The Bar Review

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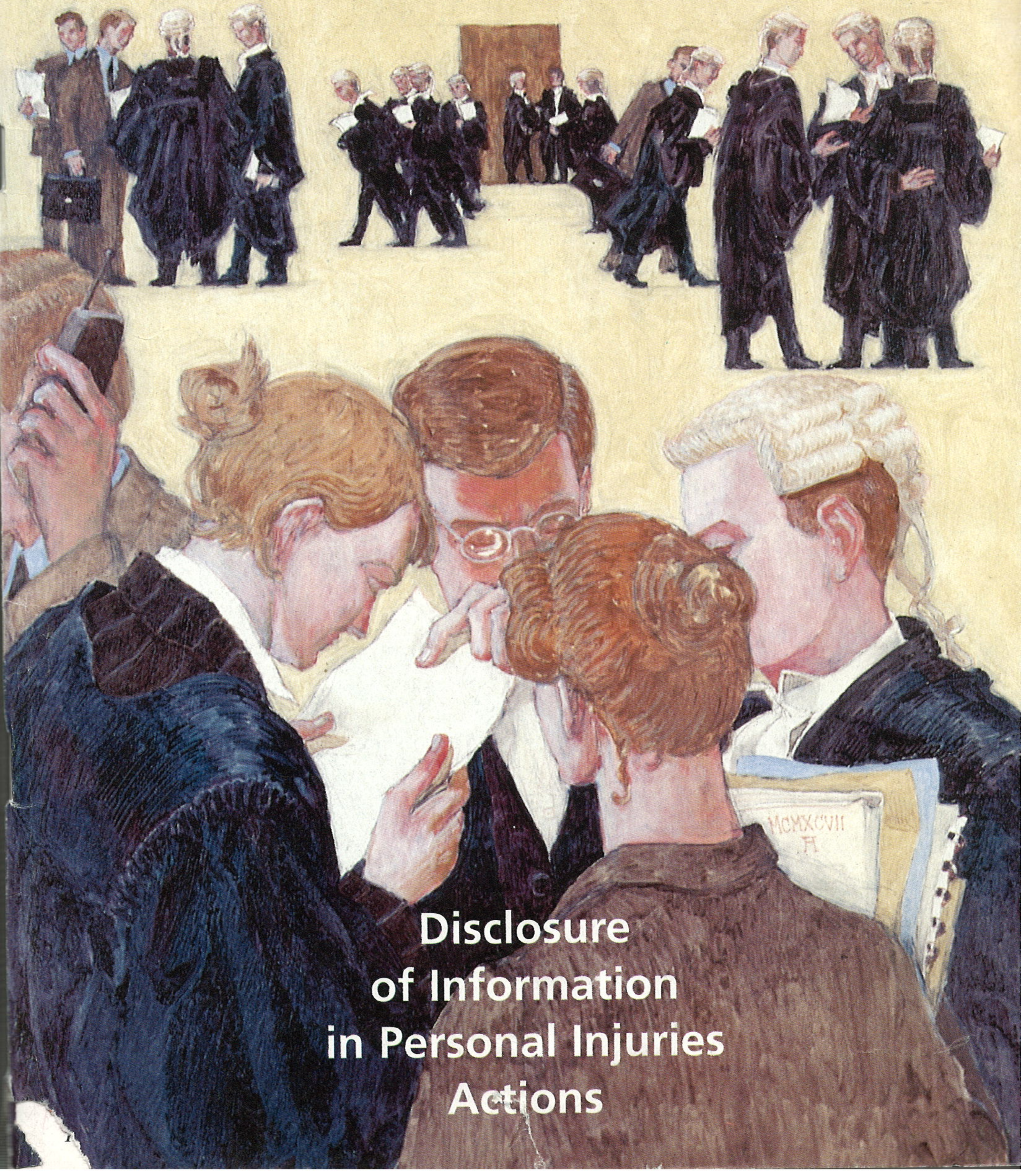

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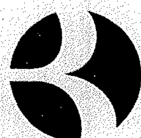

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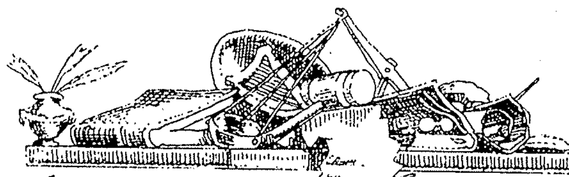

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A new photocopying / fax service for barristers who operate on Circuit is now available in the Law Library. Please contact Teddy O'Neill in the Library at 7023973. All requests will be dealt with promptly. Please endeavour to give as much notice as possible.

