the basic principles of Irish Property law'. Nonetheless it is a limitation which should not be overlooked. Several areas of practical interest are barely mentioned at all: wayleaves, boundaries, rights of way, riparian rights and so forth. Other areas such as Succession law, Registration of Title and the family home are clearly explained but require reference to specialist works for further detail. Most importantly, from the point of view of the practitioner, it is intrinsic in the nature of the book that it cannot be relied upon by the practitioner as a conclusive statement of the law on any given area. While the general principles on each topic are stated, the text does not consider problems which arise in the practical application of the law in this wide and complex field.

A final consequence of the generality of the statements in the book is that, by being too general in areas, it can give a mistaken impression of the law. One point where this arises for example is in the chapter dealing with priorities over unregistered land. The author states, on the authority of *Re Flood's Estate* (1892) 13 IR Ch R 312, that registration of a voluntary deed or conveyance in the registry of deeds will not confer priority over a prior deed or conveyance for value. This is incorrect. At the time of the judgment in *Re Flood's Estate* it was established law that a voluntary conveyance was void against a purchaser for value by reason of the provisions of section 1 of the Conveyancing Act (Ireland) 1634 (which invalidates 'fraudulent' conveyances'). However this judgment did no more than establish that registration of a voluntary conveyance in the Registry of Deeds did not circumvent section 1 of the 1634 Act. The 1634 Act was amended by the Voluntary Conveyances Act, 1893 which provides that a registered voluntary conveyance (which is bona fide and not fraudulent) will take priority over a prior unregistered conveyance for value in the absence of actual notice.

This example illustrates the danger, from a practitioner's point of view, inherent in a book of this nature. The book does not attempt to deal with every specific point of property law which may arise in practice and as a result, it may mislead the reader.

This criticism however, should not detract from the undoubted merit of the book. It is an excellent text book and, for students, is the best available.

Robert Barron, Barrister.

"Equity and the Law of Trusts in Ireland" - Hilary Delany

It is now some eight years since Keane's book on Equity and the Law of Trusts in Ireland was published. With such a specialised area,

Page 42 - The Bar Review October 1996.

one might be tempted to inquire as to whether there was room for another text dealing with the same topic and limited to the same jurisdiction. A perusal of Hilary Delany's book however immediately shows that it has a very significant contribution to make to this area and its publication is to be welcomed. In the Preface, Delany informs us that Mr. Justice Ronan Keane's book has gone out of print. This is very much to be regretted as it succeeded in achieving what might sometimes be considered the impossible - it made the law of trusts user-friendly. This new text takes us one step further, being not only extremely readable but containing a fund of valuable information.

Writing a text encompassing equity and trust law is an unenviable task. Not only must the intricate and, at times conceptually demanding, elements of the law of trusts be mastered but, additionally, the more general principles of equity must be thoroughly explored. The latter exercise involves a consideration of most areas of civil law as, unlike other areas of substantive law, equity cannot be compartmentalised but rather floats over all other areas of civil law. This book succeeds in explaining the law of trusts while giving useful insights into more general equitable principles, in particular equitable remedies and promissory estoppel.

The format of the book is traditional, commencing with the maxims and ending with the equitable doctrines. However, while comprehensively dealing with traditional trust concepts, there are also detailed and useful analyses of developing areas and areas with potential for development. There is a useful and novel subdivision of chapters into quite specific headings making it easier for the user to pinpoint where the issue of concern will be considered.

Particular areas deserving of comment include the chapter on resulting trusts which gives a useful account of the law on joint deposit accounts, the presumption of advancement and matrimonial property. There is also an interesting discussion on the role which resulting and/or constructive trusts might play in the determination of property disputes as between co-habitees.

The chapter on injunctions provides a useful synopsis of the law dealing with perpetual injunctions as well as interim and interlocutory relief. There is a useful discussion of recent caselaw, both Irish and foreign, dealing with Mareva injunctions.

The text has a useful mix of the academic and the practical and should be extremely useful both to students of the subject and practitioners. It contains numerous comparative references but not at the cost of Irish authorities. The book states the law as of October 1995 and it is interesting to note that there have been some important legal developments since then. The author herself

refers to the fact that the Supreme Court decisions in *Lynch v. Burke* [1995] 2 I.R. 159 and *Bank of Ireland v. Smyth* [1995] 2 I.R. 461 were awaited as of that date. These decisions have now come to hand resulting in important developments and changes to the law. The *Lynch* decision is of enormous significance, overruling the *Owens v. Greene* [1932] I.R. 225 decision which had so influenced the High Court in *Lynch v. Burke*. Furthermore, the "irreconcilable approaches in two High Court decisions" referred to by Delany at p. 489, referring to *Bank of Ireland v. Smyth* [1993] ILRM 790 and *Bank of Nova Scotia v. Hogan* Unrep. H.C. 21.12.1992, have now been clarified by the Supreme Court in *Bank of Ireland v. Smyth*. However, the approach of the decision is interesting, emphasising that no duty was owed by the bank to the wife but rather that steps should have been taken by the bank to ensure that the wife had properly consented to the charge in order that the bank would make certain that it got a good title to the land. The emphasis is therefore placed upon the requirements for a valid consent under section 3 of the Family Home Protection Act, 1976 and not on equitable principles of undue influence.

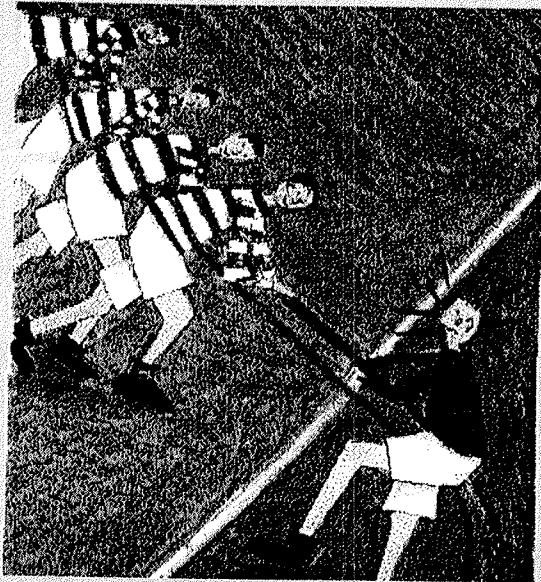
Additionally, the Supreme Court decision in *O'Mahony v. Horgan* has clarified the proofs required for the granting of Mareva injunctions. Delany states that the extent to which it is necessary to adduce evidence that the defendant's intention is to frustrate the judgment of the court has not been fully clarified. She refers to the judgments of McWilliam J. in *Fleming v. Ranks (Ireland) Limited* [1983] ILRM 541 and *Powerscourt Estates Limited v. Gallagher* [1984] ILRM 123 which seem to support the necessity of showing such intention. The author contrasts the English position and refers to the evidential difficulties inherent in the Irish approach. The Supreme Court has now approved the approach of McWilliam J. in *O'Mahony v. Horgan* [1995] 2 I.R. 411 at p. 419, Finlay CJ. states:

"... the cases establish that there must be an intention on the part of the defendant to dispose of his assets with a view to evading his obligation to the plaintiff and to frustrate the anticipated order of the court. It is not sufficient to establish that the assets are likely to be dissipated in the ordinary course of business or in the payment of lawful debts."

That there were three Supreme Court decisions in this area delivered within one month of the completion of this text shows the speed with which legal change can occur and also the practical importance of this area of law. This book is a valuable asset and a useful resource.

Nuala Jackson, Barrister.

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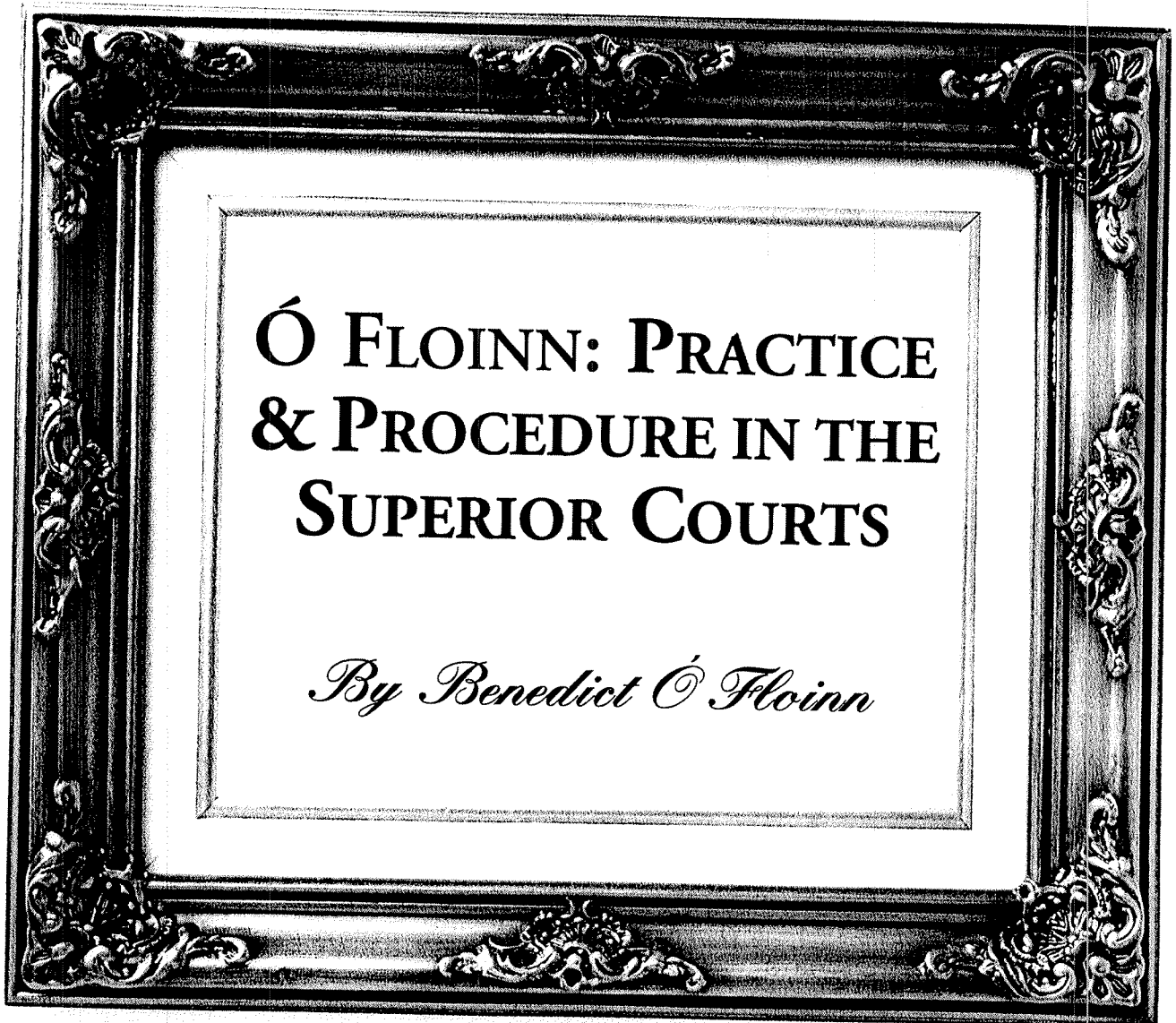
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Opinion

Resolving Disputes Through Arbitration

The traditional advantages of arbitration as a method of dispute resolution are immediately apparent; the parties are offered the opportunity to have disputes resolved by an expert of their choice, the hearing is private, speedy and is relatively inexpensive compared to court proceedings.

