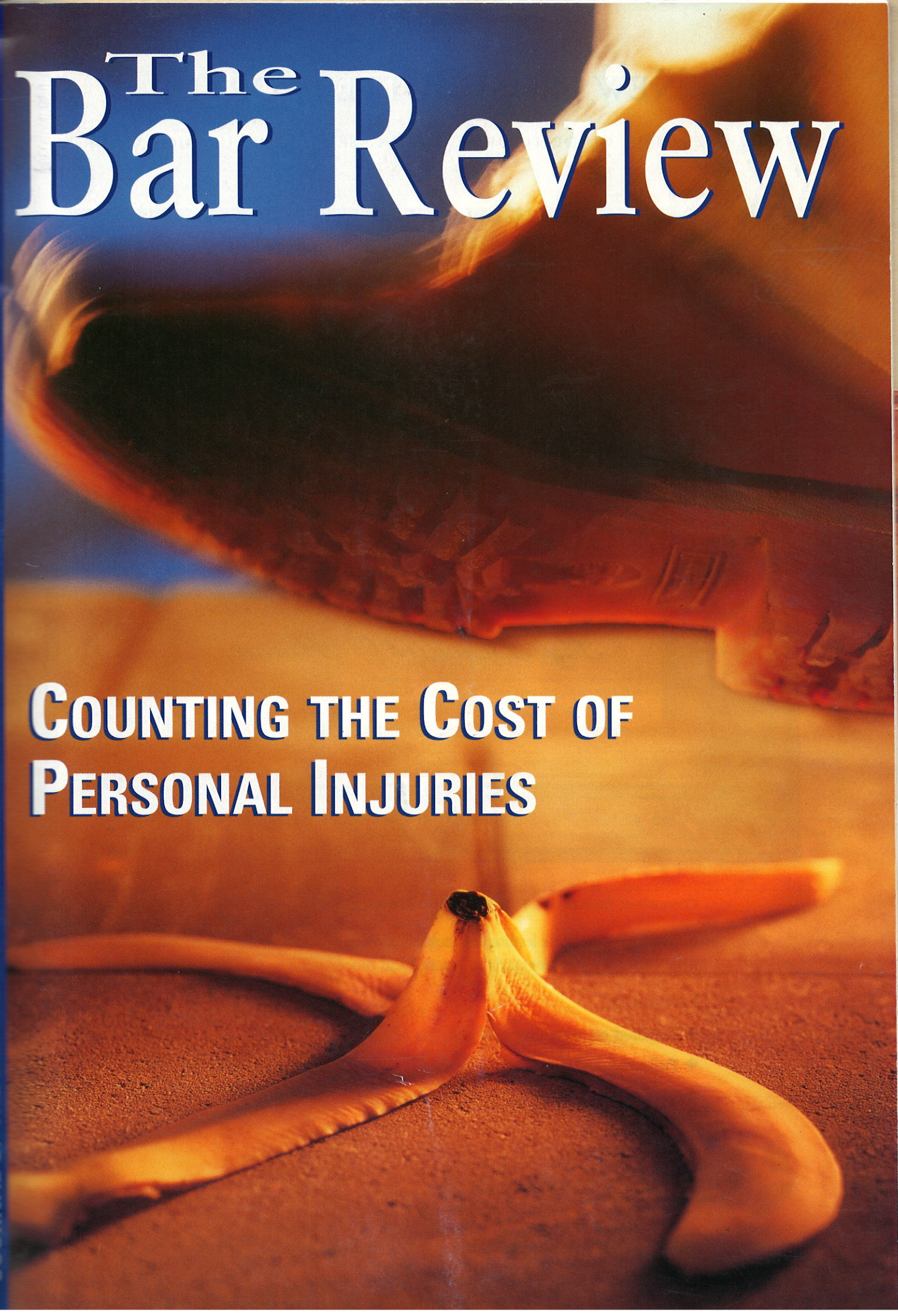
JOURNAL OF THE BAR OF IRELAND VOLUME 2, ISSUE 2, NOVEMBER 1996

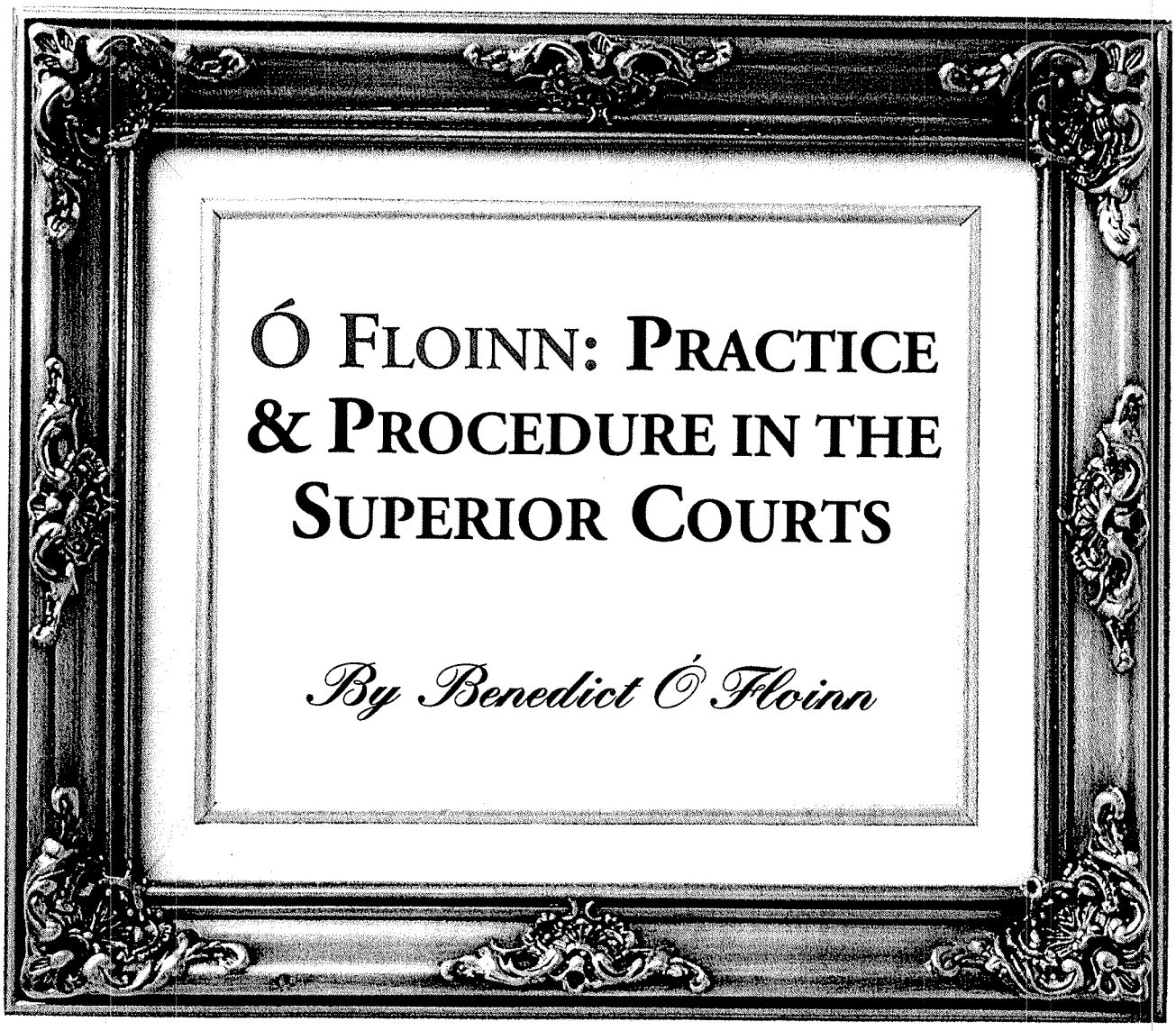
The Bar Review



Counting the Cost of Personal Injuries

NEW FROM BUTTERWORTHS

THE DEFINITIVE GUIDE TO BRINGING A CASE TO THE SUPERIOR COURTS



CONSULTANT EDITOR: THE HON SEÁN GANNON (FORMER JUDGE OF THE HIGH COURT)

Butterworths, Ireland's leading law publisher, offers you the most ***comprehensive***, ***practical*** and ***definitive*** guide to practice and procedure in the Superior Courts

FEATURES:

- **Detailed commentary and analysis of each Rule**
- **Fully indexed and cross-referenced**
- **The Appendices to the Rules are included**

Butterworths

26 Upper Ormond Quay Dublin 7 Ireland
Telephone 01-873 1555 Facsimile 01-873 1876

Published October 1996
Hardback
ISBN 1 85475 220 0
Price £95.00

The Bar Review

VOLUME 2. ISSUE 2. NOVEMBER 1996 ISSN 1393-3426

The Bar Review is published nine times during each court year.

Subscription (October 96 to July 97, 9 issues)
£65.34 (21% VAT: £11.44) airmail post inclusive.
Editorial and Subscription correspondence to
The Bar Review
Bar Council Office
Law Library Building
Church Street
Dublin 7

Telephone + 01 804 5014
Fax + 01 804 5150

The Bar Review is a refereed journal.
Contributions published in this journal are not intended to, and do not represent, legal advice on the subject matter contained herein. This publication should not be used as a substitute for legal advice.

Contents

Opinion

Counting the Cost of Personal Injuries

Prevention may well be better than cure but the reality is that accidents, like many other social maladies, will always be with us. Suffering comes with a price tag both in terms of loss for the victim and reasonable compensation on the part of the defendants.

It has always been an old chestnut with insurance industry spokespersons that our so-called 'compo-culture' is sending our insurance premia soaring skywards. While it is hardly surprising that he who pays the piper will occasionally quibble with the bill, it is now safe to say that one particular tune has been silenced for good and that is the one which called for the capping of damages in personal injury actions and would blame high costs in the insurance industry on fees charged by barristers in personal injury actions.

The Deloitte Touche Report on The Economic Evaluation of Insurance Costs, which was presented to the Department of Enterprise and Employment in October of this year, concludes that 'there is no valid reason for introducing a capping regime for general damages in Ireland'. Of particular interest is the fact that this conclusion was reached on economic grounds alone and did not have to have regard to the strong constitutional and natural justice arguments which were also contained in the Bar Council's submission to Deloitte Touche prior to finalisation of the report.

An analysis of the cases set out in Table 2 of the report (which were supplied to Deloitte and Touche by disgruntled premia payers and insurance companies) show that the brief fees marked by a barrister in the relevant cases ranged between 1 % and 5 % of the Plaintiff's damages, and on average represented 1.6 % of those damages. This is not by any standards an excessive payment for the persons with whom the ultimate responsibility lies in each case.

Despite this, it is impossible to avoid the Deloitte and Touche conclusion that 'the level of legal costs in smaller settlements is clearly excessive'. However, the general heading of Legal Costs in the report reveals upon analysis that the reason for this excessiveness cannot be traced to the Bar.

The Bar Council believes that insurance premia are excessive when compared with those in the UK. However, they can be reduced by a number of practical measures aimed at accident prevention, increasing the accuracy of witness evidence and reducing the incidence of fraudulent claims:

Uninsured drivers cost us all money and at the moment the penalties for this offence are not a sufficient deterrent. Legislation allowing the Gardai to impound uninsured vehicles until the driver gets his affairs in order with a provision for the vehicle's confiscation for a second offence should go a long way towards addressing this problem.

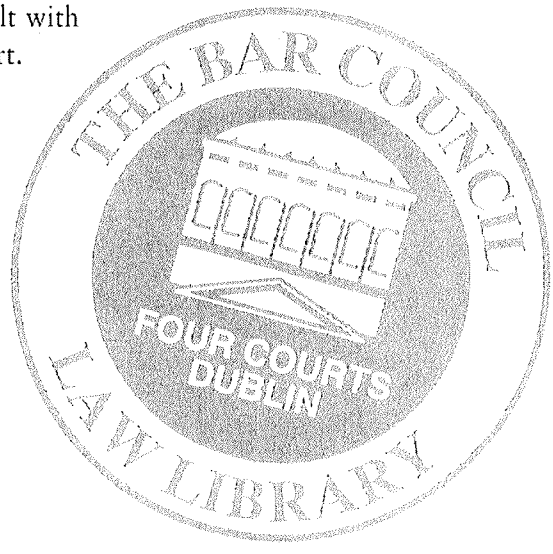
Compulsory employers liability insurance should be introduced and an individual company's premium should be based on a safety/risk assessment of the workplace, thereby encouraging optimum safety standards.

Employers should take written accounts from witnesses at the time an accident occurs and not only when the case is due to come to court.

A specific offence of 'bringing or maintaining a fraudulent insurance claim' carrying severe penalties would discourage groundless claims.

A working group has been established to consider the recommendation that certain claims be dealt with voluntarily by a tribunal rather than a court.

Minister Rabbitte could have courted popularity, interfered with the justice system and capped damages. Instead he had the subject matter examined in depth and independently by Deloitte and Touche. Their findings and recommendations have particular weight stemming from their independence and should be very valuable in any future proposals concerning personal injuries and insurance costs.



Personal Liability of Directors Under Section 204 of the Companies Act, 1990

In Mantruck Services Limited (In liquidation): Mehigan v. Duignan[1] ("Mantruck"), Mr. Justice Shanley has elucidated with great clarity many of the complex issues to which Section 204 of the Companies Act, 1990 ("Section 204"), which gives the High Court power to impose personal liability on directors who fail to ensure that the Company keeps proper books of account, gives rise. In so doing, and in imposing personal liability on a director for certain liabilities of the company under Section 204, Shanley J. has breathed new life into a hitherto ignored provision which should, in future, greatly assist liquidators in their dealings with directors who have a vested interest in ensuring that there are insufficient books and records available to the liquidator to aid him in his tasks.

Mark Sanfey, Barrister, examines the case and its potential consequences for liquidators, directors and lawyers advising in this area.

Background

To illustrate the type of difficulties with which liquidators have frequently been faced in the past, and which Section 204, as the decision in Mantruck illustrates, may be used very effectively to address, one may consider the following "nightmare scenario", which is all too familiar to insolvency practitioners.

A liquidator is appointed by order of the High Court to wind up a company. The liquidator immediately takes possession of the books and records of the company, and proceeds to investigate the position of the company in relation to assets and liabilities. He finds that the company premises are held on a short-term lease in which there is no equity for the liquidator; the plant and machinery and vehicles of the company were leased and have been returned to the finance company; the stock is either unsaleable or the subject of innumerable retention of title claims; and all he is left with is a rump of virtually uncollectable debtors.

To add insult to injury, he finds that the liabilities of the company to its bankers have been discharged, conveniently relieving the directors of their liabilities under personal guarantees.

The liquidator at this stage has already run up a lot of time establishing that this is, in fact, the situation. His investigations lead him to have grave suspicions as to the role of the directors in the conduct of the affairs of the company. He knows that he can ask the court for a Declaration under Section 150 of the 1990 Act to have the directors restricted from acting as directors for a period of five years from the date of liquidation. However, this will be of little comfort to the creditors of the company, whose wish is for the liquidator to realise assets which will satisfy their claims to some extent. The liquidator will, therefore, consider the range of legal options available to him to compel the directors to assist him further in his investigations.

A liquidator setting out to piece together sufficient information to take legal action against the directors will usually be hampered by the fact that directors who have been irresponsible in their conduct of the company's affairs are very unlikely to have been diligent and responsible in the manner in which they kept the books and records of the company. A liquidator who finds a dearth of assets in a company will rarely be able to find explanations for this state of affairs from the company's books, or be in a position to corroborate or disprove what he may suspect are spurious or improbable explanations from officers of the company. The reaction of many liquidators has been to seek an order under Section 236 of the Companies Act 1963 against the directors compelling them to transfer to the liquidator all books or records of the company which they may have. This may well be met with a simple denial that any such books or records exist. A liquidator may then seek to have the officers of the company examined before the court under Section 245 of the 1963 Act in the hope of compelling each of the examinees to supply a more complete explanation of the company's affairs, with a view to establishing the existence of further assets of the company or perhaps mounting an action against the examinee or other parties for fraudulent or reckless trading or fraudulent preference. Liquidators in the past have tended to direct their efforts towards establishing fraudulent conduct on the part of the directors. Prior to 1990, liquidators would attempt to gather evidence which would satisfy the very high onus of proof required by the courts to prove the fraudulent intent required before liability would be imposed under Sections 286[2] or Section 297[3] of the 1963 Act.

However, the classic problem faced by liquidators was that, having been able to realise very little money due to the activities of the directors, they often did not have the funds to mount legal action against the directors which would have the effect of elucidating the company's affairs or establishing the liability of the directors

under these Sections.

The liquidator would often attempt to address this problem in a number of ways. A major creditor - such as the Revenue Commissioners - which would be the main beneficiary of recovery of the company's assets by the liquidator, might be asked by the liquidator to fund an examination of the officers of the company or perhaps other legal action. Alternatively, each of the creditors was sometimes asked to contribute an amount - often a percentage of the amount owed to it - to a "fighting fund" which would enable the liquidator to pursue legal avenues.

Understandably, most creditors, once bitten, were twice shy. Such courses of action suggested by liquidators were usually regarded by creditors as "throwing good money after bad", and the liquidator, perhaps mindful that his own costs, fees and expenses were slowly but surely accounting for whatever meagre assets he had managed to realise, would reluctantly conclude that he did not have sufficient evidence to pursue matters any further.

The deficiencies of a system which gave directors a vested interest in ensuring that the company was left without assets and without sufficient books and records to help the liquidator establish what had happened to those assets were, for many years, a source of disquiet in the world of business. The frustration of creditors was exacerbated by the existence of what became known as "the phoenix syndrome"; where directors who had been responsible for the downfall of a company rose from the ashes, typically to set up virtually the same operation, often in the same premises with a slightly altered name, having "looked after" creditors of the liquidated company with which the directors wished to continue doing business.