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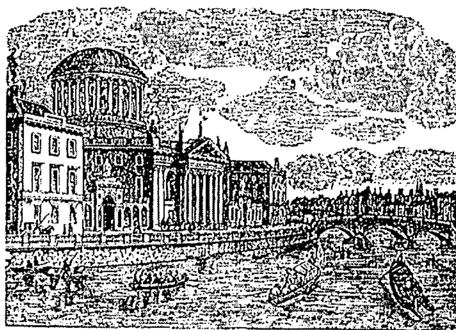
Art Exhibition in the Law Library Building, Church Street, from November, 14 to November 28, 1997

Edel Campbell is pleased to announce the second exhibition of original paintings and prints by young Dublin based artists, in the Law Library Building in Church Street. This latest exhibition, entitled, 'Influx', includes an exciting mix of paintings, drawings and prints by Edel Campbell, Ciaran Cronin, Nuala Dalzell, Ashline Lister and Kate Park. The pieces selected are new or recent works, most of which have not yet been exhibited in Ireland.

Members are invited to view the exhibition in the lobbies and restaurant of the building in Church Street, until 28th November.
Contact Edel Campbell at 4545077



Need for Legal Aid and Advice Still Strong

The Free Legal Advice Centres received 4, 524 calls to their helpline in 1996, according to statistices just released in the 1995/96 FLAC Annual Report. Although family law cases comprise the largest single element at 27% of all calls, the largest grouping of cases dealt with comprise a mixture of social welfare, housing, consumer and employment issues. In comparison, the State scheme of Civil Legal Aid and advice deals almost entirely with family law cases (94%), which FLAC points out, suggests that there are many non-family issues which the state scheme may be missing

•

New System for Payment under the Criminal Legal Aid Scheme

A new scheme for payment of solicitors and barristers came into operation in October 1997. Details of the new Scheme are as follows:

1. A copy of each individual certificate granting free legal aid under the Criminal Legal Aid Scheme will be forwarded by each District Court office to the relevant Circuit Court office to which the case has been returned for trial. The Circuit Court office must forward the certificate to the finance division in Killarney for their information. The case 'bill number' must be quoted by the Circuit Court office.
2. The Circuit Court office will produce 'day sheets' in respect of each day's criminal sittings.
3. The Court Registrar will bring his 'day sheets' to court each day and where a solicitor or barrister is representing a client under the Criminal Legal Aid Scheme he /she will sign his/her name and payee number opposite the case to record the fact that he/she appeared in court on that date to represent the defendant. It will be the solicitor's and barrister's responsibility to ensure that their appearances are recorded in every case.
4. At the end of each day the court registrar must sign the ' day sheets' to verify that the particulars recorded on the sheet are correct. Any problems must be brought to the immediate attention of the County Registrar who must sort the problem out immediately.
5. The 'day sheets' correctly certified, must be forwarded by the County Registrar to finance division within five working days of the court date. A copy of the 'day sheets' will also be forwarded to Law Library Services Limited for its information. The court office will also keep a copy of each 'day sheet' for record purposes.
6. On the basis of the information contained on the 'day sheets' finance division will continue to receive fee sheets from the Office of the DPP which will contain a flag to indicate non-standard payments which are made by theDirector. The information contained thereon will be checked against the payments already made and any underpayment / overpayment will be dealt with.
7. Solicitors and barristers should make separate claims to finance division in respect of any prison visits, quoting the relevant bill number

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New Courts Bill Pending

A new Courts Bill will shortly be introduced in the Dáil to provide for two additional High Court judicial positions.

