

ISSUE 2, VOLUME 1, AUGUST 1996

# The Bar Review

JOURNAL OF THE BAR OF IRELAND

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# The Bar Review

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# Opinion

## Criminal Justice Reform

The current debate on the criminal justice system provides a much needed opportunity to deal comprehensively in an informed manner with the threat of crime to our society today. In this context, the new initiative on crime launched by the Minister for Justice on July 2nd, 1996 contains the most wide ranging proposals for change in Irish criminal law and procedure since the foundation of the State.

Some of the changes provide for increased personnel in the gardai, the forensic science service and the probation service. Prison accommodation is to be expanded. Specialists units are to be established to target criminals and their assets. A review of the efficiency and cost effectiveness of the Garda Síochána is to be made. Extra resources for crime prevention amongst young people are also promised.

However welcome and overdue many of these measures are, some of them require a good deal more consideration before implementation. A referendum on changes in the law on bail is to be held in November which, if successful, will have a very substantial effect on the right of accused persons to bail. It will, if passed as suggested, reverse the spirit and substance of the O'Callaghan case in 1966. Most importantly, it will discriminate directly against disadvantaged persons in our society by requiring that cash or its equivalent to be lodged as bail money. It is hoped that the referendum will be preceded by a fully informed debate in order to facilitate a meaningful consideration of the relevant issues.

The right to silence is also to be affected, though why the existing provisions in the Criminal Justice Act, 1984, which affect that right, have not been employed is unclear. Consideration is also being given to have any drug trafficking offences heard by the Special Criminal Court and legislation to seize and freeze suspected assets of crime has been introduced for debate. The Misuse of Drugs Bill introduced

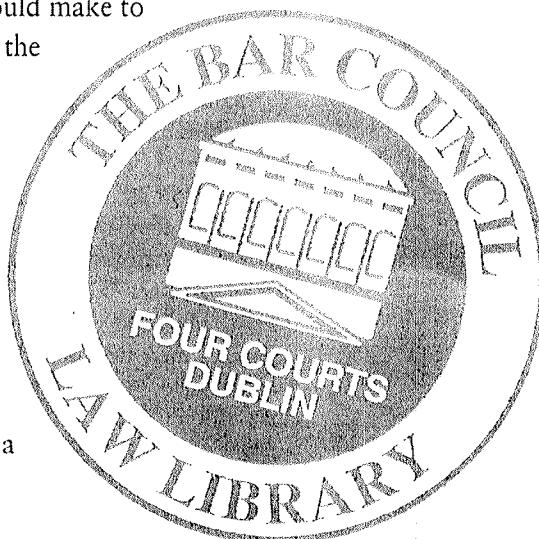
by Fianna Fail envisages seven day detention, partially validated by an ex parte application to the Circuit Court and the abolition of the preliminary examination in the District Court.

These law reform provisions will, if enacted, introduce the most radical single package of alterations to Irish criminal law and procedure ever put together. However, many of the proposals have, in the present climate, received little, if any, intelligent public debate yet. Shrill voices have been raised to attack those who defend accused persons.

This is a time for clear thinking and decisive informed action on a range of comprehensive measures. Legislation passed in undue haste is likely to give rise to unforeseen consequences and it will then fall to the courts to reconcile and remedy the fruits of such haste.

In this regard, the appointment of a Ministerial Task Force to consider a co-ordinated approach to combat and reduce the demand for drugs is welcomed as an essential component of any comprehensive package designed to deal with the criminals who trade in drugs.

The recent appointment of an additional High Court Judge and nine additional Circuit Court Judges and the extra sittings promised of the Circuit Court and Central Criminal Court are to be welcomed for the significant contribution their appointments should make to the current court delays. It has become very clear that the burden of the heavy caseload placed on the existing number of the judiciary is intolerable and has an adverse effect on the right of persons in both civil and criminal cases to speedy trials. It is clear that in the criminal law area a system which ensures a speedy trial is one effective measure which will help prevent the commission of offences by accused persons on bail. However, while these appointments are very significant, they are no substitute for a thorough overhaul of the courts system and the appointment of a Courts Commission as recommended by the Denham Committee.



# Restraining a wind up a

**The factors governing the decision of the court whether or not to restrain the presentation and/or advertising of a petition or to actually dismiss a petition to wind up a company as being an abuse of the process of the court, were recently re-considered by Keane J in *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd*.<sup>1</sup>**

**Lyndon McCann, Barrister, analyses this important area of law and the significance of this decision in particular.**

The presentation and advertising of a petition in respect of a genuinely disputed debt could of course result in considerable damage to the credit and business of the company and may therefore be restrained by the court in appropriate circumstances.<sup>5</sup>

## **Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd**

The factors governing the decision of the court whether or not to restrain the presentation and/or advertising of a petition or to actually dismiss the petition as being an abuse of the process of the court, were recently re-considered by Keane J in *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd*.<sup>6</sup> Very briefly, the facts were that Truck and Machinery Sales Ltd (TMS) entered into an agreement to buy certain second hand machinery from Marubeni Komatsu Limited (MKL) for onward sale in the United Arab Emirates ("UAE"). MKL's local distributor in the UAE objected to the sale of the machinery in the UAE on the ground that it was in breach of his exclusive distributorship agreement. The local administration found in favour of the local distributor and TMS were therefore unable to move the goods out of the UAE port. Subsequently, some of the goods were moved out of the UAE and were sold. TMS made part-payment to MKL and also notified MKL of its intention to sue the local distributor.

However, MKL served a letter of demand for the balance of £2.4m and advised that in default of payment a winding-up petition would be presented against TMS.

TMS in turn sought an interlocutory injunction restraining the presentation or advertising of the petition on the ground that the parties had previously come to an agreement that MKL would accept an

### **Background**

Section 213(e) of the Companies Act 1963 provides that a company may be wound up by the court where it is unable to pay its debts. Proof of inability to pay debts is governed by section 214 and is deemed to arise:-

- (a) where a statutory demand for £1,000 or more goes unsatisfied for a period of three weeks or more, or
- (b) where execution on a judgment debt is returned unsatisfied in whole or in part, or
- (c) where it is otherwise proved to the satisfaction of the court that the company is unable to pay its debts, taking into account the contingent and prospective liabilities of the company.

A creditor who proves inability on the part of the company to pay its debts is normally entitled to a winding up order *ex debito justitiae*.<sup>2</sup> The court is, however, slow to allow the winding up process to be used as a mere debt collection procedure and has held, in particular, that a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed on substantial grounds.<sup>3</sup> A petition which is presented in such circumstances may be dismissed as an abuse of the process of the court.<sup>4</sup>

# *petition to company*

immediate part-payment and would not proceed further but would await payment of the balance until such time as the remaining machinery was sold or, if the proceeds were insufficient to clear the balance, until such time as TMS's proceedings against the UAE distributor were concluded.

It was submitted by TMS that the factors to be taken into account by the court in determining whether or not to grant the injunction were those laid down by the Supreme Court in *Campus Oil Ltd v Minister for Industry and Energy (No 2)*<sup>7</sup> and by the House of Lords in *American Cynamid Company v Ethicon Ltd*<sup>8</sup> ie:-

- (a) whether or not there is a fair question to be tried;
- (b) if there is, whether damages are an adequate remedy; and
- (c) where the balance of convenience lies.

As Keane J observed, in an application for an interlocutory injunction the court is normally being asked to restrain an alleged violation of the plaintiff's rights. However, what TMS was seeking to do in the present case was somewhat different in that it was seeking to prevent MKL from exercising a right of access to the courts.

His lordship was of the view that the constitutional right of recourse to the courts should not be inhibited, save in exceptional circumstances, and that in deciding whether or not to so inhibit that right, the tests laid down in the *Campus Oil* and *American Cynamid* decisions, with their relatively low threshold of proof, would therefore be inappropriate. Instead, he considered that the appropriate test was as laid down by the Court of Appeal in *Bryanston Finance Ltd v De Vries (No 2)*<sup>9</sup> where Buckley LJ stated as follows:-

*The undoubted power of the courts to restrain proceedings which are an abuse of process is one which should not be lightly exercised. In the context of winding-up petitions I have no doubt that it should be exercised only where the plaintiff company has established at least a prima facie case that its presentation would constitute an abuse of process.*

*Keane J.*

"It has long been recognised that the jurisdiction of the Court to stay an action *in limine* as an abuse of process is a jurisdiction to be exercised with great circumspection and exactly the same considerations must apply to a quia timet injunction to restrain commencement of proceedings. These principles are, in my opinion, just as applicable to a winding-up petition as to an action. The right to petition the court for a winding-up order in appropriate circumstances is a right conferred by statute. A would-be petitioner should not be restrained from exercising it except on clear and persuasive grounds. I recognise that the presentation of a petition may do great damage to a company's business and reputation, though I think that the potential damage in the present case may have been rather exaggerated. The restraint of a petition may also gravely

affect the would-be petitioner and not only him but also others, whether creditors or contributories. If the presentation of the petition is prevented, the commencement of the winding-up will be postponed until such time as the petition is presented or a winding-up resolution is passed. This is capable of far reaching effects."

Following this case and the later case of *Coulson Sanderson & Ward v Ward*<sup>10</sup> Keane J commented in the following terms with regard to the approach to be taken by the court in determining whether or not to grant an interlocutory injunction restraining the presentation and/or advertising of a winding-up petition:-

"The undoubted power of the courts to restrain proceedings which are an abuse of process is one which should not be lightly exercised. In the context of winding-up petitions, I have no doubt that it should be exercised only where the plaintiff company has established at least a prima facie case that its presentation would constitute an abuse of process. In many cases, a prima facie case will be established where the company adduces evidence which satisfies the court that the petition is bound to fail or, at the least, that there is a suitable alternative remedy. It would not be appropriate to apply the principles laid down by the Supreme Court in *Campus Oil Ltd v Minister for Industry and Energy (No 2)* in cases of this nature where it is the creditors' right to have recourse to the courts, rather than any right of the plaintiff company, which is under threat."

On the facts before him, Keane J was of the opinion that a prima facie case of abuse of process had not been made out. The alleged agreement by MKL to defer enforcement of its right to payment of the balance was one which, according to a

series of authorities,<sup>11</sup> was unsupported by consideration and was therefore unenforceable. TMS was clearly indebted to MKL and accordingly the court had no hesitation in refusing the application for an injunction.

### What Constitutes an Abuse of Process?

Keane J has clearly stated that the presentation and/or advertising of a winding-up petition will only be restrained where a prima facie case of abuse of process has been established by the company. So what constitutes an abuse of process?

Some guidance is to be found in *Re Pageboy Couriers Ltd*,<sup>12</sup> a decision of O'Hanlon J in which he cites with approval the following extract from the judgment of Buckley LJ in *Stonegate Securities Ltd v Gregory*:<sup>13</sup>

"If the company in good faith and on substantial grounds disputes any liability<sup>14</sup> in respect of the alleged debt, the petition will be dismissed, or if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed. Ungood-Thomas J, put the matter thus in *Mann v Goldstein*<sup>15</sup>: 'For my part I would prefer to rest the jurisdiction directly on the comparatively simple proposition that a creditor's petition can only be presented by a creditor, that the winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the companies' court: and that, therefore, to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court.'"

According to Keane J in *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd*<sup>16</sup> the words "any liability" are important. They mean that even if part of the debt is genuinely disputed on substantial grounds, the court will still not restrain the presentation and/or advertising of a petition in circumstances where the company acknowledges that it is indebted to the petitioner in a sum exceeding £1,000.<sup>17</sup> A contrary view had been adopted by Morris J in *Clandown v Davis*.<sup>18</sup> Keane J felt, however, that this

*The court is faced with a most difficult task in trying on the one hand to protect companies against unwarranted winding-up petitions, whilst on the other hand trying to ensure that the creditor's constitutional right of access to the court is not unnecessarily or excessively impinged. Insofar as Keane J has placed emphasis on the need for companies which are insolvent in any event to be wound up, thereby protecting the proprietary interests of the legitimate creditors, it is respectfully submitted that he has struck a fair balance, and one that should be followed in future cases.*

decision should not be followed since it had been reached without the earlier English authorities being cited to the court.

It would seem to follow therefore that in order to establish that the presentation of the petition is an abuse of the process of the court, the company must show either:-

- (a) that the entire of the debt is bona fide disputed on substantial grounds, or
- (b) that all of the debt with the exception of £1,000 or less, is so disputed.

However, even if this can be shown, the court would still appear to have a discretion in the matter, at least in circumstances where there is evidence to show that the company would, in any event, be insolvent. In this regard there have been several judicial pronouncements<sup>19</sup> to the effect that where a company is insolvent, primary regard must be had to the position of the creditors, since it is they and not the shareholders who at this stage have the real proprietary interest in the remaining assets of the company. These pronouncements were cited with approval by Keane J in *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd* who stated as follows:-

"Although the fact that the company is insolvent is not, of itself, a ground for allowing a petition to proceed which is clearly an abuse of the process, it remains an important factor in every case where the court is exercising its equitable discretion in granting or withholding injunctive relief. The court must approach the position of such a company with the interests of the creditors particularly in mind."

On the facts of the case before him there were sufficient indications that the company was insolvent so that "if it were a case in which there might be some doubts as to how the discretion of the court should be exercised, those indications would be decisively in favour of refusing the injunctive relief sought."

From these comments it may be deduced that in borderline cases, (eg where there is some doubt as to the substance of the grounds on which the company is disputing the petitioner's debt), and provided there is clear evidence of insolvency on the part of the company, the court may refuse to restrain the presentation and/or advertising of the petition and may instead let the matter proceed to hearing.

At the hearing of the petition it would then be open to other creditors with undisputed debts to apply to be substituted as petitioner,<sup>20</sup> whereupon a winding up order could then be made.

However, if no other creditors should appear, whether to support or to oppose the petition, but the court were still to entertain some doubts as to the substance of the grounds upon which the petitioner's debt was being disputed by the company, it could presumably adopt one of two courses of action. Either it could dismiss the petition outright on the basis that it had not been proven on the balance of probabilities that the petitioner was a 'creditor' and thus it could not be said with any degree of certainty that the petitioner had locus standi to proceed, or alternatively, it could adjourn a final determination of the petition and direct that a preliminary issue be determined on oral evidence as to whether or not the company is in fact indebted to the petitioner and if so, for how much.

The latter course of action appears to have been adopted by Plowman J in *Re Tweeds Garages Ltd*<sup>21</sup> and makes some sense. If a company is clearly insolvent it is in the interests of all creditors that its assets should be realised in an orderly manner and be distributed in accordance with the proper order of priorities as prescribed by the Companies Acts. By



keeping the petition in place pending a determination of the issue as to the validity or otherwise of the petitioner's debt, the court can ensure that the assets of the company are effectively frozen.<sup>22</sup> If the company is subsequently found to be indebted to the petitioner, a winding up order can be made and an orderly realisation of assets can proceed.<sup>23</sup>

### Conclusion

In conclusion therefore, it may be said that the decision of Keane J in *Truck and Machinery sales Ltd v Marubeni Komatsu Ltd* represents a further refinement of the principles previously enunciated by O'Hanlon J in *Re Pageboy Couriers Ltd* regarding the circumstances in which petitions on foot of disputed debts may be restrained or totally dismissed.

The court is faced with a most difficult task in trying on the one hand to protect companies against unwarranted winding-up petitions, whilst on the other hand trying to ensure that the creditor's constitutional right of access to the court is not unnecessarily or excessively impinged. Insofar as Keane J has placed emphasis on the need for companies which are insolvent in any event to be wound up, thereby protecting the proprietary interests of the legitimate creditors, it is respectfully submitted that he has struck a fair balance, and one that should be followed in future cases.<sup>24</sup>

- 1 (High Court, 23 February 1996). High Court order affirmed in Supreme Court, 13th March 1996.
- 2 *Re P & J Macrae Ltd* [1961] 1 All ER 302; *Re Camburn Petroleum Products Ltd* [1979] 3 All ER 297.
- 3 *Re Pageboy Couriers Ltd* [1983] ILRM 510, following *Stonegate Securities Ltd v Gregory* [1980] 1 All ER 241. See also *Mann v Goldstein* [1968] 2 All ER 769; *Re FSA Business Software Ltd* [1990] BCLC 825; *McDonald's Restaurants Ltd v Urbandivide Co Ltd* [1994] 1 BCLC 306.
- 4 *Re Dubned Exports Ltd* (High Court, Costello J, 9 May 1986); *Re Pageboy Couriers Ltd* (op cit).
- 5 *Re a company* [1894] 2 Ch 349.
- 6 (High Court, 23 February 1996).
- 7 [1983] IR 88.
- 8 [1975] AC 396.
- 9 [1976] Ch 63.
- 10 [1986] 2 BCLC 99, 207.
- 11 *Foakes v Beer* (1888) 9 App Cas 605; *Re Selectmove Ltd* [1995] 2 All ER 531.

- 12 [1983] ILRM 510.
- 13 [1980] 1 All ER 241.
- 14 Emphasis added.
- 15 [1968] 2 All ER 769, at p 775.
- 16 Following the earlier English authorities of *Re Tweeds Garage Ltd* [1962] 1 All ER 121; *Taylor's Industrial Flooring Ltd v M & H Plant Hire (Manchester) Ltd* [1990] BCLC 21. An ex tempore judgment in similar terms was also delivered by Keane J in *Patrick Butterly and Sons Ltd v Top Security Ltd* (High Court, 27 September 1995).
- 17 ie, the minimum sum on foot of which a statutory demand may be served pursuant to CA 1963, s214(a), as amended by CA 1990, s213.
- 18 [1994] 2 ILRM 536.
- 19 See for example *Kinsela v Russell Kinsela Property Ltd (In Liquidation)* (1986) 4 NSWLR 722; *Re Frederick Inns Ltd* [1991] ILRM 582, aff'd [1994] 1 ILRM 387. For a general discussion of the topic, see MacCann 'Directors' Duties: to Whom Are They Owed?' (1991) 9 ILT (ns) 3 & 30.
- 20 See RSC 1986, Ord 74 r18.
- 21 [1962] 1 All ER 121.
- 22 This is because, under CA 1963 s218 any dispositions of assets by the company after the commencement of the winding up are void unless approved in advance or subsequently ratified by the court. the date of the commencement of the winding up, in the case of a compulsory liquidation is the date of the presentation of the petition and not the date of the winding up order: CA 1963, s220.
- 23 Of course, if the company is instead found to not be indebted to the petitioner, it will have suffered a strictly unnecessary freezing of its assets while the petition was in place. However, given the fact that the company is already insolvent, this should not rank as too great a prejudice, particularly when one considers that continued trading whilst insolvent is one of the hallmarks of recklessness, for which personal liability may be imposed on the officers and directors pursuant to section 297A of the Companies Act 1963. Indeed, in such circumstances the freezing of the assets (albeit strictly unjustified) could well be shown to have protected the interests of the creditors.
- 24 Indeed, it is worthy of note that in an ex tempore decision of the Supreme Court upon the hearing an expedited appeal by the company, the decision of Keane J was unanimously affirmed.