Now, the clear message to be learned from Mantruck is that a failure to keep proper books and records, which deprives the liquidator of the basic information which he needs to investigate the affairs of the company, can now, under Section 204 of the 1990 Act, be dealt with in a very direct and readily provable way of making a director accountable for his responsibility in this regard.

The Facts

As the conclusions of Shanley J. are closely linked to his findings of fact, it is necessary to consider the facts of the matter in some detail.

Mantruck Services Limited ("the Company") was incorporated on the 11th August 1988. The directors were Mr. John Duignan ("the Respondent") and his wife Mrs. Mary Duignan. The main business of the Company was the supply of tail-lift units and refrigeration units for commercial vehicles.

The clear message to be learned from Mantruck is that a failure to keep proper books and records, which deprives the liquidator of the basic information which he needs to investigate the affairs of the company, can now, under Section 204 of the 1990 Act, be dealt with by a director accountable for his responsibility in this regard.

On July 2nd 1993, the Company's creditors resolved that the Company should be wound up, and a voluntary liquidator was appointed. On July 29th 1993, on the petition of a major creditor, the company was ordered to be wound up by the court and Mr. David Mehigan ("the Applicant") was appointed official liquidator.

On the day after his appointment, the official liquidator took possession from the voluntary liquidator of the books and records of the Company. Having examined these, he formed the view that there were "significant and extensive" omissions in the Company's records which resulted in substantial uncertainty as to the assets and liabilities of the Company and substantially impeded the orderly winding up of the Company.

On August 20th 1993, the High Court on the application of the official liquidator ordered the directors to hand up to the official liquidator "all books, records and documents and all of the stock and assets of the Company" in their or their agents respective possession, power or procurement. However, save for two further invoices furnished by the voluntary liquidator to the official liquidator on November 18th 1994, no further documents were received by the official liquidator on foot of the High Court Order of August 20th 1993. The Respondent maintained that the voluntary liquidator had collected all the books and records of the Company, and further maintained in an affidavit dated November 17th 1994 that "proper books and records of the Company" were maintained and that these books and records were duly made available to and acknowledged by the voluntary liquidator.

In November 1994, the official liquidator brought a Motion for Declarations under Sections 150 and 204 of the Companies Act 1990, and the High Court directed that this Motion be heard on Affidavits filed and on oral evidence. By a further Order of November 20th 1995, the High Court directed that the Respondent be examined on oath before the Master in relation to the promotion, formation, trade dealings, affairs and property of the Company. This examination took place on February 2nd 1996.

At this examination, the Respondent told the Master that when recording purchases, sales and receipts of the Company, they were written up into a "temporary record book", and, after being "input" into a computer, the books were "scrapped", "disposed of", or "thrown out". The Respondent also said that the Company was told at the end of 1992 by a VAT inspector to use a manual system of accounts, and that the Company ceased to use a computer thereafter.

The hearing of the Motion commenced on June 18th 1996. On June 20th 1996, it was indicated on behalf of the Respondent that there might be certain books, papers, and records of the Company either at the Company's old premises or at a farm owned by the Respondent. An Order was made on that date for the purpose of delivery up of such books and records to the official liquidator, and the Hearing was adjourned to July 16th 1996.

When the Hearing resumed, the official liquidator gave evidence that he had on June 20th 1996 recovered 28 computer disks and 5 red "cathedral" books. The computer disks were, according to the Applicant, of no assistance to him in his examination of the books and records of the Company; the other records comprised a sales book, purchases book, two cash books and a wages book, each of which covered various periods between April 1991 and June 1993.

Following receipt of these records, the Applicant outlined eight different categories of information and records which were missing from the books and records of the company as received by him. He said that, by reason of the absence of these records, (a) the books and records did not enable him to determine the financial position of the Company with reasonable accuracy. (b) The books and records did not enable the Company to be readily and properly audited. (c) The books and records did not properly record the assets and liabilities of the company. (d) The books and records did not properly record all goods purchased and sold by the Company in sufficient detail to enable the goods, sellers and buyers to be identified and did not properly record all the invoices relating to such purchases and sales. (e) The books and records did not properly record all sums of money received and expended by the Company or the matters in respect of which the receipt and expenditure took place.

The Applicant expressed the view that the failure of the Company to keep books of account has resulted in substantial uncertainty as to the assets and liabilities of the Company and had substantially impeded its orderly winding up. The Applicant gave evidence of what Shanley J. called "A litany of error or failure to record", and estimated

that 80% of the time spent by him and his staff related to his efforts to overcome deficiencies in the books and records of the Company. The Applicant further stated that the Respondent was not in any way co-operative with him.

Evidence was adduced on behalf of the Applicant by an accountant who had acted as audit manager to the Company, and by a VAT inspector as to the records kept by the Company. Expert evidence was adduced on behalf of the Applicant that the books and records made available to the Applicant did not contain a record of the assets and liabilities of the Company, and that because of these deficiencies, one could not properly prepare a balance sheet or a set of accounts for the Company.

The Respondent gave evidence that substantial amounts of information could be obtained from the computer system used by the Company. The red cathedral books did not comprise a "manual system" as they contained computer references. He had never been told by the official liquidator what records he had, and in fact believed that the Applicant had the cathedral books and only became aware that the official liquidator did not have them on June 20th 1996.

The voluntary liquidator gave evidence that the books and records of the Company were more than adequate to facilitate the orderly winding up of the Company, and that the absence of credit notes was not a bar where third party verification was possible.

Submissions of the Liquidator

The Applicant liquidator submitted that the evidence before the court established: (i) That the Company was unable to pay all its debts at the time of its winding up. (ii) That the Company over an extended period of time was in contravention of Section 202 in failing to keep proper books of account. (iii). That Mr. Duignan, as its Managing Director permitted the contravention of Section 202. (iv) That the failure to keep proper books of account resulted in substantial uncertainty as to the assets and liabilities of the Company, and also, substantially impeded the orderly winding up of the Company. (v) that Section 204 permits the court in its discretion to declare that Mr. Duignan should be personally liable without limitation for all of the debts of the Company. (iv) that an Order under Section 150 of the 1990 Act should be made restricting Mr. Duignan from acting as a Director of the Company for five years.

Liability Under Section 202

Before personal liability can be imposed on an officer of the Company under Section 204, the court must be satisfied that there has been a contravention of Section 202[4]. As can be seen from the text of Section 202, this Section sets out the nature and extent of the accounting records which must kept by the Company. Shanley J. expressed the view that the Section creates an obligation "not".to act as a mere passive custodian of books and papers but rather "to create books and records in a particular form with specified contents". Also, the obligation "is necessarily a continuing obligation: they should be kept on a "continuous and consistent basis" and must be such that they "will at any time enable the financial position of the Company to be determined with reasonable accuracy"[5]. Perhaps most importantly, Section 202 (10) makes it a criminal offence for a company to contravene the Section[6].

Shanley J. held that three factors were relevant to the exercise of the discretion given by the Act to the court under Section 204, namely, causation, culpability and duration.

Liability Under Section 204

Shanley J. stated that the following matters must be established in evidence before liability can be declared under Section 204: (a) the Company in question is being wound up. (b) The Company is unable to pay all its debts. (c) The Company has contravened Section 202. (d) Such contravention has contributed to the Company's inability to pay all of its debt or has resulted in substantial uncertainty as to the assets and liabilities of the Company or has substantially impeded the orderly winding up of the Company. (e) The officer (or former officer) of the Company knowingly and wilfully authorised permitted the contravention by the Company of Section 202, or, the "officer" is a person convicted under Sections 194, 197 or 242 in relation to a statement concerning the keeping of proper books of account.

When these matters are established, the court can declare that such officer or officers be personally liable without limitation of liability for all or such part of the liabilities of the Company as may be specified by the court[7].

Section 204 also requires that the contravention of Section 202 either (a) contributes to the Company's inability to pay all its debts or (b) results in substantial uncertainty as to its assets and liabilities or (c) has substantially impeded the orderly winding up of the Company.

Shanley J. pointed out in his judgment that, on the face of the Section, there was no requirement of a causal relationship between the contravention under Section 202 and the liability declared under Section 204. The latter Section would appear to allow a court to impose unlimited liability on an officer of the Company for all debts of the Company where the contravention under Section 202 which has been permitted by that officer, has not in fact resulted in a loss to the Company, but has substantially impeded the orderly winding up of the Company, or resulted in substantial uncertainty as to its assets and liabilities.

It is clear that, if the court could exercise its discretion to impose liability where the contravention of Section 204 did not in fact result in a loss to the Company, this could be so harsh, unfair and disproportionate as to constitute an unjust attack on the personal rights of the affected officers. It therefore fell to Shanley J. to consider the ambit of the exercise of the court's discretion under Section 204.

Exercise of Discretion Under Section 204

Shanley J. referred to the dicta of Murphy J. in O'Keeffe v Ferris[8], in which Murphy J. stated that " in exercising its discretion under Section 297 (1) of the 1963 Act, the court would exercise its powers not merely in a responsible but also in a constitutional fashion. If the Constitution does require that in civil proceedings the burden imposed on the defendants should in general be commensurate with the loss suffered by the plaintiff (or the class whom the plaintiff represents) then it must be assumed that the sub section will be so construed and applied"[9]. In relation to the instant case, Shanley J. expressed the view that the court must have regard to the extent to which the contravention of Section 202 resulted in financial loss and, if it did, whether or not such losses were reasonably foreseeable by the officer as a consequence of such contravention.

Shanley J. held that three factors were relevant to the exercise of the discretion given by the Act to the court under Section 204, namely, causation, culpability and duration.[10] As to causation, there should be a causal relationship between the contravention of Section 202, the officer's contribution to that contravention, and the losses of the Company resulting therefrom. As to culpability, the less blame attaching to an officer for a Section 202 contravention, the less liability should be imposed. As to duration, it would be relevant to consider whether debts were being incurred when the contravention was taking place. The court should consider whether the loss was

reasonably foreseeable by the officer as a consequence of the contravention, and, save in exceptional circumstances, liability should not be imposed for contraventions not resulting in loss, or for losses not reasonably foreseeable as a consequence of the contravention.

Conclusions by Shanley J.

Shanley J. held that there were clear contraventions of Section 202. He did not accept that records could be retrieved from the computer disks, particularly in view of the fact that there was clearly a period of time when the absence of disks and books meant that the Company was, during that period, in contravention of Section 202, and expressed that it was "difficult to understand" how the Respondent believed that the liquidator had the red cathedral books, or why these books has not been produced to the VAT inspector who was anxious to see purchases and sales day books.

Shanley J. expressed himself satisfied that the books of account given to the liquidator were deficient in six material respects, and that these deficiencies were such that the financial position of the Company could not at any time be determined with reasonable, or indeed any, accuracy or enable the Company to be readily and properly audited. The deficiencies were such that the assets and liabilities of the Company could not be recorded and there was not a sufficient recording, or proper record, of goods purchased and sold or of the purchasers and sellers of those goods or, of invoices relating to all purchases and sales. The records of the Company did not contain statements of stock held by the Company for the years ending March 1992 and 1993. Finally, Shanley J. was satisfied that the books of account were not kept on a continuous and consistent basis and were deficient in failing to enter daily all sums of money received and expended by the Company and the matters in respect of which such took place.

Shanley J. was further satisfied that the Company, having contravened Section 202, was unable to pay its debts at the date of its winding up; the contraventions of Section 202 were such as to result in substantial uncertainty as to the assets and liabilities of the Company and also substantially impeded the orderly winding up of the Company. Shanley J. found that the Respondent knowingly and wilfully authorised and permitted the Section 202 contravention, and could not avail of any defence under Section 204.

Shanley J. held that it was not possible to separate out liabilities prior to its winding up which resulted from the contravention of Section 202. However, Shanley J. accepted the evidence from the liquidator that 80% of his time was occupied in seeking to overcome deficiencies in the books and records of the Company, and that the losses which flowed from this expenditure of time amounted to £91,239.80[11]. The learned Judge held that this loss was reasonably foreseeable by the Respondent as a consequence of the contraventions of Section 202, and accordingly declared the Respondent to be personally liable to the Company in that sum.

Comment

1. As a result of the decision in Mantruck, directors must reconsider their attitudes towards keeping the books and records of a company. Accurate books and records are essential to the running of any business, as directors can only make informed decisions on the basis of current and accurate data as to the company's performance. Failure to keep proper books and records is often a cause, rather than a symptom, of the ills which befall a company which ends up in liquidation. Often such failure arises, not from any conscious desire to obfuscate or mislead, but from a laxity which stems from weaknesses in management procedures. This is particularly the case where one person controls the company, and is trying to combine a number of functions - sales, manufacturing, supplying customers, credit control etc. Administrative duties are often the first casualty where a director is overworked. However, the consequences for directors who neglect their duties in this regard are now clear: where it is reasonably foreseeable by the director that his failure to keep proper books and records will result in financial loss, that director will now be liable to be made personally responsible for such loss[12].

2. The decision of Shanley J. to impose liability on Mr. Duignan for the costs of the liquidator incurred due to the failure to keep proper books and records also means that directors of a company in liquidation must now cooperate fully and immediately with the liquidator, so as to prevent him from incurring costs solely attributable to the inadequate state of the books and records for which they may be made liable in accordance with the principles of Mantruck. It is a cheering prospect for liquidators that previously uncooperative directors will now be subject to the threat of the possible imposition of personal liability in respect of the liquidator's fees unless they supply all information, books and records to the liquidator at the earliest possible date.

3. One major advantage of Section 204 is that it may be very much easier for a liquidator to meet the proofs required under the Section in order to impose personal liability on a director than it would be under the Sections dealing with fraudulent or reckless trading.

It is outside the remit of this article to consider fraudulent or reckless trading in detail. However, the numerous difficulties associated with establishing, as required by Section 297 A (1)(a) of the 1963 Act, that a director has been "knowingly a party to the carrying on of any business of the company in a reckless manner", or with establishing an "intent to defraud" pursuant to Section 297A (1)(b), are well known to practitioners and academics.

Actions in relation to fraudulent or reckless trading usually involve the court having to make value judgments on the conduct by the directors of the affairs of the company in general. Liquidators may have to adduce evidence from a number of parties to show a pattern of trading which the court might deem fraudulent or reckless. On the other hand, a range of extenuating circumstances will be adduced in evidence by directors in an attempt to show that they have acted "honestly and responsibly" so that the court may exercise its discretion under Section 297A(6) to relieve them from personal liability.

In an action by a liquidator under Section 204 however, the issues should be far more defined. If there is a contravention of Section 202 - and it should be relatively straightforward for a liquidator to establish this - a liquidator must establish a financial loss which results from the directors failure to keep proper books and records. Once he has done so, and the court is satisfied that this loss was reasonably foreseeable, the court will, in all probability, impose personal liability for this loss on the director in question.

An action under Section 204 will therefore, in this writer's view, usually be a far simpler and more attractive option to a liquidator who has grounds to sustain such an application and wants to take court action to hold the directors of the company accountable for their actions and impose personal liability on them, than taking action in respect of alleged fraudulent and reckless trading.

4. The High Court in recent times has directed liquidators to bring an application for directions as to whether or not a restriction order under Section 150 of the 1990 Act should be made against the directors by the court[13]. Such an application was brought by the liquidator in Mantruck in addition to the application under Section 204, and was granted by Shanley J. The Section obliges the court to declare that the director in question shall not for a period of five years be appointed or act in any way as a director or secretary of a company or take part in the promotion or formation of any company unless it meets certain requirements as to the value of its nominal and allotted share capital. The court may decline to make

the Order if it is satisfied, inter alia, that the director acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by this Section. It is submitted that a failure of responsibility under Section 202 of the 1990 Act will often defeat a claim for absolution under Section 150 on the basis that he has been honest or responsible. In Mantruck, the contraventions of Section 202 were such that the court felt justified in imposing personal liability on Mr. Duignan under that Section. In these circumstances, a restriction order was an inevitable consequence of the courts' findings of fact. However, a failure to keep adequate books and records will not always result in a restriction Order.

In Costello Doors Limited (In Liquidation) v Costello and others[14], appropriate books and records were kept by the company until September or October of 1992. After that date, the books were not written up but the primary records were retained. This situation continued until the company's liquidation in January 1993. Although Murphy J accepted that mere preservation of basic records was not an adequate compliance with the requirements of the Companies Acts, he held "not without some hesitation" that the former managing director whose ultimate responsibility the maintenance of the book-keeping system was, did not behave dishonestly or irresponsibly in the particular circumstances of that case. It is clear, as was apparent from Shanley J.'s exhaustive examination of the facts in Mantruck, that the level of culpability or responsibility which will attach to a director in respect of failure to keep proper books and records is a question of degree, and the facts of each and every case must be examined before a decision can be made by legal advisers to liquidators as to whether or not Section 204 proceedings, as well as the obligatory Section 150 proceedings, are warranted.

5. Section 202(4) provides that the court shall not make a Declaration of Personal Liability against an officer of the company if it considers that (a) he took all reasonable steps to secure compliance by the company with Section 202, or (b) he has reasonable grounds for believing and did believe that a competent and reliable person acting under the supervision or control of a director of the company who has been formally allocated such responsibility, was charged with the duty of ensuring that Section was complied with and was in a position to discharge that duty.

Legal advisors to directors faced with a Section 204 Application must work towards adducing sufficient facts in evidence to justify their client's conduct as having met the objective standard of reasonableness required by the Section. Whether or not they will be in a position to do so will depend upon the facts of each case.

As can be seen from the text of Section 202(10), contravention of the provisions of that Section constitutes a criminal offence. However, no submission was made to the court in Mantruck to the effect that Section 204 created a criminal offence. Accordingly, Shanley J held that the standard of proof required of a liquidator is the normal standard in civil matters of the balance of probabilities[15].

Section 204(5) states that the Section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the Declaration is to be made. It would appear that a director could be acquitted of the commission of a criminal offence under Section 202 where the prosecution did not prove its case beyond a reasonable doubt, and yet have personal liability imposed upon him by Order of the court under Section 204 on the balance of probabilities.