Disclosure of Information in Personal Injuries Actions

S. 45 of the Courts and Court Officers Act, 1995 makes provision for the advance disclosure of information in personal injuries actions in the High and Circuit Court and empowers the Superior and Circuit Court Rules Committees to make rules permitting disclosure of such information notwithstanding that it may be covered by legal professional privilege. In the High Court this section has been implemented by the Rules of the Superior Courts (No. 7), 1997 which introduces a new Part VI into Order 39. These Rules came into force on 1st September, 1997.

The Bar Council, in association with the Law Society, has voiced strong concerns regarding the new rules both to the Superior Court Rules Committee and to the Minister for Justice. In particular the Council is concerned with regard to the definition of "reports" covered by the Rules, the provision for sequential, rather than contemporaneous exchange of reports, the exclusion of private investigators reports, the provision making solicitors personally liable for costs, admission in evidence of reports and statements and *ex parte* applications under Rule 52.

The present definition of "report" blurs the distinction between the disclosure of evidence given at the trial of the action and steps, decisions and consultations taken in the preparation of the case to which privilege properly attaches. Also, the Rules must be changed to provide for the contemporaneous exchange of reports which is essential in the interests of justice. In exceptional cases, where a defendant can persuade a court that sequential exchange is necessary because of the complexity of the case, then an order can be made under Rule 52. The general rule should however be for mutual contemporaneous exchange. The absolute exclusion of private investigator's reports appears inconsistent with the rationale of the section which is to prevent trial by ambush. This rule should be deleted while it remains open to any party to seek exemption from the provisions of Rule 46 by application under Rule 52.

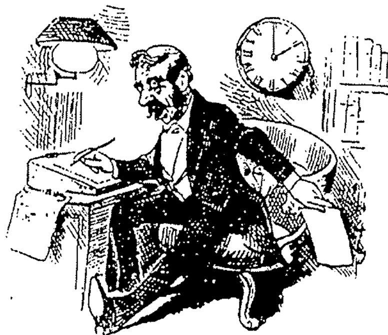
Rule 48 (2) empowering the court to make an order that a solicitor be personally responsible for costs incurred as a result of failure, delay or default, introduces an undesirable separate controversy into interparty litigation. The Bar Council believes that the current disciplinary procedures are the appropriate method to ensure proper behaviour.

The Council has also argued that the procedure envisaged by Orders 47 and 50 should be deleted as they may encourage tactical manoeuvring which may not be conducive to a fair hearing of the case. The Council has submitted that in the short-term the principle of pre-trial disclosure may be established and the parties permitted but not compelled to agree reports as is now the case. In light of developing practice, further formal steps may be taken in relation to notices to admit.

It is clear that the rules must permit a court to deal with exceptional cases, however it is also submitted that there is a difficulty in permitting such applications to be made *ex parte*. The fairest solution would follow the UK approach where application is made on notice but the substance of the evidence or statement is not disclosed.

Regarding the date from which compliance may be sought, it is the strong view of the Council that at the very least, it should have no application to cases where the notice of trial has been served or where the case has been first listed for hearing before the 1st September, 1997.

The Bar Council believes that these matters are currently being addressed by the Superior Court Rules Committee and it is anticipated that an amending order will issue shortly.



Law and Practice Relating to the Interim Refugee Appeals Authority

Sarah Farrell, Barrister

In August of this year, the Interim Refugee Appeals Authority ("the Authority") began hearing appeals from decisions of the Minister for Justice, (now the Minister for Justice, Equality and Law Reform), refusing to recognise the refugee status of persons seeking the protection of the United Nations Convention Relating to the Status of Refugees, 1951 ("the 1951 Convention") in this jurisdiction.

Practitioners presented with the prospect of appearing on behalf of an appellant face a number of difficulties in their endeavours. In particular, it can be difficult to gather together the relevant law and, in addition, there are no written rules of procedures pertaining in respect of the Authority save a very brief account contained in a letter normally sent to appellants by the Department. Further- more, the relatively recent closure of the Legal Project which had operated from the offices of the Refugee Council in Dublin, means that it will now prove difficult and time-consuming to obtain information about an appellant's country of origin (e.g. reports from human rights organisations or such State reports on human rights situations in individual countries such as those issued by the U.S. State Department annually).

The purpose of this article is to provide practitioners with a brief guide to the relevant law, as well as to provide a brief outline of the basic documents which are necessary and/or helpful in the presentation of appeals to the Authority.