These advantages will soon be further complimented in Ireland with the opening in 1997, by the Bar Council, of Ireland's first purpose built state of the art arbitration centre, capable of hosting domestic and international arbitration hearings. The Centre, located in the Law Library development on the Distillery Site on Church Street, will be uniquely placed to draw on the expertise of the Bar in arbitration matters and will provide state of the art technology and telecommunications services, including translation facilities and video conferencing, to arbitration hearings.

Against this background, it is particularly timely that the present statutory framework for the conduct of arbitrations here is currently under review by the Department of Equality and Law Reform and that preparations for a new Arbitration bill are at an advanced stage.

At present, the relevant Irish Acts in this area are the Arbitration Acts, 1954 and 1980. The 1954 Act largely implemented the English Act of 1950 and the 1980 Act enacted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 and the Washington Convention on the Settlement of Investment Disputes between the States and nationals of other States, 1965. The 1980 Act surprisingly, did nothing other than implement these two conventions, despite the alteration in England the previous year of their relevant Arbitration Act upon which, as stated above, the 1954 Irish Act had been modelled.

The Arbitration Bill currently under preparation now provides a valuable opportunity to reform Irish Arbitration law in a manner which would enhance Ireland as a forum for international arbitrations in particular. To do so, the new bill should have regard to the Model Law on international commercial arbitration which was adopted by the United Nations Commission on International Trade Law (UNCITRAL) in June 1985.

This Model Law has been enacted in whole or in part by over thirty states, including eight states of the United States. These states include not only civil law countries but also common law countries such as Canada, Scotland and Australia. In England, the model law was not incorporated into, but was taken into account in the drafting of, the Arbitration Act, 1996.

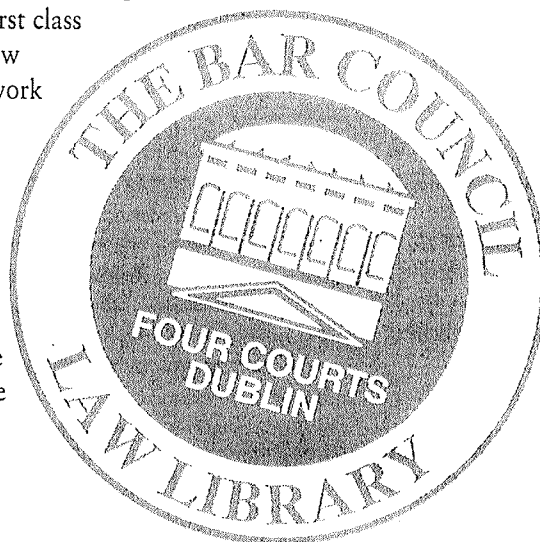
Thus, the Model Law has had, and continues to have, the desired harmonising effect in the area of international arbitration law. For example, the ICC Court of Arbitration in Paris, as well as administering around 400 international arbitration cases each year, also nominates venues for the hearing of arbitrations where the parties to the arbitration have not already done so. Jurisdictions whose domestic arbitration law is influenced by the Model Law are regularly chosen as venues for such arbitrations. Ireland will be better placed to join, and compete with, those jurisdictions currently providing international arbitration services if Irish Arbitration law is harmonised with the law on international arbitration in other countries. This jurisdiction is further enhanced as a forum for international arbitrations by the fact that Ireland is an English speaking jurisdiction.

The expanding need for the services of those engaged in arbitration services generally, and in international commercial arbitration in particular, is clear. World trade has expanded strongly for the second consecutive year. According to certain international organisations, it increased in 1995 by more than 8% while the combined value of international trade in goods and services increased by more than 17% rising to US \$6,000 billion. Following a pattern evident since the beginning of this decade, the expansion of world trade exceeded, by a wide margin, the expansion of world merchandise and services output. Expanding Irish trade figures indicate that Irish companies trading in the world market will require international arbitration services and the new Arbitration bill provides an opportunity to meet the demands for such services within this jurisdiction.

The Bar Council has recognised this growing need for domestic and international arbitration services in Ireland and is committed to meeting business demands in this area. The planned opening of the Law Library's international arbitration centre will allow the Bar to combine the provision of its first class expertise in arbitration services with first class facilities also. However, proper legislative reform is now urgently needed to provide a suitable statutory framework for the conduct of such arbitrations in Ireland.

The Bar Council's conference on arbitration which will be held in the Conrad Hotel, Dublin, on Saturday 2nd November 1996 will address further aspects of the opportunities currently posed by legislative reform and also provide an opportunity for dialogue between the Bar and leading players in markets where arbitration is widely relied upon at present, such as the construction, insurance and travel markets.

All members are invited and encouraged to attend.



The Competition (Amendment) Act, 1996

1. Introduction

The Competition (Amendment) Act, 1996 ("the 1996 Act") was signed into law by the President on 3rd July, 1996. It represents a major development in Irish competition law and significantly amends the Competition Act, 1991 ("the 1991 Act"), writes Brian Cregan, Barrister.

The major features of the new Act are:

- (1) The creation of criminal offences in respect of breaches of competition law;
- (2) The provision of penalties for undertakings or individuals found guilty of such criminal offences;
- (3) The granting of significant new enforcement powers to the Competition Authority and the conferral of a right of action on the Competition Authority to issue legal proceedings against any undertaking, director, manager or other officer of such an undertaking for breaches of competition law;
- (4) The assignment of responsibility for enforcement of competition law to one permanent member of the Competition Authority whose title shall be the Director of Competition Enforcement;
- (5) The power of the Competition Authority to issue category certificates.

There was much criticism of the enforcement provisions contained in the Competition Act, 1991 which provided for enforcement of its provisions by way of private law enforcement i.e. undertakings and/or individuals had to take their own legal proceedings. This was expensive and for many undertakings impracticable. In particular, the Competition Authority was not given any powers of enforcement of competition legislation under the 1991 Act and this deficiency has now been remedied by the Competition Act, 1996.

2. The New Criminal Offences

2.1: Criminal Offence No. 1 - Anti Competitive Arrangements

Section 2(2)(a) and (b) of the 1996 Act establish that an undertaking which enters into anti-competitive agreements, decisions or concerted practices of the kind described in Section 4 (1) of the 1991 Act shall be guilty of a criminal offence.

Section 4 (1) of the 1991 Act specifies that the prohibited agreements, decisions and concerted practices are those "which have as their object or effect, the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State ..."

Section 4(1)(a) to (e) of the 1991 Act sets out specific examples of such anti-competitive arrangements.

2.2 Defences

Section 2(2)(c) establishes certain defences for the criminal offence outlined above. These are as follows:

(A) No Knowledge

Section 2(2)(c)(i) provides that it shall be a good defence to prove that the Defendant did not know, nor in all the circumstances of the case could the Defendant be reasonably be expected to have known that the effect of the arrangement would be to distort competition. It should be noted that this defence does not extend to knowledge of the object of the arrangement. It could be argued therefore that where the Defendant did know that the object of the arrangement was to distort competition, this defence is not available to him.

(B) Valid Licence/Certificate

The second defence available to a Defendant is that at all material times there was a valid licence or certificate in force in respect of the agreement, decision or concerted practice in question.

This defence, however, is subject to a number of caveats including:

- (i) That the terms and conditions of the licence were being complied with (see Section 2(2)(c)(ii)(I)); or
- (ii) That, even where such terms and conditions of a licence were not being

complied with, they were terms and conditions that had been amended or inserted in the licence under Section 8 of the 1991 Act, and

- (iii) The Defendant was in fact complying with the original terms and conditions of the licence before any amendments, additions or insertions were made (see Section 2(2)(c)(ii)(II)(b)) and also that the Defendant began to take all reasonable steps to comply with the new terms and conditions within 14 days after the date of publication of the new terms and conditions and was "proceeding with due expedition on the date on which the offence is alleged to have been committed with the completion of any step remaining for those purposes".

(C) Reasonable Steps Towards Compliance

A further defence is given in Section 2(2)(c)(iii) which provides that it shall be a good defence (in proceedings for an offence under Section 2(2)(b) in respect of an arrangement for which there is a valid licence or certificate and where such a licence has been revoked or suspended or a certificate has been revoked), that the Defendant began to take:

- (i) All reasonable steps to ensure that any arrangements that had been made and which were necessary for the implementation of the agreement, decision or concerted practice were discontinued; and
- (ii) Was proceeding with due expedition (on the date on which the offence is alleged to have been committed) to complete any step which remained to discontinue the said anti-competitive arrangement;
- (iii) In circumstances where such action is taken within a grace period of 14 days after the date of the publication of the revocation of a licence or certificate (Section 2(2)(c)(III)(I)) or within 14 days of the suspension of a licence by order of the Supreme Court and/or the High Court as the case may be.

Section 2(3) provides that these defences shall not be available if the date on which the offence is alleged to have been committed is

more than 2 months after the date of publication of the notice of the revocation of the licence or certificate or the suspension of a licence. This effectively grants a 2 month grace period to a Defendant undertaking, during which time it is expected to ensure that the offending arrangements are discontinued.

Section 2(4) provides that these defences shall not be available to a Defendant if the doing of any act or omission was in fact the grounds for revoking the licence or the certificate for the agreement concerned.

2.3 Criminal Offence No. 2 - Breach of a Licence

Section 2(5)(a) provides that "an undertaking that is a party to an agreement, decision, or concerted practice in respect of which a licence is enforced, shall comply with the terms and conditions of the licence".

Section 2(5)(b) provides that an undertaking that contravenes this Section shall be guilty of an offence.

2.4 Defences

Section 2(5)(c) sets out the defences to this offence.

(a) Compliance/Reasonable Efforts

The first defence is:

- (i) That the Defendant was complying with the terms and conditions of the licence - immediately before the making of any amendments or insertions, and
- (ii) That within 14 days after the date of publication of the amendment or insertion of new terms and condition in the licence, the Defendant took all reasonable steps for the purpose of complying with those new terms or conditions and was proceeding with due expedition to complete any further step remaining to ensure that its arrangements were in full conformity with the new terms of the licence.

Section 2(6) provides that such a defence is not available if the offence is alleged to have been committed more than 2 months after the date of publication of the relevant notice. Thus it provides a 2 month grace period to permit the undertaking concerned to ensure that its arrangements are in conformity with the revised terms and conditions of the licence.

2.5 Criminal Offence No. 3 - Abuse of Dominance

Section 7(a) provides that an undertaking "that acts in a manner prohibited by Section 5(1) of the Principal Act or which contravenes an order under Section 14 of that Act shall be guilty of an offence".

The effect of this provision is to:

- (i) Make any abuse of a dominant position by an undertaking a criminal offence and
- (ii) To make any contravention of a Ministerial Order under Section 14 of the 1991 Act a criminal offence.

Such Section 14 orders may either prohibit the continuance of the dominant position, except on conditions specified in the Ministerial Order, or require the adjustment of the dominant position, in a manner and within a period specified in the order, by a sale of assets or otherwise as the Minister may specify.

2.6 Defences

Section 2(7)(b) sets out the defences to the offence of abusing a dominant position contrary to Section 5(1) of the 1991 Act and Section 2(7)(a) of the 1996 Act.

(a) No Knowledge

The first defence is that the Defendant did not know, nor in all the circumstances of the case could the Defendant be reasonably be expected to have known that the acts concerned would constitute an abuse of a dominant position (see Section 2(7)(b)(I)); or

(b) Compliance with Section 14 Order

The second defence is that the said act (i.e. the abuse of dominance) was done in compliance with the provisions of a Ministerial Order under Section 14 of the 1991 Act.