In addition, it would appear from the dicta of Murphy J in O'Keeffe v Ferris that there is no requirement that any possible criminal prosecution arising from Section 202 be determined before the civil action pursuant to Section 204 could be pursued[16].

Conclusions

The decision in Mantruck represents a very welcome development in the law of insolvency. While the applicability or otherwise of Section 204 in any given situation will depend on the facts, the careful analysis of the Section and exposition of the principles governing it by Shanley J. will enable accurate legal advice to be given both to liquidators and directors.

Liquidators now have a potent weapon with which to pursue delinquent directors who impede the liquidation and cause loss to the company by failing to keep or to produce proper books and records. On the other hand, directors who can show the court that they have taken reasonable steps to ensure compliance by the company with Section 202 have nothing to fear from the Section.

It is hoped that the decision will contribute to a greater desire on the part of officers of companies to take more care to ensure accurate bookkeeping - even if this desire is solely motivated by the wish to avoid the imposition of personal liability under Section 204!

Mark Sanfey, Barrister

1. High Court, unrep. Shanley J. October 8, 1996
2. In particular, that the transaction has been entered into with a "dominant intention to prefer". See Corran Construction Co. Ltd. v. Bank of Ireland Finance Ltd. [1976] ILRM 175; Station Motors Ltd. v. Allied Irish Banks Ltd. [1985] IR 756
3. now see Section 297A of the 1990 Act. For a comprehensive survey of the law relating to fraudulent and reckless trading, see Courtney, The Law of Private Companies, Butterworths, 1994 at para. 8.062- 8.095.
4. Section 204 (1)(a)
5. At page 23 of the transcript.
6. As to the penalties for conviction under the Section, see Section 203 (1) (b) of the 1990 Act.
7. Section 204 (1)
8. [1993] 3 IR 165
9. At page 175
10. In doing so, Shanley J. adopted the dicta of Tompkins J. in the New Zealand cae of Maloc Construction Ltd. (In Liquidation) v. Chadwick and ors., (1986) 3 NZ CLC 99,794. The case concerned the interpretation of provisions under Companies Act 1955 which were almost identical to ss. 202 and 204. The case, in which personal liability for debts of the Company were imposed on a director and the secretary of the company, contains a comprehensive discussion of the three factors adopted as relevant by Shanley J., and is required reading by any lawyer advising in respect of a Section 204 application.
11. 80% of the professional fees and outlay for all the liquidator's work to date of £94, 256 plus VAT at 21%.
12. In fact, the Section can be invoked by an auditor when the company is not in liquidation where execution issued on a judgment decree or other order is returned unsatisfied in whole or in part, or where it is proved to the satisfaction of the court that the Company is unable to pay its debts: see Section 251 (2) of the 1990 Act.
13. See Business Communications Ltd., v. Boxter and another [1996] ICLC 11, and in particular the dicta of Murphy J. at p. 15 a-d.
14. [1996] ICLC 52]
15. Applying the dicta of Henchy J in Banco Ambrosiano v. Ansbacher and Co. [1987] ILRM 669 at page 701, and dicta of the Supreme Court in Hanafin v. The Minister for the Environment and others, Unrep. March 1st 1996.
16. [1993] 3 IR 165 at 175-6, applying the decision of the Supreme Court in Dillon v. Dunnes Stores Ltd. [1996] IR 397.

Eurowatch

EUROPEAN CONSUMER PROTECTION LAW IN IRELAND AND WHERE TO FIND IT

In recent decades, however, the movement towards the protection of the consumer has gained momentum.

Introduction

Until recently consumer protection was firmly rooted to the base of the pyramid of legislative priorities. For almost a century sales transactions were regulated by the Sale of Goods Act 1893, a statute which was ill-equipped to cope with the increasingly sophisticated selling techniques, including mass-marketing and nationwide advertising campaigns, designed to stress the quality and desirability of particular products. Consumer credit transactions were regulated in piecemeal fashion by, inter alia, the Moneylenders Acts, 1900 and 1933, the Hire-Purchase Acts, 1946-60 and the Pawnbrokers Act, 1964. Legislative intervention in the supply of services field was minimal. In the civil sphere it was non-existent. There was no statutory implication of terms for the consumer's benefit, nor was there any accessible code of law to which he/she could turn for an indication in respect of his/her legal rights. Not all of his/her rights were spelled out by case-law, and in the absence of clear precedents, his/her precise legal rights often remained uncertain until the court pronounced judgment. There was also a lack of originality in formulating consumer protection legislation: much of the domestic legislation echoed statutes enacted decades earlier by the denizens of the Westminster Parliament.

In recent decades, however, the movement towards the protection of the consumer has gained momentum. In 1980 the Sale of Goods and Supply of Services Act made far-reaching reforms in the law relating to sale of goods, hire-purchase, leasing, misrepresentation and the supply of services. This legislation was particularly important because it afforded the Irish consumer of goods and certain categories of credit with a formidable array of rights and remedies. A major criticism of the legislation, however, was that it governed the law of hire-purchase, personal loans and leasing in fragmented isolation without attempting to lay down a comprehensive code to regulate consumer credit contracts. But the EC Directive on Consumer Credit has gone a long way towards remedying this and other defects by regulating the provision of credit in a systematic, uniform code and by introducing a comprehensive system

of licensing.

Indeed recent years have witnessed a renaissance in the field of consumer protection which has been inspired by the EC Commission in Brussels. It will not be possible within the context of this brief article to discuss this major growth in consumer protection law. But in the interests of affording greater accessibility to consumer protection legislation emanating from Brussels, the remainder of this article places it in an Irish perspective by charting the domestic implementing legislation in eight different areas: (1) Consumer Credit, (2) Misleading Advertising, (3) Safety of Toys/CE Marking Directives, (4) Package Travel, (5) Product Liability, (6) Contracts Negotiated away from Business Premises, (7) Unfair Terms in Consumer Contracts and (8) Product Safety.

A major criticism of the legislation, was that it governed the law of hire-purchase, personal loan and leasing in fragmented isolation without attempting to lay down a comprehensive code to regulate consumer credit contracts

(1) Consumer Credit Directives: Implemented in Ireland by the Consumer Credit Act, 1995 (No. 24 of 1995). This Act implements Directive No. 87/102 (as amended by Directive No. 90/88) into Irish law. It goes further than the Consumer Credit Directives insofar as it also regulates moneylending and housing loans made by mortgage lenders.

(2) Misleading Advertising Directive: Implemented in Ireland by the European Communities (Misleading Advertising) Regulations, 1988 (S.I. No. 134 of 1988). These Regulations were considered in O'Connor v. Quinnsworth, High Court, March 15, 1993.

(3) Safety of Toys/CE Marking Directives: Implemented in Ireland by the European Communities (Safety of Toys) Regulations, 1990 (S.I. No 32 of 1990) and the European Communities (Safety of Toys) (Amendment) Regulations, 1994 (S.I. No. 458 of 1994). The 1994 Regulations require the manufacturer, or his authorised representative in the Community, to affix the revised CE marking to toys.

(4) Package Travel Holidays and Tours Directive: Implemented in Ireland by the Package Holidays and Travel Trade Act, 1995 (Number 17 of 1995) and the Package Holidays and Travel Trade Act (Bonds) Regulations, 1995 (S.I. No. 270 of 1995) and the Package Holidays and Travel Trade Act (Occasional Organisers) Regulations, 1995 (S.I. No. 271 of 1995). The Directive was not fully implemented in Ireland until 1 October, 1995. Ireland implemented the Directive in three separate pieces of legislation. Ireland was ahead of the European Union insofar as it had already introduced bonding requirements in relation to tour operators providing packages outside Ireland back in 1982 (see the Transport (Tour Operators and Travel Agents) Act, 1982). The 1995 Bonds Regulations extend these requirements to those providing packages inside Ireland.

(5) Product Liability Directive: Implemented in Ireland by the Liability for Defective Products Act, 1991 (Number 28 of 1991). Section 1 of the Act excludes primary agricultural products from the ambit of the legislation. In accordance with common law tradition, there are no global limits on liability. Section 6 of the Act affords producers a developments risks defence.

(6) Contracts Negotiated Away from Business Premises Directive: Implemented in Ireland by the European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations, 1989 (S.I. No. 224 of 1989).

(7) Unfair Terms in Consumer Contracts Directive: Implemented in Ireland by the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 (S.I. No. 27 of 1995). Although these Regulations were not passed until 1 February, 1995, they apply retrospectively to all contracts concluded after 31 December, 1994.

(8) Product Safety Directive: Not yet implemented in Ireland. The latest word from the Department of Enterprise and Employment is that Ireland is on the verge of implementing this Directive and that it will probably be implemented by the end of this year.

Conclusion

In recent years European consumer protection law has become commonplace both in statements of claim and defences drafted by Irish barristers. Most legal problems in the goods and services sphere cannot be adequately addressed without taking the European dimension into account. Although this brief article only chronicles the main pieces of consumer protection legislation emanating from Brussels, it is written to highlight the fact that the new EC code is now firmly rooted in the Irish firmament. Those failing to plead EC consumer protection legislation/domestic implementing legislation in goods and services cases will, in many instances, fail to do so at their peril.

Alex Schuster, Barrister.

Drugs, Local Authorities and Exclusion Orders - A 'Township' Policy?

During the summer of this year the Government announced its intention, as part of its anti-drug package, to introduce legislation which would entitle Housing Authorities to seek exclusion orders against specific individuals for anti-social behaviour. It also indicated its intention to speed up the eviction process against drug dealers residing in local authority estates.

Cormac ODulachain, Barrister, examines the issues raised.

As the law presently stands, Housing Authorities have unfettered powers of eviction based on the notion that local authority tenants are periodic tenants and that their tenancies can be terminated by a simple notice to quit.

The Supreme Court in the case of The State (O'Rourke) v. Kelly, 1983 IR 58 confirmed that the District Court's function in such eviction cases was simply to confirm the validity of the procedural steps required and was not entitled to embark upon an enquiry as to the Housing Authority's reasons for seeking such an eviction.

The 'periodic tenancy' is in reality a legal fiction. Local authority housing is principally allocated to people who have established a need for long term housing. In addition to meeting the basic need for shelter the allocation of a local authority house can also carry with it the right to purchase it in due course. The tenant's perception and the housing authorities' intentions are that it be a home for life.

Irrespective of the Supreme Courts legal analysis of the provision and effect of the Housing Acts it is still unacceptable in principle that a person be deprived of their home and shelter by a public authority in circumstances where the facts grounding the decision cannot be tested or verified. By comparison, our laws now provide for independent appeal mechanisms in many areas such as where persons are dismissed from their employment, where social welfare is refused and where tax assessments are raised.

As matters currently stand, housing authorities, in seeking evictions for anti-social behaviour, make an assessment of a person's alleged misbehaviour based on evidence that is secretive, primarily hearsay and untested and where the person or persons affected are not afforded any of the rights conferred by the principles of natural justice.

The Government appears to be intent on reinforcing an eviction process that is already objectionable.

It could be argued that the government's proposals will mitigate the harsh elements of the existing system in allowing specific family members to be excluded as opposed to the eviction of an entire family.

It may be that there is a case to be made for society to have available, as a protective measure, exclusion orders which would be capable of being applied to all citizens in very special and defined circumstances and for limited periods of time and where such would be subject to judicial control and assessment.

What is in issue is the legislative response that is required to the drugs problem. A response which involves severe sanctions should apply equally to all citizens and not selectively and discriminately on the basis of housing tenure.

The detrimental effects on communities of the misbehaviour of individuals are properly a matter to be regulated by public law and not a matter which falls within the province

of housing law.

The current proposals are not along such lines. There are fundamental features of the proposed legislation which call for serious debate.

For example, what is to be meant by anti-social behaviour?

What function is it of a housing authority to police behaviour?

Is social order a matter for the gardai or a Housing Authority?

Why is it that only one sector of society, those in public housing, are to be subject to exclusion orders?

Are exclusion orders to be punitive protective measures?

Are exclusion orders to be concerned with current or past behaviour?

On what evidence and on what standard of proof are such orders to be granted?

How and by whom are decisions to apply for such orders to be made?

Are these orders to be directed at a handful of people or at the thousands of addicts who are not alone addicts but petty suppliers and in many cases, aids victims?

What emerges from these questions posed is a state of confusion about the purpose of such legislation and of the function of housing authorities and their role in community development. The notion that a housing authority should police the behaviour of its tenants is a concept that is medieval and feudal.

The essentially penal nature of these proposals is confirmed by the further proposals that housing authorities be empowered to refuse housing to people with drug related convictions and for tenants who are evicted or the subject of exclusion orders to be refused any other form of housing support, i.e. supplementary social welfare housing allowances.

The introduction into Irish society of a dual system of law whereby tenants of local authorities are subject to sanctions which do not apply to the rest of the community is objectionable. Drug pushers in private housing will not be amenable to the same sanctions. A person who has purchased a house from a local authority will be free from the sanctions applicable to tenants residing in the same street, estate and neighbourhood.

It is objectionable to single out public housing as an instrument of social control. It stigmatises public housing and treats access to secure and decent housing not as a right but as a very special privilege doled out by public representatives.

If society wishes to withdraw what are perceived to be privileges or benefits from individuals who offend against society, is it any more rational to withdraw housing than to withdraw electricity or water or indeed medical and social services.

Finally, there is a real danger that 'anti-social ' behaviour will be so loosely defined in legislation that the legislation could become a charter for victimising and discriminating against every 'misfit' in society.

Cormac ODulachain, Barrister.

It is objectionable to single out public housing as an instrument of social control. It stigmatises public housing and treats access to secure and decent housing not as a right but as a very special privilege doled out by public representatives.

If society wishes to withdraw what are perceived to be privileges or benefits from individuals who offend against society, is it any more rational to withdraw housing than to withdraw electricity or water or indeed medical and social services.

Law Library Credit Union

If you haven't already joined the Law Library Credit Union why not do so now? Application forms available from the Bar Council Accounts office @ 804 5002

Staff Appointments

Welcome to Claire Moran and Adele Murphy who have recently joined the staff of law library services. Both Claire and Adele are graduates in law and information technology from UCD and QUB and UCD and UCC respectively.

First Irish Legal CD-ROM

The Journal of Valuation Tribunal Judgments 1988-94 was launched earlier this year and became the first commercially available CD of Irish legal materials. Edited by Desmond Killen FRICS FSCS IRRV and Dr Brendan Williams ARICS ASCS, the Journal provides a digest of all cases decided by the Tribunal from its foundation in 1988 to June 1994 . It is published as a combined service in CD-ROM & loose-leaf format by the IPA with additional charges for concurrent users if the CD-ROM is networked.

The Tribunal receives an average of 300 appeals each year from determinations of the Commissioner of Valuation. The Tribunal's decisions are final on quantum but they may be appealed to the High Court on a point of law. The digest for each case

- states the type of property and keywords
- defines the core issues involved
- sets out the facts and arguments
- and gives the findings of the Tribunal and date of judgment

References to cases and legislation are also provided together with commentary when appropriate.

The CD-ROM runs under Clearview and provides all the expected search functionality. It is easy to install and run. The loose-leaf volume provides for portable use of the materials in venues where CDROM technology is not available. The arrangement of the loose-leaf is chronological with access provided by three indexes: appellant name; property type and keyword.

Further details from IPA 01 269 7011 Fax 269 8644

In the Law Library the CD may be searched at the Information Desk and the loose-leaf is kept at the Issue Desk.

Next Year's Law Terms

The dates given in the Bar Council Diary for next year's Law Terms are incorrect. Please accept apologies for any confusion and make the following change to your diary.