Who is a Refugee?

Article 1A (2) of the 1951 UN Convention provides that the term "refugee" shall apply to any person who can establish a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[1]

Ireland is a signatory to the 1951 Convention and the related 1967 Protocol, but the Convention has never been directly implemented into Irish law. While the Refugee Act, 1996 ("the Refugee Act") implements aspects of the Convention, only very few sections of that Act have actually been brought into force to date by the Minister, despite the fact that it was passed into law by both Houses of the Oireachtas on the 26th of June, 1996.

On the 29th of August of this year, the Irish Government published a Statutory Instrument[2] entitled the Dublin Convention (Implementation) Order, 1997 which, as its name suggests, brings into force the Dublin Convention. The purpose of the Convention is to establish a mechanism for determining the state responsible for examining applications for asylum lodged in one of the Member States of the EC. From the 1st of September, 1997, all refugee applicants entering Ireland via another Dublin Convention signatory country may be returned to that latter country following a consideration of their case in accordance with the procedures laid down in the Implementation Order and, if returned, their application will be considered in the receiving country. However, the Implementation Order contains its own appeals procedure and it would not appear that applicants for refugee status who are processed under the Dublin Convention Order will have the right to appeal to the Authority.

Therefore, pre-Dublin Convention applicants will have a right of appeal to the Authority and, in respect of applicants entering this state after the 1st of September, 1997 via a non-Convention country or to whom the Convention otherwise does not apply, it would appear that they would have a right of appeal to the Authority should the Minister refuse to recognise their refugee status[3].

Relevant Law

As outlined above, there is little Irish statute law on this area which is actually operating given that only a handful of sections of the Refugee Act, 1996 have been brought into force to date. Therefore, practitioners will be relying on the 1951 UN Convention, the 1967 Protocol and the

contents of what is known as the "Von Arnim letter"[4].

In order to properly present an appeal, legal representatives should familiarise themselves with the text of the 1951 U.N. Convention[5], the 1967 Protocol and the "Von Arnim letter"[6]. There are also a number of judgments which should be considered; in particular those in the cases of *Gutrani v. Minister for Justice*[7] and *Fakih v. Minister for Justice*[8]. In respect of whether or not the Minister is obliged to consider an application for refugee status and the applicability of the Von Arnim letter, practitioners should note that an appeal against the judgment of the High Court in *Anisimova v. Minister for Justice*[9] has recently been heard by the Supreme Court on the 5th November 1997 and judgement was reserved.

Further, the United Nations High Commissioner for Refugees ("UNHCR Handbook")[10] will, in most cases, be an essential aid and is certainly an excellent introduction to the area.

In most cases, it will be necessary for a practitoner to familiarise himself or herself with the concept of "first safe country" and the principle of non-refoulement. In summary, the former is concerned with the argument that a refugee should apply for protection in the first safe country in which he or she arrives. However, the analysis of whether a country is safe is not always a simple process; it may be that while another European country might objectively seem to be safe, in the mind of the applicant there may be good reason to regard it as unsafe. Potential examples include a refugee who fears that there are agents of an oppressive regime operating in an ostensibly "safe" country, or a refugee arriving in a country knowing that many of his or her enemies are already there.

Furthermore, the Convention does not expressly require a refugee to seek protection in the nearest available country nor in the first State to which he or she gains access. According to the Executive Committee of the UNHCR, "[t]he intentions of the asylum-seeker as regards the country in which he wished to request asylum should as far as possible be taken into account. Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state."[12] This is a controversial issue, but one which tends to rear its head in appeals where an appellant has passed through other countries en route to this jurisdiction. Practitioners should also be aware of the considerable disagreement regarding the distinction between the concepts of "safe third country" and "host third country".[13]

The principle of non-refoulement basically embodies the "rule" that no person / refugee should be returned to a place where he or she will be in imminent danger[14]. Hathaway summarises the position in the following terms: "[p]ersons who flee situations of civil disorder, domestic conflict or human rights violations should benefit from a presumption of humanitarian need, and may not be returned unless the state of refuge can rebut the presumed risk of danger."[15]