*Lyndon McCann, Barrister.*

## Bar Tennis Tournament Final

The finals of the Bar tennis tournament will take place on Sunday, 28th July, at 3 o'clock in Donnybrook tennis club. All are welcome.

## Notification of Decision To Grant Planning Permission Received

The Bar Council have received notification from Dublin Corporation of its decision to grant planning permission for the Distillery Site development to include 101 car parking spaces. Final permission should issue, in the absence of any upheld objections, on August 8 and construction will commence immediately thereafter.

## Bar Of Ireland Pension Scheme

A representative from the trustee department of Bank of Ireland will attend at Room C in Church Street all day on Monday, 22nd July to deal with queries and take contributions from members of the scheme.

## Judicial Appointments

Congratulations to the following recent appointees and nominees to the High Court and to the Circuit Court.

### High Court

Appointments:

The Honourable Ms Justice Catherine McGuinness  
The Honourable Mr. Justice Thomas Smyth

Nominated for appointment:  
Mr. Diarmuid O'Donovan, S.C.

### Circuit Court

Nominated for appointment:

Anthony Kennedy S.C.  
Kevin Haugh, S.C.  
John Buckley, Solicitor  
Raymond Groarke, B.L.  
Alison Lindsay, B.L.  
Elizabeth Dunne, B.L.  
Frank O'Donnell, Solicitor  
Michael White, Solicitor  
Olive Buttimer, B.L.

# Buying a and other traumatic

by Greg Kennedy, Information Technology Executive, Law Library

**As the Law Library phases in networked access to an extensive range of electronic legal research materials, Greg Kennedy provides some advice to barristers who are considering investing in a computer.**

Buying a computer is very much like starting a diet, it's one of those things you can always do tomorrow but you know it will eventually have to be done.

The nineteen eighties saw the explosion of the Personal Computer (PC) as a business tool to the point where it is hard to find an office now that still uses a run-of-the-mill typewriter and secretaries must be just as comfortable using a complex wordprocessing package like Microsoft Word as they are with short-hand.

However, the last three years have seen an unprecedented growth in the use of computers as both a business tool and a standard piece of home entertainment equipment. So much so that a recent survey showed that over 60% of American households now have a PC.

These figures are quite staggering for an industry that is only fifteen years old. Even the motor car did not have such a huge take up. In fact, it has been said of the computer industry that, had the motor industry progressed at the same

pace, we would now be able to fit a Rolls Royce on the top of a pin head and run it to the moon and back on a single gallon of petrol.

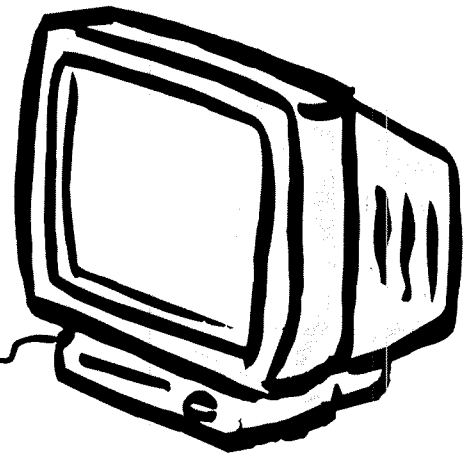
There is a perceived down side to this quick footed industry that leads to one consistent excuse for not buying a computer, and that is "They keep changing all the time!". While it is true that the computer industry is constantly changing and improving this rapid development need not affect the average user as much as you'd think.

For example, look at the applications available today compared with five years ago. We still have wordprocessors, spreadsheets and databases; the three staple programs of any business. Do today's applications do anything over and above what their ancestors did five years ago? On a basic level, not really. For the novice computer user this is true, but as you become an experienced computer user you begin to realise the benefits of more recent developments and the need to keep up to date with technology.

In fact, in most cases, change in the industry is dictated by the user. The mass software market changes slowly in terms of new developments. Take WordPerfect for example. It's newest release (6.1) came out in September 1993, but the previous release (5.1) came out in 1989. This is 1996 and we are only now about to see a new version for Windows 95.

As for the machines themselves they, (meaning the microchips inside them), follow a well known law which states that the speed of computers will double every two years. But even then

# computer experiences



compatibility must be maintained with the older chips so the manufacturers don't lose the millions of users weaned on the older systems. When considered in this light buying a computer is akin to buying a car.

## Where to go

Having gone through the pain of learning the basics of computers it would be a shame to walk into the first retail shop and be confused by unnecessary jargon.

Probably the first trick is not to go to a high street retail shop at all. The big name shops seem convenient at first but when it boils down to it they are not true computer retailers. This is evident in a number of ways, with two more prominent than others.

The sales staff need to have a bit of understanding about so many items that a complete knowledge of one product is rare.

Also, when anything goes wrong with the machine it is never fixed on sight but shipped back to the manufacturer, taking anything from a week to ten days to come back, during which time your practice is losing money.

The best place to start is probably either the Bar Council's Approved Suppliers List, or the big direct supply computer manufacturers (whose special offers you'll find daily in the newspapers) or, the Golden Pages. The computer market is very cut-throat with salespeople getting tiny profit margins, because of this it is a buyers market.

Shopping around should never be discouraged, whatever the purchase. In general the prices will not vary by a huge amount from around £1300 for a desktop and £1800 for a laptop (July 96)

assuming the machine has a specification similar to the ones below. If the price is a lot over this figure you are normally paying for some specialised feature e.g. sound on a laptop, voice recognition on a desktop, or else you are being over-charged. If the price is well below those given, the components inside the machine may not be up to standard.

What may vary greatly for this price is the accessories that come with the computer i.e. software, multi-media capabilities, disk size and memory. This rule is likely to stand for quite some time. To those readers who already have a computer, consider how much it cost you and what you got. If it was bought more than three years ago the price would have been similar to today but you may have had to pay extra for software e.g. Windows, WordPerfect etc.

So those people that are waiting for the price of a new computer to come down below £1000 may be waiting a long time. Admittedly, you can get a second hand computer for this price. But

*The computer market is very cut-throat with salespeople getting big profit margins, because of this, it is a buyers market.*

ask yourself the question, why is the person selling the computer? I think you'll find in most cases it is because they need the later model to run the latest programs.

## So what do I get?

The basic machine, be it desktop or laptop would have the following configuration:

### Pentium 100Mhz

"Pentium" is the type of microchip inside the machine and 100Mhz is the speed it runs at.

### PCI (Peripheral Component Interconnect) Motherboard with "Plug and Play" capabilities

The type of motherboard can have a huge impact on the speed with which signals travel around the computer and therefore its speed.

### 1Gb (Gigabyte) Hard Disk

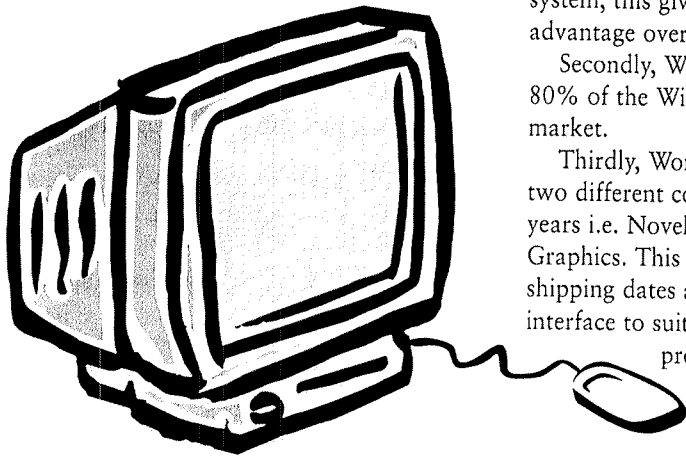
This is the internal storage space where you will store your programs and data files. Software these days takes enormous amounts of space especially if you plan to use multi-media.

### 16Mb RAM (Random Access Memory)

RAM is the area the computer uses for storing instructions ready for execution.

### Quad or Hex Speed CD-ROM

Most software these days will be supplied on CD-ROM and so are most legal



databases. (Bear in mind, a CD-ROM drive on a laptop computer is a very expensive extra)

#### **Super VGA screen**

This is a standard specification on all machines now.

#### **Mouse/TrackBall/TrackPointer/Track Pad**

You will need some pointing device for use with Windows

#### **Windows 95**

This is the latest software from Microsoft for controlling your computer and is very easy for a novice user to learn.

As mentioned above, this specification would probably cost you somewhere in the region of £1300/1400 for a desktop machine and between £1800 and £2000 for a laptop (you pay for the miniaturisation in a laptop, hence the price difference).

At these prices I wouldn't accept anything less than the above specification and would perhaps expect a good deal on any software I wished to buy.

#### **Word, Word, Words**

The choice of wordprocessor is not as critical as the choice of machine. However, there are a few subtle points. The two main wordprocessors on the market at the moment are Word Version 7 for Windows 95 from the Microsoft Corporation and WordPerfect Version 6.1 for Windows 3.1/3.11 from Corel Graphics and there are some differences between the two to be borne in mind when making a choice.

The first difference is that WordPerfect is not due to be shipped in a Windows 95 version until late summer whereas Microsoft have had Word 7.0 shipping since the release of Windows 95 in August 1995. As Windows 95 is fast becoming the standard PC operating

system, this gives Word a distinct advantage over Word Perfect.

Secondly, Word for Windows has over 80% of the Windows wordprocessor market.

Thirdly, WordPerfect has been sold to two different companies in the last three years i.e. Novell Corporation and Corel Graphics. This makes for delayed shipping dates and changes to the user interface to suit the latest owner's other products.

However, there is one definite advantage in the legal community for

WordPerfect; it was the wordprocessor that has been used from the start here. Most Barristers who have used computers will have cut their teeth on WordPerfect 5.1 for DOS and will find the transition to the Windows version quite easy. However, Word is very user-friendly and easy to learn. The Law Library's machines have WordPerfect 5.1 at present but we intend introducing new word processing PCs with Word 7.0 for Windows 95.

#### **Smith vs. Jones**

Of course if Mr or Mrs Jones has a sports car you have to have one with alloy wheels and electric windows. So with that in mind there are some optional extras which can be added on when you become confident with your machine.

#### **More RAM**

The quickest and easiest way to speed up a computer is to add more RAM. This is doubly true for Windows based machines.

#### **More Hard Disk Space**

If you intend to use your computer for more than just business (read: playing games) you will definitely need more disk space.

#### **Fax/Modem**

The Internet is quickly becoming an attractive alternative as a global communications network and you will need a modem to get on-line. Also, faxing directly from your PC can save a small fortune in paper print-outs as will e-mailing documents directly to your client.

#### **Multi-Media**

If you want to add sound to your desktop machine it is quite easy and makes for a nice diversion but it is much harder to add sound to a laptop which wasn't bought with that capability.

*Consider what you need, decide whether you want a laptop or desktop, decide if you will be running Windows or DOS, and lastly judge how much you want to spend.*

#### **Voice Recognition**

Voice recognition systems like the IBM Personal Dictation System and Dragon Dictate have come on in leaps and bounds over the last two years and are now a viable option.

A word of warning though, these systems take time to train in and usually come with specialised dictionaries to shorten this training time. In this case you would need to buy the legal dictionary.

#### **Docking Station**

This device is only used for laptop computers connecting to desktops. If you work on the move with a laptop and have a PC at home the docking station is an extension to your PC which allows you to plug directly into its resources (usually bigger disk space and better screen resolution).

#### **Virtual Reality Goggles**

This might sound a bit strange at first but Virtual Reality is making big in-roads into the business world where huge volumes of information need to be digested quickly, the Stock Exchange being a prime example.

Also, the internet has recently had a standard set to allow information stored on it to be viewed using Virtual Reality.

Besides, isn't it the ultimate Executive gadget?

#### **Approved Suppliers List**

Because of the problems people might have wading through the many brochures and glossy printouts from computer suppliers, the Bar Council decided to build up an "Approved Suppliers List". This list consist of five companies chosen out of thirty-two who were approached with the standard specification above.

Their success was based on price, backup service and company profile. This

list should be viewed as a "snap-shot" of the best companies and prices in June 1996. Please note that price was not the sole determinant for entry on the list so you may find better prices elsewhere. In particular, the large direct supply computer manufacturers (Gateway and Dell) can offer exceptional value on PCs - keep an eye out for their adverts in the national newspapers.

## Approved Supplier List

Moss Technology, 9/12 High Street, Christchurch. Ph: Gareth Madden, 6792211

Brannagan Business Supplies, 30 Upr Abbey Street, Dublin 1. Ph: John Carolan, 8726155

Chevron Computer Services Limited, Merchants Court, Merchants Quay, Dublin 8. Ph: Stephen Rea, 6798020

Croft Computers, Western Parkway Business Pk, Ballymount, Dublin 12. Ph: Susan Kenna, 2958544

Softtech Computers, South County Business Pk, Leopardstown Road, Dublin 18. Ph: Orlaith Murphy, 2953416

## Direct Suppliers:

Gateway 2000 Ph: 1800 45 2000  
Dell Corporation Ph: 1850 235235

## Conclusion

Buying a computer isn't as hard as you would think. With a little knowledge of what you need and what you don't need, buying the machine can be as easy as buying a car.

A word of warning though, as with buying a car there is the temptation to go for the Ferrari. Computers are all about keeping excess to the minimum. There is little point in buying a high powered computer if all you will be running on it is a basic wordprocessor, as its potential wouldn't even begin to be utilised.

On the other hand if you want to run heavy duty Windows programs on your machine don't expect high performance if you don't give it the power it needs.

So, consider what you need, decide whether you want a laptop or desktop, decide if you will be running Windows or DOS, and lastly judge how much you want to spend.

*Good luck!*

*Greg Kennedy, Information Technology Executive.*

# The Law Library Soccer Team Trip To Portugal

The Law Library Soccer Team continued its tradition of away matches with a very successful visit to Portugal during the Whit vacation this year. Excellent foresight and planning meant that we were all to assemble at the airport at 6 a.m. on the morning following the end of term. President McMorrow extravagantly arranged for his passport to arrive independently of himself by taxi. Club captain M.P. O'Higgins discovered at an inappropriate time that his passport had expired previously, leading to some concern as to whether the midfield dynamo would make it through immigration. He did and we were on our way.

The first night curfew was respectfully ignored by everyone despite the best attempts of Seamus Woulfe, who decided though not to lead on this particular one by example. The day for our first match dawned and the coach was still keeping the team selection a secret in an attempt to intimidate the Portugese. They in turn sought to intimidate us with a tour of FC Porto's trophy room.

We started the game slowly in oppressive heat only to go down two-one due to a late offside goal. David Barniville did the honours for the Bar and for Ireland with his impressive goal following from a timely pass from Jeremy Maher.

A 'feasty dinner' was promised by our hosts for that evening in the

Catholic University and they were as good as their word. Afterwards, Paul O'Higgins thanked our hosts and cajoled Mary Rose Gearty and Tom Rice into leading the singing.

For the next game, Colman Cody (excruciating pain), Des Dockery (bruising of the pride) and Charles Garavan (broken shinpad) all failed late fitness tests. Luckily the Hunts and Mark Sanfey entered the squad. Only Paddy Hunt's incomparable influence on the game prevented a deluge of goals. Nonetheless the game was narrowly lost two-nil.

We had lost both our tour matches but won the hearts of a nation.

Our hosts kindly arranged a tour of Sandeman's fine porthouse and a tour of the city by boat the following day. After the success of the Saturday night dinner we were hosted again on our last night by the Portugese lawyers in their Law School. Here they presented us with mementoes of the Ordem dos Advogados in the shape of ties or scarves. Also, Sara Moorhead accepted a presentation on behalf of the Bar Council. We were again provided with bacchanalian delights and portugese music and in response to much demand the Irish singers rounded off a most enjoyable evening and trip.

Thanks to our Portugese colleagues whom we hope will visit us next year and Roll on Sicily '97.

*Dara Hayes, Barrister.*



**Jeremy Maher skillfully negotiates the Portugese Bar's defence and slides the ball to David Barniville (not in picture) who did the honours for the Irish Bar.**

# The Arbitration Acts

## RIPE FOR REFORM

**With Ireland's first purpose built International Arbitration Centre to be opened next year as part of the Law Library's Distillery Site development, Rory Brady, S.C., suggests that a number of legislative changes to our Arbitration Acts are urgently required to meet the needs of those parties who choose arbitration as a method for resolution of their disputes.**

The late Mr Justice Niall McCarthy identified the legislative purpose of the Arbitration Act 1954 in the following passage in his judgment in *Keenan v Shield Insurance Company Limited* (1988) I.R. 89:

"The Act of 1954 was "to make further and better provision in respect of arbitrations. It took as its model the English Acts of 1899 and of 1950 and was intended to provide a comprehensive scheme whereby matters commercial, such as in construction, insurance, financial services, shipping and kindred and other industries might be resolved without recourse to the courts and, in many instances, by those best equipped for that purpose by training and experience in the particular field. There was no purported exclusion of the supervisory or enforcement role of the Courts as a "back-up" to the arbitration procedure which, itself, allowed for reference to the Courts in different ways when appropriate. The underlying intent, however, was to provide a private and appropriate forum, largely for business disputes, reminiscent of the motives that lead the Dublin business community to

found the Dublin Chamber of Commerce (see L. M. Cullen "Princes and Pirates" Dublin Chamber of Commerce (1983))."