Easter Term:
Monday 7th April - Thursday 15th May (not 22nd May as indicated in the diary)
Trinity Term:
Wednesday 28th May (not 4th June as indicated in the diary) - Thurs. 31st July.

legal update

A directory of legislation, articles and written judgments from 5th October to 4th November 1996
Judgment information compiled by the researchers in the Judges Library, Four Courts Edited by Desmond Mulhere, Law Library, Four Courts, Dublin 7.

subject summaries

AGRICULTURE

statutory instruments
National milk agency (fees) regulations, 1996
S.I.265/1996
Date signed: 3.9.96

Diseases of animals (bovine spongiform encephalopathy) order, 1996 S.I.271/1996
Commencement date: 16.9.96

Diseases of animals (bovine spongiform encephalopathy) (no.2) order, 1996
S.I.278/1996
Commencement date: 17.10.96

ALIENS

statutory instruments
Irish nationality and citizenship (fees) regulations, 1996
S.I.291/1996
Commencement date: 1.10.96

Refugee Act, 1996 (section 24(1)) (commencement order) order, 1996
S.I.290/1996
Commencement date: 1.10.96

Aliens (amendment) (no 5) order, 1996
S.I.301/1996
Commencement date: 8.10.96

article
The Refugee Act, 1996
Hickey, Jack
1996 BR 35

ANIMALS AND BIRDS

statutory instruments
Animals remedies regulations, 1996
S.I.179/1996
Commencement date: 1.8.96

European communities (notification of varroasis in bees) regulations, 1996
S.I.268/1996
Commencement date: 3.9.96

European communities (conservation of wild birds) (amendment) regulations, 1996
S.I.269/1996
Commencement date: 1.10.96

Diseases of animals (bovine spongiform encephalopathy) order, 1996 S.I.271/1996
Commencement date: 16.9.96

Diseases of animals (bovine spongiform encephalopathy) (no.2) order, 1996
S.I.278/1996
Commencement date: 17.10.96

Control of dogs (restriction of certain dogs) (amendment) regulations, 1996
S.I.295/1996
Date signed: 8.10.96

CHILDREN

articles
Combating child exploitation
O'Briain, Muireann
1996 BR 31

Third party rights of access to and custody of children
Martin, Marie
1996 BR 39

COMMERCIAL

library acquisition
Irish-EC business and commercial law
Linehan, Denis M
[Cork] Emerald 1996

COMMUNICATIONS

statutory instrument
Telecommunications (amendment) (no 3) scheme, 1995
S.I.134/1995
Commencement date: 26.5.95

COMPANY

statutory instrument
Statistics (business accounts) order, 1996
S.I.92/1996
Commencement date: 1.4.96 to 31.12.2000

articles
Forensic accounting - a legal support
Johnson, Peter
1996 CLP 206

Twomey, Michael J
The limited partnership act 1907
1996 CLP 211

COMPETITION

library acquisitions
Competition law and policy in Ireland
Massey, Patrick
Dublin Oak Tree Press 1996

Competition law source book
O'Connor, Tony
Dublin Round Hall S & M 1996
articles

The competition (amendment) act, 1996
Cregan, Brian
1996 BR 6

Restraint of trade and competition law in Ireland
Bolger, Marguerite
1996 GILS 245

CONSTITUTIONAL

Gallagher v. Director of the Central Mental Hospital & Ors.
High Court: Kelly J., Laffoy J., Geoghegan J.
06/09/1996

Habeas corpus; Article 40.4.2 application; validity of detention; applicant charged with two murders; found guilty but insane; detained in Central Mental Hospital; applied to minister for release; refused; whether minister's decision in accordance with fair procedures; whether serious breaches of constitutional rights; whether detention a matter for the executive; advice of advisory committee; whether decision given timeously; legality of decision; whether decision arbitrary or irrational; proportionality

Held: Application for release dismissed

CONSUMERS

statutory instrument
Maximum prices (magazines) (revocation) order, 1996
S.I.307/1996
Date signed: 14.10.96

article
Housing loans under the Consumer credit act 1995
Elliot, John B
1996 CLP 195

CONTRACT

library acquisition
Specific performance
Jones, Gareth
Butterworths 1996

COPYRIGHT, DESIGNS & PATENTS

library acquisition
Annand, Ruth E
Blackstone's guide to the Trade marks act 1994
Blackstone Press 1994

CRIMINAL

statutory instruments
Criminal Assets Bureau act, 1996 (establishment day) order, 1996
S.I.310/1996
Commencement date: 15.10.96

Criminal justice (legal aid) (amendment) regulations, 1996
S.I.311/1996
Commencement date: 1.6.93

library acquisitions
The law on the misuse of drugs and drug trafficking offences
Fortson, Rudi
London S & M 1996

Report on sentencing
Law Reform Commission
Dublin Law Reform Commission 1996
articles

Forensic accounting - a legal support
Johnson, Peter
1996 CLP 206

The proceeds of crime act 1996
O'Higgins, Michael
1996 BR 12

Defending a charge of dangerous driving - a reminder and update
Pierse, Robert
1996 GILS 295

DAMAGES

articles
A delicate balancing act - defamation, damages and freedom of expression
Kennedy, T P
Reed, Alan
1996 ILTR 215

Deductions from awards in personal injuries cases
Hickey, Jack
1996 GILS 289

DEFAMATION

article
A delicate balancing act - defamation, damages and freedom of expression
Kennedy, T P
Reed, Alan
1996 ILTR 215

EDUCATION

statutory instruments
Vocational education committees (filling of casual vacancies) regulations , 1996
S.I.205/1996
Date signed: 5.7.96

University College, Dublin (extension of term of office of governing body) order, 1996
S.I.304/1996
Date signed: 8.10.96

EMPLOYMENT

statutory instruments
Employment regulation order (hairdressing joint labour committee), 1996
S.I.20/1996
Commencement date: 6.3.96

Employment regulation order (law clerks joint labour committee), 1996
S.I.72/1996
Commencement date: 1.4.96

Employment regulation order (retail grocery and allied trades joint labour committee), 1995
S.I.123/1995
Commencement date: 7.6.95

Employment regulation order (contract cleaning city and county of Dublin) (joint labour committee), 1995
S.I.180/1995
Commencement date: 12.7.95

Employment regulation order (hotels joint labour committee), 1995
S.I.193/1995
Commencement date: 25.7.95

Employment regulation order (contract cleaning (city and county of Dublin) (joint labour committee), 1996
S.I.194/1996
Commencement date: 28.6.96

Employment regulation order (hotels joint labour committee), 1996
S.I.208/1996
Commencement date: 24.7.96

Employment regulation order (catering joint labour committee), 1995
S.I.210/1995
Commencement date: 8.8.95

Transnational information and consultation of employees act, 1996 (commencement) order, 1996
S.I.276/1996
Commencement date: 22.9.96

library acquisition
Health and Safety Authority
Guide to the Safety, Health and Welfare at Work Act, 1989 and the Safety Health and Welfare at Work (general application) regulations, 1993 Dublin Health and Safety Authority 1995

ENVIRONMENTAL

library acquisition
Environmental law
Hughes, David
Butterworths 1996

EQUITY & TRUSTS

statutory instrument
Enduring powers of attorney (personal care decisions) regulations, 1996
S.I.287/1996
Commencement date: 7.10.96

library acquisitions
Specific performance
Jones, Gareth
Butterworths 1996

The doctrine of proprietary estoppel
Pawlowski, Mark
London S & M 1996

EUROPEAN COMMUNITIES

statutory instruments
European Communities (live bivalve molluscs) (health conditions for production and placing on the market) regulations, 1996
S.I.147/1996
Commencement date: 27.5.96

European communities (notification of varroasis in bees) regulations, 1996
S.I.268/1996
Commencement date: 3.9.96

European communities (conservation of wild birds) (amendment) regulations , 1996
S.I.269/1996
Commencement date: 1.10.96

library acquisitions
Irish-EC business and commercial law
Linehan, Denis M
[Cork] Emerald 1996

Competition law source book
O'Connor, Tony
Dublin Round Hall S & M 1996

articles
The case for a EU convention causebook and judgment registry database
Egan, Twinkle
1996 BR 14

Where can one sue in the European Union?
Kennedy, T P
1996 GILS 249

Interim relief in national courts pending the outcome of a preliminary reference
Flynn, Leo
1996 ILTR 206

Keeping an eye on euro cash
Carney, Paul
1996 GILS 284

Article 93(3) EC and the role of national courts in policing non-notified state aids
Travers, Noel J
1996 ICLR 2-35

FAMILY

library acquisition
Divorce
Bird, Roger
Bristol Family Law 1996

article
Third party rights of access to and custody of children
Martin, Marie
1996 BR 39

FISH & FISHERIES

statutory instruments
European Communities (live bivalve molluscs) (health conditions for production and placing on the market) regulations, 1996
S.I.147/1996
Commencement date: 27.5.96

Bass (restriction on sale) order, 1996
S.I.177/1996
Commencement date: 1.7.96 to 30.6.97

Celtic sea (prohibition on herring fishing) (revocation) order, 1996
S.I.285/1996
Commencement date: 29.9.96

Cod (restriction on fishing) (no.3) order, 1996
S.I.279/1996
Commencement date: 1.10.96

Haddock (restriction on fishing) (no 4) order, 1996
S.I.280/1996
Commencement date: 1.10.96

Haddock (restriction on fishing) (no 3) order, 1996
S.I.281/1996
Commencement date: 1.10.96

Haddock (restriction on fishing) (revocation) order, 1996
S.I.306/1996
Commencement date: 11.10.96

Hake (restriction on fishing) (no 5) order, 1996
S.I.282/1996
Commencement date: 1.10.96

Monkfish (restriction on fishing) (no.7) order, 1996
S.I.283/1996
Commencement date: 1.10.96

Monkfish (restriction on fishing) (no.8) order, 1996
S.I.284/1996
Commencement date: 1.10.96

Mackerel (restriction on fishing) (revocation) order, 1996
S.I.286/1996
Commencement date: 6.10.96

FOOD & DRUGS

statutory instruments
Medical preparations (advertising) (amendment) regulations, 1996
S.I.308/1996
Date signed: 15.10.96

Medicinal products (prescription and control of supply) (amendment) regulations, 1996
S.I.309/1996
Date signed: 15.10.96

HEALTH SERVICES

statutory instruments
National Cancer Registry Board (establishment) order, 1991 amendment order, 1996
S.I.293/1996
Date signed: 3.10.96

Western Health Board (district mental hospitals) amendment order, 1996
S.I.292/1996
Date signed: 3.10.96

INFORMATION TECHNOLOGY

articles
On-line : an introduction to electronic legal research
Ferriter, Cian
1996 BR 32

Whelan, Darius
Lawyers and the Internet
1996 ILTR 212

JUDICIARY

library acquisitions
Raw judicial power?McKeever, Robert J
Supreme Court and American University Press
Access to justice: final report to the Lord Chancellor
Woolf, The Right Hon Lord
London HMSO 1996

Access to justice: draft civil proceedings rules
Woolf, The Right Hon Lord
London HMSO 1996

article
The Denham Commission's second report
Gormally, Edel
1996 BR 10

LANDLORD & TENANT

Cue Club Ltd. & Ors. v. Navaro Ltd.
Supreme Court: Hamilton C.J. Barrington J. Murphy J.
23/10/1996

Lease; appellant assignee of lease of unit in shopping centre; failure to pay rent and other charges when due; possession order granted on consent; whether consent based on mistake of fact relating to monies owing; relief against forfeiture sought

Held: Relief against forfeiture denied; case allowed to proceed in relation to alleged overpayment of rent

library acquisitions
McKibben, Elizabeth
Drafting and negotiating commercial leases. Supplement
Butterworths 1996

Commercial leases
Tromans, Stephen
London S & M1996

LEGAL AID

statutory instrument
Criminal justice (legal aid) (amendment) regulations, 1996
S.I.311/1996
Commencement date: 1.6.93

LEGAL PROFESSION

library acquisitions
The Irish legal system
Byrne, Raymond
Dublin Butterworths 1996

German legal system & laws
Foster, Nigel G
Blackstone Press 1996

Introduction to P & I
Hill, Christopher
London LLP 1996

Raw judicial power?
McKeever, Robert J
Supreme Court and American University Press

The Future of Law
Susskind, Richard E
Oxford Clarendon Press 1996

Access to justice: final report to the Lord Chancellor
Woolf, The Right Hon Lord
London HMSO 1996

Access to justice: draft civil proceedings rule
Woolf, The Right Hon Lord
London HMSO 1996

article
Does advertising by solicitors affect medical litigation?
Healy, Brendan
Murphy, Ken
1996 GILS 232

MEDICINE

statutory instruments
Medical preparations (advertising) (amendment) regulations, 1996
S.I.308/1996
Date signed: 15.10.96

Medicinal products (prescription and control of supply) (amendment) regulations, 1996
S.I.309/1996
Date signed: 15.10.96

articles
Does advertising by solicitors affect medical litigation?
Healy, Brendan
Murphy, Ken
1996 GILS 232

More attention to complaints would reduce litigation
Murphy, Ken
1996 GILS 279

NEGLIGENCE

Ryan v. Walsh & Anor.
Supreme Court: Hamilton C.J. O'Flaherty J. Keane J.
18/07/1996

Road traffic accident; driver killed; spouse injured; driver found negligent; defendant county council found guilty of contributory negligence; grounds for contributory negligence not raised by expert witnesses for either party; witnesses for county council not given opportunity to refute certain allegations; whether trial satisfactory

Held: Appeal allowed; trial judge erred in not giving defendant's witnesses an opportunity to answer criticisms; re-trial ordered

Coleman v. Kilternan Hotel & Golf Club Ltd.
Supreme Court: Blayney J. Barrington J. Murphy J.
19/07/1996

Personal injury; plaintiff tripped, fell and injured hand on a jagged piece of cement on defendant's premises; trial judge granted a non-suit; whether correct test applied; whether any evidence of negligence; whether on balance of probabilities negligence established; duty of an occupier to an invitee; s.4 Hotel Proprietors Act; whether reasonable care taken to ensure reasonable safety of premises; whether negligence could be inferred

Held: Negligence could not be inferred; non-suit upheld

Cuffe v. CIE & Anor.
Supreme Court: Hamilton C.J. Blayney J. Keane J.
22/10/1996

Work related injury; plaintiff employee of CIE; injured while lifting post bag onto railway station; An Post found guilty of negligence; clause in contract between CIE and An Post indemnifying An Post; whether indemnity clause applied to common law actions as well as statutory claims

Held: Indemnity clause not applicable to common law actions: court refused to imply such an onerous and exceptional term in absence of express language

O'Shea v. Anhold & Anor.
Supreme Court: Hamilton C.J. O'Flaherty J. Keane J.
23/10/1996

Road accident; plaintiff driver in collision with horse owned by defendants; whether defendants guilty of negligence; s.2 Animals

Act 1985; whether reasonable care taken by defendants; whether fencing adequate; onus of proof; res ipsa loquitor

Held: Appeal allowed; no finding of negligence

article
More attention to complaints would reduce litigation
Murphy, Ken
1996 GILS 279

PLANNING

McCann v. An Bord Pleanála & Anor.
High Court: Lavan J.
20/06/1996

Application for leave to apply for judicial review; planning permission granted subject to certain conditions; appeal against conditions sought; refusal to hear appeal; time-limit for appealing decision of An Bord Pleanála; whether time-limit had expired; s.26(5) Local Government (Planning and Development) Act 1963; interpretation of statutory time-limit; whether `corresponding date' rule applies; minimal delay; whether time-limit mandatory or directory; whether strict compliance with a mandatory requirement; right of access to courts

Held: Refused leave to seek judicial review

library acquisition

Environmental law
Hughes, David
Butterworths 1996

PRACTICE & PROCEDURE

Short & Ors. v. Ireland & British Nuclear Fuels Plc. & Anor.
Supreme Court: Hamilton C.J. O'Flaherty J. Blayney J. Denham J. Barrington J.
24/10/1996

Service out of the jurisdiction; Order 11 RSC; whether `good arguable case' established by plaintiffs; whether defendants necessary parties to the action; balance of convenience; Brussels Convention; whether Irish courts have jurisdiction to hear case; whether interference with jurisdiction of courts in the United Kingdom; whether it is a matter for national law; whether there are European law implications

Held: Order allowing service out of the jurisdiction upheld

Gaspari v. Iarnród Eireann & Ors.
High Court: Kinlen J.
30/07/1996

Review of taxation by taxing master; initial action concerning passenger and carrier; damages awarded; bill of costs; assignments with regard to counsel's fees and refresher fees; proportionality

Held: Taxing master's decision upheld but a variation allowed in the instructions fee

library acquisitions
The Supreme Court practice 1997
S & M 1996

Discovery. Third supplement
Matthews, Paul
London S & M 1996

Odgers on civil court actions
Odgers, William Blake
London S & M 1996

The doctrine of proprietary estoppel
Pawlowski, Mark
London S & M 1996

Access to justice: draft civil proceedings rule
Woolf, The Right Hon Lord
London HMSO 1996

articles
The case for a EU convention causebook and judgment registry database
Egan, Twinkle
1996 BR 14

Where can one sue in the European Union?
Kennedy, T P
1996 GILS 249

Interim relief in national courts pending the outcome of a preliminary reference
Flynn, Leo
1996 ILTR 206

Glanville, Stephen
Discovery in aid of execution
1996 GILS 293

PRISONS

statutory instrument
Prison (disciplinary code for officers) rules, 1996
S.I.289/1996
Commencement date: 1.10.96

RECORDS & STATISTICS

statutory instruments
Statistics (business accounts) order, 1996
S.I.92/1996
Commencement date: 1.4.96 to 31.12.2000

Statistics (structure and distribution of earnings) order, 1996
S.I.218/1996
Date signed: 10.7.96

ROAD TRAFFIC

article
Defending a charge of dangerous driving - a reminder and update
Pierse, Robert
1996 GILS 295

SEA & SEASHORE

statutory instrument
Harbour rates (Kinsale Harbour) order, 1996
S.I.288/1996
Commencement date: 4.10.96

SHIPPING

statutory instrument
Galway pilotage (amendment) order, 1996
S.I.211/1996
Commencement date: 22.7.96

library acquisition
Hill, Christopher
Introduction to P & I
London LLP 1996

SOCIAL WELFARE

statutory instruments
Social welfare act, 1996 (section 7) (commencement) order, 1996
S.I.188/1996
Commencement date: 13.6.96

Social welfare (consolidated payments provisions) (amendment) (no 5) regulations, 1996
S.I.189/1996
Commencement date: 13.6.96

Social welfare (consolidated supplementary allowance) (amendment) regulations, 1996
S.I.190/1996
Date signed: 10.6.96

Social welfare (consolidated supplementary welfare allowance) (amendment) (no 2) regulations, 1996
S.I.202/1996
Commencement date: 17.6.96

TAXATION

statutory instruments
Finance act, 1994 (commencement of chapter I of part II) (excise duty on tobacco products other than cigarettes) order, 1996
S.I.302/1996
Commencement date: 1.10.96

Finance (excise duty on tobacco products) act, 1977 (section 2A(5)) order, 1996
S.I.303/1996
Commencement date: 1.10.96 and 1.4.97

Value-added tax (returns) regulations, 1996
S.I.294/1996
Commencement date: 1.9.96

library acquisitions
Capital tax acts 1996-97
Boland, Tom
Dublin Butterworth 1996

Cooney, Terry
Taxation summary
Dublin Institute of taxation 1996

TRADE & INDUSTRY

article
Restraint of trade and competition law in Ireland
Bolger, Marguerite
1996 GILS 245

at a glance

European provisions implemented into Irish law up to 4/11/96

Information compiled by Mary Smartt, Law Library, Four Courts

Animals remedies regulations, 1996
S.I.179/1996
(DIR 81/851, 81/852, 87/20, 87/22, 90/676, 90/677, 91/412, 92/18, 92/74, 93/40, 93/41) (Council Reg 2377/90
Revokes SI 115/1980, SI 257/1985, SI 236/1986, SI 258/1985, SI 235/1986, SI 22/1986, SI 171/1990 & SI 244/1991
Commencement date: 1.8.96

European communities (conservation of wild birds) (amendment) regulations , 1996
S.I.269/1996
(DIR 79/409)
Commencement date: 1.10.96