It is highly unlikely that an act of the Minister under Section 14 of the 1991 Act which seeks, in the interest of the common good, to prohibit the continuance of the dominant position or to require the adjustment of the dominant position, would in fact order an act which would amount to an abuse of a dominant position. In the unlikely event that such an order was to require an abusive act, then the fact that such action was taken by the undertaking in compliance with the provision of the order under Section 14 of the 1991 Act would amount to a good defence.

It should be noted that in fact no orders have been made to date under Section 14 of the 1991 Act since that Act was implemented. Thus it could be argued that these provisions are largely redundant.

Given that there have been no Section 14 orders, it is tempting to remark that Section 2(7)(b)(ii) and (iii) are wholly unnecessary and unduly prolix. It adds little to the legislation except confusion. It would have been better if all references to Section 14 orders had been omitted. This could have

caused the deletion of Section 2(7)(b)(ii), (iii) & (iv).

3 The New Enforcement Regime

3.1 Investigations

Section 3(5) of the 1996 Act provides that the Authority, or an authorised officer appointed under Section 20 of the 1991 Act, may carry out investigations into any of the alleged offences which may have occurred under Section 2 above, which the Authority, or an authorised officer suspects has occurred or is occurring. This effectively permits the Authority and/or the authorised officers to carry out criminal investigations and also to carry out dawn raids on an undertaking should it so wish.

3.2 Summary Proceedings

Section 3(6)(a), which provides that summary proceedings for Section 2 offences may be brought by the Minister or the Authority, is another significant increase in the Authority's enforcement powers.

Section 3(6)(b) provides that any criminal prosecutions which may be brought under Section 2 of the 1996 Act will not prejudice any actions by the Minister, the Competition Authority or other aggrieved persons under Section 6 of the 1991 Act because such actions under Section 6 may be brought whether or not there has been a prosecution for an offence under Section 2 of the Act. It also provides that the bringing of a Section 6 action shall not prevent a prosecution being initiated for an offence under Section 2 of the 1996 Act.

Section 3(6)(c) provides that summary proceedings may be instituted within 2 years from the date of the offence.

3.3 Civil Proceedings

Section 7 of the 1996 Act is another source of significant additional enforcement powers for the Competition Authority.

Section 7 amends Section 6 of the 1991 Act and provides that the Competition Authority shall have a right of action in respect of an arrangement which is prohibited under Section 4 or an abuse prohibited under Section 5 for the reliefs specified in Section 6 (3) (a) only (i.e. an injunction or declaration but not damages).

3.4 Director of Competition Enforcement

Section 9 of the 1996 Act provides for an amendment to paragraph 1 of the Schedule to the 1991 Act. It states that the Minister

may assign to one of the permanent members of the Competition Authority the title "Director of Competition Enforcement".

This person is granted specific statutory powers, including:

- (a) The power to carry out an investigation, either on his own initiative or as a result of complaints to him from any person, into any contravention of Section 4 (i.e. anti-competitive arrangements) or Section 5 (i.e. abuse of dominance) or Section 2(2), (5) or (7) (i.e. the criminal offences of the 1996 Act) which he suspects has occurred or may occur.
- (b) The power of making recommendations and giving advice to the Authority about the institution by the Authority of proceedings under Section 6 of the 1991 Act or Section 3(6) of the 1996 Act (in relation to Section 2 offences) and the enforcement generally of the provisions of the Act.

4. Who are the Defendants?

4.1 Criminal Liability of Undertakings for Acts of its Officers or Employees

The first class of Defendants is the undertakings themselves. Section 2(9) provides that any act done by an officer or an employee of an undertaking shall be regarded as an act done by that undertaking provided that it is done for the purposes of, or in connection with, the business or affairs of the undertaking. Thus an undertaking is liable for a criminal offence where its officers, employees, servants or agents carry out these acts.

4.2 Criminal Liability of Directors, Managers, Officers

Section 3(4)(a) provides that where an offence under Section 2 of the Act has been committed by an undertaking and such acts were authorised or consented to by either a director, manager or other officer of the undertaking or by a person who purports to act in such capacity, then that individual

shall also be guilty of an offence and could be prosecuted and punished as if that person were guilty of the Section 2 offence.

Section 3(4)(b) provides that in the circumstances where such a person is proceeded against for an offence of an undertaking committed under Section 2 and it is proved that such a person was at the time a director, manager or similar officer of the undertaking, then it shall be presumed until the contrary is proved, that the person consented to the doing of the acts of the undertaking which constituted the offence.

Section 3(4)(c) provides that, in so far as a body corporate is managed by its members, then the members are to be treated as if they were directors of the body corporate and therefore are open to the same criminal proceedings being taken against them as the undertaking itself and directors, managers and other officers of the undertaking.

5 What are the Penalties?

The 1996 Act provides in Section 3(1) for the penalties for breach of the above provisions.

Section 3(1)(a) provides that an undertaking which is liable on summary conviction shall be found liable to:

- (a) a fine of up to £1,500 and/or
- (b) imprisonment for up to 6 months.

Section 3(1)(b) provides that the penalties for conviction on indictment shall be:

- (a) a fine of up to £3,000,000 or 10% of the turnover and/or
- (b) imprisonment of up to two years.

The Act also provides for continuing penalties: if the contravention is continued after the conviction, the undertaking shall be guilty of a further offence and shall be liable on summary conviction to a fine of up to £1,500 (Section 3(2)).

6. Category Certificates

Section 5 of the 1996 Act amends Section 4(4) of the 1991 Act by providing that the Competition Authority may grant category certificates for types of agreements. To date

the Competition Authority has been empowered to issue category licences but not category certificates. It is possible that among the early category certificates will be employee agreements and perhaps also certain merger and/or sale of business agreements.

7. Aspects of the Criminal Prosecution

7.1 The Nature of the Offence

It seems extraordinary that such complex activities as agreements, decisions of associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition, should have become criminal offences.

One of the important criteria for a criminal offence is that the nature of the offence should be clear. This issue arose in the case of *King v. Attorney General* [1981] 1 IR 233. In this case the Courts considered the construction of Section 4 of the Vagrancy Act, 1824. On 13th November, 1975 the Plaintiff was convicted in the District Court of loitering in a public place with intent to steal contrary to Section 4 of the 1824 Act.

The Plaintiff brought an action in the High Court claiming that the provisions of Section 4 of the 1824 Act, inter alia, were inconsistent with the provisions of the Constitution. He also claimed a declaration that the orders of conviction made by the District Court were invalid. The High Court gave judgment for the Plaintiff, holding that a portion of Section 4 of the 1824 Act was inconsistent with the provisions of the 1937 Constitution.

Referring to the relevant statutory provision, Henchy J. said: "In my opinion the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct when engaged in by another person in similar circumstances would be free of the taint of criminality, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is not at variance."

In my view some of the same criticism could be levelled at the criminal offences

Law Library Staff Changes

Alison Boland and Phil Ryan have joined the Law Library staff as telephonists. Joan Breidy has replaced Bridget Molloy in the Bar Council office and Eidin Finlay has taken up a position in the Accounts office.

Cork Bar

Bridget Molloy has left for Cork to be responsible for administration of the new Law Library which will be officially opened there in October.

created by the 1996 Act. In particular, what is extraordinary about the creation of the criminal offences under the 1996 Act is the fact that there is no definition in either the 1991 Act or the 1996 Act of the following terms:

- (1) Agreements;
- (2) Decisions of associations of undertakings;
- (3) Concerted practices;
- (4) The meaning of object or effect;
- (5) The meaning of prevention, restriction or distortion of competition;
- (6) Abuse;
- (7) Dominant position;
- (8) In a substantial part of the State.

It is precisely this vagueness which has bedevilled the parties in civil litigation in the State since 1991. This lack of precision and lack of clarity has caused enormous difficulties for business persons and their legal advisors in seeking to successfully bring a claim under Section 6 of the Act in the civil side. There have only been a handful of cases which have gone to full hearing since 1991 and in these only a small number have succeeded in proving that there was an anti-competitive practice or an abuse of dominance. This is so when the standard of proof was simply on the balance of probabilities and not the higher standard in criminal cases of beyond a reasonable doubt.

Moreover, when one considers that there are very few doctrines in competition law on which there is unanimity, then it becomes evident that it is even more difficult to clarify what the offence is. For example, resale price maintenance is not regarded by each and every school of economic thought as an anti-competitive practice; in certain schools of economic thought resale price maintenance may serve a useful function. However, in Ireland at the moment resale price maintenance is regarded by the Competition Authority as a serious anti-competitive practice; therefore it could bring criminal proceedings in relation to such a matter. Presumably, however, if one economist can be found who will testify that in his/her opinion it does not have as its object or effect the prevention, restriction or distortion of competition, then such an offence has not been established beyond all reasonable doubt.

Moreover, when one considers that in the interpretation of Section 4 of the 1991 Act the Competition Authority and the Courts have to distinguish between agreements which per se are contrary to Section 4(1) and agreements which are only contrary to Section 4(1) when applying a rule of reason, then it becomes abundantly clear that the creation of criminal offences for anti-competitive practices is wholly unworkable.

7.2 The Standard of Proof

Applying the standard of proof in a criminal trial to competition law concepts shows the

extraordinary difficulty - if not impossibility - of pursuing a successful prosecution for criminal offences under the 1996 Act.

For example, consider the following questions:

- (1) Will a jury be able to be satisfied beyond a reasonable doubt that the relevant product market is bananas, or fresh fruit (United Brands) or whiskey/alcoholic drinks (Cooley/Irish Distillers) or ice-cream or impulse confectionery (Mars/HB).
- (2) Will a jury be able to draw "inescapable conclusions" from econometric models and statistical models proving cross-elasticity of demand?
- (3) Will a jury accept that the effect of the Defendant's conduct was beyond a reasonable doubt the prevention, restriction or distortion of competition when the agreement is considered in the perspective of a rule of reason?
- (4) Will a jury believe beyond a reasonable doubt that the appropriate geographic market is a country or city or that an undertaking is in a dominant position or that vertical restraints imposed on a franchisee might breach the terms of the category licence on franchise agreements?

7.3 Expert Evidence

Section 4(1) provides that, for proceedings under Section 2 of the Act, and not in relation to proceedings under Section 6 of the 1991 Act, any expert witness who appears to the Court to have the necessary qualifications or experience in relation to the matter shall be entitled to give an opinion which shall be admissible in evidence in relation to any issue which calls for expertise or special knowledge that is

relevant to the proceedings. It also provides that any witness who gives an opinion that agreements, decisions or concerted practices have as their object or effect the prevention, restriction or distortion of competition in trade shall have such opinion admissible in evidence. Moreover, any opinion of the witness which sets out for the Court's assistance or explains to the Court any relevant economic principles or the application of such principles in practice shall also be admissible in evidence.

This general principle is qualified in Section 4(2) wherein it is provided that a Court may, in the interests of justice, direct that evidence of a general or specific kind referred to in sub-section (1) shall not be admissible, or shall be admissible for specific purposes only.

8 Conclusions

It is interesting to recall that the lack of proper enforcement powers for the Competition Authority has been seen as the Achilles heel of the 1991 Act and that business people and practitioners have been calling for changes to the enforcement of competition policy in Ireland ever since the publication of the Competition Bill, 1991.

The 1996 Act seeks to remedy that deficiency. However, what it has done, is to create difficult and obscure criminal offences, it has provided for prosecutions of individuals and companies and it has provided for the enforcement of such criminal offences by a body with no previous experience of civil enforcement much less criminal enforcement. In these circumstances, it remains to be seen how effective the new enforcement mechanism will be.