While undoubtedly the arbitral forum is frequently the most appropriate means of dealing with commercial disputes - protected as it is with the cloak of confidentiality and free from the glare of media attention - a number of lacunae in the existing arbitration code in this jurisdiction require legislative attention in order to maximise the attraction of arbitration as an efficient method of dispute resolution in Ireland.

These deficiencies have undermined the efficacy of arbitrations and cast a shadow over this important area of dispute resolution. When Mr Justice McCarthy made the above observations in the *Keenan* case the globalisation of the financial services industry was at a seminal stage. The "Big Bang" in the City of London was then a matter of recent history and the development of a financial services centre in Ireland had just become a matter of government policy. These events are now well established phenomenon. These developments in the economic and political sphere were inevitably accompanied by a strong growth in legal commercial work and commercial litigation in this jurisdiction.

While significant legislative action occurred to reflect these changes, our legislature overlooked the necessity to alter its existing arbitration code which was designed to meet the needs of a more insular economy. Having regard to the fact that the

parties involved in newly generated commercial litigation would typically be the subsidiaries of large multi national corporations or financial institutions it was inevitable that legislation enacted in 1954, and with a definite domestic focus, would prove to be inadequate in changed circumstances. While the Arbitration Act 1980 made some amendments to the substantive law it failed to address certain fundamental deficiencies inherent in the Arbitration Act 1954.

The two primary deficiencies relate to (a) the award of interest, and (b) the taxation of an Arbitrator's costs. The opening of the Ireland's first purpose built Arbitration Centre as part of the Law Library's Distillery Site development provides an unprecedented opportunity to maintain and strengthen Ireland's reputation as a place in which effective and efficient arbitral proceedings can be conducted. In order to take full advantage of this opportunity for the benefit of parties seeking a resolution to their legal disputes it is proposed that the law be amended in the manner set out below.

### **(a) Interest**

F. A. Mann in his treatise "The Legal Aspects of Money" describes the function of damages at law as being compensation for the value of a loss. Thus he observes:

"When the courts are called upon to assess damages they are guided by the principle that, in order to compensate the Plaintiff for the loss suffered by him, a value must be put on the loss, and, as will be shown, such value is measured by looking at the position existing at the material date. This fundamental principle of English law makes it possible to arrive at the somewhat closer definition that the monetary obligation created by the liability to pay damages involves the payment of that sum of money which, subject to the Courts assessment, represents the value of the loss.

Monetary obligations thus appear to be obligations the subject matter of which is the payment of a sum of money where it is fixed at the outset or subsequently. Their principal characteristics are that in the absence of specific legislation their payment can not ever become impossible and that they are capable of carrying interest."

While it is obvious that an award of a fixed sum of money by an arbitrator is capable of bearing interest there is high judicial pronouncement in this jurisdiction to the effect that an arbitrator (in the absence of agreement) does not have jurisdiction to award interest. Mr Justice O'Flaherty in *McStay v Assicurazioni Generali* (1991) I.L.R.M. 237 (at pages 246 and 247) observed as follows:

"(1) Arbitrator's Jurisdiction  
Section 34 of the Arbitration Act 1954,

*If our politicians wish to acknowledge the role which arbitration as a speedy, efficient and confidential method of dispute resolution can play in promoting a strong and vibrant financial and business community, a simple amendment to give an Arbitrator the same power to award interest as a judge would be a sensible first step.*

provides that a sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as and from the date of the award and at the same rate as a judgment debt. It shall be observed that the entitlement to interest under this section follows automatically unless, for some reason, the Arbitrator should direct otherwise.

In my judgment the Arbitrator does not have jurisdiction to award interest at common law in respect of a period prior to the award. Neither do I think can such a power to award interest be implied along the lines indicated by the Court of Appeal in England in *Chandris v Isbrandtsen-Moler Co. Incorporated* (1951) 1 K.B. 240.

I find it impossible to take the leap required from finding that prior to 1981 an Arbitrator had no power to award interest (aside from agreement) to a finding that such a power is to be implied in agreements because of Section 22 of the Courts Act 1981. That clearly reserves the entitlement to award interest to a "judge"; not even to a "Court": See judgment of Finlay P. (as he then was) in *Mellowhide Products Limited v Barry Agencies Limited* (1983) I.L.R.M. 152".

Deprived of a statutory jurisdiction (and in the absence of the draftsman of the contract vesting such a power in the arbitrator), this inability to award interest can lead to serious injustice to a party who seeks to have his rights vindicated in an arbitral forum. The risk of a case stated to the High Court with consequent delay is a factor that inevitably will influence a party to settle his case early, since his continuing loss of money over a fuller period of time will not be compensated by an award of interest. Thus to the unscrupulous party who is in default in his payment obligations an arbitration clause in his commercial

contract becomes an instrument of fraud. While an artful lawyer can have recourse to a claim for interest by way of "special damages" by placing reliance on the authority of *Wadsworth v Lydall* (1981) 1 W.L.R. 598 or by relying on the more esoteric area of equitable interest such tactical manoeuvrings should be an unnecessary feature of our arbitration system and are clearly no substitute for an express statutory power to award interest.

If our politicians are serious about providing a full legislative panoply of a modern sophisticated financial services centre in Dublin, and wish to acknowledge the role which arbitration as a speedy, efficient and confidential method of dispute resolution can play in promoting a strong and vibrant financial and business community, a simple amendment to give an Arbitrator the same power to award interest as a judge would be a sensible first step.

### **(b) Costs**

With the escalation in the cost of litigation, particularly over the last decade, a litigant with limited financial resources can be inhibited at the prospect of having to pay both his own costs and those of the other side. This is a factor that frequently inspires a litigant to settle his claim at an undervalue. While it is not suggested by the writer that there is any obvious and immediate panacea for this normal risk inherent in litigation unfortunately those risks are further compounded by a flaw that exists in Section 33 of the Arbitration Act 1954. This flaw derives from the fact that while an Arbitrator's costs can be the subject matter of independent review by the Taxing Master, that taxation can only take place where the High Court has intervened at the request of a party to the arbitration who has refused to pay the Arbitrator's costs prior to taking up his award. If, however, a party to the arbitration takes up the Arbitrator's award and pays the costs of the award in advance to the Arbitrator there is no right to subsequently challenge the amount of those costs and to have them taxed by the Taxing Master of the High Court. This anomaly was identified by Carroll J. in her judgment in *Laurence Duggan v Winkens* (unreported 31 July 1987). That section requires to be amended so as to give a right to tax an arbitrator's costs subsequent to the payment of those costs.

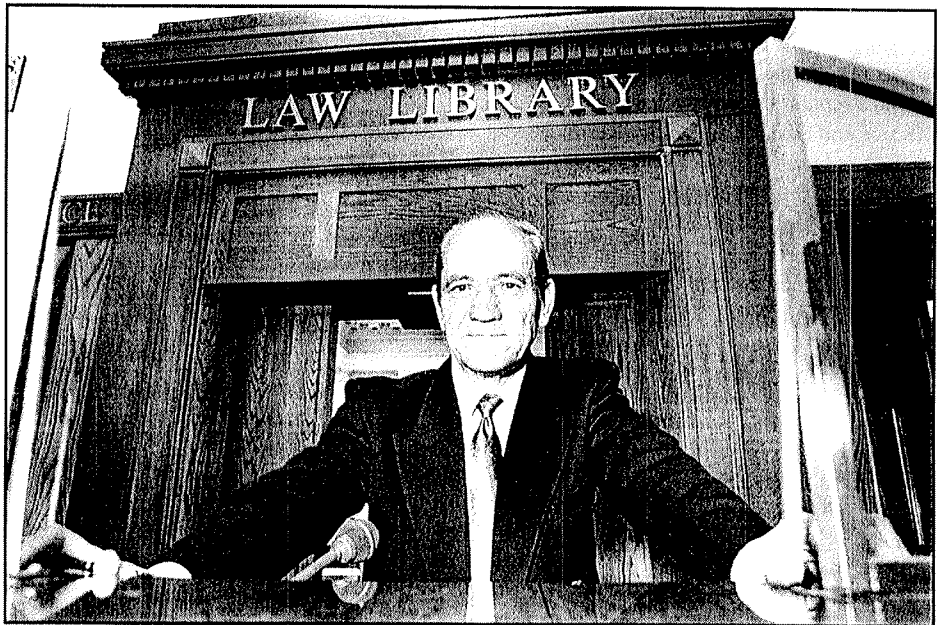
It is the writer's contention that legislative changes are urgently required to remove these anomalies and to improve the quality of the Irish arbitration code. These amendments will benefit both domestic and international clients in a manner that can only advance the interests of the State and its citizens.

Rory Brady, S.C.

# A Lifetime in the Law

As the Crier in the Law Library, Pat McDonald has to be one of the best known faces within legal circles in Dublin. On the 2nd July this year he celebrated 40 years of service to members of the Law Library and the Bar Council marked the occasion with a reception held in the Sky Bar. The Bar Review took this opportunity to talk to Pat about times past.

Mr Pat McDonald, who celebrated 40 years service to the members of the Law Library this month.



Before beginning to work in the Law Library in 1956 Pat McDonald already had a number of years service in the Kings Inns library. He heard about the job in the Law Library through his grandfather, Pat Geraghty, who was the robing master in the library at the time.

“Basically in those days, everything in the Library was much simpler and not as sophisticated as today. For example there were only a few phones, no faxes or computers and everything was conducted quietly and at a different pace. There were only a couple of hundred barristers, if there were even that many at the time, and no more than half a dozen or so staff in the Library. There just wasn’t the same hustle and bustle as you have today”

Pat’s own job as crier was very different too. When he first started there was no public address system and the crier had to shout the names of the barristers who were called. So you had to have a good voice in those days as your voice had to be able to reach to the far end of the back gallery. With all the noise and commotion in the Library these days, Pat jokes that he hope the public address system will never breaks down, because if it does, there is no way anyone will be able to make themselves

heard.

Although he has 40 years service behind him and hopes to finish out the next 7 until the time comes for his retirement, Pat still won’t have achieved quite the same length of tenure as his grandfather did. Pat Geraghty started work in the Law Library in 1894 and worked for 62 years until he died in 1956, the same year as Pat started. Between them, Pat and his grandfather span over 102 years of continuous service to the barristers’ profession in Ireland.

Over his time in the Law Library Pat has quite literally seen the emergence of a new generation of lawyers. “I’ve seen a lot of people come and go and in fact there are some members in the Law Library now whom I held on my knee as children. You see, when I started here, often I would help out in the barristers homes at weekends or during the vacation with gardening or whatever needed doing and I would get to know the children who, in some cases, ended up becoming barristers themselves”.

Despite the new hustle and bustle Pat McDonald seems happy with his lot. “40 years is a long time to spend at any one job but at this stage the Law Library is a second home to me and I don’t think I’m ever likely to start looking for a new job now”.



# legal update

Directory of legislation, articles and written judgements from 22nd May to 2nd July 1996 Edited by Desmond Mulhere, Law Library, Four Courts

## subject summaries

### ADMIRALTY

*library acquisition*  
Enforcement of maritime claims  
Jackson, D C  
[London LLP 1996]  
N330

### AGENCY

*library acquisition*  
Law of agency  
Stone, Richard  
[London Cavendish 1996]  
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(sections 6 and 7) (comment)  
cement) order, 1996  
S.I.161/1996  
Commencement date: 1.6.96

Employment regulation order (agricultural  
workers joint labour committee)  
1996  
S.I.141/1996  
Commencement date: 1.6.96

European Communities (retirement of  
farmers) regulations, 1996  
S.I.150/1996  
Not yet rec.

*library acquisition*  
The development of milk quotas in the U.K.  
Trotman, Charles  
[London Sweet & Maxwell 1996] W109.4

### ALIENS

*Mishra v. Minister for Justice & Attorney  
General*  
*High Court: Kelly J.*  
21/05/1996

Judicial review; aliens; application for  
naturalisation; refusal by Minister; whether  
exercise of Minister's absolute discretion  
carried out in arbitrary and unjust manner;  
Ministerial jurisdiction under Irish Citizenship  
and Nationality Acts 1956 and 1986; absolute  
discretion subject to compliance with  
constitutional justice; failure by applicant to  
obtain registration with Medical Council;  
policy not to naturalise people unemployable  
in own profession and who would  
subsequently immigrate on obtaining Irish  
citizenship

*Held:* Decision of Minister quashed and  
application remitted for reconsideration

*Gleeson v. Cheung*  
*High Court: Geoghegan J.*  
18/06/1996

Case stated; employment of alien; whether  
offence committed under Article 4 of Aliens  
Order 1946 and under Article 3 1975 Order;  
meaning of 'enter into service of'

*Held:* Offence committed only on date when  
service or employment commenced

### ANIMALS & BIRDS

*statutory instrument*  
Animal remedies regulations, 1996  
S.I.179/1996  
Not yet rec'd details in Iris Oifigiuil 25.6.96

Bovine diseases (levies) (amendment) act, 1996  
(sections 6 and 7) (commencement) order,  
1996  
S.I.161/1996  
Commencement date: 1.6.96

### ARBITRATION

*Vogelaar v. Callaghan*  
*High Court: Barron J.*  
30/04/1996

Award; challenge to arbitration award;  
procedure; grounds; costs; dispute over  
building contract submitted to arbitration;  
whether application to have award set aside  
out of time; whether time running from date  
award made; Order 56 rule 4, RSC 1986  
considered; whether arbitrator required to give  
reasons for award; whether misconduct;  
whether initial contract void for illegality;  
failure of arbitrator to consider open offer in  
awarding costs; error of law on face of the  
record

*Held:* Application refused: an arbitration  
award will only be set aside in rare  
circumstances; question of costs remitted to  
arbitrator for reconsideration

*library acquisition*  
International commercial arbitration Huleatt-  
James, Mark London [LLP 1996]  
C1250

Default powers of arbitrators  
Thomas, D Rhidian  
[LLP 1996]  
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Building regulations advisory body order,  
1995. (amendment) order, 1996  
S.I.133/1996  
Date signed: 17:5:96

## CHILD ABDUCTION

*S. (A.) v. H. (E.) & Anor.*  
*High Court: Budd J.*  
08/05/1996

Luxembourg convention; improper removal; procedure; application by defendants to have proceedings struck out; whether necessary order obtained from requesting state; child removed from England; plaintiff father subsequently obtaining interim order of custody from English courts; whether declaration as to earlier removal having been unlawful made; parallel proceedings by defendants in Ireland; policy of convention; comity of international courts; Article 12 considered

*Held:* Application to strike out refused; English order with respect to custody had implicitly declared removal to have been unlawful

*D. (S.) v. B. (R.)*  
*High Court: Costello P.*  
23/05/1996

Luxembourg convention; custody; child brought to Ireland from England by mother; custody rights conferred on father subsequent to removal; declaration by English court that earlier removal unlawful; service; whether notice of application to make declaratory order served on defendant; whether notice adequate; whether defendant had concealed her whereabouts

*Held:* Plaintiff could not rely on declaratory order because notice not properly or adequately served in time to allow defendant contest those proceedings

## COMMERCIAL LAW

*library acquisition*  
Restraint of trade  
Jefferson, Michael  
[Chichester Wiley 1996] N266.2

## COMPANY LAW

*In the Matter of Cavan Crystal Group Ltd. (In Receivership)*  
*High Court: Murphy J.*  
26/04/1996

Directors; application for restriction order under S.150 Companies Act 1990; certain directors of financial institutions; whether exempt from statutory restrictions; whether directors acted honestly and responsibly; S.150 Companies Act 1990 considered

*Held:* Application for restriction order dismissed; directors acted honestly and responsibly

*library acquisition*  
E.C. merger control  
Cook, C John  
[London Sweet & Maxwell 1996]  
W110.2

Minority shareholders' protection Goo, S H [London Glass House 1994]  
N263

## COMPETITION

*articles*  
Case C-415/93 : one letter and five figures which change a life  
Travers, Noel  
1996 ICLR 2-1

Extra-territorial application of competition law  
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1996 CLP 118

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O'Toole, Francis  
1996 ICLR 2-14

## CONFLICT OF LAWS

*article*  
The Hague convention on the service abroad of judicial and extrajudicial documents in civil and commercial matters  
O'Callaghan, Patrick  
1996 CLP 123

## CONSTITUTIONAL LAW

*Hanafin v. The Minister for the Environment & Ors.*  
*Supreme Court: Hamilton C.J. O'Flaherty J. Blayney J. Denham J. Barrington J.*  
12/06/1996

Referendum; referendum petition; Fifteenth Amendment to Constitution Bill; Referendum Act 1994; interpretation of 'conduct of the referendum' contained in 1994 Act; unconstitutional funding of divorce advertising campaign by the government; whether unlawful funding interfered with the conduct of the referendum; whether outcome of referendum materially affected by government's advertising campaign; burden of proof; standard of proof

*Held:* Appeal dismissed; no evidence to support material affect on outcome of referendum; findings of fact of divisional court cannot be overturned

*article*  
Breach of the constitutional right of access to a lawyer and the exclusion of evidence - the causative link  
Ong, David K  
1995 ICLJ 156

## CONSUMER LAW

*statutory instrument*  
Consumer credit act, 1995 (section 2) regulations, 1996  
S.I.127/1996  
Date signed: 13:5:96

Consumer credit act, 1995 (section 36) regulations, 1996  
S.I.128/1996  
Date signed: 13:5:95

Consumer credit act, 1995 (section 37) regulations, 1996  
S.I.129/1996  
Date signed: 13.5.96

Consumer credit act, 1995 (section 60) regulations, 1996  
S.I.130/1996  
Date signed: 13.5.96

Consumer credit act, 1995 (section 86) regulations, 1996  
S.I.131/1996  
Date signed: 13.5.96

Consumer credit act, 1995 (section 129) regulations, 1996  
S.I.132/1996  
Date signed: 13.5.96

Casual trading act, 1995 (forms) regulations, 1996  
S.I.146/1996  
Commencement date: 1.6.96

*article*  
Labelling and packaging : an introduction to sources of statutory law  
Furlong, John  
1996 CLP 111

Labelling and packaging : sources of statutory law - foodstuffs and other goods  
Furlong, John  
1996 CLP 153

## CONTRACT

### *library acquisition*

A treatise on the specific performance of contracts  
Fry, Edward  
[London Stevens 1921] N231

## CRIMINAL LAW

*Ward v. Judge of Longford District Court & Ors.*  
*High Court: Kelly J.*  
17/05/1996

Judicial review; application for orders of certiorari quashing two orders of the District Court; several claims brought based on technicalities; whether preliminary examination violated S.7(1) Criminal Procedure Act 1967; natural justice; constitutionality of 1967 Act; return for trial; book of evidence; statements of evidence; detention; arrest

*Held:* Claims dismissed

*People (DPP) v. Martin & Callinan*  
*High Court: Flood J.*  
23/06/1996

Bail; estreatment; obligations on sureties; discretion of court under S.10 Fines (Ireland) Act 1851; recognisance to be forfeited to amount judge thinks fit

*Held:* Bond of first respondent not estreated; bond of second respondent estreated

*DPP (Garda Houlihan) v. Minister for Education*  
*Supreme Court: Hamilton C.J. Blayney J. Denham J. Barrington J. Keane J.*  
11/06/1996

Child; religion; reformatory school; whether conducted in accordance with the doctrines of the Roman Catholic Church pursuant to Children Act, 1908; whether fact that minister visited school sufficient; when enabling provision allowing for external pastoral care restricted to non catholic detainees; whether necessary that school be owned and managed by religious community

*Held:* Absence of a particular form of structured religious instruction did not deprive the school of its character as a catholic school

*statutory instrument*  
Criminal justice act, 1994 (section 44) regulations, 1996  
S.I.167/1996  
Not yet received in library.