European Communities (live bivalve molluscs) (health conditions for production and placing on the market) regulations, 1996
S.I.147/1996
(DIR 91/492) DIR 91/493, 89/662
Revokes SI 157/1979
Commencement date: 27.5.96

European communities (notification of varroasis in bees) regulations, 1996
S.I.268/1996
(DIR 92/65) Amends SI 291/1985
Commencement date: 3.9.96

GOVERNMENT BILLS IN PROGRESS AS AT 04/11/96

Information compiled by Sharon Byrne, Law Library, Four Courts

ADOPTION (NO.2) BILL, 1996 - COMMITTEE - DAIL

CENTRAL BANK BILL, 1996 - 1ST STAGE - DAIL

CIVIL LIABILITY (AMENDMENT) BILL, 1996 - PASSED IN SEANAD

CONTROL OF HORSES BILL, 1996 - 2ND STAGE - DAIL

CRIMINAL JUSTICE (MISCELLANEOUS PROVISIONS) BILL, 1996 - COMMITTEE - DAIL

CRIMINAL LAW BILL, 1996 - COMMITTEE - DAIL

COMMITTEES OF THE HOUSES OF THE OIREACHTAS (COMPELLABILITY, PRIVILEGES AND IMMUNITIES OF WITNESSES) BILL, 1995 - COMMITTEE - DAIL

ELECTORAL BILL, 1994 - COMMITTEE - DAIL

EMPLOYMENT EQUALITY BILL, 1996 - 1ST STAGE - DAIL

EUROPEAN PARLIAMENT ELECTIONS BILL, 1996 - 1ST STAGE - DAIL

FAMILY LAW (DIVORCE) BILL, 1996 - COMMITTEE - DAIL

GARDA SIOCHANA BILL, 1996 - 2ND STAGE - DAIL

HEALTH (AMENEMDNT) BILL, 1996 - REPORT - DAIL

IRISH TAKEOVER PANEL BILL, 1996 - 1ST STAGE - DAIL

MALICIOUS INJURIES (REPEAL OF ENACTMENT) BILL, 1996 - 1ST STAGE - DAIL

MERCHANT SHIPPING (LIABILITY OF SHIPOWNERS AND OTHERS) BILL, 1996 - REPORT - SEANAD

MILK (REGULAITON OF SUPPLY)(AMENDMENT) BILL, 1996 - 1ST STAGE - DAIL

NATIONAL CULTURAL INSTITUTIONS BILL, 1996 - 1ST STAGE - SEANAD

PROSECUTION OF OFFENCES AND PUNISHMENT OF CRIMES BILL, 1996 - 1ST STAGE - DAIL

SIXTEENTH AMENDMENT OF THE CONSTITUTION BILL, 1996 - 2ND STAGE - DAIL

TELECOMMUNICATIONS (MISCELLANEOUS PROVISIONS) BILL, 1996 - 2ND STAGE - DAIL

UNIVERSITIES BILL, 1996 - 1ST STAGE - DAIL

ACTS OF THE OIREACHTAS1996

Information compiled by Sharon Byrne Law Library, Four Courts

21/1996 - AN BORD BIA ACT
* COMMENCED ON SIGNING 10/07/1996

22/1996 - BORROWING POWERS OF CERTAIN BODIES ACT
* SIGNED 10/07/96

5/1996 - BOVINE DISEASES (LEVIES) (AMENDMENT) ACT
* COMMENCED ON SIGNING 16/03/96

13/1996 - CIVIL SERVICE REGULATION (AMENDMENT) ACT
* COMMENCED BY S.I. 197/1996

3/1996 - COMMISSIONERS OF PUBLIC WORKS (FUNCTIONS AND POWERS) ACT
* COMMENCED ON SIGNING 28/02/96

19/1996 - COMPETITION (AMENDMENT) ACT
* COMMENCED ON SIGNING 03/07/96

26/1996 - COURTS ACT
* COMENCED ON SIGNING 31/07/96

29/1996 - CRIMINAL JUSTICE (DRUG TRAFFICKING) ACT
* COMMENCED BY S.I. 275/1996

25/1996 - DISCLOSURE OF CERTAIN INFORMATION FOR TAXATION AND OTHER PURPOSES ACT
* COMMENCED ON SIGNING 30/07/1996

1/1996 - DOMESTIC VIOLENCE ACT
* COMMENCED ON SIGNING 27/02/96

14/1996 - DUMPING AT SEA ACT
* COMMENCED ON SIGNING 19/06/1996

9/1996 - FINANCE ACT
* COMMENCED ON SIGNING 15/05/1996

11/1996 - HARBOURS ACT
* SIGNED 20/05/1996

15/1996 - HEALTH (AMENDMENT) ACT
* SIGNED 26/06/1996

23/1996 - HEALTH (AMENDMENT)(NO.2) ACT
* COMMENCED ON SIGNING 15/07/1996

8/1996 - IRISH STEEL LIMITED ACT
*COMMENCED ON SIGNING 30/04/1996

2/1996 - JOHNSTOWN CASTLE AGRICULTURAL COLLEGE (AMENDMENT) ACT
* COMMENCED ON SIGNING 28/02/1996

27/1996 - METROLOGY ACT
* SIGNED 31/07/1996

28/1996 - NATIONAL STANDARDS AUTHORITY OF IRELAND ACT
* SIGNED 31/07/96
* COMMENCEMENT TO BE BY S.I.

18/1996 - PENSIONS (AMENDMENT) ACT
* COMMENCED ON SIGNING 03/07/1996

12/1996 - POWERS OF ATTORNEY ACT
* COMMENCED BY S.I. 195/1996

30/1996 - PROCEEDS OF CRIME ACT
* SIGNED 04/08/96

16/1996 - PROTECTION OF YOUNG PERSONS (EMPLOYMENT) ACT
* SIGNED 20/06/1996

17/1996 - REFUGEE ACT
* SIGNED 26/06/1996

7/1996 - SOCIAL WELFARE ACT
* SIGNED 03/04/1996
* DATES FOR COMMENCE MENT SPECIFIED IN ACT

6/1996 - TRADE MARKS ACT
COMMENCED BY S.I 198/1996

20/1996 - TRANSNATIONAL INFORMATION AND CONSULTATION OF EMPLOYEES ACT
* SIGNED 10/07/1996
* COMMENCED BY S.I. 276/1996

24/1996 - TRANSPORT (DUBLIN LIGHT RAIL) ACT
* COMMENCED ON SIGNING 15/07/1996

4/1996 - VOLUNTARY HEALTH INSURANCE (AMENDMENT) ACT
* COMMENCED ON SIGNING 06/03/96

10/1996 - WASTE MANAGEMENT ACT
* COMMENCED BY S.I. 192/1996

PRIVATE MEMBERS BILLS IN PROGRESS AS AT 04/11/1996

Information compiled by Sharon Byrne, Law Library, Four Courts

CHILD SEX TOURS BILL, 1995 - 2ND STAGE - SEANAD

CONTROL AND REGULATION OF HORSES BILL, 1996 - 1ST STAGE - DIAL

CRIMINAL JUSTICE (MENTAL DISORDER) BILL, 1996 - 1ST STAGE - DAIL

CRIMINAL LAW (SEXUAL OFFENCES)(NO.2) BILL, 1995 - 1ST STAGE - DAIL

DEFAMATION BILL, 1995 - 2ND STAGE - DAIL

ELECTORAL (AMENDMENT) BILL, 1996 - 1ST STAGE - DAIL

FREEDOM OF INFORMATION BILL, 1995 - 2NDSTAGE - SEANAD

INDEPENDENT REFERENDUM COMMISSION BILL, 1996 - 2ND STAGE - DAIL

MARRIAGES BILL, 1996 - 1ST STAGE - DAIL

MISUSE OF DRUGS BILL, 1996 - 2ND STAGE - DAIL

SEXUAL OFFENCES (JURISDICTION) BILL, 1995 - 2ND STAGE - DAIL

SOCIAL WELFARE (CHARTER OF RIGHTS) BILL, 1995 - 2ND STAGE - DAIL

SOCIAL WELFARE (MEANS TESTING) BILL, 1996 - 2ND STAGE - DAIL

SOCIAL WELFARE (SUPPLEMENTARY WELFARE ALLOWANCE APPEALS) BILL, 1995 - 2ND STAGE - DAIL

ACCESSIONS LIST

Information compiled by Joan McGreevy, Law Library, Four Courts

The Supreme Court practice 1997
S & M 1996 N361

Chronological tables of the statutes 1922 to 1995
Dublin Stationery Office 1996

Annand, Ruth E
Blackstone's guide to the Trade marks act 1994
Blackstone Press 1994 N114.2

Bird, Roger
Divorce
Bristol Family Law 1996N173.1

Boland, Tom
Capital tax acts 1996-97
Dublin Butterworth 1996M337.16.C5

Byrne, Raymond
The Irish legal system
Dublin Butterworths 1996L13

Cooney, Terry
Taxation summary
Dublin Institute of taxation 1996M335.C5

Fortson, Rudi
The law on the misuse of drugs and drug trafficking offences
London S & M 1996 M505.4

Foster, Nigel G
German legal system & laws
Blackstone Press 1996L29.1

Health and Safety Authority
Guide to The safety, health and welfare at work act, 1989
and The safety health and welfare at work (generalapplication) regulations, 1993Dublin
Health and Safety Authority 1995N198.2.C5

Hill, Christopher
Introduction to P & I
London LLP 1996
N335

Holland, James A
Learning legal rules
Blackstone Press 1996L90

Hughes, David
Environmental law
Butterworths 1996N94

Jones, Gareth
Specific performance
Butterworths 1996N231

Law Reform Commission
Report on sentencing
Dublin Law Reform Commission
1996M587.C5

Law Reform Commission seventeenth report (1995)
Law Reform Commission Dublin
1996L160.C5

Linehan, Denis M
Irish-EC business and commercial law
[Cork] Emerald 1996N250.C5

Massey, Patrick
Competition law and policy in Ireland
Dublin Oak Tree Press 1996N266.C5

Matthews, Paul
Discovery. Third supplement
London S & M 1996N386

McKeever, Robert J
Raw judicial power?Supreme Court and American University PressL221.U48

McKibben, Elizabeth
Drafting and negotiating commercial leases. Supplement
Butterworths 1996N92.6

O'Connor, Tony
Competition law source book
Dublin Round Hall S & M 1996W110.C5

Odgers, William Blake
Odgers on civil court actions
London S & M 1996N383.Z3

Pawlowski, Mark
The doctrine of proprietary estoppel
London S & M 1996N384.4

Susskind, Richard E
The future of law
Oxford Clarendon Press 1996
L50

Tromans, Stephen
Commercial leases
London S & M1996N92.6

Woolf, The Right Hon Lord
Access to justice: final report to the Lord Chancellor
London HMSO 1996
L201

Woolf, The Right Hon Lord
Access to justice: draft civil proceedings rule
London HMSO 1996N350

ABBREVIATIONS

BR = The Bar Review

CPLJ = Conveyancer & Property Law Journal

CLP = Commercial Law Practitioner

DULJ = Dublin University Law Journal

GILS = Gazette of the Incorporated Law Society of Ireland

IFLR = Irish Family Law Reports

ILT = Irish Law Times

IPELJ = Irish Planning and Environmental Law Journal

ITR = Irish Tax Review

JISLL = Journal of Irish Society of Labour Law

MLJI = Medical Legal Journal of Ireland

P & P = Practice Procedure

Why You Should Consider Your Pension Requirements Now

The average age of members at the Bar is 40, yet, any straw poll will reveal that less than half of the Bar have made a will, commenced pension provision or taken out prolonged illness cover. Many people resist making a will because it seems fatalistic unless you are old enough for the bus pass. Equally so, many resist making provision for retirement or wind down until relatively late in the day. This short piece is an attempt to persuade you to consider carefully, with a view to action, the question of starting now to make provision for the other half of the rest of your life.

Self-employed people are potentially the wretched of the earth when it comes to pension provision. Their earnings in their early years in business are negligible and in the later years they find that the Revenue Commissioner's limits on what they can put into a pension arrangement are too low to provide a pension in any way commensurate with the living standards they enjoy in the latter part of their careers. Unlike most occupational schemes for salaried people, including company directors, there is no defined level of benefit. It depends entirely on the amount of your fund and the prevailing annuity rates which are linked to long-term interest rates. The Bar's pension scheme is one where each individual contributes what s/he can in order to build a personal fund with which to purchase an annuity later. The bigger the fund the better the annuity.

Why the Bar Pension Scheme?

Unlike insurance based pension funds, the costs of the Bar's scheme are very low. Insurance based pensions based on regular contributions will usually take more than half of the first year's contribution in commissions and fees of one kind or another, by comparison the Bar's scheme takes one fortieth - 2.5 %. Unlike most unitised funds there is no "bid/offer spread" which is another way of saying they don't take 5% off the value on taking benefit. Although regular contributions is the preferred way to go, a particular benefit for the Bar is that the scheme does not commit you to fixed regular payments, it allows you to save as much as you can, whenever you can. You can also choose which kind of fund you want to place your savings in and when it is appropriate to move from one fund to another.

The Bar Pensions Committee is now very active in ensuring that subscribers get appropriate information from the Trustees and in negotiating additional facilities for subscribers. Earlier this year the Trustees held a seminar for subscribers and their financial advisers. This will be repeated next January, shortly before the last date for making allowable contributions in the tax year 1995/6. In the meantime, it is important that those who are not yet subscribers are aware of the benefits of the scheme and, more particularly, the benefit of starting early, however modestly, to make provision for their future.

Managed Funds v. Cash Funds

At present, members have an option between a managed fund and a cash fund. In general terms nobody would consider investing in a cash fund unless they were nearing the age at which they could take benefit.

Virtually all contributions currently go into the Managed Fund. This fund is a mixture of equities, fixed interest stocks and property. To provide a longer term option an additional new equities-only fund will be available to subscribers. We know that over a 30-40 year period equities will out-perform other types of investment. In the short term, however, they are more volatile, as Black Monday in October 1987 has shown. Some Cassandras say that the stock markets are overvalued and that a major "correction" is due. If you are a 28 year old barrister who has a potential contribution period of between 32 and 42 years to look forward to, this risk is one which you can take with a great deal more equanimity than somebody who intends to take benefit next year and who should be discussing with his advisers and the Trustees the possibility of moving almost everything into cash in advance of taking benefit.

What Happens if I Die Prematurely?

Another innovation in the scheme which will be made available shortly is an insurance option like a mortgage protection policy which will provide a form of spouse's and children's cover in the event of premature death. The idea is that if you were intent on having a pension benefit of say, £50,000 p.a. in today's money, you can ensure that if you died prematurely, the insurance policy would pay out to secure that level of benefit for your spouse and children.

Remember, early and regular contributions are important. You only need save half as much, starting at 30 years of age to secure every £1.00 of benefit at 65, compared to a colleague who does not commence saving until age 40.

How is the Fund Performing?

Very well, is the short answer. Since its inception in 1984, the fund has grown to more than £24m. There are now 270 subscribers and only 10 members have taken benefit to date. £1,025 invested in May 1984 was worth £6,006 on 1 October 1996. Over the past 5 years the unit price has increased by 89% [that is 13.6% per annum compound compared with an annual inflation rate of 2.1% over the same period]. The Trustees of the Bar Scheme are Bank of Ireland Trust Services and the Fund Managers are Bank of Ireland Asset Managers.

John Dowling, Director, Bar Council.

Bar Pension Scheme

Advantages	*Disadvantages*
Full tax relief	Must take annuity
No fixed amount necessary	Cannot take benefit before 60
No 'Bid Offer' Spread	Cannot take partial benefit
Switching of funds	Contributions cannot exceed
Low Charges	15% of earnings if under 55 or
25% of Fund available tax free	20% of earnings if over.
Insurance Option	Annuity rates can be unattractive when taking benefit

Arbitration

The recent High Court decision in Vogelaar v. Callaghan[1] touches upon a number of practical issues with respect to conduct of arbitrations, and in particular serves to reiterate the reluctance of the courts to interfere with arbitral awards. The case related to an arbitration with respect to a contract for the construction of a dwelling house for the applicants by the respondent. The applicants sought to impugn the arbitration award on a number of grounds. Garrett Simons, Barrister, comments on the issues raised.

Time Limits for Challenging Arbitration Awards

Under Order 56, Rule 4, of the Rules of the Superior Courts, an application to remit or set aside an award must be made within six weeks after the award has been made and published to the parties, or within such further time as may be allowed by the Court. Barron J. rejected the applicants' submission that this six week period was to be calculated from the date upon which the parties took up the award, holding that the six weeks ran from the date upon which the award was actually made. On this interpretation, the application was out of time. Barron J. did, however, extend the time for the application as the award had been taken up jointly upon a date when the six week period had already elapsed and thus it would be unfair to enforce the rule, and the respondent had also been ignorant of the rule: the time limit was not raised until an advanced stage of the proceedings. The decision to extend time in this case appears to be broadly consistent with the judgment in Bord na Mona v. John Sisk & Sons Ltd.[2] where Blayney J. indicated that factors to be considered by the court in deciding whether or not to extend time included the length of the delay and whether or not it was unreasonable or culpable. A distinction between the two judgments is the weight which the Bord na Mona decision attached to the question of whether or not the applicant had a good arguable case on the merits, in deciding the time limit issue. However, the relative brevity of the delay in the Vogelaar case may explain this difference in emphasis.