Brian Cregan, Barrister.

Bar Council Bursaries

Congratulations to the following new entrants who were awarded Bar Council bursaries this year.

Bursaries equivalent to waiver of entry fee for achieving first place in a subject in the Kings Inns examinations in June, 1996 were awarded to:

Maeve Boyle
Judith Blake
Sara Farrell
Bridget Power

Bursaries equivalent to three year's subscription fee for rank achieved in the results of Kings Inns examinations in June, 1996 were awarded to:

Garrett Simons
Kilda Mooney
Sara Phelan

The Denham Commission's Second Report

The Working Group on a Court's Commission, under the chair of the Hon Ms Justice Susan Denham has published its second report dealing with issues of judicial and administrative case management. Edel Gormally notes the matters considered.

Whereas the first report of this Working Group addressed the management structure of the courts on a national basis, this second report is concerned with management of the courts at individual jurisdictional level and addresses further the problems concerning high cost, inefficient management and delays in litigation which were identified in the first report.

Broadly, this second report considers the role and tenure of Presidents of each Bench, the powers and composition of the Rules Committees and the issue of judicial case management where would signal a radical transfer of responsibility for the management of civil litigation from the litigants and their legal advisers to the Courts. In addition, the issue of administrative case management, which is

concerned with how the administrative structure of the courts system carries out its tasks, is also addressed.

Taking each in turn, the report proposes that the present system of appointing Presidents of the different Court levels to hold office until they retire from judicial office should be replaced by a system of appointment for a non renewable fixed term of e.g. seven years. Constitutional considerations are referred to but are not considered so serious as to make it pointless for the Group to consider the issue. Given the increased workload presently carried by the Presidents of the Courts and the fact that that workload is set to increase significantly with the implementation of the First Report of the Group, the report suggests that to introduce a fixed non renewable term would ensure that an unfair burden is not carried for an unduly long length of time by any one judge and that other judges who may be best qualified for the position would have the opportunity to fill it over time. In referring to the crisis of volume and complexity and delay in litigation currently facing the courts, the report suggests greater flexibility should be given to the Presidents of each Bench which would enable them to request a judge to work on the management of specific issues, e.g. the co-ordination of the family courts or the listing of cases.

The report states that the Rules Committees have the potential to be active vehicles for improving the practice and procedure of the courts and

Because of the fundamental change in the philosophy underlying civil litigation which would be reflected by the introduction of a system of judicial case management, the Group believes that the fullest and most wide ranging discussion should take place before it makes any recommendations to the Minister for Justice in this regard.

recommends that they should meet very regularly and be fully resourced in order to be proactive in the court system.

Concerning judicial case management, the report employs the definition also used in the Woolf report on Access to Justice in Britain, namely, it involves:

"the court taking the ultimate responsibility for progressing litigation along a chosen track for a pre-determined period during which it is subjected to selected procedures which culminate in an appropriate form of resolution before a suitably experienced judge. Its overall purpose is to encourage settlement of disputes at the earliest possible stage, and, where trial is unavoidable, to ensure that cases proceed as

quickly as possible to a final hearing which is itself of strictly limited duration."

The report records that the idea of case management was first studied seriously in the United States where apparently, it has helped reduce delays in Courts and eased access to Courts in that jurisdiction. In Ireland, case management has led to important and successful developments at both judicial and administrative level in the Examiner's office, with consequent benefit to litigants. Also the Law Reform Commission in its report on Family Courts recommended the introduction of formal case management procedures throughout the family law system.

The issue of case management requires consideration of the stage at which case management should begin, by whom should the case management be conducted and the powers which the case management judge should possess. The report also states that the consideration of this issue should include how the courts can encourage the use of alternative methods of dispute resolution such as arbitration.

Because of the fundamental change in the philosophy underlying civil litigation which would be reflected by the introduction of a system of judicial case management, the Group believes that the fullest and most wide ranging discussion should take place before it makes any recommendations to the Minister for Justice in this regard. The Group plans that this discussion will involve a

number of steps including highlighting the issue, facilitating a debate with relevant parties and organising a conference on the topic with international experts from other jurisdictions before production of the final report on case management.

The Group also records the findings of its ongoing consideration of the current systems of administrative case management in the different offices and sections of the court system. The report records that the Group has found crisis management in many offices and a lack of communication systems, training schemes, information technology and resources where staff are locked into systems where they have grave responsibilities but are not empowered to fulfil them.

Most vividly, the report points out that the Accountants office which has a monthly income of £10m still operates a manual accounting system, involving a typewriter which has two keys missing. The timewasting involved in such a system is compounded by the absence of any training system for those working in the office which has approximately £1.2m outstanding in uncollected monies for which the office does not have the time or the resources to seek payment.

Concerning the Examiner's office and the Official Assignee's office, the report suggests that serious consideration be given to the creation of a division of the High Court to deal with bankruptcy, company liquidations and matters arising from the Examiner's list. This Insolvency Court, could, it is suggested, be created on a de facto basis initially as a pilot scheme. Also incorporated into this concept would be the extension of the jurisdiction of the 'Bankruptcy' Judge to cover all issues of both law and fact,

in the course of a bankruptcy or arrangement, which would involve the re-introduction of Section 66, Bankruptcy (Ireland) (Amendment) Act, 1872.

The introduction of information technology into the office of Wards of Court is regarded in the report as a matter of absolute priority, in addition to the provision of additional staff at appropriate levels, more visits to Wards in accordance with the requirements of the Rules of the Superior Courts should be carried out and the Registrar and Assistant Registrars should be enabled to attend continuing legal education course to help keep abreast of complexities of new legislation which would impinge on the welfare of Wards and the management of their estates. The office of The General Solicitor For Minors and Wards of Court would benefit from the introduction of an automated database to ensure fast and efficient retrieval of information in respect of each case, the appointment of an Assistant Solicitor, provision of adequate secretarial facilities and the introduction of a defined career and promotional structure in relation to legal/technical would also improve staff morale, according to the report.

The report also records that the present Taxing Master, has for some time sought to obtain a photocopier, a word processing system and the removal of Bills of Costs, some 50 years old to the National Archives from the office of one of the Assistant Registrars. As regards the Supreme Court, again the report highlights the fact that the staff there work with an absence of modern technology and pressures of space and states that the Supreme Court's caseload warrants a more administrative approach.

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Members interested in acquiring ties designed with the crest of the Kings Inns can obtain them from Vivian McDonnell who now has a number in stock.

The Proceeds of Crime Act 1996

The Proceeds of Crime Act, 1996 is one of the most radical pieces of legislation to be passed into Irish law since the foundation of the State, writes Michael O'Higgins, Barrister, and he believes it merits close examination in terms of its intended objects and likely effects on the rights of the individual and the fight against crime in this country.

The Act in question allows the confiscation of assets which the court reasonably believes may directly or indirectly, constitute the proceeds of crime. Persons need not ever have been convicted of a criminal offence to attract the Act which has retrospective effect to include the proceeds of any crime, regardless of how long ago the crime was committed.

It is primarily designed to confiscate any assets owned by suspected criminals who are not in a position to prove they came by them by lawful means. Property is given a very wide definition in the Act but in practice, money in bank accounts, other financial investments, shares and real estate are most likely to be the targets of applications under the Act, the provisions of which apply to any property valued in excess of £10,000.

There are three stages to an application under the Act. First, a Chief Superintendent or revenue official must apply to the High Court. The application is *ex parte*, grounded on affidavit and the application must be heard 'otherwise than in public'. When a respondent appears to contest the application there is a provision for the proceedings to be heard in camera but this is not a right but may be granted only on the discretion of the court.

Section 8 of the Act permits the applicant to express an opinion that a person owns property which was acquired directly or indirectly from the proceeds of crime. Provided the court is satisfied that there are reasonable grounds for that belief this then constitutes evidence upon which the court can act. It is clear that the court is entitled to act on this opinion evidence and nothing else. Hitherto the court has been prepared to

accept information from an informant who has previously proven reliable as grounds for a reasonable belief.

The court then makes an order for 21 days effectively freezing the property which is the subject matter of the application.

At any time during that 21 day period, the person against whom the order has been made can apply to the court to have it discharged. However, the Act makes it clear that there is no absolute obligation on the State to inform a person that an interim order has been made. This only has to be done if it is possible to ascertain the respondent's whereabouts. Thus where people reside outside the jurisdiction the entire proceedings may be conducted in their absence. Once the State applies for an interlocutory order the interim order automatically remains in place until it, and any appeal, has been determined. Any person wishing to contest the order must go into evidence. The wording makes clear that once there is evidence before the court, even opinion evidence that a chief superintendent or revenue official believes that the property is the proceeds of a crime, the court must make an interlocutory order unless it is shown to its satisfaction, on evidence tendered by a respondent, that the property is not the proceeds of crime.

There is a saver to the effect that the Court need not make the order 'if it is satisfied that there is a serious risk of injustice.' However, this is a vague and intangible yardstick and it is not immediately clear how it would operate in practice.

A court has the power to order a respondent to file an affidavit setting out all income received by them, and also specifying the source of that income, over the 10 year period immediately prior to the date of the application being made.

An interlocutory order can remain in place indefinitely. After seven years, an application can be made to court to have the property transferred to the Minister for Finance. The proceeds are then put into the Exchequer Fund. Under Section 7 of the Act, the court may appoint a receiver to manage the property during the interim period. The court may also direct him to manage it or dispose of it or otherwise deal with it as it seems appropriate. Receivers are granted special protection; if the receiver deals with property which is not the subject matter of a court order but believes on reasonable grounds that he is entitled to take

such action, he is immune from suit in the absence of negligence on his part.

Section 6 of the Act permits a court, on the application of a respondent, to make orders in relation to the property affected so as to enable a person to discharge living expenses and legal costs or to continue to carry out business on the property which is the subject of the order.

Section 16 permits the court to award compensation (but not damages) as it considers just in respect of any loss incurred by reason of the order concerned. The confining of payment to 'loss' would seem to indicate that compensation is confined to 'special damages' which can be measured as a matter of record. This is problematic in that one's credit rating for example, will be affected by such an order but the Act does not seem to provide for how that is to be measured for the purpose of calculating compensation for the loss incurred.

Though an earlier bill made provisions for orders for costs the Act as passed is silent on this issue.

Ironically, the Act will probably be ineffective against the very persons whom it is ostensibly targeting. Drug dealing is a cash rich business and thus proceeds are liquid and mobile. Once cash is removed outside the jurisdiction, the Act is powerless.

Any businessperson whose tax affairs are not wholly in order should worry, though many tax evaders will be immune from suit as a result of availing of the Government tax amnesty.

The Act applies retrospectively to any crime no matter how long ago it was committed. There is no requirement that a person whose property is the subject of such an order be convicted of a crime. Once the State has reasonable grounds for believing that the property is, even indirectly, the proceeds of crime then the onus shifts to the respondent to prove that it is not.

It will be up to the courts to delineate the parameters of what is 'indirectly' the proceeds of crime. Where a person committed a crime 15 years ago it seems possible that it could be argued that any surplus in a bank account is indirectly the result of a crime in that the person would not have that surplus but for the fact of the crime committed long ago and accordingly could be the subject of an order made under the Act.

No one can justify a criminal acquiring

property as a result of criminal activity. There is nothing wrong in principle with introducing legislation which would remove such property from them. In fact there are already such provisions in force under the Misuse of Drugs Act, 1994. However these provisions do place an onus on the State to prove that a specific crime has actually been committed. There is then a greater element of fairness in this type of confiscation.