### *library acquisition*

Emmins on criminal procedure  
Emmins, Christopher J  
[London Blackstone Press 1995] M500  
The psychology of interrogations, confessions, and testimony  
Gudjonsson, Gisli H  
[Chichester Wiley 1992] M580.12

Murphy on evidence  
Murphy, Peter  
[London Blackstone Press Press 1995] M600  
Criminal evidence and procedure Seabrooke, Stephen  
London Blackstone Press 1996 M600

### *articles*

Drugs and crime - making the connection : a discussion paper  
Charleton, Peter  
1995 ICLJ 220

Reforming the mental element of murder  
Newman, Jonathan  
1995 ICLJ 194

Reversing the burden of proof in a criminal trial : Canadian and Irish perspectives on the presumption of innocence  
Ni Raifeartaigh, Una  
1995 ICLJ 135

Diminished responsibility as a defence in Irish law  
Boland, Faye  
1995 ICLJ 173

## CUSTOMS & EXCISE

*statutory instrument*  
European communities (customs declarations) regulations, 1996  
S.I.114/1996  
Commencement date: 1.5.96

### *article*

The new appeals procedures for customs and excise duties  
Herbert, Louis  
1996 ITR 106

## DAMAGES

*articles*  
Hepatitis C - a new legal remedy  
Courtney, Fergus  
2 (1996) MLJI 9

Personal injury judgments : liability and quantum  
Hall, Eamonn G  
1996 GILS 99

## DEFAMATION

*Murphy v. Times Newspapers Ltd. & Ors.*  
*Supreme Court: Hamilton C.J. O'Flaherty J. Barrington J.*  
16/05/1996

Defamation; charge to jury; defence of justification, mitigation, reputation and evidence are questions for jury; whether trial judge failed to distinguish between evidence relevant to issues of justification and mitigation and evidence relating to reputation and that which is hearsay in his charge to the jury; whether jury should have been directed on issues of credit and cross-examination

*Held:* New trial ordered; trial defective

*Bell v. Pedersen & Sandoz Ringaskiddy Ltd.*  
*High Court: Morris J.*  
14/05/1996

Defamation; privilege; defendants application to have case withdrawn from jury; letter circulated to persons ordinarily protected by qualified privilege; issue of malice; onus on plaintiff; balance of probabilities; judge's function in determining malice

*Held:* Plaintiff failed to establish on balance of probabilities that jury would find defendants guilty of malice

## EDUCATION

*statutory instrument*  
European Communities (second general system for the recognition of professional education and training) regulations, 1996  
S.I.135/1996  
Commencement date: 21.5.96

### *article*

The education of solicitors for the new millennium  
O'Connor, Patrick J  
1996 GILS 139

## EMPLOYMENT

*Harte & Ors. v. The Labour Court & Anor.*  
*High Court: Keane J.*  
29/03/1996

Application for judicial review; equal pay; applicants brought a claim in the labour court under the Anti-Discrimination (Pay) Act 1974; labour court concluded that there was no discrimination on grounds of sex as there were persons of the opposite sex doing the same work as the applicants in the same place who

were being paid the same rate; whether labour court erred in law; whether requirements of natural justice adhered to; whether certiorari is the correct remedy

*Held:* Application for judicial review dismissed

#### *statutory instrument*

Employment regulation order (agricultural workers joint labour committee)  
1996

S.I.141/1996

Commencement date: 1.6.96

Social welfare act, 1996 (employers' pay-related social insurance exemption scheme) regulations, 1996

S.I.145/1996

Not yet received in library.

Social welfare (occupational injuries)(amendment) regulations, 1996

S.I.171/1996

Not yet received in library.

#### *library acquisitions*

Unfair dismissal

Madden, Declan

Federation of Irish Employers 1990 Dublin  
192.24.C5

What happens to my pension if I leave? A guide to the preservation and transfer of benefits for early leavers under the Pensions act

The Pensions Board Dublin

Pensions Board [1992]

N193.4.C5

Selecting member trustees The Pensions Board Dublin

Pensions Board [1992] N193.4.C5

Pensions act 1990 Pensions Board

The Pensions Board Dublin

Pensions Board [1992] N193.4.C5

The pensions act and regulations

The Pensions Board Dublin Pensions Board [1995]

N193.4.C5

#### *articles*

Shop workers and the law

Kerr, Anthony

10 (1994-95) JISLL 195

Working towards real equality between men and women in the European Community and the Irish parallel

Mayenfisch-Tobin, Mary

10 (1994-95) JISLL 235

Keeping pay deductions within the law

Langford, Kevin

1996 ILT 148

The constitutionalisation of labour law

Whyte, Gerry F

10 (1994-95) JISLL 208

Sexual harassment in Ireland

McAuley, Adam

10 (1994-95) JISLL 215

Business sales and transfers, the contracting out of services, and employee rights

Byrne, Gary

1996 CLP 139

## ENVIRONMENTAL LAW

#### *statutory instruments*

Environmental protection agency (extension of powers) order, 1996

S.I.126/1996

Commencement date: 27.5.96

Local government (water pollution)(amendment) regulations, 1996

S.I.184/1996

Not yet received in library.

Access to information on the environment regulations, 1996

S.I.185/1996

Not yet received in library.

Waste management act, 1996 (commencement) order, 1996

S.I.192/1996

Commencement date: 1.7.96

#### *library acquisitions*

The concise lexicon of environmental terms

Grant, Malcolm [Chichester Wiley 1995]  
N94

Environmental and planning law in Ireland

Scannell, Yvonne

[Round Hall Press Dublin 1995]

N96.4.C5

## EQUITY & TRUSTS

#### *statutory instrument*

Powers of attorney act, 1996

(Commencement) order, 1996

S.I.195/1996

Commencement date: 1.8.96

## EUROPEAN UNION LAW

#### *statutory instruments*

European communities (customs declarations) regulations, 1996

S.I.114/1996

Commencement date: 1.5.96

European communities (introduction and movement of certain harmful organisms, plants, plant products and other objects for trial or scientific purposes and/or for work on varietal selections) regulations, 1996

S.I.122/1996

Commencement date: 10.5.96

European Communities (mobile and personal communications) regulations, 1996

S.I.123/1996

Date signed: 16.5.96

European communities (indication of prices of foodstuffs and non-food products) (amendment) regulations, 1996

S.I.124/1996

Commencement date: 7.5.95

European Communities (second general system for the recognition of professional education and training) regulations, 1996

S.I.135/1996

Commencement date: 21.5.96

European Communities (retirement of farmers) regulations, 1996

S.I.150/1996

Not yet received in library.

European communities (cosmetic products) (amendment) regulations, 1996

S.I.164/1996

Commencement date: 1.7.96

European Communities (transit of natural gas) (amendment) regulations, 1996

S.I.169/1996

Date signed: 6.6.96

European Communities (vehicle testing)(amendment)(no.2)regulations, 1996

S.I.174/1996

Not yet received in library.

European communities (protein feedingstuffs) (amendment) regulations, 1996

S.I.186/1996

Not yet received in library.

#### *library acquisitions*

Equality in law between men and women in the European Community Callender, Rosheen  
Luxembourg Office for Official Publications of the EC 1994 M208.C5

E.C. merger control

Cook, C John

London Sweet & Maxwell 1996

W110.2

Court of Justice of the European Communities A-Z Index 1995 Luxembourg Office for Official Publications of Publications of the European Communities

Methods of execution of orders and judgments

in Europe Kaye, Peter  
Chichester Wiley 1995 N395.2.008

### articles

Case C-415/93 : one letter and five figures which change a life  
Travers, Noel  
1996 ICLR 2-1

Extra-territorial application of competition law

Friel, Raymond J  
1996 CLP 118

The economics of vertically restrictive agreements

O'Toole, Francis  
1996 ICLR 2-14

Procedure before the European Court of First Instance

Keville, Cathrina  
1996 (2) P & P 8

Member state liability for damages for breach of Community law obligations

O'Neill, Michael  
1996 ILT 146

Actions for damages against the state for breach of E.C. law

Barrington, Eileen  
1996 (1) P & P 5

## FAMILY

*M. (M) v. M. (D)*

*Circuit Court: Judge McGuinness*  
23/05/1996

Engagement broken; purchase of house prior to engagement; defendant made all repayments on house; plaintiff purchased chattels for house and sought return of these; whether premises intended as matrimonial home; Family Law Act 1981; beneficial interest

*Held:* No beneficial interest in premises accrued to plaintiff; award given to plaintiff for expenditure on chattels

*B. (S) v. B. (R)*

*Circuit Court: Judge McGuinness*  
10/05/1996

Application for judicial separation; adultery; maintenance sought; whether family home to be transferred to wife's name or sold and proceeds divided

*Held:* Sale of family home ordered; maintenance awarded to wife and costs

*R. (J) v. R. (P) & Anor.*  
*Circuit Court: Judge McGuinness*  
15/02/1996

Judicial Separation Act 1989; financial relief; security for costs; wife resident within jurisdiction; poverty of wife; Civil Legal Aid Act 1995

*Held:* Security for costs refused

### library acquisitions

The right to remarry  
[Dublin Stationery Office 1995] N172.C5

The family court practice 1996

[Family Law Bracewell,]

N170.Z71 1996

Child abuse & the law

[Cobley, Cathy London]

Cavendish 1995

N176.41

Children as witnesses Dent, Helen

[Chichester Wiley 1992]

N176

Putting children first

Department of Health

[Dublin Stationery Office 1996] N176.41.C5

Review of Scottish child care law Sinclair, J W

[Scotland HMSO Scotland 1990] N176.B2

### articles

Domestic violence act, 1996

O'Mahony, Joan

1996 GILS 136

## FINANCIAL SERVICES

### statutory instrument

Post office savings bank (interest on deposits) (no. 2) regulations, 1996

S.I.162/1996

Commencement Date: 1.6.96

## FISH & FISHERIES

### statutory instrument

Bass (restriction on sale) order, 1996

S.I.177/1996

Commencement date: 1.7.96

Cod (restriction on fishing) order, 1996

S.I.154/1996

Date signed: 30.5.96

Mackerel (restriction on fishing) (no 2) order, 1996

S.I.134/1996

Commencement date: 19.4.96

Monkfish (restriction on fishing) (no 4) order, 1996

S.I.155/1996

Commencement date: 1.6.1996

Hake (restriction on fishing) (no 3) order, 1996

S.I.156/1996

Commencement date: 1.6.96

Monkfish (restriction on fishing) (no 3) order, 1996

S.I.157/1996

Commencement date: 1.6.96

Haddock (restriction on fishing) order, 1996

S.I.158/1996

Commencement date: 1.6.96

## HEALTH & SAFETY

### statutory instruments

Explosives (land mines) order, 1996

S.I.175/1996

Not yet received in library.

## HEALTH SERVICES

### statutory instruments

Disabled persons maintenance allowances regulations, 1996

S.I.165/1996

Commencement date: 5.6.96

St James's hospital board (establishment) order, 1971 (amendment) order, 1996

S.I.136/1996

Date signed: 17.5.96

Health (community pharmacy contractor agreement) regulations, 1996

S.I.152/1996

Commencement date: 31.5.96

Infectious Diseases (Maintenance

Allowances) Regulations, 1996

S.I.166/1996

Commencement date: 5.6.96

## HOUSING

### statutory instrument

Housing regulations, 1980 (amendment) regulations, 1996

S.I.148/1996

Date signed: 28.5.96

## HUMAN RIGHTS

### article

Eleventh protocol to the European convention for the protection of human rights and fundamental freedoms

Conlan Smyth, David  
1996 (3) P & P 2

## INFORMATION TECHNOLOGY

### *library acquisition*

The internet [Trinity College]  
[Dublin] 1996 L157.C5

Quality management for information and  
library managers,  
Brophy, Peter & Aldershot, Gower  
[Hampshire, 1996]

## INJUNCTIONS

*O'Connor v. Williams & Anor.*  
*High Court: Barron J.*  
15/05/1996

Civil injunction sought against breach of  
criminal law; unlawful interference with right  
to earn livelihood; injunctive relief sought to  
restrain hackney car owners from interfering  
with taxi drivers business; whether  
interference with business; whether  
proceedings maintainable as damages not  
claimed; whether use of criminal law would  
be more effective; application to amend  
pleadings

*Held:* Relief refused: criminal law sufficiently  
strong to prevent damage caused to plaintiff

### *article*

Limitations on Mareva injunctions  
Goldberg, David  
1996 (3) P & P 5

Mareva injunctions  
Conlon Smyth, David  
1996 (1) P & P 12

## INSOLVENCY

### *library acquisition*

Corporate insolvency and rescue Lynch, Irene  
[London Butterworths 1994]  
N310.C5

### *articles*

Barron, Robert  
Pursuing insolvent companies  
1996 (1) P & P 9

## JUDICIAL REVIEW

*Gibbs v. President of Dublin Circuit Court &  
DPP*  
*High Court: Kelly J.*  
16/05/1996

Page 22 - Legal Update July 1996.

Fraud investigation; delay in prosecution; law in  
relation to right to trial with reasonable  
expedition; whether applicant suffered actual  
prejudice by delay

*Held:* Order of Prohibition granted against  
respondents

*Eogan v. University College Dublin*  
*High Court: Shanley J.*  
16/05/1996

Employment; scope of judicial review; legitimate  
expectation; statutory lecturer; retirement;  
whether legitimate expectation to continue in  
office until aged seventy; statutory body; source  
of power; whether duty in public domain;  
whether exclusively matter of private law

*Held:* Judicial review lies against a university  
established by statute; plaintiff did not have  
legitimate expectation

## JUDICIARY

### *library acquisitions*

The lives of the chief justices of England 1849-  
1857 John Murray  
[Campbell, John Lord London]  
B10

Working Group on a Courts Commission  
Denham, Susan  
[Dublin Stationery Office 1996] L220.C5

### *articles*

The Charter and the role of the judiciary in  
Canada  
McLachlin, Beverley  
1996 ILT 141

A democratic judiciary  
O'Connell, Rory  
1996 ILT 138

## LAND LAW

*Bank of Ireland Finance v. Browne*  
*High Court: Laffoy J.*  
24/06/1996

Charge on lands; claim for possession of lands  
by plaintiff in 1985; plaintiff transferred charge  
to applicant; substitution of applicant as  
plaintiff under Order 17, Rule 4, Rules of  
Superior Courts requested; whether applicant  
given liberty to execute previous order for  
possession of lands under Order 42, Rule 23,  
Rules of the Superior Courts

*Held:* Order made

### *library acquisition*

Boundaries and easements  
Sara, Colin  
[London Sweet & Maxwell 1996]  
N65.1

## LANDLORD AND TENANT

*Sepes Establishment v. KSK Enterprises Ltd.*  
*Supreme Court: Hamilton C.J. Blayney J.*  
*Barrington J.*  
21/05/1996

Lease; covenants; insurance; construction of  
clauses in a lease; two conflicting clauses;  
whether lessee to pay 80% of insurance  
premiums payable by the lessor in respect of  
the entire premises or the entire amount; use  
of premises changed from time when lease first  
granted; higher premium to be paid by lessee;  
whether lease drafted to give effect to this;  
whether insurance only covers loss or damage  
by fire

*Held:* Appeal dismissed; lessee to pay entire  
premium; insurance covers all risks to building

## LEGAL AID

### *article*

Breach of the constitutional right of access to  
a lawyer and the exclusion of evidence - the  
causative link  
Butler, Andrew S  
1995 ICLJ 156

## LEGAL PROFESSION

### *article*

Resolving complaints about solicitors : the  
role of the Society and what a solicitor can do  
to help  
1996 GILS 152

## LEGAL SYSTEMS

### *library acquisitions*

Digest of Northern Ireland law  
Dickson, Brice  
[Belfast SLS 1995] L14

Introduction to the New Zealand legal system  
Mullholland, R D [Wellington Butterworths  
1995]  
L28  
Legislative drafting  
Thornton, G C  
[London Butterworths 1996]  
L34

## 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, 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

### *statutory instruments*

The local government staff negotiations board (establishment)(amendment) order, 1996  
S.I.160/1996  
Commencement date: 1.7.96

Local government (water pollution)(amendment) regulations, 1996  
S.I.184/1996  
Not yet received in library.