Duty of arbitrator to give reasons for award

A failure on the part of the applicants to request either that the award be in the form of a case stated, or simply that the arbitrator give reasons, was held to preclude them from subsequently challenging the absence of reasons. Barron J. further intimated that there is no universal requirement for an arbitrator to offer reasons for his award;[3] the giving of reasons must be dependent upon the nature of the issues arising in the course of the hearing. Insofar as this aspect of the decision indicates that the appropriate stage to seek to invoke the jurisdiction of the court is prior to the actual making of the award, it is well supported by authority.[4] However, the judgment does appear to break new ground in forging a link between any duty to provide a reasoned award and the jurisdiction of the courts to review an arbitration award. Barron J. characterises the complaint as to the failure to provide reasons as 'in reality an effort to appeal the decision of the arbitrator'.[5] This equation of a demand for reasons with a challenge to the award is significant. Typically, the justification for imposing a duty to give reasons on inferior tribunals is to facilitate judicial review of their decisions, by enabling the court to ascertain the manner in which a decision was reached.[6] An alternative basis for the duty is to ensure compliance with the rules of natural and constitutional justice and, in particular, the requirement that justice must be seen to be done.[7] In

Awards

emphasising the former justification, Barron J. may be indicating that in the context of consensual arbitration,[8] any court imposed duty as to the stating of reasons arises only in order to facilitate judicial review of an award. Given that the courts will intervene only in 'rare circumstances'[9] to set aside or remit an arbitration award, it may generally be unnecessary for the arbitrator to disclose his reasons.[10] This somewhat diffident stance to the review of arbitration decisions stems from a policy of ensuring the finality of arbitral awards:[11] the parties to an arbitration are taken to have abandoned their right to litigate that precise question.[12]

In regard to the requirements of natural and constitutional justice, Barron J. considered the failure of the applicants to request reasons as concluding the matter. With respect, this approach has much to recommend it: the parties themselves determine the procedure to be followed by the arbitrator. If reasons are required the parties should so stipulate; in the absence of such a stipulation (or a failure to object to the standard practice),[13] the courts should not impute a conserve intention to the parties.

Jurisdiction of arbitrator

The applicants sought to challenge the arbitrator's award on the basis that it arose out of an illegal contract: part of the contract price was to be paid in cash so as to avoid liability to VAT. It seems clear that any such attempt to lessen tax liability would render the contract illegal and hence unenforceable.[14] The issue before Barron J. then was whether or not the arbitrator had competence to determine the legality of the very contract which founded his jurisdiction:

"In the present case the Arbitrator has made it clear that he did not regard the contract as being one to defraud the Revenue in respect of VAT. There is no reason for seeking to upset that decision upon grounds that it could not have been come to. The Arbitrator heard the evidence and was in a proper position to ascertain the truth."[15]

The judgment thus tacitly recognises that the arbitrator does have jurisdiction to rule on the question of legality. Furthermore, it appears that the court will not substitute its

In regard to the requirements of natural and constitutional justice, Barron J. considered the failure of the applicants to request reasons as concluding the matter.

view for that of the arbitrator where there is evidence to support the arbitrator's decision.

This finding as regards the competence of the arbitrator is consistent with the approach of Morris J. in Parkarran Ltd. v. M. & P. Construction Ltd.[16] where he held that even a fundamental breach of the underlying contract did not oust the arbitration clause contained therein: the parties therefore remained obliged to refer the matters in issue arising out of the contract to arbitration. Both these cases appear to be indicative of a strong judicial policy to uphold the validity of arbitration clauses so as to bind the parties to their agreement to arbitrate: an arbitration clause seems to exist as an agreement independent of the underlying contract, to the extent that the former can survive the termination or even the initial invalidity of the latter. It is arguable that the Vogelaar decision actually represents an extension of the principle in that the question of the legality of a contract has a public policy element which is absent from the issue of its termination.[17] An arbitration award erroneously finding an illegal contract to be valid would presumably be unreviewable by the courts, as the error would be one within the arbitrator's jurisdiction. By thus allowing an arbitrator a competence to determine definitively issues of legality, the courts may be required to be party to the enforcement[18] of contracts properly void on public policy grounds: arbitration is not entirely a private matter

Dublin Personal Injury Actions

The following changes in the weekly Wednesday call over of the Dublin Personal Injuries List will be introduced with effect from the call over on Wednesday, 20th November (in respect of approximately 350 cases listed for hearing not before Tuesday, 3rd December.

1. Consent applications for adjournments may be made to the Registrar as before but the Registrar will sit at 9.30 am rather than 10.00 am to take such applications.
2. In addition, all parties are required to be in attendance and to inform the Registrar that their cases are ready to proceed. These cases only will be listed for hearing in the week specified.
3. Cases in the warning list which have not been adjourned or in respect of which the Registrar has not been informed are ready to proceed will be called over before the Judge at 10.30 am and in the event of no application being made will be struck out of the list.

Irish Association For the Protection of the Financial Interests of the European Community
"The Law of Equity in Pursuit of Hot Money"

Speaker:	**Mr. Michael Ashe, Q.C.**
Chairman:	**The Hon. Mr. Justice Paul Carney**
Venue:	**Conference Room, National Bureau of Fraud Investigation, Harcourt Square, Dublin 2.**
Date;	**Thursday, November, 28th 1996**
Time:	**6.30 pm**
Reception:	**Afterwards at a nearby venue**

because the State stands in the background as the ultimate enforcer of the award.[19]

The enforcement of illegal contracts has also been considered in Church & General Insurance v. Connolly.[20] In that case, the issue of the legality of the underlying contract had not been considered by the arbitrator but Costello J. (as he then was) held that the court must itself consider the illegality at first instance where its attention had been drawn to an arbitration award whose enforcement might be contrary to public policy. However, Costello J. also indicated obiter that had the arbitrator considered, and mistakenly rejected, an illegality argument this would not have represented misconduct:

"not guilty of misconduct because he interpreted an ambiguous statutory provision in a manner I might consider erroneous."

A similar margin of appreciation is afforded in the Vogelaar case, albeit in the less arcane context of tax evasion; Church & General Insurance v. Connolly involved the consideration of insurance legislation dating from the last century. It seems, therefore, that the desirability of giving effect to the right of the parties to choose to resolve their disputes definitively by arbitration outweighs any other public policy considerations.[21]

It seems, therefore, that the desirability of giving effect to the right of the parties to choose to resolve their disputes definitively by arbitration outweighs any other public policy considerations.

Costs of the Arbitration

The arbitrator awarded the costs of the arbitration to the respondent upon the basis that the respondent had succeeded in obtaining an award in his favour. The applicants had in fact made an open offer which was in excess of the sum ultimately awarded to the respondent. Accordingly on normal principles, the award of costs should not have been made in favour of the respondent as he had failed to 'beat' the offer; the arbitrator appears not to have taken the applicants' offer into account. The difficulty for the court, however, was in identifying the legal mechanism whereby it could review this error. Barron J. held that the error of law with respect to the exercise of the arbitrator's jurisdiction as to costs was one which was implicit from the award itself, and hence fell to be challenged as an error on the face of the award. As to allow the award to stand with the direction as to costs 'would be to indicate a severe injustice',[22] Barron J. remitted the matter to the arbitrator. This treatment of an error in the awarding of costs as exciting the court's common law jurisdiction to set aside is, it is submitted, somewhat unusual. The English courts appear to regard the failure of costs to follow the event as prima facie evidence of misconduct in the absence of sufficient reason.[23] If treated as misconduct, a failure to exercise the jurisdiction as to costs judicially may then be dealt with by way either of remission under Section 36, Arbitration Act, 1954[24] or setting aside under Section 38. Such a statutory based approach may be preferable to reliance on the court's common law jurisdiction; whether the common law jurisdiction runs to a power to remit an award as an alternative to quashing it or setting it aside may be questionable.[25] An example of reliance on the statutory jurisdiction to remit an award of costs to the arbitrator is to be found in the decision in Manning v. Shackleton.[26]

Garrett Simons, Barrister

1. 7th May, 1996
2. High Court, unreported 31st May, 1990
3. See also Manning v. Shackleton [1994] 1 I.R. 397 at 403
4. In the absence of misconduct, failure to have disputed questions of law resolved by recourse to the case stated procedure will generally be fatal to any subsequent challenge to the award: McStay v, Assicurazioni Generali spa [1991] I.L.R.M. 237; Manning v. Shackleton [1994] 1 I.R. 397 at 405; see also Hamilton C.J. in Doyle v. Shackleton [1995] 2 I.R. 424 at.444 noting the failure to request a case stated.
5. At 231
6. State (Creedon) v. Criminal Injuries Compensation Tribunal [1988] I.R. 51 at 55; Manning v. Shackleton [1994] 1 I.R. 397 at 403
7. State (Creedon) v. Criminal Injuries Compensation Tribunal; Manning v. Shackleton; Doyle v. Shackleton (High Court) [1995] 2 I.R. 424 at 432
8. cf. the anomalous position of statutory arbitrations which are apparently susceptible to judicial review in the technical sense, see Bremer Vulkan v. South India Shipping [1981] A.C. 909 at 978; State (Commissioners of Public Works) v. McDermott, High Court, unreported 15th January, 1986 (Order of prohibition sought) and Manning v. Shackleton (Order 84). cf. Doyle v. Shackleton [1995] 2 I.R. 424 where Hamilton C.J. appears to have discounted a submission (at p.443) that there is a distinction between statutory and consensual arbitrations: the subsequent reasoning relies on dicta as to the need for finality in arbitration per se, nor are any of the public law cases relied on in the High Court applied.
9. Vogelaar v. Callaghan, at 231
10. cf. H. v. Director of Public Prosecutions [1994] 2 I.R. 589 at 603
11. Keenan v. Shield Insurance Company Ltd. [1988] I.R. 88 at 96
12. ibid.; McStay v. Assicuraziono Generali spa [1991] I.L.R.M. 237 at 242
13. Manning v. Shackleton [1994] 1 I.R. 397 at 405
14. See, for example, the decision of Barron J. in Hayden v. Sean Quinn Properties Ltd. [1994] E.L.R. 45 refusing to enforce a claim under an illegal contract with respect to unfair dismissal under the contract.
15. At 231
16. High Court, unreported 9th November, 1995
17. Just such public policy arguments were rejected, however, by the Court of Appeal in Harbour Assurance Ltd. v. Kansa Ltd. [1993] Q.B. 701
18. Either under Section 47, Arbitration Act, 1954, or in action on the award.
19. King v. Thomas McKenna Ltd. [1991] 2 Q.B. 480 at 489
20. High Court unreported 7th May, 1981
21. Harbour Assurance Ltd. v. Kansa Ltd. [1993] Q.B. 701
22. At 232
23. [1963] 2 Ll. Rep. 270 at 273; see also Mustill and Boyd, Law and Practice of Commercial Arbitration on England, (2nd ed.) (1989) at p. 399
24. Arguably the courts power to remit under Section 36 need not be so restricted to cases of misconduct but may extend to cases of injustice; see, for example, King v. Thomas McKenna Ltd. [1991] 2 Q.B. 480
25. But cf. McStay v. Assicurazioni Generali Spa [1991] I.L.R.M. 237 at 242-3
26. [1994] 1 I.R. 397 at 406

Pocket Sized Diary

Members will have received their individual pocket sized Bar Council diary. Any comments will be welcomed by Claire Byrne, Bar Council office @ 804 5000.

Forms Indicating Areas of Special Interest

Members are reminded to return the above forms duly completed to Claire Byrne in the Bar Council office.

Televising the Courts

April 1995 was an historic month for the Irish courts and for Irish television. For the first time, RTE news cameras recorded pictures of a sitting court at the opening of proceedings in the Supreme Court. The camera was restricted to filming the entry of the judges, then required to leave. Since then, TV cameras have been allowed in the Supreme Court on several occasions, but the pictures have been brief, formal and silent.

Kieron Wood examines the arguments in favour of televised court proceedings

The present position

Ireland has no statutory provisions relating to the making of sound or vision recordings in court, nor are there any laws relating to taking photographs or drawing sketches in the courtroom. In this respect, this country is unlike England and Wales, where s. 41 of the 1925 Criminal Justice Act makes it a criminal offence to take or attempt to take in court any photograph or, with a view to publication, to make any sketch. (The Act hardly foresaw OJ Simpson: it was passed 11 years before the first public television service began!) S.9 of the English Contempt of Court Act 1981 similarly bans the broadcast of sound recordings. In Ireland, as in Scotland, it is a matter for the judge in each individual case to decide whether such activity should be allowed.

While sketch artists have been permitted to operate in Irish courts on occasion, judges have - almost without exception - refused permission for the making of sound recordings or videos for non-judicial purposes.

The Law Reform Commission report

The question of televising the courts was first raised officially in July 1991, when the Law Reform Commission issued a consultation paper on Contempt of Court. In its final report in September 1994, the Commission said:

"There may be a significant public benefit to be gained from exposing the detailed workings of the administration of justice in the courts to everyone within reach of a television set, thereby lessening, as one would hope, the remoteness of court proceedings from the general public and the sense of alienation which many feel from that process.

"We also appreciate the dangers which could result from the televising of court proceedings. Of these, perhaps the most important is the possible detriment to the interests of justice arising from the impact of televising the proceedings on the parties and the witnesses. There is also the danger that the television cameras would prove intrusive and disruptive of the proceedings.

"Having considered these arguments carefully, we are, nevertheless, in favour in principle of the televising of court proceedings and, in particular, would suggest that, at the least, consideration should be given to a pilot scheme in the first instance."

The Commission recommended the setting up of an advisory committee to review the arrangements for court television, to devise pilot projects and consider the broadcasting of tribunals of inquiry. But, although an RTE report on televising the courts was delivered to the Minister for Justice more than a year ago, nothing has been done.

The English Bar Council report

The Law Reform Commission drew on a 1989 report prepared by a working party of the public affairs committee of the Bar Council of England and Wales The three-man committee spent a year assessing the position in other countries, visiting the United States to see the televising of State courts and liaising with broadcasters, lawyers and other interested parties.

The report considered the background to the statutory ban on court photography and the arguments for and against televising the courts. It assessed recent technological developments and concluded that:

1. the absolute ban on cameras was no longer justified,
2. pilot projects should take place in appellate and trial courts,
3. broadcasters should obtain the prior permission of the trial judge,
4. judges should have a reviewable discretion whether or not to allow cameras in court,
5. judges could exclude cameras for any part of the proceedings,
6. such an exclusion could be appealed (while the trial went on),
7. broadcasters would be subject to strict rules of coverage and
8. televised reports would be subject to the law of contempt.

The findings of the report were widely welcomed. The London Times, in an editorial, said:

"When claims of innocence are made on behalf of people who have been convicted, such as the Birmingham and Guildford pub bombers, lawyers and Home Office Ministers often reply that those making the claims were usually unable to observe the court room behaviour of the defendants - unlike the jury which passed sentence. Television could let the wider public witness that behaviour - albeit, it would have to be admitted selectively."

The Courts (Research) Bill 1991

Following publication of the working party's report, the Bar Council of England and Wales sponsored a Private Member's Bill; the Courts (Research) Bill, in 1991. This was the first time that the concept of televising courts had been debated in Parliament. The arguments aired during that debate reflect

the opposing views taken by members of the Bar and judiciary in England and Wales.

The sponsor of the Bill, Dr Mike Woodcock, Conservative MP for Ellesmere Port and Neston, said he didn't aim to make television a permanent feature of the courts - merely to test the arguments for and against.

He said if television were to become a permanent feature, it would have to be limited to appropriate cases, conforming with tightly drawn rules under the supervision of the trial judge. Television should never be allowed in the courts if it could act against the interests of justice.

Dr Woodcock said the vast majority of people relied for their understanding of what occurred in court on second-hand media reports, which were no substitute for personal observation. But very few people had the time, resources or will to attend trials, even if the courts could accommodate them.

He said it must be questionable to ban the use of a medium which more than 70 per cent of the population relied on as their principal source of information on current events. The respect of young people for the law might also be increased if they could see justice at work, and potential offenders might be deterred by seeing criminal trials televised.

Barrister Ivan Lawrence, MP for Burton, opposing the Bill, said justice should be more widely seen to be done, but not if it were to be turned into a media circus. If people wanted to see the courts at work, they only had to go there. If they wanted to read what went on in court, they only had to read the newspapers.

Mr Lawrence warned that members of juries might be frightened by additional publicity. He said it was precisely because of threats and fear that there were no juries in the Diplock courts in Northern Ireland. He was sure that Dr Woodcock would exclude the Northern Irish courts from any experiments in televising trials!

Mr Humfrey Malins, MP for Croydon North-West, seconding the Bill, drew a comparison with the televising of Parliament, to which he said he had been initially hostile. He said televising the House had enabled millions of people - including the housebound, poor and disabled - to see Parliament at work. Television did not change into a circus something that was not already a circus, but if something was already a circus, television showed it as such.

The vote on the Bill was 22-0 in favour, so it didn't receive the required majority of 100 for a second reading of a Private Member's Bill.

The Scottish courts experience

Meanwhile, as Ireland considers the possibility of broadcasting court proceedings, Scotland has already taken action.

The first courtroom documentaries were broadcast in February 1994. Scottish Television made two one-hour documentaries dealing with the two Scottish Supreme Courts. The first programme, called Proof, featured a civil proof in the civil Court of Session. The second programme, called Judgment, showed a sentencing in the criminal High Court of Justiciary.

Two months later, BBC Scotland broadcast a half-hour documentary covering a four-day criminal trial in Glasgow Sheriff Court (on a charge of stealing a bus!)

Lord Hope, the Lord President of the Court of Session, said modern technology now allowed court proceedings to be televised without undue interference in the conduct of proceedings. It was also in the public interest that Scots should become more aware of the way justice was administered in their own courts.

Lord Hope said cameras had been admitted to Parliament and religious services in an acceptable way. Cameras had also been admitted to the European Court of Justice in Luxembourg and the International Court of Justice in The Hague.

He said that, from now on, the criterion for permission to film in Scottish courts was whether or not there would be a risk to the administration of justice. Initially, in view of such risks, cameras would not be allowed to film criminal trials or civil proofs, but - subject to satisfactory arrangements - appeals and courtroom ceremonies could be filmed with the judges' consent. Mute video shots of judges on the Bench would be permitted as a replacement for still photographs.