Many will say that an innocent person has nothing to fear from this legislation. Only criminals need worry. However, this argument will be familiar to those who recall the debates during the introduction of the Criminal Justice Act, 1984. Since then, there have been a number of statements taken in custody which the courts and juries have rejected as unsafe. The argument that it is only criminals who need worry is borne of complacency and a sense that legislation is really going to affect somebody else. After all the State can be relied upon to use all of its powers responsibly, can it not?

Unfortunately the complacent require to be reminded that time and time again abuses will occur. For example, the Criminal Assets Bureau visited the offices of a well known solicitor to inspect records relating to one of his clients. Media photographers were on hand to record the event and it was the solicitor and not his client who was front page news. The leaking of the visit to the media was an abuse of power. It was insidious and shows the danger of new toys in the wrong hands.

The State has been criticised for being bureaucratic, inefficient, under-resourced and cumbersome. These criticisms are valid.

The Act in question allows the confiscation of assets which the court reasonably believes may directly or indirectly, constitute the proceeds of crime. Persons need not ever have been convicted of a criminal offence to attract the Act which has retrospective effect to include the proceeds of any crime, regardless of how long ago the crime was committed.

Nonetheless, it is also the most powerful institution in the country.

There have been three criminal statutes since the foundation of the State which have seriously encroached upon the liberty of the individual. The Offences Against the State Act, 1939 permits the detention of individuals for up to 48 hours and in certain circumstances the removal of a right to trial by jury. The Act has been used extensively but by no means exclusively against those suspected of subversive crime. Persons suspected of malicious damage have been arrested under the Act.

In 1976 the government passed the Criminal Law (Jurisdiction) Act, which contained a provision which allowed for the detention of suspects for up to seven days. The Act was used exclusively against subversives and fell into disuse mainly because the gardai found it ineffective.

In the early 1980's the gardai expressed

deep frustration that under existing law their hands were tied. Specifically, they complained that save for very limited circumstances they were not entitled to question suspects. The criminal Justice Act, 1984 was passed which permitted the gardai to detain suspects for up to 12 hours. Though the detention was expressed only to arise in circumstances where it was necessary for the further investigation of the offence, in practice it was used to obtain statements of admission from suspects. Most significantly, the Act was only passed after months of public debate both inside and outside the Dail and the main sections did not become operative until three years later when the Garda Complaints Boards was set up and regulations were passed to afford protections to people in custody under the Act. These safeguards were introduced after much public debate and discussion highlighted crucial issues of concern.

It is lamentable that in the present climate of concern about the scale and seriousness of criminal activity, particularly among those involved in drug dealing, that the State is abrogating its responsibility to gather evidence against suspected criminals and prosecute them for crimes they have committed. Instead they will now gather information which points the finger of suspicion against any individual and once that has been done, it is up to that person to prove that the property owned by them has been lawfully obtained. Regardless of the concerns this raises for liberty of the individual, it also begs the question, whatever happened to good old fashioned detective work?

Michael O'Higgins, Barrister.

Bar Council Members 1996/97

Following the Bar Council elections last July, the following are members of the Bar Council for 1997/98

Standing Committee:

James Nugent, S.C., Chairman, Bar Council
Patrick Hanratty, S.C., Vice-Chairman, Bar Council
Michael Durack, S.C., Hon Treasurer, Bar Council
Fergal Foley Hon. Secretary, Bar Council.
Conor Maguire, S.C., Chair, Library Committee
John MacMenamin, S.C., Chair, Professional Practices Committee
Oonah McCrann, Chair,

Liaison Committee
Eamon Leahy, Chair, Internal Relations Committee

Other Council Members

The Attorney General, Mr. Dermot Gleeson, S.C.
Gerard Durcan, S.C.
Liam McKechnie, S.C.,
Donal O'Donnell, S.C.
James O'Driscoll, S.C.,
Seamus Sorahan, S.C.
Mary Rose Gearty
Isobel Kennedy
Patrick Marrinan
Sara Moorhead
Nehru M. Pillay
Peter Somers
David Sutton
Paddy McCarthy, S.C.*
Kevin Cross*
Patricia Dillon*

*Co-opted to serve on the Bar Council until 31st August, 1997

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Isobel Kennedy
Caitriona Maguire

Each Committee may also co-opt three members who are not members of the Bar Council

The Case for a EU Convention Causebook and Judgment Registry Database

The effective workings of the European single market and European monetary union requires that individuals, investors and companies have access to comprehensive, accurate and up to date information on other players in the single market. A centralised European Cause book and Registry Database is required, argues Twinkle Egan, Barrister, to meet business needs in this area.

The EU and the EFTA states combined comprise in excess of 370 million people and are responsible for over one fifth of world trade. The 1968 Brussels Convention recognised the importance of a legal structure to underpin and support these commercial dealings across member states in the drive towards greater union among the peoples of Europe. However, while the Convention allows for the effective enforcement of judgments against defendants in other member states, more is now required in order to satisfy the needs of individuals, investors and businesses worldwide involved in economic activity across the EU and to promote the greater union of peoples within the Community.

In the words of Peter Sutherland: "At its simplest, our message is that action must be taken now by the European institutions and member states to overcome consumer uncertainty, local or sectoral resistance to change, and commercial and industrial anxieties the challenge now is to reassure the consumer and to capture the imagination of business, particularly the smaller firm, that the rules of a really frontier free market will be applied across the Community. When this is achieved, the internal market will truly be seen as the basic stepping stone in the construction of Europe."¹

At present, the effective operation of the aims of the Brussels Convention are hampered by the fact that proceedings instituted in one country under the

Convention are a matter of record only with in that jurisdiction. Similar proceedings against the same defendant may have occurred or be underway in other jurisdictions, but there is at present no mechanism whereby the existence or significance of such proceedings can be ascertained by interested parties. This anomaly in the effective workings of the Convention has long required the establishment and maintenance of a centralised European Cause Book and Judgment Registry Database.

The proposed EU Convention Cause Book and Judgment Registry Database would, for the first time, provide just such a centralised register and would contribute to greater protection of individual and investor's rights throughout the EU; increase the range and quality of information available to advisers; help promote greater integration of legal procedures throughout the EU and help reduce existing delays by the speed of collation and dissemination of information. In addition, the proper operation of the Cause Book and Registry Database would stimulate capital investment and its protection throughout the EU. Also, it would enable the EU Commission to monitor the compliance of companies and their products with international standards and to act accordingly on detected breaches.

And it would do all this quite simply by providing a database which would record details of cases taken under the EU Convention, such as the names of the plaintiff and the defendant, the record and file number of the action, the subject matter of the action, breaches of international standard, if applicable. It would also record whether the proceedings are ongoing or have concluded and if concluded, the relevant outcome would be registered. The precise information to be contained and the manner of its structure, along with queries and searches to provide data to users is still under ongoing consideration and can only be finalised after agreement between the member states. The question of whether priority of competing plaintiffs in different jurisdictions to a common defendants assets can be decided from the date of registration of an action against that defendant in the centralised

registry is also under consideration.

The Scheme has received widespread support to date from the judiciary and the legal professions internationally, the insurance industry, the Stock Exchange and business and consumer representative groups.

Full information and updates on the European Cause Book and Judgment Registry Database are available on the Internet by following the links from uniform resource location: <http://www.cyberia.ie/~twinkle>.

The Irish Centre for European Law has included the case for the establishment of the Centralised European Causebook and Judgment Registry Database in the Conference Programme of 'The Brussels Convention: Current Problems and Future Opportunities' to be held on Saturday, 26th October, 1996. Tel: 01 6081080.

Twinkle Egan, Barrister.

Footnotes

1. Report to the European Commission entitled 'The Internal Market After 1992 - Meeting the Challenge' published 28/10/92.

New Benchers

Mary Finlay, S.C. and Greg Murphy, S.C., are congratulated upon their appointment as Benchers of the Kings Inns.

3 New Senior Counsel

Congratulations and best wishes to Sean Moylan, S.C., Diarmuid McGuinness, S.C. and Tony Sammon, S.C. who took silk on Monday 7th October.

Bicentenary of Four Courts

Because of celebrations to be held in the Round Hall on Friday, 8th November in honour of the bicentenary of the Four Courts, the courts will be closed on that date.

legal update

A directory of legislation, articles and written judgments from 3rd July to 4th October 1996.
Edited by Desmond Mulhere, Law Library, Four Courts, Dublin 7.

subject summaries

ADMINISTRATIVE LAW

McNeill v. Commissioner of An Garda Síochána
Supreme Court: Hamilton C.J. O'Flaherty J. Denham J.*
* dissenting
30/06/1996

Garda Síochána; disciplinary proceedings; delay; whether delay excessive; disciplinary regulations; use of terms 'as soon as practicable' and 'without avoidable delay'; matter initially subject to criminal proceedings; whether reasonable to proceed with criminal trial prior to disciplinary proceedings; whether constitutional tenet of 'reasonable expedition'; test for delay in disciplinary proceedings

Held: Requirement for expedition under regulations not met

Keane & Ors. v. Commissioners of Irish Lights
Supreme Court: Hamilton C.J. O'Flaherty J.* Blayney J. Denham J.* Barrington J.
* dissenting
18/07/1996

Judicial review; statutory corporation; powers; statutory interpretation; commissioners for Irish lights; whether construction of radio mast ultra vires; definition of 'beacon'; updating construction; whether statutory powers restricted to adjacent seas; whether 'mark' of sea; whether updated construction excluded by language used; implied powers

Held: Construction of radio mast ultra vires

Madden & Ors. v. Minister for the Marine
Supreme Court: Hamilton C.J. Blayney J. Barrington J.
31/07/1996

Appeal; fisheries; foreshore and fish

culture licences; objections raised to granting of licences; judicial review; whether minister used correct machinery in granting licences; Foreshore Act 1933, Fisheries (Consolidation) Act 1959, Fisheries Act 1980; statutory interpretation; whether 1959 Act appropriate for granting such licences; interference with public fishing rights; entitlement to public enquiry; ministerial discretion

Held: Minister did not have power to grant licences pursuant to 1959 Act

Lee v. Minister for Defence
High Court: Barron J.
19/05/1996

Defence forces; disciplinary proceedings; parallel disciplinary and medical proceedings; decision to repatriate on medical grounds; whether decision concluded relevance of disciplinary proceedings; whether natural justice applied; nature of medical process; whether required to be conducted judicially

Held: Applicant not prejudiced

Grant v. An Garda Síochána Complaints Board
High Court: Murphy J.
12/06/1996

Garda Síochána; disciplinary proceedings; appellate tribunal; disciplinary tribunal making certain findings of fact; disciplinary tribunal making finding on one of three complaints; appellate tribunal making finding on other charge; *autrefois acquit*; whether duplication of charges; standard of proof; whether criminal standard appropriate for allegations of professional misconduct; nature of instant disciplinary proceedings

Held: No injustice to applicant; civil standard applicable in employment situation

Lovett v. Minister for Education, Ireland & Attorney General
High Court: Kelly J.
11/07/1996

Judicial review; employment; pension; statutory scheme for pensions for teachers; scheme providing for forfeiture of pension in event of criminal conviction; whether provision for forfeiture ultra vires; whether provision beyond principles and policies of parent Act; significance of scheme being laid before Oireachtas; whether provisions unconstitutional; whether unjustifiable interference with property rights; judicial self restraint

Held: Provisions ultra vires Teachers Superannuation Act, 1928

Abrahamson & Ors. v. Law Society of Ireland & AG
High Court: McCracken J.
15/07/1996