Local government act, 1994 (commencement) order, 1996  
S.I.191/1996  
Commencement date: 24.6.96

## MARRIAGE

*C. (S.) v. D. (P.)*  
*High Court: McCracken J.*  
14/03/1996

Nullity; onus of proof; balance of probabilities; examination of law of nullity and modern extension of it; whether respondent at time of marriage suffered from mental illness which rendered her incapable of forming and sustaining lifelong relationship

*Held:* Illness was not such as to render respondent incapable of forming and sustaining relationship

## MEDICAL LAW

### *statutory instrument*

Coroners act, 1962 (fees and expenses) regulations 1996  
S.I.151/1996  
Commencement date: 1.1.95

Coroners act, 1962 (fees and expenses) regulations 1996

S.I.162/1996  
Commencement date: 1.5.96 Date signed:  
24.5.96 Date received: 12.6.96

## LIBRARY ACQUISITIONS

Irish medical directory. MIS 2000  
Dublin [1996 ]1996-97  
M608.0022C5

On the office and duties of coroners Jervis,  
John L254

### *articles*

Legal issues in artificial insemination  
Madden, Deirdre  
2 (1996) MLJI 11

Hepatitis C - a new legal remedy  
Courtney, Fergus  
2 (1996) MLJI 9

Confusion and uncertainty : the Irish approach to the duty to disclose risks in medical treatment  
Donnelly, Mary  
2 (1996) MLJI 3

Legal actions for negligence relating to sterilisation  
Donnelly, Mary  
2 (1996) MLJI 21

Re SJB (a minor) Irish abortion law : united in confusion  
McGleenan, Tony  
2 (1996) MLJI 19

## MENTAL HEALTH

### *library acquisition*

Psychiatric detention Cooney, Tom  
[Delgany Baikonur 1996]  
N155.3.C5

### *articles*

Diminished responsibility as a defence in Irish law  
Boland, Faye  
1995 ICLJ 173

Implications of recent decision on pre-discharge assessment process of psychiatric patients  
Spellman, Jarlath  
2 (1996) MLJI 25

## NEGLIGENCE

*Graham v. Ireland & Ors.*  
*High Court: Morris J.*  
01/05/1996

Plaintiff deprived of right to vote at general election; whether this arose as a result of the negligence of the defendants and in particular the returning officer; whether returning officer failed to exercise reasonable care; breach of constitutional rights

*Held:* Negligence not established; decision of returning officer although incorrect was based on valid grounds

*Jeffers v. Cabill & Anor.*  
*High Court: Costello P.*  
21/05/1996

Personal injuries; damages; plaintiff sustained serious injuries in a motor accident; assessment of damages for loss of earnings; future pain and suffering; loss of enjoyment of life; future disability; balance of probabilities

*Held:* Awarded £525,000 in damages

*Kelly v. McNamara*  
*High Court: Budd J.*  
05/06/1996

Employer's liability; accident on building site; sub-contractor; definition of 'contractor'; whether concept of 'contractor' includes main contractor as well as sub-contractors; duty of contractor under Construction (Safety, Health and Welfare) Regulations 1975; whether plaintiff a direct employee of main contractor; concept of 'control'; contributory negligence; damages

*Held:* Defendants in overall control of operations; they were responsible and owed a duty as occupier

### *library acquisitions*

Lawyers' liabilities  
Evans, Hugh  
[London Sweet & Maxwell 1996]  
N33  
Jackson & Powell on professional negligence  
Jackson, Rupert M  
[London Sweet & Maxwell 1996]  
N33.7

### *articles*

Legal actions for negligence relating to sterilisation  
Donnelly, Mary  
2 (1996) MLJI 21

## PLANNING LAW

*McNamara v. An Bord Pleanala*  
High Court: Barr J.  
10/05/1996

Judicial review of planning decisions; procedure; time limit; Kill dump; challenge to planning appeal decision; strict statutory time limit provided for challenging planning decisions; whether additional grounds of challenge not notified within time limit may be advanced; whether applicant required to identify specific grounds for proposed challenge within time limit; whether grounds could be derived or inferred from the documentation initially filed; role of board on planning appeal; certain matters left over for agreement between planning authority and developer; whether board unlawfully delegating responsibility to planning authority; whether matters delegated fundamental; whether third parties shut out from decision making process; whether newspaper notice defective; whether condition with respect to traffic regulation on public roads ultra vires

*Held:* Application for judicial review refused

*Irish Asphalt Ltd. v. An Bord Pleanala*  
Supreme Court: Hamilton C.J. O'Flaherty J. Blayney J. Denham J. Barrington J.  
22/05/1996

Judicial review; appeal; Article 34.4.3; application for leave to apply for judicial review refused by High Court; whether right of appeal to Supreme Court; decision of High Court to be final save with leave of High Court; whether refusal to grant leave to appeal a 'decision' for purposes of Article 34.4.3; whether exclusion of appeal clear and unambiguous; policy of legislation; S.19 Local Government (Planning and Development) Act 1992 considered

*Held:* Right of appeal excluded: power to grant leave to appeal represents an exception to this exception peculiarly within discretion of High Court

*Westmeath County Council v. Quirke & Sons*  
High Court: Budd J.  
23/05/1996

Section 27 injunction; doctrine of intensification; material change of use; whether use existed prior to October 1964; factors to be taken into consideration in deciding whether material change of use takes place; examination of doctrine of abandonment; whether abandonment of previous use right

*Held:* Intensification in quarrying activities amounted to a material change of use

## PRACTICE AND PROCEDURE

### (CIVIL)

*Best v. Wellcome Foundation Ltd. and Ors.*  
High Court: Barron J.  
08/03/1996

Costs; order directing repayment and interest of excess sum

*Held:* Unjust not to direct repayment with interest

*McCole v. The Blood Transfusion Service Board & Ors.*  
High Court: Laffoy J.  
11/06/1996

Preliminary procedure; application for leave to deliver 53 interrogatories; difference between interlocutory procedure and trial of the action; matters of law; interrogatories concerning source of infective Hepatitis C virus in donated blood; whether donor had been diagnosed with infective Hepatitis

*Staunton v. Durkan & Ors.*  
Supreme Court: O'Flaherty J. Blayney J. Murphy J.  
13/06/1996

Costs; expert witness; whether costs allowable; witness a fulltime civil servant; whether any loss incurred by attendance at court; distinction between civil servant qua expert witness

*Held:* Costs allowed; test not whether there had been a loss but whether solicitor had acted reasonably

### library acquisitions

Bullen and Leake's precedents of pleadings in actions...of the High Court of Justice, Bullen, Edward [London Stevens 1935] N383.Z3

Enforcing money judgments  
Envis, Gary  
[London Butterworths 1995]  
305.1

Discovery. Second supplement  
Matthews, Paul  
[London Sweet & Maxwell 1995]  
N386

Legislative drafting  
Thornton, G C  
[London Butterworths 1996]  
L34

### articles

Security for costs against foreign plaintiffs  
Buttimore, Jonathan  
1996 CLP 158

The Hague convention on the service abroad of judicial and extrajudicial documents in civil and commercial matters  
O'Callaghan, Patrick  
1996 CLP 123

Aids to judgment enforcement : the processes of Garnishee and receiver by way of equitable execution  
Heslin, Jacinta  
1996(2) P & P 2

Security for costs against foreign plaintiffs  
Buttimore, Jonathan  
1996 CLP 158

## PRISONS

*McHugh v. The Minister for Justice & Ors.*  
Supreme Court: O'Flaherty J. Blayney J. Murphy J.  
07/06/1996

Judicial review; order of mandamus sought; applicant seeking temporary release; S.2 Criminal Justice Act 1960; temporary release of prisoners serving a sentence of penal servitude or imprisonment; discretion of Minister for Justice

*Held:* Appeal dismissed; matter for discretion of Minister

## PROPERTY

### statutory instrument

Powers of attorney act, 1996  
(Commencement) order, 1996  
S.I.195/1996  
Commencement date: 1.8.96

### library acquisition

Boundaries and easements  
Sara, Colin  
[London Sweet & Maxwell 1996]  
N65.1

## REVENUE

*Lennon v. Judge Clifford & DPP*  
Supreme Court: Hamilton C.J. O'Flaherty J. Murphy J.  
23/05/1996

Judicial review; applicant failed to deliver to tax inspector a return in the prescribed form



for income tax under Finance Act 1983; interpretation of 'prescribed form'; whether tax return forms 'prescribed' by S.165 Income Tax Act 1967; evidence of statutory form of return

*Held:* Appeal dismissed; application outside the scope of certiorari

*In the Matter of S.18 of the Finance Act, 1983*

*Supreme Court: O'Flaherty J. Keane J. Murphy J.*  
22/05/1996

Appeal; order of High Court requiring financial institutions to furnish particulars of all accounts of certain taxpayers to the Inspector of taxes under S.18 of the Finance Act 1983; discrepancy between assets of taxpayers and tax returns; whether reasonable grounds for making an application pursuant to S.18; whether preconditions for a S.18 order had been met; whether trial judge had erred on a point of law; right of confidentiality

*Held:* Appeal dismissed

*O'Rourke v. Revenue Commissioners*  
*Supreme Court: Hamilton C.J. O'Flaherty J. Murphy J.*  
15/05/1996

Case stated; whether plaintiff entitled to payment of interest on foot of over payment of tax pursuant to S.30 Finance Act 1976; plaintiff relied on statement of inspector of taxes dispensing with formalities of raising assessment

*Held:* Without analysis of contents of agreement and conduct of official(s) impossible to evaluate case which plaintiff seeks to make; matter referred back to High Court to clarify basis on which questions posed to court

## RECORDS & STATISTICS

### *statutory instrument*

Registration of births and deaths (Ireland) Act, 1863 (section 18) (Waterford) (no. 2) order, 1996  
S.I.140/1996  
Commencement date: 22.5.96

## REVENUE & FINANCE

### *statutory instrument*

Post office savings bank (interest on deposits) (no. 2) regulations, 1996  
S.I.162/1996  
Commencement Date: 1.6.96

### *library acquisition*

Gill & Macmillan financial adviser's guide 1996/97 McMahon, Ciaran  
[Gill & Macmillan Dublin 1996] N308

## ROAD TRAFFIC

### *statutory instruments*

European Communities (vehicle testing)(amendment)(no.2)regulations, 1996  
S.I.174/1996  
Not yet received in library.

Road traffic (lighting of vehicles) (amendment) regulations, 1996  
S.I.137/1996  
Date signed: 23.5.96

Road traffic (construction, equipment and use of vehicles) (amendment) (n o. 3) regulations, 1996  
S.I.138/1996  
Date signed: 23.5.96

Road traffic (construction, equipment and use of vehicles) (amendment) (n o. 4) regulations, 1996  
S.I.139/1996  
Date signed: 23.5.96 Date received: 28.5.96

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S.I.173/1996  
Not yet received in library.

## SEA & SEASHORE

### *statutory instruments*

Wicklow harbour works order, 1996  
S.I.180/1996  
Not yet rec'd details in Iris Oifigiuil 25.6.1996

Cork harbour works order, 1996  
S.I.182/1996  
Not yet rec'd details in Iris Oifigiuil 25.6.96

Harbour rates (Dundalk harbour) order, 1996  
S.I.183/1996  
Not yet rec'd details in Iris Oifigiuil 25.6.96

## SOCIAL WELFARE

### *statutory instruments*

Social welfare act, 1996 (sections 26 and 27) (commencement) order, 1996  
S.I.142/1996  
Not yet received in library.

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scheme) regulations, 1996  
S.I.145/1996  
Not yet received in library.

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S.I.165/1996  
Commencement date: 5.6.96

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S.I.171/1996  
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## TAXATION

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S.I.149/1996  
Date signed: 29.5.96

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S.I.163/1996  
Commencement date: 15.5.96 & 6.7.96

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[Gill & Macmillan Dublin 1996] N308

### *articles*

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1996 ITR 100

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1 (1996) CPLJ 5

UK self assessment  
McGuinness, Peter  
1996 ITR 130

Relief for film investment - 1996 style  
Judge, Norman E  
1996 ITR 110

Wear and tear of machinery or plant  
Kearns, Sean  
1996 ITR 87

Relevant contract tax  
McMoreland, Kenneth  
1996 ITR 93

The taxes consolidation bill  
Moore, Alan  
1996 ITR 84

VAT on property transactions  
Corbett, Tom  
1 (1996) CPLJ5

## TORT

*Southern Milling Ltd. v. Kantoher Food Products Ltd. & Anor.*  
*High Court: Geoghegan J.*  
26/04/1996

Interference with contractual relations; contract containing special terms of payment; contract for the supply of poultry feed stuffs; sums due; defendants went into liquidation; whether there was inducement to break contract by failing to make payments; conflict of evidence

*Held:* Action dismissed; no evidence to support claim of inducement of breach of contract

*Bailey v. Gallagher*  
*Supreme Court: O'Flaherty J. Keane J. Murphy J.*  
23/05/1996

Appeal; plaintiff detained as an 'involuntary patient' under Mental Treatment Act 1945 by medical doctor; plaintiff applied for leave to pursue claims for damages for negligence and false imprisonment and/or defamation pursuant to S.260 of the 1945 Act; whether claims vexatious or frivolous; degree of proof required before leave can be granted; balance of probabilities that substantial grounds exist; whether doctor acted in bad faith and without reasonable care; whether detention unlawful; expiry of certificate for detention

*Held:* Leave granted to issue proceeding

## TRADE & INDUSTRY

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## TRAVEL

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Holidays will never be the same again  
Lee, Richard  
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## TRUSTS

*library acquisitions*  
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N210

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Palm trees in the rain - new model constructive trusts in Ireland  
Mee, John  
1 (1996) CPLJ9

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*article*  
Creation and enforcement of mutual wills  
Friel, Raymond J  
1 (1996) CPLJ 2

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Walsh, Edward S  
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## European provisions implemented into Irish law up to 2/07/96

European communities (customs declarations) regulations, 1996  
S.I.114/1996  
Commencement date: 1.5.96

European Communities (mobile and personal communications) regulations, 1996  
S.I.123/1996  
Date signed: 16.5.96

European communities (indication of prices of foodstuffs and non-food products)(amendment) regulations, 1996  
S.I.124/1996  
Commencement date: 7.5.95

European Communities (second general system for the recognition of professional education and training) regulations, 1996  
S.I.135/1996  
EA European Communities act, 1972 s3 (DIR 92/51, 94/38, 95/43)  
Commencement date: 21.5.96

European Communities (retirement of farmers) regulations, 1996  
S.I.150/1996  
Not yet received in library.

European communities (cosmetic products) (amendment) regulations, 1996  
S.I.164/1996  
Commencement date: 1.7.96 Commencement date: 1.7.97

European Communities (transit of natural gas) (amendment) regulations, 1996  
S.I.169/1996  
EA European Communities act, 1972 s3 (DIR 91/296, 94/49, 95/49) Amends  
SI 343/1991  
Date signed: 6.6.96

European Communities (vehicle testing)(amendment)(no.2)regulations, 1996  
S.I.174/1996  
Not yet received in library

European communities (protein feedingstuffs) (amendment) regulations, 1996  
S.I.186/1996 Not yet received in library.

INFORMATION COMPILED BY  
MARTINE O'CONNOR,  
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## Abbreviations

CLP Commercial Law practitioner  
CPLJ Conveyancer & Property Law Journal  
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 Irish Society Labour Law  
MLJI Medico Legal Journal of Ireland  
P&P Practice & Procedure

# at a glance

## 1996 Acts up to 02/07/96

Information compiled by Sharon Byrne, Law Library, Four Courts.

ACTS IN BOLD TYPE ARE PARTIALLY OR TOTALLY COMMENCED. THOSE NOT IN BOLD ARE NOT IN FORCE OR INFORMATION IS NOT AVAILABLE AT THIS DATE	6/96 TRADE MARKS ACT SIGNED 16:03:96 COMMENCEMENT TO BE BY STATUTORY INSTRUMENT	13/96 CIVIL SERVICE REGULATION (AMEND) ACT SIGNED 16:06:96 COMMENCED BY SI 197/1996
ACTS OF THE OIREACHTAS 1996	7/96 SOCIAL WELFARE ACT SIGNED 03:04:96 COMMENCEMENT IN ACT - DIFFERENT DATES	14/96 DUMPING AT SEA ACT SIGNED 19:06:96
1/96 DOMESTIC VIOLENCE ACT COMMENCED ON SIGNING - 27/02/96	8/96 IRISH STEEL LIMITED ACT COMMENCED ON SIGNING 30/04/96	15/96 HEALTH (AMENDMENT) ACT SIGNED 26/06/96
2/96 JOHNSTOWN CASTLE AGRICULTURAL COLLEGE (AMEND.) ACT COMMENCED ON SIGNING - 28/02/96	9/96 FINANCE ACT COMMENCED ON SIGNING 15/05/96	16/96 PROTECTION OF YOUNG PERSONS (EMPLOYMENT) ACT SIGNED 26/06/96
3/96 COMMISSIONERS OF PUBLIC WORKS (FUNCTIONS AND POWERS ACT) COMMENCED ON SIGNING - 28/02/96	10/96 WASTE MANAGEMENT SIGNED 20:05:96 COMMENCED BY SI.192/96	17/96 REFUGEE ACT Signed 26:06:96
4/96 VOLUNTARY HEALTH INSURANCE (AMEND.) ACT COMMENCED ON SIGNING 06/03/96	11/96 HARBOURS ACT SIGNED 20:05:96 COMMENCEMENT TO BE BY STATUTORY INSTRUMENT	FIFTEENTH AMENDMENT OF THE CONSTITUTION ACT SIGNED 17:6:96
5/96 BOVINE DISEASES (LEVIES)(AMEND.) ACT COMMENCED ON SIGNING 16/03/96	12/96 POWERS OF ATTORNEY ACT SIGNED 05:06:96	CONSTITUTIONAL AMENDMENTS: 13/96 FIFTEENTH AMENDMENT OF THE CONSTITUTION ACT SIGNED 17:06:96

## Bills in Progress as at 02/07/96

Information compiled by Sharon Byrne, Law Library, Four Courts.