The BBC2 series The Trial capitalised on the new judicial openness. Preparatory negotiations with Lord Hope took seven months. Filming took a further ten months and the resulting five hours of television were broadcast from November 1994.

Scottish Court TV guidelines

Before filming began, Scotland's Lord Justice General laid down guidelines. The trial judge would have to be told the BBC's reasons for wishing to film the case and give his prior consent. He would be entitled to withdraw his consent or change the conditions for filming at any time. The judge would have to be informed about lighting (and the resulting heat), the number and position of all cameras and the floor space they took up and the number of microphones. He would have to be satisfied that the operation of the cameras would not be unduly intrusive. The total cost - including the court's administrative costs - would be borne by the BBC.

The consent of everyone appearing had to be obtained in advance. No witness was to be filmed unless he had given written consent in advance and, if witnesses did not consent, they could not be asked to change their minds. A witness's consent could be withdrawn up to 24 hours after giving evidence. No jurors were to be filmed unless all the jury had agreed beforehand by signing a confidential form.

There was to be no recording of any 'in camera' proceedings, books, papers or off-the-record conversations, nor were the cameras allowed to film anyone in the public gallery, unempanelled jurors or the precincts of the court building.

No recordings of evidence at a trial could be shown until all appeals had been exhausted and no BBC material was to be handed over to anyone else without the permission of the Lord Justice General. Judges were entitled to see and approve the programmes in advance.

Reaction to the series was positive. The general view of the English judiciary was that they would be quite happy to see appeals televised, but would be more cautious about trials, especially criminal trials.

Scotland's 250 advocates felt that the series gave a fair overview of the work in the Scottish courts and that the fears expressed before filming began were not justified.

Scottish solicitors were said to be happy with the Lord Justice General's guidelines - particularly because anyone who did not want to be filmed did not have to participate and that evidence in trials could only be televised once the case had been concluded.

United States

The situation in the United States is quite different from that in these islands, largely due to the freedom of speech guaranteed by the American Constitution. This permits broadcasts which would be neither acceptable nor legal in the Irish situation.

The OJ Simpson trial, in particular, focussed attention on American courtroom television. But the founder of Court TV, Steven Brill, claimed that much of the opposition to cameras at that trial related to coverage outside the courtroom. He said there were "re-enactments by actors of scenes described in the hearing, on-screen pulse readings of mock jurors to test reactions to various aspects of the defense and prosecution claims and even an 'O.J.-ometer' that gauged how well things were going for Simpson day by day."

But he said that would all have happened without cameras in court. "The media circus has nothing to do with one small, silent, unlit camera that covers the dignified, serious proceedings in court...We need cameras in the courts as the antidote to all the garbage that has polluted reporting of these serious and seriously distorted events."

A Court TV survey indicated that 173 out of 174 judges who'd had experience of cameras in their courtrooms believed the

presence of TV cameras had not impeded the fairness of the judicial process. Despite this, the US Judicial Conference decided in September 1994 to refuse to allow cameras on a permanent basis in Federal civil courts.

Canada

Despite the concern caused by the OJ Simpson case in the United States, the neighbouring common law jurisdiction of Canada last year introduced a "Cameras in the Courtroom" pilot project. It began in the Canadian Federal Court of Appeal on 1 January 1995 and will run until the end of this year.

Guidelines specified that Canada's Chief Justice was to select the proceedings to be covered in consultation with a panel of judges. Media coverage could be terminated at any time.

Coverage is normally restricted to two portable cameras, one stills photographer and one audio system. The guidelines contain a schedule of approved cameras and video tape recorders. There are restrictions on the courts which may be covered, on the sound and light output and on distracting movements of media personnel. The Chief Justice requires copies of any material to be broadcast 10 days prior to broadcast.

Oireachtas coverage

In Ireland, while cameras have not been allowed in courtrooms, they have been permitted in Parliament. Television coverage of proceedings in the Dáil and Seanad began in 1990. Certain officials and parts of the chambers may not be shown and, in the case of any disorder, the cameras must focus on the Cathaoirleach or the Ceann Comhairle, to avoid giving publicity to Senators or TDs resorting to "attention-seeking tactics".

In a Senate debate on the issue in 1994, Senator Paschal Mooney said: "The misgivings expressed at the time have largely evaporated in the light of experience."

Senator Maurice Manning said: "The cameras are unobtrusive. We barely know they are there...We do not see the play-acting which people thought television might induce."

Conclusions

While there seems little doubt that television coverage of the courts in Ireland in some form will eventually be a reality, it is an issue which should be approached sensitively and diplomatically, balancing the public's right to know with the fundamental requirement for justice to be done.

Initially, cameras might cover courtroom ceremonies, such as the swearing-in of new judges or the call of new barristers to the Bar. From ceremonies, the cameras might move to coverage of judgments, then to appeals where there were no witnesses or jurors. The penultimate step would be coverage of civil cases. Last of all - and most problematical - would be coverage of criminal trials.

All coverage should be subject to strict judicial guidelines, including rules about editorial control. In the light of the experience of the Oireachtas, the rules should be drawn up by the judiciary in consultation with broadcasters.

Whatever the perceived problems, the evidence from other jurisdictions suggests that, if court television is established (subject to adequate safeguards), many of the fears of judges, lawyers and legislators will prove groundless and the presence of cameras in the courtroom will be welcomed as a positive aid to democracy and justice.

Kieron Wood, Barrister

The Irish Bar - Meeting the Demand for Domestic and International Arbitration Services in Ireland'

The Bar Council conference on the above topic which was held in the Conrad Hotel on Saturday 2nd November was extremely well attended, attracting an audience of almost 200, composed of barristers, solicitors, business people and leading players in the Alternative Dispute Resolution field.

The speakers in the morning session, chaired by the Attorney General Mr. Dermot Gleeson S.C., addressed the mechanics of international and domestic arbitration law and procedure, while the afternoon session, chaired by Bar Council Chairman Mr.James Nugent S.C., consisted of a panel discussion with contributions from arbitration practitioners, representatives of the construction and travel industries and the Insurance Ombudsman for Ireland.

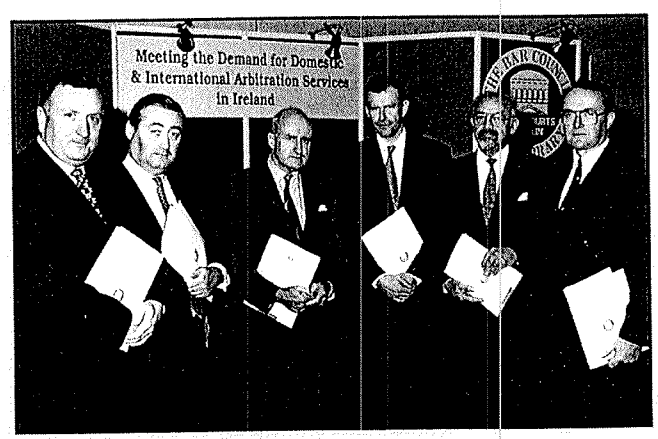
Christopher Koch, Counsel with the International Court of Arbitration outlined the rules of arbitration under the International Chamber of Commerce rules of conciliation and arbitration, which offer parties the benefits of a highly developed institutional supervision of the arbitral process including scrutiny of awards made under the rules. He spoke of his optimism that Ireland could become an important venue for international commercial arbitrations, given its common law system, the expertise of its lawyers and its attractiveness and cost competitiveness as a business venue. He was of the view however that Ireland's arbitration laws would need to be reformed to ensure that international parties could arbitrate effectively here.

This need for legislative reform was echoed by other speakers. David Byrne S.C., outlined how international commercial arbitration was governed in Ireland by the Arbitration Act 1954 which was not designed for international arbitrations, the case stated procedure being a particular deterrent. A draft arbitration bill has been prepared by the Arbitration Committee of the Irish Branch of the ICC which adopts the UNCITRAL model law on arbitration. The Model Law renders certain, and minimises, the involvement of the national judiciary in any arbitration thus aiding the speed and certainty of the arbitrations conducted under it. The ICC draft Arbitration Bill is ready for presentation to the government. The need for Ireland to adopt the Model Law was also expressed by one of Ireland's foremost international arbitration practitioners Dr Nael Bunni, Past Chairman of the Irish Branch of the Chartered Institute of Arbitrators.

Certain deficiencies in domestic arbitration law were identified by Rory Brady S.C. in his presentation on Domestic Arbitrations under the Arbitration Acts 1954 to 1980. These deficiencies include the fact that under existing Irish Law it is doubtful whether an arbitrator can dismiss a stale arbitration claim for want of prosecution and whether he can in the absence of agreement conferring such power, make an order for security for costs or an award of interest. There is also no jurisdiction to seek taxation of an arbitrator's costs.

The practicalities of rendering Ireland a more suitable venue for both domestic and international arbitrations were addressed by arbitration expert Ercus Stewart SC. Perspectives on arbitration and other methods of dispute resolution were offered by representatives of the travel, insurance and construction industries.

Papers presented by the speakers at the conference are available from Joan Reidy, Bar Council office, @ 804 5000.



Pictured at the Bar Council Conference on Domestic and International Arbitration Law and Practice held in the Conrad Hotel on Saturday, 2nd November, were (left to right): Mr. Rory Brady, S.C., Mr. Patrick Hanratty, S.C., Vice-chairman, Bar Council, The Attorney General, Mr. Dermot Gleeson, S.C., Mr. Christopher Koch, Counsel, International Court of Arbitrators, Paris, Dr. Nael Bunni and Mr. James Nugent, S.C., Chairman, Bar Council.

On-line: Elec

The On-Line section continues its introduction to the impact of technology on legal practice by looking at electronic mail ("e-mail") and the electronic Legal Diary.

The Bar Council in conjunction with Lawlink has just launched a pilot system for an e-mail and electronic legal diary service for barristers. The service, which will be launched in full after Christmas, will enable barristers to send and receive messages and documents down the telephone line to solicitors and other clients. It will also be possible to receive an electronic version of the Legal Diary the evening before the paper version becomes generally available.

This article deals with the questions most likely to occur to the non-computer-literate practitioner about these new services.

What is e-mail?

E-mail essentially involves the delivery, down telephone lines, of documents prepared on a computer. Where the postman formerly drove his van down your road and dropped a letter in your letterbox, a piece of computer software now drives your document down the information highway and drops the document into your computer box. Each e-mail box has an "address" eg. 'Joe.smith@-lawlibrary.ie' which is constructed by taking the e-mail user's name (in this example, Joe Smith) with the location of the "service provider" who handles their account (here, the Law Library) and an abbreviation for the country or type of organisation (here, "ie" being Ireland).

A "service provider" acts as a post office for e-mail, storing and transmitting people's e-mail messages.

Internal e-mail is an e-mail system which is confined to networks in organisations, typically in offices, where the user can't e-mail the outside world . "External e-mail" systems allow you to e-mail the outside world. External e-mail includes Internet e-mail which is e-mail carried on the massive network of machines that constitutes the "Internet" or the "Information Superhighway".

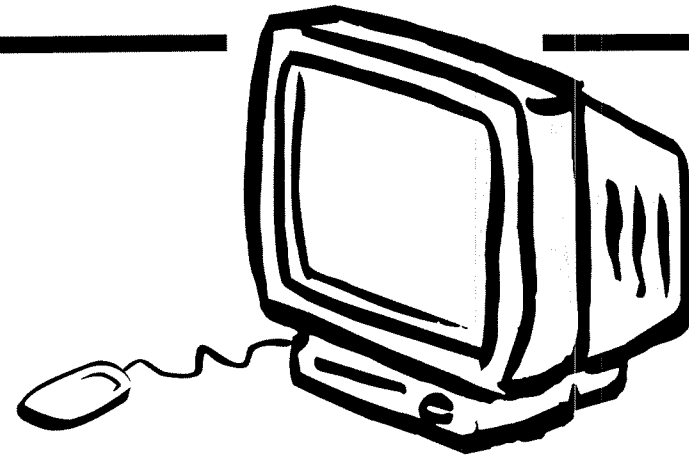
Sending or opening your e-mail is very simple - it merely involves a couple of clicks with your computer mouse.

What will I use e-mail for?

E-mail can be used to send any form of electronically prepared or scanned document. The size of the document doesn't matter - you can send a 200 page report or a one-line acknowledgement. The document

tronic Mail

Once you have the relevant equipment and a telephone line you can send and receive messages from anywhere including your home, your office, or a mobile laptop computer.



need not be a letter or report - it could be a spreadsheet (e.g. sending your draft accounts to your accountant), a document found searching a database (e.g. the text of an EC Directive which your solicitor is looking for), a digital image downloaded from the Internet etc.

E-Mail will be of particular use for barristers communicating with solicitors in relation to documents that are likely to be amended by either barrister or solicitor e.g. draft pleadings, correspondence inter partes etc. This is because you can send the document directly to your solicitor's machine where s/he can make amendments (and vice versa) thus avoiding the need to retype, reprint and fax. This is of course much faster and more efficient than providing such text on disc to the solicitor.

But what if my solicitor doesn't have e-mail?

If your solicitor doesn't have e-mail, but has a fax machine, you will be able to e-mail your document directly to that fax machine. There is an element of the chicken-and-egg debate about whether you should get an e-mail account when your main solicitors don't yet use it. A similar debate took place when fax machines were first introduced in the '80s but now lawyers could not survive without the fax. The fax is now very much an intermediary technology and e-mail is likely to replace it in the next few years.

When you think about it, it's a bit wasteful to prepare something on a machine (your computer), print it out on another machine (your printer), feed it into a third machine (your fax) which sends it to a fourth machine (your solicitor's fax) which again prints it out so that it may be re-keyed into a fifth machine (your solicitor's computer) before being printed out on a sixth machine (your solicitor's printer) and all this when the technology exists to send it directly from your computer to your solicitor's computer/printer. E-mail is thus set to largely replace the fax as the dominant means of document exchange for lawyers.

It is also the case with e-mail, unlike the fax, that you can send the same document to many people at the same time as you can have multiple addressees when sending messages by e-mail.

Is e-mail secure?

You may have heard remarks to the effect that "nothing is secure on the Internet" or "it's easy to intercept an e-mail". While it is true that the electronic postman is more in danger of attack than An Post's finest, the danger of interference with, or corruption of, your e- mail can be virtually eliminated by setting up a private e-mail network which is vigilantly policed and by sending your message in a code which will be almost impossible to decipher by an interceptor. Lawlink has achieved this by setting up a private network for lawyers which avoids the need for messages to be transmitted on the public Internet highways (the most dangerous streets for our electronic postman). Lawlink's e-mail package (called Securemail) also deploys sophisticated encryption techniques to ensure that an interceptor cannot decode your document. Thus the e-mail service will be as secure as any postal or courier services might be, i.e. it can not be 100% secure but is as close as we're likely to get to it.

An indication of the level of security on Lawlink's service is that the Department of Social Welfare uses the same platform for its system of electronic transmission of welfare payments i.e. for sending money.

Accessing The Legal Diary By Computer

The Legal Diary is now available in an electronic format from Lawlink. The diary can be accessed on-line (ie by dialling in to Lawlink with a modem) or be sent to you by e-mail if you have a ccMail account. The principle advantages of the electronic version over the paper version is that the electronic version will be available from 4.30pm the day before the paper version becomes generally available; the electronic version can be searched by court, list, party etc. and the electronic version can be stored cumulatively for record purposes. Practice directions can also be "pasted" from the electronic version into your own files. This involves selecting the relevant section, and using your cut and paste options to insert into your relevant file.

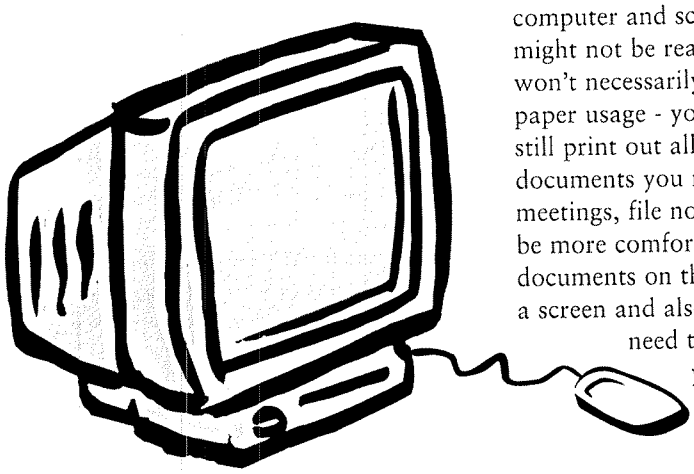
Those participating in the e-mail trial period will also receive the electronic legal diary. The legal diary will be available electronically from the Law Library as a whole after Christmas.

What equipment will I need?

You will need the e-mail software, a computer (PC or laptop), a modem and a telephone line. A modem is a device that enables text to be sent down the telephone line from one computer to another - in effect a telephone set for digital words. When the service is fully available in the Law Library you will be able to send and receive messages from computer points in the library which will not require you to have a modem (we will have a centralised modem set-up). You can use the same telephone line for voice calls and e-mail (though you can only use one or other at the one time). If you are a heavy user of e-mail it may be worth getting a separate telephone line installed.

Can I access e-mail at home also?

Once you have the relevant equipment and a telephone line you can send and receive messages from anywhere including your home, your office, or a mobile laptop computer. Many hotels and some Bed and Breakfasts also have phone sockets available for laptop modems. Barristers out on Circuit can use these to send and receive documents. There are now even laptop machines which have GSM modems i.e. they allow wireless transmission of e-mail and text so you are not dependent on telephone points being available.



Can my secretary send and receive documents on my e-mail?

Yes, once your secretary has your password she can send (and receive) documents as soon as they have been created on the word processor and reviewed by you.

Are there drawbacks to e-mail?