Judicial review; solicitors; access to vocational training; legitimate expectation; *res judicata*; whether previous decision of High Court in Bloomer case binding on applicants; applicants relying on exemptions from examinations; whether right to be consulted; whether legitimate expectation wider than promissory estoppel; whether mandatory order will lie given that regulation giving rise to legitimate expectation ultra vires; whether exceptional circumstances
Held: Applicants had legitimate expectation; declaration of exceptional circumstances granted

Hughes v. Commissioner of An Garda Síochána
High Court: McCracken J.
23/07/1996

Judicial review; garda síochána; disciplinary proceedings; conduct of disciplinary hearing; whether investigating officer should have urged

finding of breach of discipline; whether scope of complaint extended; two part machinery for dealing with complaints; whether further hearing necessary

Held: Setting up of tribunal ultra vires

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Civil service regulation (amendment) act, 1996 (commencement) order, 1996
S.I.197/1996

Commencement date: 25.6.96

Diplomatic and consular fees (amendment) regulations, 1996
S.I.203/1996

Commencement date: 1.8.96

Borrowing powers of certain bodies act, 1996 (commencement) order, 1996
S.I.232/1996

Commencement date: 1.8.96

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ADOPTION

B. & Ors. v. An Bord Uchtala, Ireland and Attorney General

Supreme Court: Hamilton C.J. O'Flaherty J. Blayney J. Barrington J. Murphy J.
25/07/1996

Judicial review; recognition of foreign adoptions; Adoption Act, 1991; respondents refusing to recognise chinese adoptions; requirement that foreign adoption have 'essentially same legal effect' as Irish order; provision for termination of adoptive relationship under chinese law; finality of Irish adoption order; whether residual rights under chinese law; whether *certiorari* appropriate remedy

Held: Chinese adoption having essentially same legal effect

McD. & Anor. v. Eastern Health Board
Supreme Court: Hamilton C.J. Barrington J. Keane J.
29/07/1996

Foreign adoption; assessment of suitability of adoptive parents; delay in assessment; statutory duty to carry out assessment as soon as practicable; whether delay of seven months breach of duty; meaning of 'as soon as practicable' considered; whether delay caused by inadequate resources; increase in number of applicants; shortage of qualified personnel

Held: No breach of statutory duty; delay to be determined by reference to

circumstances of particular health board

Brady & Ors. v. An Bord Uchtala
High Court: Flood J.
12/04/1996

Judicial review; recognition of foreign adoptions; Adoption Act, 1991; respondents refusing to recognise chinese adoptions; requirement that foreign adoption have 'essentially same legal effect' as Irish order; provision for termination of adoptive relationship under chinese law

Held: Chinese adoption having essentially same legal effect; provision for setting aside registration considered

G.(D) & Anor. v. An Bord Uchtala
High Court: Laffoy J.
23/05/1996

Adoption order; application to consent with consent of mother; placement for adoption; whether mother's consent fully informed and free; ability of mother to receive information and intellectually process it considered; whether mother recognised possibility of consent being dispensed with; mother's will overborne by her parents; *habeas corpus*; custody of child; welfare of child; whether long term psychological effects if child removed from adoptive parents

Held: Child returned to mother; initial consent not valid

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Milk quotas in Ireland
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S.I.210/1996

Date signed: 10.7.96

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S.I.233/1996

Date signed: 1.8.96

European communities (additives in feedingstuffs) (amendment) (no.2) regulations, 1996
S.I.252/1996

Date signed: 22.8.96

European communities (marketing of fertilisers) regulations, 1996
S.I.270/1996

Commencement date: 1.10.96

European communities (feedingstuffs) (tolerance of undesirable substances and products) (amendment) regulations, 1996
S.I.275/1996

Date signed: 19.9.96

ALIENS

statutory instruments

Aliens (amendment) (no.3) order 1996
S.I.120/1996

Commencement date: 1.5.96

Aliens (amendment) (no.4) order, 1996
S.I.251 1996

Commencement date: 19.7.96

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Interdepartmental Committee on Non-Irish Nationals
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ANIMALS AND BIRDS

statutory instruments

Greyhound race track totalisator (super) (trio) jackpot regulations 1996
S.I.111/1996

Commencement date: 23.4.96

Wildlife (wild birds) (open seasons) (amendment) order, 1996
S.I.219/1996

Date signed: 16.7.96

Wildlife (wild mammals) (open seasons) (amendment) order, 1996
S.I.220/1996

Date signed: 16.7.96

ARBITRATION

Dublin Corporation v. Building and Allied Trade Union & Ors.

Supreme Court: Hamilton C.J. O'Flaherty J. Blayney J. Barrington J. Keane J.
24/07/1996

Compulsory purchase; compensation paid on basis of cost of re-instatement value; no such work carried out; finality of

arbitration award; *res judicata*;
Acquisition of Land (Assessment of
Compensation) Act 1919; finality to
litigation; absence of provision for re-
payment under legislation; whether unjust
enrichment abridges *res judicata*

Held: Award *res judicata*

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AVIATION

Burke v. Aer Lingus Plc
High Court: Barr J.
26/06/1996

Negligence; personal injuries; Warsaw
Convention; Air Navigation and
Transport Act, 1936; time limit
applicable for damages sustained in
course of disembarking; whether action
barred; meaning of 'disembarking';
passenger injured on shuttle bus; whether
in continuous control of airline; whether
air related risk; location of accident in
operations area

Held: Time limit applicable: Convention
extends beyond specific act of leaving
plane

CHARITIES

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Activities for Charitable and Other
Purposes
Dublin Stationery Office 1990 Costello,
Declan N215.C5

Tudor on charities
Tudor, Owen Davies
S & M 1995
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Broadcasting (receiving licences)
(amendment) regulations, 1996
S.I.249/1996
Commencement date: 1.9.96

COMPANY LAW

Carway v. Attorney General
High Court: Carroll J.
03/07/1996

Winding up; s.150 Companies Act 1990
application; preliminary issue;
constitutionality of liquidator's certificate
under s.149 (1)(b) of the 1990 Act;
whether certificate constitutes an
irrebuttable presumption of insolvency;
whether insolvency is part of a justiciable
controversy; purpose of s.149

Held: S.149 not unconstitutional;
certificate not conclusive evidence of
insolvency; certificate is a preliminary
step for an order under s.150

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Proposed merger or take-over prohibition
(amendment) order, 1996
S.I.214/1996
Date signed: 16.7.96

Stock transfer (forms) regulations, 1996
S.I.263/1996
Date signed: 5.9.96 Date received:
18.9.96 Commencement date: 9.9.96

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CONFLICTS OF LAW

Casey International Plant Sales & Hire v.
Ingersoll-Rand Sales Co. Ltd.
High Court: Shanley J.
12/07/1996

Contract; defendant company registered
in EC; plaintiff domiciled in Ireland;
claims for breach of contract,
misrepresentation and negligent
misstatement; jurisdiction; Jurisdiction of
Courts and Enforcement of Judgments
(European communities) Act 1988; article
5(3) Brussels Convention 1968; whether
damage occurred in this jurisdiction

Held: Lack of jurisdiction; damage did
not occur in this jurisdiction

Petronelli v. Collins
High Court: Costello P.
19/07/1996

Enforcement of foreign judgment; non-
appearance; default judgment; application
to set aside enforcement order; whether
documents properly served; Order 13,
Rule 11 RSC; whether defendant aware
of proceedings; whether judgment should
be set aside on basis of fraud; whether
Irish courts should exercise jurisdiction in
enforcing judgment where fraud rejected
by foreign court

Held: Proper service conducted; judgment
of foreign court stayed

CONSTITUTIONAL LAW

Iarnrod Eireann (Irish Rail) & Anor. v.
Ireland & Ors.
Supreme Court: Hamilton C.J. O'Flaherty
J. Blayney J. Denham J. Barrington J.
16/07/1996

Judgment of Court: legislation; challenge
to validity; Civil Liability Act, 1961;
proportionality; concurrent wrongdoers;
provision for recovery of entire judgment
against one joint tortfeasors; whether
interference with property rights of
plaintiff; whether so contrary to reason
and fairness as to constitute an unjust
attack

Held: Validity of legislation upheld;
legislation represents a rationalisation of
the liability of concurrent wrongdoers
inter se; issue of locus standi not
considered

Heaney & Anor. v. Ireland
Supreme Court: Hamilton C.J. O'Flaherty
J. Blayney J. Denham J. Barrington J.
23/07/1996

Judgment of Court: legislation; challenge
to validity; right to silence; Offences
Against State Act 1939; offence to fail to
give account of movements; whether right
to silence protected under Article 38 as
pre-trial procedure; freedom of
expression; self-incrimination; whether
information admissible at trial;
proportionality; public order; state's
entitlement to protect itself

Held: Provision proportionate

O'R. (W) v. H.(E)
Supreme Court: Hamilton C.J. O'Flaherty
J. Denham J. Barrington J. Murphy J.
23/07/1996

Guardianship; non-marital child; de facto family; rights of natural father; application for guardianship; parallel adoption proceedings; whether natural father having prima facie right to guardianship; effect of adoption order on existing access rights of natural father; welfare of infant; whether natural father having constitutional rights; whether court entitled to consider effect of pending adoption in considering guardianship application; Articles 41 and 42 considered

Held: Position of natural father a factor only to be considered; State (Nicolaou) v. An Bord Uchtala discussed

Croke v. Smith
Supreme Court: Hamilton C.J. O'Flaherty
J. Blaney J. Denham J. Barrington J.
31/07/1996

Judgment of Court: Article 40.4.3 reference; legislation; constitutional validity; right to liberty; whether s.172 of Mental Treatment Act, 1945 repugnant to Constitution; presumption of constitutionality; reception and detention orders of persons of unsound mind; whether detention for indefinite duration valid; whether such orders part of administration of justice; whether judicial intervention necessary; purpose of Act; safeguards

Held: S.172 of 1945 Act not repugnant to Constitution

Barry v. Waldron
High Court: Carney J.
23/05/1996

Detention under Criminal Justice Act, 1984; application for habeas corpus; procedure; right of access to solicitor by person in custody; short term detention; whether habeas corpus appropriate; nature of right of access to solicitor; costs

Held: Detainee entitled only to reasonable access to solicitor

Gallagher v. Director of the Central Mental Hospital & Ors.(Application of Maguire)
High Court: Geoghegan J.
09/07/1996

Locus standi; application to be joined in habeas corpus proceedings; relative of murder victims; claim that release of detainee would endanger applicant; nature of inquiry under Article 40; whether potential victim entitled to representation

Held: Application refused

O'Brien v. Governor of Limerick Prison
High Court: Geoghegan J.
31/07/1996

Habeas corpus application; Article 40.4 of Constitution; detention; legality; refusal to grant remission; Rules for the Government of Prisons 1947; validity of sentencing order; partial suspension of sentence; whether applicant entitled to remission; powers of the executive

Held: Detention lawful

Walsh v. Governor of Limerick Prison
High Court: Laffoy J.
31/07/1996

Habeas corpus application; Article 40.4 of Constitution; Offences Against the State Act, 1939; whether detention valid; whether committal warrant of Special Criminal Court valid; technical defect; fundamental defects; breach of prison rules; conduct of visits

Held: Detention lawful; no fundamental breach

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CONSUMER LAW

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Maximum prices (magazines) order, 1996
S.I.207/1996
Commencement date: 17.7.96

Consumer credit act, 1995 (section) regulations, 1996
S.I.245/1996
Date signed: 8.8.96