BILLS IN PROGRESS AS AT 02/07/96	EUROPEAN PARLIAMENT ELECTIONS BILL, 1996 - 1ST STAGE - DAIL	CRIMINAL JUSTICE (MENTAL DISORDER) BILL, 1996 - 2ND STAGE - DAIL
GOVERNMENT BILLS IN PROGRESS - 26/06/96	FAMILY LAW (DIVORCE) BILL, 1996 - 1ST STAGE - DAIL	CRIMINAL LAW (SEXUAL OFFENCES)(NO.2) BILL, 1995 - 2ND STAGE - DAIL
ADOPTION (NO.2) BILL, 1996 - 1ST STAGE - DAIL	GARDA SIOCHANA BILL, 1996 - COMMITTEE - DAIL	CONTEMPT BILL, 1995 - 2ND STAGE - DAIL
AN BORD BIA (AMENDMENT) BILL, 1996 - COMMITTEE - SEANAD	HEALTH (AMENDMENT) BILL, 1996 - COMMITTEE - DAIL	CONTROL AND REGULATION OF HORSES BILL, 1996 - 2ND STAGE - DAIL
BORROWING POWERS OF CERTAIN BODIES BILL, 1996 - 1ST STAGE - DAIL	HEALTH (AMENDMENT)(NO.2) BILL, 1996 - 1ST STAGE - SEANAD	CRIMINAL LAW (SEXUAL OFFENCES)(NO.2) BILL, 1995 - 2ND - DAIL
CIVIL LIABILITY (AMENDMENT) BILL, 1996 - 1ST STAGE - SEANAD	MALICIOUS INJURIES (REPEAL OF ENACTMENT) BILL, 1996 - 1ST STAGE - DAIL	DEFAMATION BILL, 1995 - 2ND STAGE - DAIL
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COMPETITION (AMENDMENT) BILL, 1994 - REPORT STAGE - DAIL	METROLOGY BILL, 1996 - COMMITTEE - DAIL	FREEDOM OF INFORMATION BILL, 1995 - COMMITTEE - SEANAD
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**Sabha Greene is the national administrator of the Free Legal Advice Centres in Ireland. We talked to her about what has been achieved since its foundation in 1969 and about the organisation's plans for the future.**

# Coping with FLAC

A dimly lit hallway, housing a snooker club among other things on South William Street, Dublin 2 is the inauspicious location where you will find the headquarters of the Free Legal Advice Centres in Ireland. For over 25 years FLAC has been to the fore in safeguarding the rights of citizens who could not otherwise afford legal advice.

It was FLAC which led the way for the introduction of Civil Legal Aid in Ireland following the Airey case in 1977. More recently, with the case of Cotter and McDermott v. The Minister for Social Welfare, FLAC played an invaluable role in working for the payment of £ 240 million pounds to 40,000 Irish women.

Yet, FLAC survives on limited resources including an annual grant of £45,000 from the Department of Equality and Law Reform.

FLAC operates one full time centre in Dublin, with a number of other part time centres in the greater Dublin and Cork areas which are entirely run by volunteers. The initial point of contact for many people is the telephone referral line. From there, queries which can be handled immediately are dealt with and others are referred on to the appropriate service for example, the Legal Aid Board. The organisation also runs seminars and produces publications in addition to providing legal training to other groups such as Citizens Information Centres. They also actively monitor and seek legislative change to improve the services which are available, as was evidenced by their activity in relation to the recent Civil Legal Aid Act.

"There is no way FLAC could maintain its level of work without the strong financial and practical support which we receive from the legal professions. We simply could not survive without donations from members of the solicitors and barristers professions who donate up to £20,000 annually to FLAC. We

are highly dependent on this financial help which we supplement with various fundraising events and with fees earned from sale of publications and from training carried out by FLAC staff"

Greene says that in addition to giving financial help, FLAC is fortunate to have a valuable resource of law students, barristers and solicitors who volunteer their time free of charge to assist in FLAC centres as volunteers. Indeed many FLAC cases would not come to court were it not for the help of highly skilled and committed barristers who act for FLAC clients on a purely voluntary basis, she says.

In the past year, the FLAC head office in Dublin, have used the voluntary services of a large number of barristers and there have also been many more volunteers whose services were not needed. "Everyone knows of the high profile cases such as Airey and Cotter and McDermott, everyone associates certain people such as President Mary Robinson with a large amount of pro bono work when she was at the Bar but there are an awful lot of lesser known unsung heroes who continue to bring the more mundane cases to court for us year in, year out without remuneration or recognition"

Greene is full of praise for the financial support and voluntary assistance of legal practitioners which help supplement her shoestring budget. But she says this is no substitute for a fully comprehensive and workable system of legal advice and representation which she feels should be available as of right to all those who cannot afford private legal services.

She envisages an imaginative, community based, tiered system for the provision of civil legal aid and advice throughout the country.

She sees this new system as essentially taking the best of what is available and supplementing it. For instance the first stop for general legal queries would be at local

centres such as the present Citizens Information Centres which could be resourced to deal with legal queries. These would be supplemented by community based law centres, such as the Coolock Community Law Centre. The community centres would be run by local representatives who would determine the type of legal issues which deserve priority in their communities. The law centres would carry out research, handle cases and also provide training to members of the community.

They in turn would be supplemented by a panel of legal practitioners in private practice. The private practitioners would act in cases which are outside the area of speciality of the community centre. They could also in family law cases where obviously both parties could not be represented by the same centre and it would save one party having to travel some distance to the next centre for assistance.

The work of the local centres and private practitioners would be supplemented by the establishment of a number of specialist agencies such as the European Equality Agency. These agencies would monitor the implementation of legislation, take test cases and provide back up services in their areas of specialisation.

The final tier of Greene's proposed new civil legal advice system, would be a supervisory body charged with a strong informative and educational role. In addition to advising people of their rights the supervisory body would also monitor the provision of all services and instigate test cases where appropriate

And is Sabha Greene optimistic for the future? "Yes, I am certainly encouraged by the commitment of our volunteers, directors and staff and by the financial assistance which we receive voluntarily from all sources. It has taken a lot of hard work on behalf of all involved but a lot has been achieved to date and I believe that much can and will be achieved in the future".

# New Requisitions on

**The Law Society have recently introduced the 1996 Revised Edition of Law Society Objections and Requisitions on Title**

**Deborah Wheeler, Barrister, notes the changes contained in the new requisitions.**

The 1996 Edition of the Law Society Objections and Requisitions on Title is now in use. Although many of the Requisitions will appear familiar to conveyancers, there is a sufficient amount of revision of the content of the surviving Requisitions in addition to the new material that thorough reading of the new Edition is required. The following comments are not an exhaustive review of the new Edition, but are intended only to facilitate identification of the significant changes.

References to numbered Requisitions are to those of the new 1996 Edition.

## **General:**

All references to the National House Building Guarantee Scheme have been changed to its new name, the Home Bond Scheme. The HG5 Agreement has been replaced by the HB10 Agreement and the HG6 Guarantee Certificate by the HB11 Notice.

### **Requisition 12**

The list of Acts under which a vendor may have received notices has taken on a greener tinge, for example the Air Pollution Act, the Environmental Agency Act, the Water Pollution Act and the Wildlife Act.

### **Revised Requisitions:**

Requisition 6 now only deals with fishing licences or rights. Sporting ones are covered by Requisition 7. They have, however, been expanded to ascertain the nature of the rights, i.e. how they were created, which thus clarifies how they may be extinguished.

### **Requisition 14:**

The old Requisition on Encumbrances used to ask if the property or any part of

# *Title*

it were inter alia subject to any Board of Works charge. This has been omitted from this requisition which now asks if the property inter alia subject to any rent charge.

### **Requisition 15:**

Voluntary Dispositions/Bankruptcy has been both amended and expanded. Requisition 15(b)'s request for a statutory declaration of solvency where there is a voluntary disposition within the past five years reflects that reduction from ten to five years by Section 59 of the Bankruptcy Act, 1988. As that section, of course also provides that a voluntary disposition shall, if the disponent is adjudicated bankruptcy within two years after the date thereof, be void as against the Official Assignee, Requisition 15(c) looks for an insurance bond equal to the value of the property.

### **Requisition 16.2:**

Taxation has been expanded in that a certificate of absolute discharge from any Capital Acquisitions Tax not only in respect of any gift or inheritance within the last twelve years, but also of any gift within the meaning of Section 8 of the Capital Acquisitions Tax Act, 1976 is now required.

Requisition 16.10 has been extended to enable a purchaser to comply with the requirements of Section 76 of the Finance Act, 1995 so that in the event of certificates under paragraph 11(6) of the Fourth Schedule to the Capital Gains Tax Act, 1975 not being furnished, a vendor is now to provide 15% of the estimated market value of the property to the purchaser on closing.

### **Requisition 20:**

Unregistered Property has also been made more precise. If all or any of the property is unregistered land, the registration of which was compulsory prior to the date of contract, that registration is to be

procured prior to completion of the sale. Furthermore, under Requisition 20.3 where registration will become compulsory because of the sale, the vendor has to furnish an undertaking that, if requested to do so within two years from the completion of a sale, he shall at the purchaser's expense supply any additional information which he may reasonably be able to supply together with any documents in his possession which may be required to effect the registration.

The Family Law Act, 1995 has made a nominal appearance to Requisitions 24, 25 and 26 covering the Family Home Protection Act, 1976, the Family Law Act, 1981 and the Judicial Separation and Family Law Reform Act, 1989. Is it over-optimistic to hope that Requisition 24 will need to be revised in the not too distant future?

### **The scope of Requisition 27:**

On the Local Government (Planning and Development) Act, 1963 is wider than its heading suggests, for example, Requisition 27.11 covers the question of compensation under the Local Government (Planning and Development) Act, 1990. While Requisition 27.12 is concerned with the interesting situation covered by Section 22(7) of the Building Control Act, 1990, that Act has its own Requisition (with which conveyancers are already familiar) incorporated into the Requisitions as Requisition 28.

The Requisition on the Fire Services Act, has been "promoted" to Requisition 29 with the additional request for an architect/engineer's certificate of substantial compliance with any notices under the Act or Fire Authority requirements.

### **Requisition 32:**

The Food Hygiene Regulations (previously included in the Requisition on Licensing) is targeted at the use of premises such as hotels, restaurants, public houses, butcher's shops or food manufacturers which must be registered with the local health authority under the Food Hygiene Regulations, 1950 as amended.

### Requisition 35:

This Requisition on the Local Government (Multi-Storey Buildings) Act, 1988 has been amended to ascertain whether the property comes within the 1988 Act or what was defined as "the Regulations" in Requisition 28, i.e. the Building Control Act, 1990 and consequent regulations. However, Requisition 35.9 goes further than before and, where a certificate has been submitted to the Local Authority under the 1988 Act, looks for a letter from the Local Authority confirming that the certificate has been placed on the Register.

### Requisition 37:

Secondhand Flats/Secondhand Management Properties. This has also been amended and reflects the problems experienced by conveyancers in such transactions, for example Requisition 37.1a looks for evidence that the Management Company is still registered in the Companies Office while Requisition 37.2 covers the all too familiar situation where the Management Company has still not become the owner of the developer's interest on foot of their agreement.

### New Requisitions:

**Requisition 9:** Tenancies has been updated to take the newer statutory provisions into account, for example Requisition 9.1d requests that, if there is a renunciation under the Landlord and Tenant (Amendment) Act, 1994, a copy of it should be furnished immediately and the original closing. It should, of course, not be forgotten that Section 4 of the 1994 Act which introduced the renunciation also stipulated that the tenant should have received independent legal advice in relation to his renunciation.

**Requisition 9.8** deals with the Housing (Miscellaneous Provisions) Act, 1992 and the regulations which may be made thereunder, up to and including the Housing (Registration of Rented Houses) Regulations, 1996 which came into force on 1 May, 1996 and need particular consideration where the private rented house is being sold.

**Requisition 16:** on taxation, has been substantially expanded (as well as revised) to take into account additional taxes. Requisition 16.5 deals simply with deaths on title after 17 June, 1993 for the purposes of Probate Tax which was introduced under the Finance Act, 1993.

**Requisition 16.6** requires a vendor to furnish a certificate of discharge from Capital Acquisitions Tax pursuant to Section 146 of the Finance Act, 1994 where the title to the property or any part thereof depends on a claim for adverse possession because Section 146 provides that a person shall not be registered as owner of property in the Land Registry on foot of an application made on or after 11 April, 1994 based on possession unless the applicant produces such a certificate. Lastly, Requisition 16.11 covers the certificate requirements for Residential Property Tax.

**Requisition 18:** Body Corporate Vendor is another Requisition with a number of additional points. Requisition 18.5 has been incorporated into the Requisition because of the provision in Section 29(1) of the Companies Act, 1990 that, subject to sub-sections 6, 7 and 8 of the Section, a company shall not enter into an arrangement whereby a director of the company or its holding company or a person connected with such a director acquires or is to acquire one or more non cash assets of the requisite value from the company or the company acquires or is to acquire one or more non cash assets of the requisite value from such a director or a person so connected unless the arrangement is first approved by a resolution of the company in general meeting and, if the director or connected person is a director of its holding company or a person connected with such a director, by a resolution in general meeting of the holding company. Requisition 18.6 deals then with the question of loans or quasi loans or credit transactions to directors or persons connected with a director prohibited by Section 31 of the Companies Act, 1990. If there is such a transaction which is saved from the effect of Section 31 by coming within one of the exceptions contained in Sections 32-37 of the Act, a certificate of the company secretary/auditor specifying exactly which exception is applicable is requisitioned.

### Requisition 30:

While this requisition on Safety Health and Welfare at Work (Construction) Regulations, 1995 is new, its relevance should prove limited but the need for a Safety File in appropriate circumstances should be borne in mind.

**Requisition 31:** Environmental. This is now an area of increasing importance. Indeed one wonders whether this is a Requisition destined for further revision

as conveyancers increasingly come to grips with environmental law. Is Requisition 31.4, for example, too basic when it simply asks is the vendor aware of any breach of the Environmental Controls in respect of the property.

**Requisition 38:** Tax based Incentives/Designated Areas, Requisition 39: Milk Quotas and Requisition 42: Special Restaurant Licences deal with their own specific areas. Having read through the 1996 Edition of the Law Society Objections and Requisitions on Title to the very end, a restaurant selling the full range of intoxicating liquors might well require closer investigation.

*Deborah Wheeler, Barrister.*

## Circuit Court Sittings To Resume On 16th September.

Following the recent appointment of nine Circuit Court Judges, sittings of both the Dublin Circuit Court and Circuits outside Dublin will commence on the 16th September next. It is the intention to clear all backlogs of family law cases where possible and thereafter the County Registrar in conjunction with the sitting Judge will arrange additional sittings. Members have been advised by Mr. Michael Quinlan, the County Registrar for the Dublin Circuit to contact the local County Registrar for further details in relation to these earlier sittings.

## Bar Council Election Results

Congratulations to the following members who were elected to the Bar Council on Friday, 12th July

### Senior Panel

Seamus Soroan, S.C.,  
William McKechnie, S.C.,  
Michael Durack, S.C.,  
John MacMenamin, S.C.,  
Donal O'Donnell, S.C.,

### Junior Panel

Nehru Morgan Pillay  
Oonah McCrann,  
Fergal Foley,  
Mary Rose Gearty  
Patrick Marrinan

# *Eurowatch*

## **NATIONAL SECURITY THE EUROPEAN COURT OF JUSTICE TESTS THE WATERS**

**The European Court of Justice ("ECJ") has recently confirmed its status as the "bête noire" of the EC Institutions in the eyes of the British Government with its decision in the Gallagher case<sup>1</sup> in which it held that the UK had breached EC law in the manner in which it had deported an Irish national on grounds of national security policy.**

**David Conlan Smyth,  
Barrister, Dip. Eur.Law  
(Bruges), examines the case  
and the UK reaction.**

**I**n Gallagher, the ECJ implicitly found a breach of a Community Directive by the United Kingdom in a sensitive case concerning the discretion enjoyed by Member States in excluding individuals suspected of terrorist activities. Although the ECJ has delivered judgments regarding Northern Ireland before<sup>2</sup>, until now it has always been possible to discern a certain reluctance on the part of the Court to become too involved in issues which concern the national

security policy of a Member State. In this respect it operates in a very different fashion to the European Court of Human Rights ("ECHR") in Strasbourg which has frequently delivered politically embarrassing judgements concerning Ulster. The Gallagher case, together with Francovich<sup>3</sup> and the recent Brasserie du Pêcheur/Factortame<sup>4</sup> and certain social policy cases, were considered so infuriating by the British Government that it has called at the Inter-Governmental Conference taking place at the moment for a mechanism to be inserted into the revised Treaties which would empower the Council to revoke decisions of the Court of Justice.

### **Legal Safeguards for Individuals exercising Treaty rights to free movement**

The EC Treaty was designed inter alia to remove all discriminatory practices or laws which prevent the free movement of workers, the freedom of establishment and the freedom to provide and receive services as between the Member States. Such radical propositions would not have been accepted by the original Member States without a corresponding right to exclude the entry of those persons whose residence would constitute a



threat to “public policy, public security or public health”. Accordingly, the Treaty allows for limitations based on those grounds.

Such limitations were interpreted and regulated a few years later by Council Directive 64/221 (‘the Directive’). The Directive has two basic functions. First, it governs the conditions and reasons which a Member State may rely on in expelling or refusing entry to a national of another Member State on the grounds of public policy, security and health. Secondly, the Directive imposes certain procedural safeguards which must be complied with by a Member State when seeking to expel or refuse entry.

Article 9(1) of the Directive provides that a decision to expel the holder of a residence permit from a Member State shall not be taken by an “administrative authority” where there is no right of appeal to a court or, where such an appeal may only be in respect of the legal validity of such decision or where such appeal cannot have suspensory effect, save in cases of urgency, until an opinion has been obtained from a “competent authority” of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for.

The competent authority according to Article 9(1) shall not be the same as that empowered to take the decision refusing renewal of the residence permit or ordering expulsion. Article 9(2) provides that where the Member State concerned proposes to expel a person before issuing a first residence permit, reference shall be made to the “competent authority” only where the person concerned so requests.