E-mail is most useful for documents that are prepared or available electronically. You won't be able to e-mail someone a copy of an 1854 case unless it has been scanned into a computer and scanning technology might not be readily accessible. E-mail won't necessarily cut down on your paper usage - you will find that you still print out all the messages and documents you need for pleadings, meetings, file notes etc. because it may be more comfortable to read longer documents on the printed page than on a screen and also because you may need the paper versions for your records. Not everyone you'll want to send an e-mail to will have e-mail but this will change significantly in the next few years. Security is also an issue and as with any computer file received from another computer or system your computer is at risk of contracting viruses, although anti-virus software exists.

Dose everyone need to have the same e-mail system to be able to communicate?

A problem in the past has been that e-mail systems have only spoken to like packages; in a telephone context, frustration would likely ensue when you as a monoglot telephone your client to discover that he was a non-english speaking Finn. The Lawlink system overcomes this difficulty by providing a central translation service so that if you are sending a message on e.g. ccMail (one of the principal e-mail packages) to a solicitor who has e.g. MS Mail, the message will be received by the solicitor as if it were an MS Mail message. (The Law Library will be running the e-mail service on Lotus ccMail).

Is e-mail costly?

The only addition you need to your PC/laptop is a modem which can be purchased for about £200. It only costs the price of a phone call to send an e-mail and the service charge for using the system will be a matter of some pence per page sent. The price of sending a 2 or 3 page document by e-mail will thus usually be less than the price of a stamp. Considering the benefits of speed, flexibility of amendment of documents, the ability to send to multiple addressees and the professional image associated with its use, it is a very cost effective tool in any legal practice. The earlier you start to use and master e-mail, the quicker you will be able to reap the longer term benefits.

Cian Ferriter,
Special Projects Manager, Bar Council

Any one interested in receiving further details of the e-mail service can contact Cian Ferriter in the Law Library @ 804 5119

Book Reviews

Irish Conveyancing Law, Second Edition, J.C.W. Wylie. Published by Butterworths. £80.00

It is over 18 years since the publication of the first edition of Irish Conveyancing Law by J.C.W. Wylie. There have been tremendous changes in the area of conveyancing and real property in those years and one was aware that in the last few years it was unwise to rely on the first edition, such was the rate and nature of changes in certain areas. The Family Home Protection Act, 1976 was in its infancy when the first edition appeared. Conveyancers were warned of the consequences which could flow from such an Act. However, few would have realised the scope and breadth of litigation which it would engender.

Almost twenty years after the introduction of this Act into law it is to be hoped that the major points arising out of the legislation have been adjudicated upon. One is struck at the new cases involving lending institutions which appear in the second edition of this book. The case law cited is up to date in this regard and the whole area of the Family Home Protection Act is comprehensively dealt with.

While the provisions of the Family Law Act 1995 are to be welcomed, its provisions are not simple. The subject of a general consent under this Act is comprehensively dealt with at para. 16.69 of the textbook.

Another area which is clarified in this latest edition is that involving the term 'Subject to Contract'. The matter has now been settled with the case of Boyle v. Lee [1992] 1 IR 555. Also covered is the matter of the powers of the receiver in execution which has been clarified in Industrial Development Authority v. Moran [1978] IR 159

In the first edition of this book there was concern regarding various matters such as planning, the existence of a closing or demolition order or a proposed CPO relating to the land in sale. The matter was dealt with in the first edition thus:

"The result has been the growth in the number of requisitions on title made nowadays and much recent discussion in Ireland as to whether a system of pre-contract enquiries should be adopted". "The practice has not been found to be entirely satisfactory and it has not as yet been adopted to any significant extent in the Republic of Ireland".

In this second edition however, the subject merits a whole chapter. Mr. Wylie deals comprehensively with the development of pre-contract enquiries "the extent to which this should be done must remain a matter of professional judgment for the purchaser's solicitor". Where something is left to a conveyancer's discretion, and where there is not a uniform practice, relying on chapter 5 of Mr. Wylie's second edition, the conveyancer will have more confidence in deciding what he feels should validly be done pre-contract.

Mr. Wylie deals with the acquisition of the freehold by those statutorily entitled. This writer would like to have seen the subject of vesting by the Land Registry dealt with more fully. It may not be properly realised by purchasers of property from vendors in whom premises have been vested by the Land Registry pursuant to the 1978 Act that no investigation of title is carried out and it is therefore necessary to peruse the leasehold title. It should be pointed out that the Land Registry is not required to investigate title in such circumstances.

A useful addition to a book such as this would be a definition of terms, for example, lease forever and other terms not commonly used. Also useful would be a chapter on problems and how to deal with them. For example, if a deed of rectification is required and one of the parties to the deed is a company which is no longer in existence, guidance as to the steps to be taken would be welcome. Such a chapter could also usefully deal with questions such as when would it be reasonable to accept possessory title, when should lending institutions be satisfied with a possessory title and when can one reasonable ignore covenants in old leases?

Tremendous changes have taken place in Irish society in the past 18 years and a perusal of the index in this second edition revealing matters such as milk quotas, multi-storey buildings and designated areas reflects such changes.

The inclusion of the 1996 edition of the Law Society's Objections and Requisitions on Title and Mr. Wylie's analysis of same are very welcome. The requisitions are dealt with item by item in chapter 16. The length and extent of the requisitions on title is a source of concern to conveyancers. However, with Mr. Wylie's analysis and guidance, much is demystified.

The Power of Attorney Bill, mentioned in a foot note on page 690 of the text is now law.

The property lawyer is well served by this second edition of Mr. Wylie's textbook, along with other superb authoritative works on this topic in the past 20 years. As in Laffoy's Irish Conveyancing Precedents, Ms. Deborah Wheeler, Barrister, has had a significant role in the preparation of this text, and her general contribution to this area of law has been immense.

Maureen Harewood, Barrister.

The Bar Council have been contacted by Arran Solicitors, the owners of the arbitration centre, 4 Arran Square, Dublin 7, stating that some persons who received advance publicity for the Bar Council conference on 'Meeting the Demand for Domestic and International Arbitration Services in Ireland' got the impression that there was no existing arbitration centre in this country. This is not what the advance publicity intended and no such inference should be read into it. The arbitration centre at 4 Arran Square has been in operation since 1994.

Licensing Acts, 1833 - 1995 by Constance Cassidy. Published by Round Hall, Sweet and Maxwell, 1996. £150.00

This is the first edition of an important textbook on the liquor licensing laws. It will appeal to students of the subject, traders in the product and enforcers and defenders of the licensing laws alike. It is particularly fitting that Constance Cassidy is the author of this seminal textbook on this subject since, it was her father, the late Judge John B. Cassidy SC who transformed the practice of this uncodified maze of law into an art form demonstrating a unique understanding of the contradictions, complexities and lacunae in the relevant provisions based upon a thorough grounding in the historical and social principles on which they were based.

What licensing practitioner could recall the memory of John without reflecting upon the patient skill by which he created the Henry Street off-licence, the flight of fantasy by which Allen's pub at Rockbrook was saved, the determination by which he secured the widow Riordan's inheritance, the insight which pulled Farrell back from the pit of forfeiture and the courage and commitment to his own opinion which navigated Power Supermarkets safely to port in the Supreme Court and so many more. John's creative innovation in his use of the outmoded tools and dust laden sections of this moribund maze was a true work of art which continues to inspire.

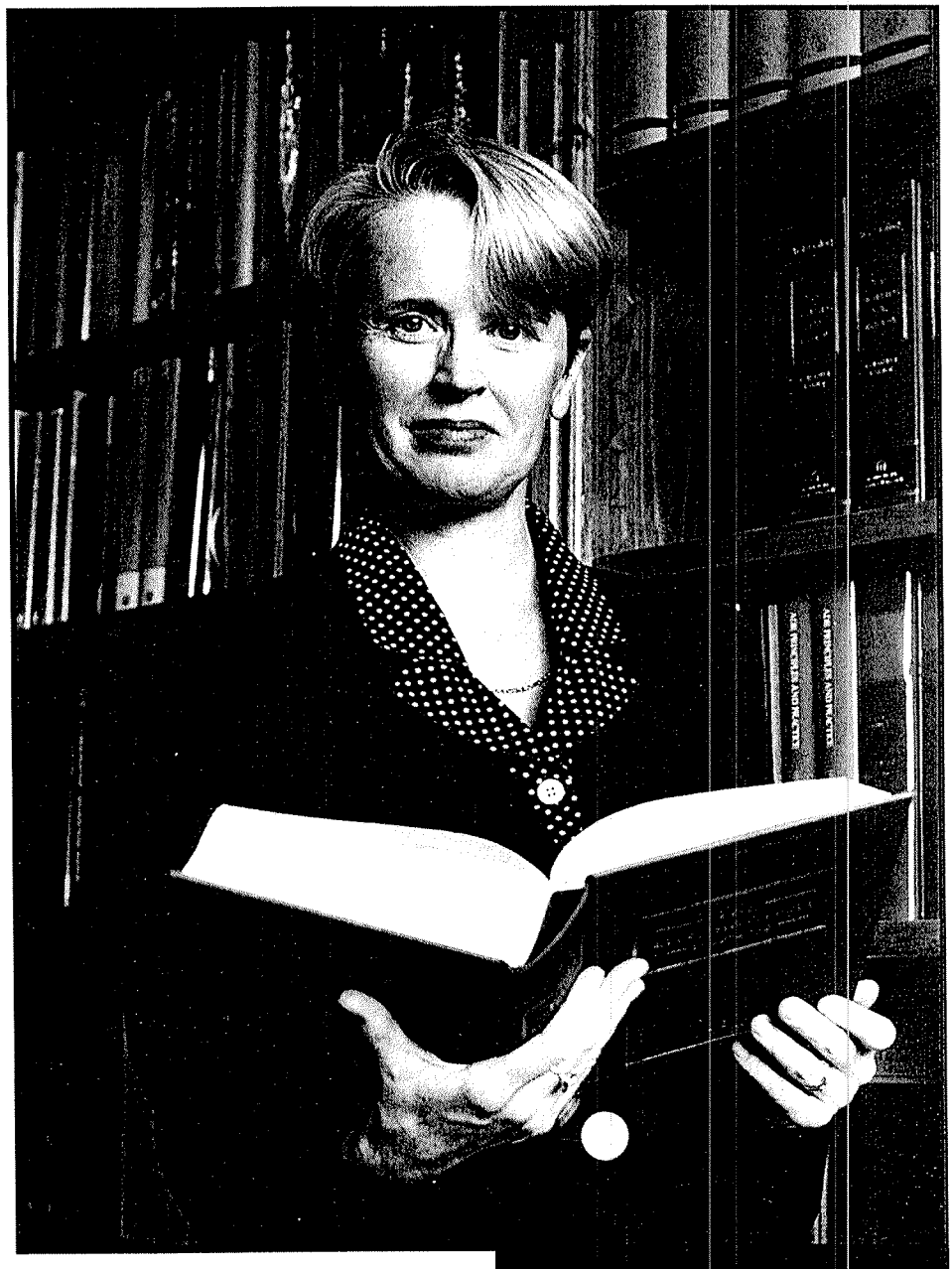
This publication by his daughter now serves as a fitting tribute to the memory of John and his wife who inspired and helped him through his long career in practice.

The book understands and accepts the need for consolidation but does not shirk from the greatly time consuming task of setting out the law as it is currently laid down. It de-mystifies the subject, sets it in its proper historical context and sets out clearly the complexities in a manageable form which is joyously easy to read and comprehend.

The book refuses, quite correctly, to wax academic or critical or to take any personal or myopic viewpoint. Where there is doubt or room for debate Ms. Cassidy clearly flags the issue as open to question and future determination.

Initially daunting at over one thousand pages and additional contents, cases, statutes and statutory instruments tables, the essential text respects the sheer size of its subject matter with 615 pages of well written, abundantly clear information. There are 94 pages of helpful draft documents for the practitioner, fifteen of the more relevant statutes account for a further 160 pages with a complex Summary Table of Offences, which should prove invaluable and a 48 page index that I have not been able to put under pressure. This is a timely work which will prove to be a remarkable and invaluable aid to practitioners in the area.

Thomas Morgan, Barrister.

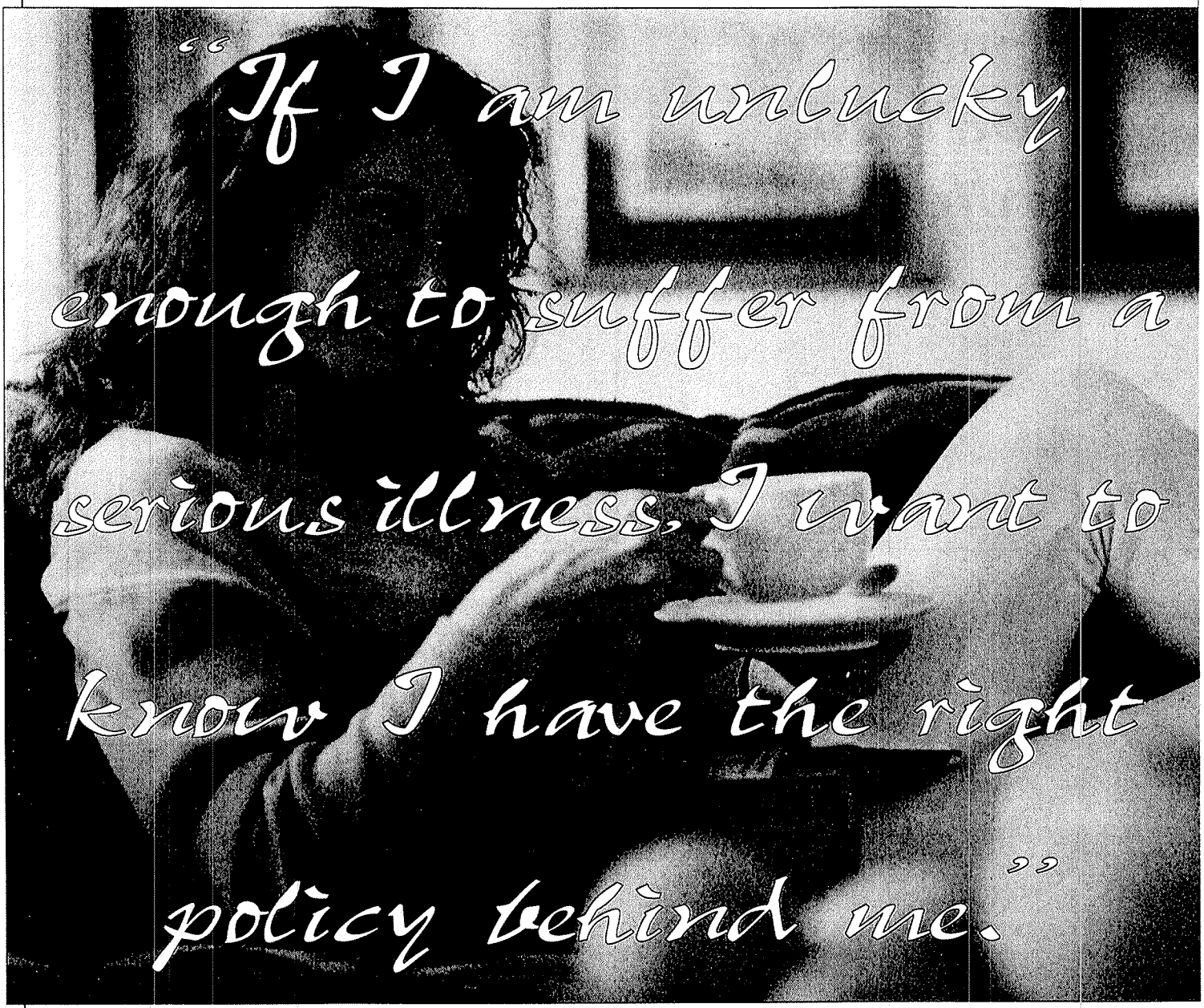


Ms. Constance Cassidy, Barrister, pictured at the launch of her book, 'The Licensing Acts, 1833-1995'.

Attention Criminal Law Practitioners

A committee has been established under the chairmanship of George Bermingham to enquire into methods for improving the efficient operation of the criminal courts. The committee is anxious to elicit the views of criminal practitioners on ways of improving procedures. All views, however brief, are welcome and should be submitted to Fergal Foley (@ 5046) and Una Ni Raifeartaigh (@ 4418).

Living Cover. Flexible and comprehensive protection from serious illness.



Before we introduced Living Cover we asked people what they wanted from a serious illness policy.

They asked for **Comprehensive Cover**. And we designed a policy which covers serious illness, disability and surgery. It also provides life cover, free children's cover and the optional benefit of hospital cash. Living Cover provides three different levels of payout. Each is based on the impact the condition has on your life.

They asked for **Plain English**. And we produced the first and only serious illness brochure to be awarded the Plain English "Crystal" Mark in Ireland for content that is clear and easy to understand. The policy document setting out the policy terms and conditions is available on request. **Read it and you'll see that Living Cover is a truly flexible and comprehensive serious illness policy.**

Bank of Ireland is a tied insurance agent of Lifetime Assurance Company Ltd.

Bank of Ireland

For further information on Living Cover contact any Bank of Ireland branch.

To all members of the legal profession

EBS BUILDING SOCIETY
CLARE STREET, DUBLIN 2
(BESIDE GREENE'S BOOKSHOP)

OPENING HOURS
9.30 A.M. to 5.00 P.M.
NO LUNCH CLOSURE

WE OFFER

- *MORTGAGES AT EXCELLENT RATES*
- *WIDE RANGE OF DEPOSITS*
- *NO BANK CHARGES*

MANAGER PADRAIC HANNON WILL BE MORE THAN PLEASED TO DISCUSS YOUR MORTGAGE REQUIREMENTS NOW OR IN THE FUTURE

THIS BRANCH AT CLARE STREET IS PARTICULARLY STRUCTURED TO CATER FOR THE REQUIREMENTS OF BARRISTERS AND SOLICITORS

JUST TELEPHONE
01 6763663, OR 01 6762135
OR 087 633039
FOR AN IMMEDIATE QUOTE

PADRAIC HANNON
MANAGER

EBS
BUILDING SOCIETY