Consumer credit act, 1995 (section 60) (no.2) regulations, 1996
S.I.246/1996
Date signed: 8.8.96

Consumer credit act, 1995 (section 120) regulations, 1996
S.I.247/1996
Date signed: 8.8.96

Consumer information (consumer credit) order, 1987 (revocation) order, 1996

S.I.248/1996
Commencement date: 8.8.96

European communities (consumer credit act, 1995) (amendment) regulations, 1996
S.I.277/1996
Date signed: 23.9.96

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CONTRACT

Ennis v. Butterly
High Court: Kelly J.
26/07/1996

Preliminary action; strike out; vexatious claim; damages; breach of contract; negligent and fraudulent misrepresentation; non-marital co-habitation; whether non-marital co-habitation agreements can be enforced; public policy; whether 'palimony' claim recognised by Irish law; Article 41 of Constitution; family rights

Held: Claim for breach of contract struck out; 'palimony' not part of Irish law; misrepresentation claim separate from contract

COPYRIGHTS, PATENTS AND DESIGNS

Allen & Hanbury's Ltd. & Anor v. Controller of Patents, Designs & Trademarks & Anor.
High Court: Carroll J.
26/07/1996

Copyright; patents; compulsory licences; appeal against order of controller granting licences; s.75 Patents Act, 1964; grant of licences pursuant to s.42 of the Act; whether s.46(3) of 1964 Act, confers a right not to have compulsory licences granted; interpretation of s.46(3); presumption of constitutionality; agreement of Trade Related Aspects of Intellectual Property Rights (TRIPS); jurisdiction of controller to grant licences; whether licences valid after ratification of TRIPS agreement; whether agreement is a treaty or convention applying to the State

Held: Licences should not have been granted

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Trade marks act, 1996 (commencement) order, 1996
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Commencement date: 1.7.96

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S.I.199/1996

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CRIMINAL LAW

Kelly v. DPP & Anor.

Supreme Court: Hamilton C.J. O'Flaherty J. Murphy J. 28/06/1996

Prosecution; procedure; nolle prosequi; election between summary prosecution and indictment; whether DPP estopped from proceeding by indictment once summons issued; summary proceedings out of time; whether abuse of process; whether double jeopardy; jurisdictional acquittal; order of prohibition sought

Held: Prosecution not estopped from proceeding by indictment as summary proceedings were void

Curtis v. Judge Brennan & DPP

High Court: Moriarity J. 23/05/1996

Assault; District Court; jurisdiction; question as to title to lands; district court precluded from determining assault cases if question as to title; s.46 Offences Against the Person Act, 1861; whether necessary nexus between assault and dispute as to title of lands; whether relevant that title subsequently settled; whether dispute should be substantive defence

Held: Title dispute not at heart of alleged assault

Dunne v. DPP

High Court: Carney J. 06/06/1996

Application to set aside warrant; breach of s.2 Criminal Damage Act, 1991; warrant issued; execution of warrant for arrest after several attempts; whether undue delay in execution of said warrant; nature of warrants

Held: No delay in execution of warrant

Attorney General v. Judge Wallace

High Court: Geoghegan J. 18/06/1996

Fisheries; detention of boat; master of boat to be brought before court 'as soon as may be'; whether delay of thirty six hours excessive; whether state took reasonable steps to have matter heard as soon as practicable; s.234 Fisheries (Consolidation) Act, 1959 considered

Held: Application was made 'as soon as may be'

DPP v. Flannery

High Court: Barr J. 25/06/1996

Prosecution; duty of disclosure; duty of investigating officers; failure to disclose witness statements going to credibility of main prosecution witness; documents obviously relevant; whether deliberate policy to subvert course of justice; relief to be given; whether fair trial precluded

Held: Permanent stay on prosecution granted

Dunne v. Judge Lynch

High Court: Geoghegan J. 26/06/1996

Costs; judicial review; previous trial aborted; whether defendant/applicant entitled to costs; whether judicial review appropriate remedy; whether trial judge had made order refusing costs; whether High Court entitled to go behind order of Circuit Criminal Court

Held: Court of Criminal Appeal the proper forum: judicial review refused

National Authority for Occupational Safety and Health v. Fingal County Council

High Court: Murphy J. 04/07/1996

Time limits; prosecution; Safety, Health and Welfare at Work Act, 1989; differing time limits prescribed; prosecution to be brought within twelve months of accident or six months of inquest; *generalia specialibus no derogant*; whether six month time limit from inquest an extension or restriction of general time limit; penal statute to be construed strictly

Held: Six month time limit applied; absence of phrase 'whichever shall be later' noted

National Authority for Occupational Safety and Health v. O'K Tools Hire and Sales Ltd.

High Court: Laffoy J. 11/07/1996

Offence; prosecution; time-limits; statutory defence where defendant proves that a third party is actual offender; first defendant to lay information; whether statutory defence gives rise to separate proceedings; whether general time limit applies to laying of this information; whether first defendant prejudiced where statutory defence time barred; undue delay

Held: General time limit no applicable; defence does not give rise to separate proceedings

DPP v. Bambrick

High Court: Carney J. 26/07/1996

Sentence; murder charges; manslaughter plea accepted by DPP; guilty plea; sentencing procedure; propensity to re-offend; preventative detention; constitutional implications; whether life sentence may be imposed; mitigating factors; protection of society; sentencing parameters

Held: Maximum penalty not available; guilty plea; full confession; concurrent sentences imposed

DPP v. Dougan

High Court: Geoghegan J. 30/07/1996

Case stated; drunk driving offences; disqualification order; whether such an order is a minor or non-minor offence; Road Traffic Act 1994; jurisdiction of District Court; whether District Court judge has jurisdiction to have case stated; whether this amounts to a constitutional challenge

Held: Offence was minor; no jurisdiction to mount constitutional challenge *DPP (Garda Lenihan) v. McGuire* High Court: Kelly J. 31/07/1996

Arrest; detention; Criminal Justice Act, 1984; Treatment of Persons in Custody in Garda Siochana Stations Regulations 1987; duties to be performed by 'member in charge'; failure of Garda to sign station diary; whether nevertheless member in charge; whether prejudice to respondent; whether link between alleged breach and prejudice

Held: No breach: duties of member in charge do not flow from entry in station diary

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Extradition (European convention on the suppression of terrorism) act, 1987 (designation of convention countries) (amendment) order, 1996 S.I.244/1996

Commencement date: 2.8.96

Criminal justice (drug trafficking) act, 1996 (commencement) order, 1996 S.I.257/1996
Commencement date: 9.9.96

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DAMAGES

Moran v. Murphy
High Court: Flood J.
21/06/1996

Road traffic accident; motorcycle and car collision; plaintiff suffered personal injuries; negligence found; damages assessment; general and special damages
Held: Plaintiff awarded damages

EC LAW

McNamara v. An Bord Pleanala
High Court: Barr J.
31/07/1996

Application seeking reference to European Court of Justice on a point of EC law; Article 177, Treaty of Rome; substantive hearing concerning planning permission granted for dump; judgment given; interpretation of Community law; objective of Article 177; ruling of ECJ while case in national court is pending; consultative procedure

Held: Such reference not permissible after domestic court has given final judgment

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Date signed: 15.1.96

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Commencement date: 1.7.96

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Commencement date:10.6.96

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Commencement date: 1.7.96

European communities (importation of bovine animals and products obtained from bovine animals from the United Kingdom) (amendment) regulations, 1996 S.I.210/1996
Date signed: 10.7.96

European communities (air-traffic management equipment and systems) (standards) regulations, 1996 S.I.221/1996
Date signed: 18.7.96

European communities (materials and articles intended to come into contact with foodstuffs) (amendment) regulations, 1996 S.I.226/1996
Commencement date: 16.9.96

European communities (trade in bovine breeding animals, their semen, ova and embryos) (amendment) regulations, 1996 S.I.233/1996
Date signed: 1.8.96

European communities (minced meat and meat preparations) regulations, 1996 S.I.243/1996
commencement date: 14.8.96

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Date signed: 22.8.96

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Commencement date: 26.8.96

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Date signed: 10.9.96

European communities (marketing of fertilisers) regulations, 1996 S.I.270/1996

Commencement date: 1.10.96

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EMPLOYMENT LAW

C & D Food Ltd. v. Cunnion & Ors.
High Court: Barron J.
30/07/1996

Equality; Anti-discrimination (Pay) Act, 1974; appeal on a point of law; whether employed on 'like work'; whether work of equal value; whether discrimination on grounds other than sex; whether men and women recruited for same job

Held: Findings of fact of Labour Court final

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Employment regulation order (provender milling joint labour committee), 1996
S.I.168/1996
Commencement date: 14.6.96

Employment regulation order (retail grocery and allied trades joint labour committee), 1996
S.I.181/1996
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S.I.193/1996
Commencement date: 1.7.96

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Energy (miscellaneous provisions) act, 1995 (section 14) order, 1996
S.I.274/1996
Date signed: 16.9.96

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S.I.184/1996
Commencement date: 24.7.96

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S.I.229/1996
Date signed: 31.7.96

Quality of bathing waters (amendment) regulations, 1996
S.I.230/1996
Date signed: 31.7.96

Environmental protection agency (licensing fees) (amendment) regulations, 1996
S.I.239/1996
Commencement date: 3.9.96

Environmental protection agency (licensing) (amendment) (no.2) regulations, 1996
S.I.240/1996
Date signed: 2.8.96

Air pollution act 1987 (emission limit values for combustion plant) regulations, 1996
S.I.264/1996
Commencement date: 1.10.96

EXTRADITION LAW

Brien v. Judge King & Ors.
High Court: Barr J.
05/07/1996

District court; duty to protect constitutional rights; whether evidence established an intention by requesting authorities to prosecute; whether correspondence of fair procedures

Held: Matter remitted to district court to determine whether real intention to

prosecute

Smithers v. Governor of Mountjoy Prison
High Court: Kelly J.
03/05/1996

Procedure; extradition to United States; provisional arrest in case of urgency; request through diplomatic channels; requirement of intention to send a request for extradition; whether district court entitled to treat separate documents as constituting a request; whether failure to provide documents prior to hearing; whether a subsequent legal detention is impaired by earlier illegal detention

Held: Detention valid

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S.I.118/1996
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Commencement date: 1.9.96

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S.I.267/1996
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FISH AND FISHERIES

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High Court: Keane J.
20/06/1996

Fisheries; trespass; injunction; plaintiffs seeking to restrain obstruction and interference with enjoyment of fishery; whether plaintiffs having good title to fishery; whether defendants entitled to rely on *jus tertii*; profit-*-pendre*; whether plaintiffs having lease of fishery rights only on bed of river; whether fishery rights carrying with them right of access over adjoining land; whether words of limitation required; whether derogation from original grant; whether fishing restricted to salmon; rights of riparian owners considered; Irish Land Act, 1903; whether plaintiffs seeking equity with clean hands

Held: Injunction granted

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European communities (fishery products) (health and hygiene rules for production and placing on the market) regulations, 1996
S.I.170/1996
Commencement date: 10.6.96

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order, 1996
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Commencement date: 1.8.96
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S.I.253/1996
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Commencement date: 1.9.96

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S.I.257/1996
Commencement date: 9.9.96

GARDA SIOCHANA

Reid & Ors. v. Minister for Finance
High Court: Budd J.
29/07/1996

Compensation claim; Garda Compensation Acts 1941 to 1945; death of Garda while on duty with UN; compensation sought by widow and family; claim for loss of earnings; mental distress; loss of consortium