## **The Gallagher case**

John Gallagher is an Irish citizen who was convicted in Ireland in 1983 for the unlawful possession of firearms and imprisoned. In April 1990, Gallagher moved to the United Kingdom where he successfully secured employment. In September 1991, Gallagher was arrested under the 1989 Prevention of Terrorism (Temporary Provisions) Act (‘1989 Act’) and three days later the Home Secretary decided to make an exclusion order against Gallagher because he was satisfied that Gallagher “is or has been concerned in

the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland”. Gallagher consented to his deportation to Ireland because his girlfriend who was due to give birth would be there. Once in Ireland, Gallagher exercised his right under Section 7 of the 1989 Act to make representations regarding his exclusion and accordingly an interview of Gallagher was conducted by an official nominated by the Home Secretary at the British embassy in

***The Gallagher case, together with... certain social policy cases, were considered so infuriating by the British Government that it has called at the Inter-Governmental Conference taking place at the moment for a mechanism to be inserted into the revised Treaties which would empower the Council to revoke decisions of the Court of Justice.***

Dublin in December 1991. The official concerned did not reveal his name nor did he offer any reasons for the exclusion order. Upon a subsequent reconsideration of the case, the Home Secretary found no grounds on which to revise his exclusion order which was accordingly confirmed.

Gallagher instituted judicial review proceedings in England challenging the exclusion order, the refusal to revoke it, the nomination of the adviser with whom he had the interview and the decision not to reveal the adviser’s identity, grounding his application in particular on the pre-deportation procedure which he alleged was in breach of Community Directive 64/221 and in February, 1994 the Court of Appeal referred two questions regarding the interpretation of Article 9 of the Directive for a preliminary ruling to the ECJ.

The first question posed by the Court of Appeal requested the ECJ to decide whether or not the opinion of the “competent authority” may be given after the decision to expel the person concerned has been taken. The second question related to whether or not the Directive precluded the appointment of the “competent authority” by the Secretary of State who in fact functioned also as the “administrative authority” under the Directive.

## **Minimum Procedural Safeguards**

In answering the first question, the Court relied on past jurisprudence holding that it was settled law that Article 9(1) of the Directive intends to confer a “minimum procedural safeguard” on persons who hold residence permits and who are subject to exclusion orders (this also includes those who, due to legislation, are not required to hold residence permits as is the case with Irish nationals in Britain).

Article 9(1) operates where there is no, or a limited right of, access to court and requires the intervention of a “competent authority” other than the “administrative authority” which takes the decision to expel. In proceedings before the “competent authority”, the person concerned must enjoy such rights of defence including assistance or representation as are provided for by the domestic law of that country. The purpose behind such intervention, according to the ECJ’s judgement in *Adoui*<sup>5</sup> and *Santillo*<sup>6</sup>, is to enable an exhaustive examination of all the facts and circumstances, including the expediency of the proposed measure, to be carried out before the decision is to be finally taken. The Court also referred to its ruling in *Pecastaing*<sup>7</sup> where it had held that save in cases of urgency, the administrative authority may not take its decision until an opinion has been obtained from the competent authority.

The United Kingdom contended that the 1989 Act complied with these requirements of the Directive insofar as persons subject to exclusion orders may make representations to a “competent authority” the opinion of which will be examined by the Secretary of State who may reconsider

the merits of the decision before the individual concerned is removed from the territory of the United Kingdom.

The Court rejected this submission and followed the line of reasoning of the Advocate General in holding that this interpretation would undermine the distinction between Articles 9(1) and (2) of the Directive. Article 9(1) requires the opinion to be obtained prior to the decision being taken whereas Article 9(2) provides for the opinion to be obtained afterwards and only at the request of the person concerned, if he has raised objections. Accordingly the Court found that Article 9(1) of the Directive requires that, save in cases of urgency, the competent authority must give its opinion before the administrative authority takes its decision ordering expulsion.

### **Nature of the "competent authority"**

The second question permitted the ECJ to comment on the legislative ambiguities in Article 9 which required amplification. The Court found that the Directive did not specify the manner or term of appointment or the exact composition of the "competent authority". Nevertheless the provision requires that the "competent authority" performs its duties in an absolutely independent fashion and may not be subject in the exercise of its duties either directly or indirectly to any control by the "administrative authority" which may take the decision to expel. The "competent authority" must also employ a procedure enabling the person subject to the proceedings to present his defence effectively. It is for the national court to determine in each case whether those requirements have been met. The ECJ bowed in one respect to the idea of national security in finding that although the person concerned is entitled to be notified of the "competent authority's" opinion, the Directive does not require the opinion to identify the members of the authority or indicate their professional status (as in the case at issue) since such identification is relevant only to allow the national court to determine whether the members of the authority are independent and impartial. Accordingly the Court found that the

*Whatever about the obvious room for abuse inherent in the Court's finding that the "competent authority" may be appointed by the "administrative authority" it is somewhat unsatisfactory that the Court found that the competent authority was not required to identify itself to the person before it.*

Directive does not preclude the "competent authority" from being appointed by the administrative authority so long as the former complies with the above standards.

Whatever about the obvious room for abuse inherent in the Court's finding that the "competent authority" may be appointed by the "administrative authority" it is somewhat unsatisfactory that the Court found that the competent authority was not required to identify itself to the person before it. Anyone subject to a process which may well result in their expulsion will be suffering enough trauma without having to undergo the additional stress of meeting with an unidentified individual or group who will have a significant input into the final decision as to whether or not the person concerned may remain in the host Member State.

Having, by implication, been directed by the Court of Justice that there had been a breach of the Directive, the Court of Appeal in London found a few weeks ago that there had been a breach of European Community law but it appears it decided that no compensation would be awarded as the breach established was not sufficiently serious.

### **Conclusion**

The Gallagher case is one of the first forays by the Court of Justice into the national security sphere and according to some in Britain

represents an unwarranted interference into a matter more properly disposed of at domestic level. The Court of Justice has of course not been known for judicial timidity and in the face of some bitter opposition established the doctrine of supremacy within six years of its establishment. A court which can successfully challenge the concept of the nature of international law so successfully and so expeditiously should have no difficulty in establishing itself as the ultimate supervisory tribunal for Governmental activity in the national security sphere concerning rights derived from Community law. It would have been very interesting to see how the Court would have disposed of the case brought by one Gerry Adams challenging his own exclusion order and the political reaction which that would have attracted. That case was however withdrawn during the peace process and will not be ruled on by the Court. It can however be said that Gallagher represents the first of many Northern Irish cases which if brought within the EC context will receive a much more rigorous examination in the Court of Justice than has hitherto been the case.

- 1 R. -v- Secretary of State for the Home Department, ex parte John Gallagher. Case C-175/94 Judgement delivered the 30th day of November, 1995. Reported at (1996) 1 CMLR 557.
- 2 EC 6/90 (1991) ECR 1-5337.
- 3 For a good example see Johnston -v- RUC Case 222/84 (1986) ECR 1651, (1986) 3 CMLR 240.
- 4 Joined Cases C-46/93 and C-48/93. Judgement delivered on March 5th, 1996.
- 5 Adoui & Cournaille -v- Belgium Joined Cases 115-116/ 81 (1982) ECR 1665, (1982) 3 CMLR 631.
- 6 R. -v- Secretary of State for Home Affairs, ex parte Santillo C 131/79 (1980) ECR 1585, (1980) 2 CMLR 308.
- 7 Pecastaing -v- Belgium C 98/79 (1980) ECR 691, (1980) 3 CMLR 685.

# Family Law Act 1995

Reviewed by Inge Clissman S.C. and Nuala E. Jackson, Barrister.

The Family Law Act 1995 (the 1995 Act) which will commence operation on the 1st of August 1996 represents a very significant change in Irish Family Law. It introduces new ancillary orders which may be granted following a judicial separation as well as providing for new circumstances in which relief will be available. It also introduces entirely new reliefs such as a Declaration of Marital Status. However, areas of uncertainty may also be identified; to what extent are the new additional ancillary remedies to be available where a decree of judicial separation has been granted before the 1995 Act becomes operational and how may these new remedies be sought where proceedings are already in being although not yet determined?

The new Act is deserving of considerable study and will no doubt require to be re-assessed when the final shape of a forthcoming Divorce Act is known. It is not possible in an article of this size to give a definitive and exhaustive analysis of the new Act and the aim of the present paper is simply to note the most significant changes which will be introduced following its commencement next month.

The Act will be considered here in terms of its effects to the following areas of family law:

- 1 Judicial Separation;
- 2 Relief after Divorce or Separation outside the State;

- 3 Declarations of Marital Status;
- 4 Property Reliefs pursuant to Section 36 of the Act;
- 5 Extension of jurisdiction in the Circuit Court;
- 6 Amendments to the Family Law (Maintenance of Spouses and Children Act), 1976;
- 7 Amendments to the Family Law Protection Act, 1976, and
- 8 New limitation periods in Family law actions.

## I. JUDICIAL SEPARATION:

The grounds upon which a judicial separation may be granted continue to be the six grounds as set out in Section 2 of the 1989 Act and the Primary Application for Judicial Separation will continue to be made pursuant to the 1989 Act. However, the 1995 Act substantially amends the law in its application to ancillary orders following the granting of a Decree of Judicial Separation and repeals Part 2 of the 1989 Act almost in full. The main amendments in the area of ancillary orders may be outlined as follows:

### I.1 ATTACHMENT OF EARNINGS.

Reference should be made to the changed attachment of earnings procedure

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contained in Section 8(6) of the 1995 Act which would appear to place the onus of proof firmly upon the maintenance debtor to convince the Court that such an order ought not to be made. The existing requirements set down in the Family Law (Maintenance of Spouses and Children) Act 1976, which require either that the maintenance debtor be in default or that he/she would consent before such an order would be made, now appears to have been changed. Section 8(6) indicates that such order shall be made but in advance of so doing, an opportunity is to be given to the maintenance debtor to make representations as to his credit worthiness.

## **1.2 PROPERTY ADJUSTMENT ORDERS.**

Under the new Statute these orders can now be made more than once. This represents a very significant change from the position under Section 15 of the 1989 Act under which multiple applications were only possible in the case of non disclosure by the Respondent spouse being shown. Certain restrictions however, upon the entitlement to claim this relief, apply and if the applicant spouse has re-married, no such property adjustment order will be made in favour of that spouse. Also, pursuant to Section 9(7), no such order may be made in respect of a family home in which the Respondent spouse resides with a new spouse following re-marriage.

## **1.3 RIGHT TO RESIDE IN THE FAMILY HOME.**

The granting of an exclusive right to reside in a family home pursuant to Section 16 (a) of the 1989 Act is well established. The relief remains available under Section 10 (i)(a) of the 1995 Act, as does the power of the Court to direct the sale of the family home. However, the 1995 Act has added a provision which sets out the matters to which a Court should have regard in deciding whether to grant these orders. Generally, Section 10(2) of the new Act says that the Court must have regard to the welfare of the spouses and any dependent member of the family but goes on to particularise two specific items which must be taken into account: first, following a grant of Judicial Separation, that it will not be

possible for the spouses to continue residing together and secondly, that proper and secure accommodation should, where practicable, be provided for the financially weaker spouse. This seems to introduce a slight bias in favour of leaving the financially weaker spouse in the family home in the event that a sale thereof is not financially viable.

## **1.4 NEW RELIEFS FOLLOWING JUDICIAL SEPARATION.**

The 1995 Act introduces three new ancillary reliefs which may be sought following the granting of a Judicial Separation. It should be remembered that many of the ancillary reliefs available following a judicial separation will now also be available following a divorce or separation outside the State. The new ancillary reliefs are financial compensation orders (Section 11), pension adjustment orders (Section 12) and preservation of pension entitlements (Section 13).

### **1.4.1 FINANCIAL COMPENSATION ORDERS**

Section 11 allows a Court to give the applicant spouse the benefit of life assurance in order to compensate that spouse for either the loss of an opportunity or possibility of acquiring a benefit which would have been obtainable had there not been a decree of judicial separation. The statute goes on to give an example of such an opportunity or possibility of acquiring a benefit by referring to a benefit under a pension scheme and indicates that such compensation orders are to provide financial security for the spouse in question. In deciding whether or not to make a financial compensation order it is provided that the Court should consider whether adequate and reasonable financial provision can be made pursuant to the other sections of the Act granting ancillary relief. An order under Section 11 shall cease to have an effect upon the re-marriage or death of the applicant and no relief under the section is to be given to a spouse who has re-married.

### **1.4.2 PENSION ADJUSTMENT ORDERS**

Section 12 introduces pension adjustment orders. The most important

point to note is that the Court is only entitled to make an order in relation to retirement benefit which has accrued at the date of the decree of judicial separation; the application for this relief might be made at a later time but this limitation as to the extent of the benefit which may be adjusted remains unchanged. Thus, the significance of Section 12 relief will be dependent upon how long the respondent spouse has been participating in the pension scheme as of the date of the decree. The Section also provides for pension adjustment in respect of contingent benefits, which is how death in service benefits are described in the 1995 Act.

Once a pension adjustment order has been made, the options available to the spouse to whom the transfer has been made are set out in Section 12(5) of the 1995 Act. These include, either the provision of a benefit under the same pension scheme that is of the same actuarial value as the transfer amount or, provided payment of the designated benefit concerned has not commenced, the spouse to whom the transfer has been made may request the trustees of the scheme to make a payment to either such other occupational pension scheme the Trustees of which are agreeable to accepting the payment or, alternatively, in discharge of any payment falling to be made by the trustees under any such other approved arrangement.

Clearly, the provisions of Section 12 are of enormous significance to the trustees of occupational pension schemes and the statute recognises this significance by giving the trustees the option to make representations to the Court prior to any relief being granted. The sting in the tail however must be found in Section 12(22)(a) which indicates that any costs incurred by the trustees of a scheme in making such representations shall be borne by the parties. Thus, the financial advantage in seeking a pension adjustment order may be greatly curtailed by the costs involved in pursuing such relief as the provisions of Section 12 make it clear that in many instances actuarial evidence may be required, the evidence of a pension advisor may also be required by the Court and additionally the trustees of the pension scheme are entitled to intervene with all of these expenses falling to be paid from the pooled family assets. As is similar to the position under Section 11 of the

Act the Court is required under Section 12(3) to have regard to the question of whether adequate and reasonable financial provision may be made without availing of pension adjustment relief.

### **1.4.3 PRESERVATION OF PENSION ENTITLEMENTS**

Section 13 indicates that a Court may make an order directing the trustees of a pension scheme to continue to regard the Applicant as entitled to a spousal pension pursuant to the scheme, notwithstanding that the scheme itself has a provision requiring the continued residence together of the spouses in order for the spousal benefit to be payable. The practical impact of this provision, as with the similar provision in the case of separation agreements in Section 8 (b) of the Family Law (Maintenance of Spouses and Children) Act 1976, as amended, must be viewed in light of the fact that most private pension schemes nowadays are discretionary and being deemed a 'spouse' will not guarantee a benefit. However, the provisions of Section 13 remain important to certain state schemes and older private schemes. In such cases, the actuarial impact of the continued entitlements remains to be seen.

## **2. RELIEF FOLLOWING FOREIGN DIVORCE OR SEPARATION:**

Part III of the 1995 Act introduces certain ancillary reliefs which may be sought where the Respondent spouse has obtained a divorce or legal separation in a foreign country. With certain limited exceptions, all of the ancillary reliefs available following a decree of judicial separation will also be available where there has been a divorce or separation outside the State. One of the interesting requirements in respect of this relief however, is the requirement that ex-parte leave must be sought before issuing the application and the Court is directed by Section 23(3)(a) that it should not grant such leave unless it considers that there are substantial grounds for so doing.

A further relief available in these circumstances is available under Section 25 which allows for application to be made not more than 12 months after representation is first granted, to have provision made for the surviving "ex-

spouse" out of the estate of the deceased. Such relief is not to be granted if the applicant spouse has re-married and, in determining the extent of the relief to be granted, the Court must have regard to such provisions as have been made during the lifetime of the deceased spouse, any lump sum maintenance payment or property adjustment order which has been made in favour of the Applicant or any divide or bequest made by the deceased to the Applicant. In any event Section 25(4) indicates that the amount which may be ordered to be paid from the estate is not to exceed the amount to which the Applicant would have been entitled under the Succession Act 1965 if the marriage had not been dissolved. Any application being made under Section 25 requires notice to be given to the surviving spouse of the decease if such person exists.

## **3. DECLARATIONS OF MARITAL STATUS:**

The provisions of Section 29 which introduces relief by way of declaration of marital status is a useful relief. However, it does not envisage a declaration that a marriage was invalid and in fact the provision states that if any question relating to the void or avoidable nature of a marriage arises in the course of an application for declaration of marital status, the Court shall proceed to determine the matter as an application for a decree of nullity.

## **4. DETERMINATION OF PROPERTY DISPUTES BETWEEN SPOUSES:**

Section 36 of the Act repeals and replaces Section 12 of the Married Women's Status Act, 1957. Section 36 is a broad provision giving the court jurisdiction to determine "any question" arising in relation to the title or possession of any property as between spouses. Section 36(2) indicates that the Court is entitled to make such order in respect of the disputed property as it considers just, including but not exclusively, an order for sale or partition of the property in question.

The Section permits a Court to grant compensation to an applicant spouse where property to which the applicant or a dependent child was beneficially

entitled has been in the possession or control of the respondent spouse and, has ceased to be in such possession or control or, where the present state of possession or control is unknown to the Applicant spouse. Clearly this is an attempt to protect against the transfer of property by a spouse to third parties with a view to defeating the interest of the other spouse or a dependant child in that property and it effectively gives the Court a remedy in order to redress an injustice so caused. The definition of "spouse" under this section is extremely wide (Section 36(8)).

## **5. EXTENDED JURISDICTION OF THE CIRCUIT COURT:**

The jurisdiction of the Circuit Court has been very significantly extended by the 1995 Act as all of the reliefs and remedies discussed here may be sought in that jurisdiction. In addition, nullity decrees which may now be heard by the Circuit Family Court. The 1995 Act also seeks to resolve the matter as to whether or not the Circuit Family Court has jurisdiction in judicial separation matters under the 1989 Act where the rateable valuation limit specified in the Courts (Supplemental Provisions) Act 1961 is exceeded. The new Act indicates that while the Circuit Court does have jurisdiction, if application is made to the Circuit Court by an person having an interest in the proceedings, the proceedings must be transferred to the High Court without prejudice to the validity of any actions undertaken by virtue of orders of the Circuit Court prior to such transfer.

## **5. AMENDMENTS TO THE FAMILY LAW (MAINTENANCE OF SPOUSES AND CHILDREN) ACT, 1976 -**

### **5.1 LUMP SUM ORDERS AND DISTRICT COURT JURISDICTION:**

Lump sum orders may now be made under Section 42 of the 1995 Act otherwise than ancillary to another

decree. The financial limit of such order in the Circuit Court is unlimited and in the case of the District Court the lump sum payment is not to exceed £5,000.

## **5.2 "DEPENDENT CHILD"**

The provision of the Act simply alters the definition of dependent child to 23 years rather than 21 years. It would appear that where there are orders presently in place these will continue in relation to dependent children until the children attain the age of 23. Queries must arise from this retrospection particularly as consent orders may have been consented to on the basis of a 21 cut off point and indeed Court orders have also been made on the basis that the order would cease at 21.

## **5.3 MAKING SEPARATION AGREEMENTS A RULE OF COURT**

Section 8 of the 1976 Act allows pension entitlements requiring the continued residence together of the spouses to be retained notwithstanding that a separation agreement has been entered into. In order to preserve such a pension entitlement a court order pursuant to Section 8 of the 1976 Act is required. Similar considerations arise in relation to this relief as were discussed above in respect of the preservation of pension entitlements following a decree of judicial separation (Section 13).

## **6. AMENDMENTS TO THE FAMILY LAW PROTECTION ACT, 1976 -**

### **6.1 INCREASED PROTECTION FOR THE BONA FIDE PURCHASER:**

Of very significant importance is the new statutory limitation period which has been introduced in respect of proceedings for a declaration of voidness under section 3 of the Family Home Protection Act of 1976. A six-year limitation period has been introduced upon seeking such a declaration, subject to the exception that such limitation is not to apply where the spouse for whose protection the 1976 Act operates has been in actual

occupation of the family home immediately before the expiration of the six-year period. Clearly this provision introduces a degree of finality to situations where there has been a conveyance without the required consent and can only serve to justifiably protect third parties where a sufficient period has elapsed such that the superior entitlement to protection of the non-owning spouse has in fact lapsed.

The Act also indicates that where proceedings are instituted in order to have a conveyance declared void pursuant to Section 3 of the 1976 Act, the Plaintiff shall cause a *lis pendens* to be entered as soon as possible in accordance with the provisions of the Judgments (Ireland) Act 1844. Again this serves to protect third parties who may be involved in acquiring an interest in the property concerned.

## **7. NEW LIMITATION PERIODS IN FAMILY LAW:**

- Many of the ancillary reliefs must be sought within the lifetime of the respondent spouse;
- Pension adjustment orders in relation to contingent benefits must be sought not later than one year after the granting of the decree of judicial separation;
- Applications for spousal provision out of the estate of a deceased spouse following a foreign divorce or separation must be made not more than 12 months after representation to the estate involved was granted;
- Applications for the determination of property disputes under Section 36 of the Act where there has been a domestic decree of nullity or a foreign decree of nullity or divorce must be within three years from the date of the decree concerned and, in the case of void marriages not so declared, within three years from the date the parties ceased ordinarily residing together;
- A six year limitation period for declaring a conveyance void under section 3 of the Family Home Protection Act, 1976, subject to certain exceptions.

## **Law Library By The Lee**

The Bar Council has agreed to lease a premises directly opposite the Court House in Cork for use by members of the Library based in Cork. The premises will be used to provide the Cork bar with a book library and with access to the data bases in the Law Library in Dublin through use of modern information technology. In addition, telephone, fax, and photocopying facilities will be available to members in the premises. An official opening of the premises will be held next October.

The premises is 1,069 sq feet in size and will be leased by the Bar Council under a 35 year lease. The Bar Council will meet the start up costs of providing the facility and the Cork bar will then meet the running costs thereafter. The facility will be serviced on a full time basis and the Council are currently receiving applications in relation to this position.

## **Seamus Sorohan Cup Challenge**

The annual Staff / Members soccer match for the Seamus Sorohan Cup will kick off at 6.30 on Friday, 26th July, 6.30 in the Grangegorman Sportsground. All are welcome to attend the match and the presentation of the cup to the winners in the Sky bar afterwards.

## **Have You Joined The Law Library Credit Union Yet?**

The Library's Credit Union is still in a trial phase at the end of which a decision will be made whether to register with the League of Credit Unions. The credit union movement has proven its success in practically every community and large business in the country. It is a unique way for a community to pool its resources and provide low interest loans to its members. Join the Law Library's Credit Union today for as little as £1.00 and help make it a success. Application forms available from the Bar Council office or the Accounts office. All credit union transactions are completely confidential and credit union funds are not subject to DIRT.

## Discovery in Ireland

Eamonn Cahill, B.L.

Intended as a guide for practitioners, Eamonn Cahill's book on discovery is unique in being the first work about Irish Superior Court procedure of any kind. The book focuses on the procedural requirements of discovery while giving particular emphasis to the development of discovery in Ireland since *Murphy v. Dublin Corporation*.

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# The Distillery Site Development

The barristers profession is synonymous with the Law Library in the Four Courts. In recent years however pressure of space resulting from the increasing numbers entering the profession has meant that alternative space had to be found. The Bar Council met the challenge by building the Church Street development of 90 rooms for barristers and has now embarked on an even more ambitious development on the Distillery Site development which will contain rooms for over 175 barristers, consulting rooms, a first class legal research centre and Ireland's first state of the art arbitration centre. The purpose of the development is to meet the current challenges in a manner which will maintain the profession as a unified, autonomous body of independent practitioners who benefit from the collegiality and pooled resources of membership of a central Law Library. Michael Durack, S.C., Chairman of the Premises Committee, outlines the essential features of the latest plans and explains their significance for the future of the profession.

The response from the Bar to the proposed development of new facilities on the Distillery Site at Church Street, Dublin 7 has been excellent. Applications for tenancies opened on 19 June 1996. By lunchtime, more than half the space had been reserved. At the time of writing, it is about three quarters full with some type "A" and type "B" rooms remaining. With this start, it is expected to be fully booked long before the target completion date of September 1997.

The project and the building itself is large. With 163,000 sq.ft. on a site of just over an acre, it is nearly 4 times the size of the existing facility on Church Street. Pre-tender estimates indicate a construction cost of £13m. When fit-out, site acquisition, professional fees and finance are added, the total will be in the region of £18m.

The site itself posed interesting design problems. The stone warehouses date from the early 1800's and are listed for conservation/restoration. As their original purpose was the storage of grain and whiskey, the ceiling height is low and the windows are small, so they let in little light and are badly spaced for modern uses.

Frank Buckley of Brian O'Halloran & Associates won the Concept Competition in January 1996. Their solution was to create three atria along the centre of the site and use them to provide natural light to the rooms facing them. These

courtyards will also provide a private space where members can meet.

The former Teidt-owned premises, on the corner of May Lane, will be demolished and, together with the open yard at the rear, will provide the space for a totally modern structure. This will contain the Entrance and a public area of about the size of the ground floor of the Four Courts library. Consultation Rooms and retail units - including a Restaurant and a Bank, will be situated just off this entrance.

The new Legal Research Centre will be on the first floor of the new block and will measure a planned 10,000 sq.ft. - which is over twice the size of the ground floor of the Law Library. Seating will be unassigned and it will be open to all members. To enable members to get value from the new computer systems which will be installed in the Legal Research Centre

*With this development we are catering for our own immediate needs and also laying a secure foundation for the profession to continue as an independent body into the future.*

to access the Law Library's databases, they need to be trained in their use. A major training initiative will take place next year so that all members will be familiar with this resource and be in a position to use it to the best advantage.

There is a significant amount of space devoted to commercial and retail activities. This is partly due to planning requirements but will also provide for many of our own needs. Needless to say the Bar Council has no intention of becoming directly involved in retailing activities. Each of the units will be leased to people experienced in their field and who will benefit by the associated tax reliefs. There have been several inquiries already and negotiations will continue over the coming months. It is expected that a substantial unit on May Lane will be a public restaurant/cafe. Other suggestions include possible use of space as a creche and also a gym.

Raising finance for such a project requires careful planning and consideration. At the end of May 1996, Chapman Flood, Financial Advisers to the project, organised a presentation for more than a dozen financial institutions. This resulted in a number of funding proposals which are now the subject of further negotiation.

It is likely that a financial institution will own the building until the Bar Council exercises an option to purchase it in 13 - 15 years time. (This is to take account of



the tax status of the site.) In the meantime, a portion of the rent collected will pay the interest and the balance will accrue in a sinking fund which will go towards the ultimate purchase price.

Within 15 years time, the Bar will own the existing Church Street Building and three years later, the Distillery Site development will follow. With this development we are catering for our own immediate needs and also laying a secure foundation for the profession to continue as an independent body into the future.

As the law stands, the special capital allowances relate only to expenditure before 31 July 1997. While the Corporation and others are lobbying to have this changed, no extension can be assumed. The Bar Council's aim is that the development be available for occupation for the Michaelmas Term in 1997. This requires a strict timetable.

#### Projected Timetable for Distillery Site development:

Intention to grant permission received	8 July 1996
Expiry of objection period	8 August 1996
Commence building works	15 August 1996
Complete building programme	Sept 1997

In the meantime, discussions with contractors continue and the tendering process is under way. 1200 tons of steel have been reserved for delivery in August. The telecommunications specification and computer infrastructure is at an advanced stage of development. All buildings will operate on the same network for phones and data.

The purpose built, state of the art, Arbitration Centre is intended to be a stand alone venture. It will have four large Hearing Rooms capable of dealing with both domestic and larger international matters. Some 20 Consultation rooms will also be available for hourly/daily rent. There will be a Hearing Room fully equipped for teleconferencing and the taking of evidence on video link. This will obviate the need for witnesses to travel from abroad and reduce the costs of litigation.

This Arbitration Centre, like all the other facilities to be available in the Distillery Site development will continue to position the Bar as a provider of first class legal services to litigants of which the Bar and the public alike can be justifiably proud.

Michael Durack \*

\* Honorary Treasurer, Bar Council  
Chairman, Premises Committee.

## BOOK REVIEW

### *Corporate Insolvency & Rescue by Irene Lynch, Jane Marshall & Rory O'Ferrall (Butterworths 1996)*

The text of this book is the result of a very harmonious collaboration between the academic (Lynch) and the practitioners (Marshall, a Solicitor and O'Ferrall, an Accountant). Despite the number of authors, the text is very clear, readable and logically laid out.

Chapter 1 opens directly - even abruptly - on the subject of winding up by the Court. No space is wasted on the usual preliminary discussion of Solomon's Case and the nature and status of corporations. Solomon's Case is dealt with in its proper place - in Chapter 8 in the context of the circumstances in which the "privilege" of limited liability is withdrawn from those in control of the company.

Each of the twelve chapters represents not only the most up-to-date commentary on the topic covered but also an incisive and stimulating treatment of that topic.

The problems created by the "Phoenix syndrome" are highlighted. As the authors say, the "Phoenix syndrome" is a classic example of commercial abuse.

Unscrupulous directors continue to incorporate companies with little or no capital which, in their short lives, will continue to live for as long as they can from credit supplied by creditors. Directors will organise the affairs of these companies in such a way that, when subsequently they go into liquidation, there will be no assets available to fund any action by a liquidator against them for fraudulent or reckless trading. The directors simply cause a new company to be set up in its place and the pattern starts all over again. There is no State agency such as an official receiver to take action in such circumstances. This is a very serious deficiency in the State's armoury. The fact that such activities go unpunished does nothing to engender confidence in those doing business with Irish companies abroad and the long term effect on foreign trade should not be underestimated.

The authors draw particular attention to the uncertainty which the Companies (Amendment) Act, 1990 creates for those proposing to invest in or to provide finance for Irish business. These uncertainties have resulted in lawyers being unable to advise banks and financial institutions that the securities sought by them as a condition of providing finance will actually protect them in the event of company insolvency. The irony is that the operation of the Act may actually subvert its original intention to foster and

preserve industry and enterprise. If such finance is not available, growth in the industrial and commercial sector will suffer.

Also, at present under the 1990 Act, a company with capital of £2, very significant debts, little or no workforce beyond its directors, with no more than a prospect of exploiting its first potentially profitable contract, can easily come within the criteria for protection even though the costs of an examination are likely to be out of all proportion to the benefit which creditors might expect under a scheme of arrangement. One can readily appreciate why it is necessary to provide some form of protection for companies with large capital investment and significant workforces, and there is a clear need for some form of minimum criteria (either by reference to capital, workforce or otherwise) which a company should have to satisfy before qualifying for protection under the Act.

Inevitably, there are a number of omissions in the book. It is surprising to find no mention of the Supreme Court decision in *Comhlucht Páipeár Ríomhaireachta Teo v. Udarás Na Gaeltachta* [1990] 1 IR 320. This decision has very serious implications for any liquidator contemplating taking action against potential defendants (including the former directors and controllers of the company). If he fails in such proceedings, the costs of the successful Defendant will take priority even over the liquidator's own legal costs and remuneration in the liquidation.

Paragraphs 1.63 to 1.69 (on the circumstances where a Court will terminate a voluntary liquidation and direct a Court winding up in its place) would also have benefited from reference to O'Donnell "Opposing a Creditors' Voluntary Liquidation - Learning to Swallow the Bitter Pill" in 1995 2 C.L.P. 79 and the cases cited there.

It is also a pity that the book was published too early to deal with the decision of Keane J. in *Truck & Machinery Sales Limited v. Marubeni Komatsu Limited* (High Court, Unreported, 23 February, 1996) which must (since its affirmation in the Supreme Court) represent the definitive treatment of the circumstances in which a winding up petition can be opposed by a company. However, these quibbles aside, this text is essential reading for anyone involved in practice in this area of the law. Any reader of this book could not but be impressed by the wealth of Irish jurisprudence which the authors have unearthed in this relatively narrow area of the law.

Denis McDonald, Barrister

# Book Review

## Agriculture And The Law

Edited by Edward Walsh

Published by Round Hall, Sweet and Maxwell, 1996

As its preface indicates, this book is not aimed primarily at lawyers but rather sets out to inform those involved in farming and the agriculture industry generally of the principal aspects of law which may impact on them in their daily lives.

The book consists of a series of self contained articles by a number of our colleagues giving a concise outline of the legal principles and relevant legislation on areas of agricultural interest. Excessive use of precedent and reference to textbooks has been avoided. All material is presented in a fashion so as to be readily understood by the layman and for the most part the book

has been edited so as to avoid any overlapping in the areas considered by the various authors.

Those expecting a detailed consideration of boundary disputes and turbary rights will be disappointed. This book is clearly more focused on the legal aspects of the agricultural industry rather than the equity suit. While it does include areas which traditionally excited rural interest such as succession and cattle trespass, the preponderance of the book is devoted to areas such as planning and environmental law, taxation and even includes banking and employment law.

Recent developments in the law which have affected those in rural areas such as the Occupiers Liability Act, 1995, the Rural Environmental Protection Scheme, and the regulation of waste disposal are all included.

Further, there is a succinct and very useful explanation of the operation of the Milk Quota system.

Surprisingly there is no chapter devoted to the impact that developments in the family law area have had on property rights but this was probably considered outside the scope of this largely business orientated work.

As Irish agriculture becomes increasingly modernised and also subject to regulation from legislators in this country and in Brussels, Irish farmers have had to become familiar with diverse and complicated legislation from a variety of sources. Perhaps the real benefit of this work is that for the first time it presents an informative summary of these areas of law in clear and understandable language.

*Thomas Rice, Barrister.*

## Practice Direction Personal Injury Actions In Which Liability Is Admitted

- 1 With a view to reducing the number of cases awaiting trial and the length of trials and to reduce costs it is proposed to introduce, on a trial basis, a scheme for the holding of preliminary hearings by way of Case Conference by a Judge of personal injuries actions in which liability is not in issue. When such actions have been placed in the waiting list the plaintiff may, by letter to the Chief Registrar, request a Case Conference. These cases will then be listed for a Case Conference for the purpose of exploring the possibility of early resolution of such cases either by way of settlement or if this is not possible, the reduction of the issues to be tried with the ultimate objective of listing such cases for an early trial. At the Conference, the judge will consider any objections to its holding that the defendant may wish to advance.
- 2 Case Conferences will be held in chambers and will be attended by the parties' solicitors and, if briefed, Counsel responsible for the conduct of the case. Clients should be readily available to furnish instructions. It is proposed initially to list cases on Mondays at 2 p.m. during term.
- 3 One week prior to the Case Conference, the parties will be required to complete a check list in the form appended to this Practice Direction, file it in the Central Office and serve it on the other parties. Copies of the check list can be obtained from the Central Office.
- 4 At the Conference, enquiries may be made, inter alia, in relation to the following matters:
  - (a) whether there has been compliance with any Rules made under Section 45 of the Courts and Court Officers Act, 1995.
  - (b) Whether the parties have exchanged medical reports or are prepared to do so.
  - (c) Whether the parties have exchanged witness statements or are prepared to do so.
  - (d) whether the parties have exchanged expert witnesses' reports or are prepared to do so.

### The parties may be required:

- (i) to state in concise form the nature of the case or defence for the purpose of identifying the issues remaining in the case
  - (ii) to furnish an exact statement of the special damages now claimed or admitted
  - (iii) to identify the areas in which they are not in agreement.
- 5 At the Conference, the Judge will have power to make such Orders by consent for the speedy resolution of the remaining issues in the case, including the power to:
    - (a) Order Discovery of Documents
    - (b) Direct Replies to Particulars
    - (c) Direct Delivery of Interrogatories
    - (d) Direct Delivery of Replies to Interrogatories
    - (e) Extending the time provided for in the Rules of the Superior Courts for taking any interlocutory step in the action
    - (f) To enter judgment in an action or to strike it out.
    - (g) To deal with all matters relating to the costs of holding the Conference if the action is settled. If the action is not settled the costs will be reserved for the trial judge.
  - 6 At the Conference the judge, may, with the parties consent, assist in effecting a settlement of the action. In this event, and if the case is not settled, he/she will not preside at the trial.
  - 7 The Conference Judge may direct that appropriate steps be taken to refer specific issues for hearing in Court
  - 8 After the Conference the case will be listed for hearing at an early date suitable to the parties.

Dated 21st day of June, 1996.

Signed D. Costello

President of the High Court.

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