Held: Awards made to widow and children

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Garda Siochana (associations) (amendment) regulations, 1996
S.I.222/1996
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Commencement date: 1.8.96

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JUDICIAL REVIEW

Kenny v. Revenue Commissioners
High Court: Costello P.
24/06/1996

Application for leave to apply; scope of
judicial review; whether applicant having
requisite interest; stamping of documents;
adjudication of revenue commissioners
on stamp duty; applicant claiming that
adjudication affected admissibility of
evidence in other court proceedings;

Stamp Act, 1891; discretionary nature of
remedy; whether more appropriate
remedy available to applicant; whether
court having jurisdiction to grant
declaratory relief against notice parties

Held: Leave to apply refused

O'Brien v. Commissioner of An Garda
Siochána
High Court: Kelly J.
19/08/1996

Certiorari; dismissal; review of order
dispensing with services of trainee Garda
on medical/psychological grounds;
reasons for dismissal; fair procedures;
whether principles of audi alteram
partem applied

Held: Order quashed for failure to
inform applicant of all the reasons for
dismissal

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LOCAL GOVERNMENT

Cullen v. Wicklow County Council
High Court: McCracken J.
13/06/1996

Local authority; relation between elected members and executive; s.27 County Management Act, 1940; duty to afford information in possession of county manager to council; procedure; whether request need be in writing; definition of 'information'; whether restricted to general information or extending to production of documents; county manager refusing to produce legal documentation

Held: Chairman of County Council entitled to all information including that in a written form

Ward & Ors. v. South Dublin County Council
High Court: Laffoy J.
31/07/1996

Travellers; housing; provision of halting sites; whether statutory obligation to provide halting sites; s.13 Housing Act, 1988; role of court where housing authority taking steps; priorities in performance of statutory functions; matters of policy; whether obligation to house recently arrived travellers; unauthorised encampment; service of notices under s.10, Housing Act, 1992; whether temporary dwelling could 'appropriately be accommodated' at site; whether caravan located in 'public place'

Held: Housing authority to ascertain accommodation requirements

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Local government (water pollution)(amendment) regulations, 1996
S.I.184/1996
Commencement date: 24.7.96

Heritage act, 1995 (designation of heritage building) order, 1996
S.I.206/1996
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S.I.214/1996
Date signed: 16.7.96

Local government act, 1991 (commencement) order, 1996
S.I.215/1996
Commencement date: 16.10.96

Local government act, 1994 (commencement) (no.2) order, 1996
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MARRIAGE

O'G. (M) v. O'G. (R)
High Court: Lavan J.
16/05/1996

Foreign divorce; recognition; preliminary issue in judicial separation proceedings; whether applicant wife's English divorce recognised under Irish law; domicile; persistence of domicile of origin; significance of acquisition of property in England; whether applicant wife averred to domicile in divorce petition; intention to return to Ireland

Held: Applicant had not abandoned domicile of origin

P.(M) v. P. (A)
High Court: Laffoy J.
26/06/1996

In camera rule; courts; judicial separation proceedings settled; consent deemed to be part of order; access disagreements to be referred in first instance to named psychologist; defendant unsatisfied with psychologist and making complaint; whether professional disciplinary proceedings against psychologist would breach *in camera* rule; whether psychologist entitled to immunity as potential witness in judicial proceedings; s.34 Judicial Separation Act, 1989

Held: Dissemination of materials to Psychological Society restrained

M. (B.J.) v. M. (C)
High Court: Flood J.
31/07/1996
Capacity; consent; whether consent to marriage real; respondent wife significantly disfigured; petitioner

husband unaware of disfigurement until after marriage; psychological revulsion; whether petitioner deprived of election upon entering into marriage contract; length of marriage considered

Held: Marriage null and void

MEDICINE

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Medicinal products (prescription and control of supply) regulations, 1996
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Supreme Court: O'Flaherty J. Blayney J. Murphy J.*
* dissenting
28/06/1996

Damages; personal injuries; work accident; vehicle plaintiff was driving went out of control; defects in vehicle; whether employer negligent; duty of care; whether principle of *res ipsa loquitur* applicable; cause of accident; whether onus of explanation for accident on employer

Held: Appeal allowed: new trial ordered

Coughlan v. Birr Urban District Council
Supreme Court: Hamilton C.J. O'Flaherty J.* Blayney J.
* dissenting
22/07/1996

Damages; personal injuries; work related injury; building site; employer's duty of care; foreseeability of danger; breach of Construction Regulations 1975; whether working conditions safe; inferences of fact; whether trial judge correct in inferring that system was safe

Held: Appeal allowed: system not safe; damages awarded

Ward v. Dawson & Anor.
High Court: Flood J.
26/07/1996

Road traffic accident; whether contributory negligence; damages; whether plaintiff driving too fast; condition of car after accident; assessment of damages; post-traumatic stress disorder
Held: No contributory negligence

Howard & Ors. v. Dublin Corporation
High Court: Lavan J.
31/07/1996

Duty of care; housing authority; statutory duty; installation of heating system; whether breach of statutory duty in making loan to householder; whether representation as to quality; whether breach giving rise to action in negligence; status of plaintiff as tenant purchaser; whether continuing duty of care; implied warranty of fitness for human habitation

Held: No breach of duty of care established on facts

PLANNING LAW

McMahon & Ors. v. Dublin Corporation
High Court: Barron J.
19/06/1996

Development of lands; erection of houses and maisonettes; conditions of use; short term lettings; decision of An Bord Pleanala concerning exempted development; decision appealed; whether authorised use; commercial use; whether material change of use; purpose for which building designed; s.28(6) Local Government (Planning and Development) Act, 1963 considered

Held: Material change of use constituted unauthorised development; decision of An Bord Pleanala upheld

Littondale Ltd. v. Wicklow County Council
High Court: Laffoy J.
10/07/1996

Planning permission; extension of permission; application; refusal; judicial review; whether 'substantial works'; whether development commenced within appropriate period; whether development would be completed within a reasonable time; whether planning authority had considered irrelevant matters; whether decision unreasonable; role of court; meaning of 'substantial'; *res judicata*; whether planning authority estopped by adjudication on application from pleading *res judicata*

Held: Decision of planning authority not unreasonable

Gregory v. Dun Laoghaire/ Rathdown County Council
High Court: Geoghegan J.
16/07/1996

Judicial review; condition attached to planning permission by An Bord Pleanala; interpretation; condition limiting number of storeys interpreted by council as not limiting overall height of structure

Held: Certiorari granted; council's interpretation unreasonable

Blessington & District Community Council Ltd. v. Wicklow County Council
High Court: Kelly J.
19/07/1996

Judicial review; whether substantial grounds for leave to apply for judicial review; planning application; whether newspaper notice defective; whether description of existing use misleading; existing use unauthorised but immune from enforcement; whether site notice required; transitional provisions considered; failure to specify demolition of habitable house; whether material contravention of development plan; building listed for consideration for preservation; whether properly considered; whether applicant having locus standi to challenge time-limits for judicial review

Held: Leave to apply refused

Irish Wildbird Conservancy & Commissioners of Public Works v. Clonakilty Golf & Country Club Ltd. & Ors.
High Court: Costello P.
23/07/1996

Development; proposed golf course/ agricultural development; absence of planning permission; injunction sought; whether 'exempted development'

Held: Not exempted development; injunction granted

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PRACTICE AND PROCEDURE (CIVIL)

First National Commercial Bank Plc. v. Anglin & Anor.
Supreme Court: Hamilton C.J. Denham

J. Murphy J.
27/06/1996

Summary summons; leave to defend; debt; guarantee; whether guarantee validly executed; allegations of fraud abandoned; whether reasonable probability of bona fide defence; security documents executed in escrow

Held: Guarantee valid

Commissioners of Irish Lights v. Weldon & Anor.
High Court: Barron J.
15/05/1996

Bill of costs; taxation; brief fee; refresher fee; whether fees reasonable; factors relevant to the amount of the fee; nature of case; complexities and importance of case to parties; care and prudence of solicitor; other cases

Held: Fees not unreasonable; allowed in full

Goldenvale Plc. v. Food Industries Plc. & Ors.
High Court: McCracken J.
13/06/1996

Application to have third party notice set aside; whether breach of s.27 Civil Liability Act, 1961; whether third party notice served 'as soon as is reasonable possible' meaning of 'concurrent wrongdoer'

Held: Relief refused; third parties not concurrent wrongdoers within meaning of s.27

Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.
High Court: Laffoy J.
19/07/1996

Order 15, RSC 1986; application to join defendant; onus on plaintiff to establish stateable case against intended defendant; standing of extant defendant to challenge joinder; whether defendant should be joined where time bar could be raised as defence; company piercing the corporate veil; whether parent company to be joined as co-defendant

Held: No stateable case; separate legal personality of parent upheld

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REVENUE

P.W.A. International Ltd. v. Commissioner of Valuation
High Court: Carroll J.
26/07/1996

Valuation; rateable plant; machinery; Valuation Act, 1986; whether furnaces and oven rateable plant; furnaces bolted to floor; whether 'secured to' premises; whether of permanent or semi-permanent nature; findings of fact of valuation tribunal

Held: Not plant: not of permanent nature

Saatchi & Saatchi Advertising Ltd. v. McGarry (Inspector of Taxes)
High Court: Barron J.
30/07/1996

Manufacturing relief; interpretation of revenue statutes; canons of construction; relief for production of film; s.41 Finance Act, 1990; provision intended to

reverse previous decision of High Court denying relief; whether retrospective; claim for relief not made within accounting period; whether procedural requirement should yield to substantive amendment

Held: Taxation statutes to be construed strictly even in case of relief

ROAD TRAFFIC

Cranny v. Kelly & The Motor Insurers Bureau of Ireland
High Court: Lavan J.
05/04/1996

Civil Liability Act, 1961; negligence; damages against first and second defendants; conflict of evidence as to driver of motor car; balance of probabilities; whether deceased knew that car was not insured

Held: Claim dismissed

SEA & SEASHORE

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S.I.187/1996
Commencement date: 1.7.96

Harbour authority (mortgage) (amendment) regulations, 1996
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Commencement date: 1.7.96

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S.I.204/1996

Commencement date: 1.7.96

European communities (air-traffic management equipment and systems) (standards) regulations, 1996

S.I.221/1996

Date signed: 18.7.96

WILLS

O'Dwyer & Anor. v. Keegan & Ors/ In the matter of the Estate of Cummins (Deceased)

High Court: Kelly J.
12/06/1996

Will; spouse's legal right share; testator making no provision for spouse in will; spouse dying within twelve hours; s.111 Succession Act, 1965; effect of legal right share; whether automatic transfer; whether forming part of spouse's estate;

purposive interpretation; whether right can be waived; whether mandatory

Held: Legal right share is exercisable only at the instance of the surviving spouse

Blackall v. Blackall & Anor.

High Court: McCracken J.
28/06/1996

Will; validity; earlier will in existence; whether later will properly executed; s.78 Succession Act, 1965; whether testatrix of sound mind, memory and understanding

Held: Will valid

Browne v. Sweeney & Anor.,

In the matter of Browne (Deceased)

High Court: Lavan J.
05/07/1996

Will; s.117 Succession Act, 1965; no provision for children in will; inter vivos gift made to children during testatrix's lifetime; plaintiff son, dissipated bequest before testatrix's death; change in circumstances in son's life at time of testatrix's death; whether testatrix failed in her moral duty to make proper provision for her son; whether provision for son should have been made in the form of a trust

Held: Testatrix had discharged her moral duty

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Commencement date: 1.8.96

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