Applicable Procedures

Until the Refugee Act is brought into force, the applicable procedures for non-Dublin Convention refugees are set out in what is known as "the Von Arnim letter", which is a letter sent from the Department of Justice to the UNHCR in London in December 1985. The text of this letter provides a procedural framework within which, it was submitted to the UNHCR, all applications would be considered[16]. Of particular note is paragraph 4 of the letter in which it is expressly stated that an individual will not be refused entry or removed until he or she had been given the opportunity to present his or her case *fully*, his or her application has been *properly* examined and a decision has been reached.[17]

The applications for refugee status of appellants coming before the Authority should have been processed in accordance with the standards and procedures[18] set out in the Von Arnim letter and practitioners should ensure that both these procedures and the constitutional requirements relating to fair procedures were adhered to in respect of the appellant's case at all stages of the interview and decision-making processes. Further, practitioners should ensure that the procedures and principles applied in processing the appellant's claim in the first instance were in line with the standards set out at Part Two of the *Handbook on Procedures and Criteria for Determining Refugee Status*, published by the UNHCR[19]. Of particular interest are the "basic requirements" set out at paragraph 192 of the Handbook and the applicable "Principles and Methods", as well as the guidance relating to the "Benefit of the Doubt" to be accorded to an applicant. The Handbook also deals with what are termed "cases giving rise to special problems in establishing the facts", namely applications by mentally disturbed persons and unaccompanied minors.

Of central importance is paragraph 202 of the Handbook which states that:

> "since the examiner's conclusion on the facts of the case and his personal impression of the applicant will lead to a decision that affects human lives, he must apply the criteria in a spirit of justice and understanding and his judgement should not, of course, be influenced by the personal consideration that he applicant may be an "undeserving case'."

The Interim Appeals Authority

The Authority was established in 1993 by the then Minister for Justice to hear appeals from applicants who had unsuccessfully sought recognition of their refugee status from the Minister.

Before it had commenced hearings, its operation was suspended pending a judicial review application brought on behalf of a number of Moldovan nationals, which challenged the absence of provision for legal aid for prospective appellants. During last summer, the latter case was settled on the basis that an "all-in" sum of £120.00 in respect of each appellant would be paid by the State by way of legal aid to the solicitor acting for the Moldovan appellants. It has become the practice now that solicitors appearing before the Authority have been invited to apply for the said sum in respect of their client(s). Following settlement of the Moldovan case, the Authority began to hear appeals in August 1997.

In the normal course of events, an unsuccesful applicant for refugee status will receive a letter informing him or her of the Minister's refusal to recognise his or her status as a refugee under the 1951 Convention and further informing the applicant of his or her right to appeal to the Authority. If the applicant indicates to the Department of Justice, Equality and Law Reform that he or she wishes to appeal the

decision, a further letter usually issues outlining the date of the appeal hearing with a brief description of the forum and an equally brief outline of the procedures involved. This letter usually encloses the material upon which, it is stated, the Authority will "in the main" rely. In most cases, this material includes reports of interviews, UNHCR observations and "any additional material furnished by, or on behalf of, applicants".

Where the Legal Project of the Refugee Council had been working on an application, there will generally be a submission prepared by the Project on the Department's file[20] which is inevitably of enormous assistance to a legal representative, comprising a written submission on the applicant's circumstances, details relating to the country of origin and materials from international human rights organisations and reports supporting the application for recognition of refugee status.

The said letter from the Department states that the Appeals Authority is "a non-statutory body which considers cases in an informal manner: it is not akin to a court hearing". It is stated to be a non-adversarial hearing where appeals are considered by Mr. Justice Peter O'Malley, retired President of the Circuit Court. It is further stated that "it is not thought that the calling of witnesses will be necessary "but that, upon hearing the case, the Authority will review the matter if it considers the calling of a witness to be necessary."

The letter also provides that where an applicant requests an oral hearing, the Appeals Authority "will afford the applicant an opportunity to make his or her case. His or her legal representative, if any, may then be invited to make a short submission."

Practice Points

The jurisdictional basis of the Authority is not clear and, in pre-appeal correspondence, legal representatives should invite the Minister to outline the precise jurisdictional basis upon which the Authority operates. Similarly, the Minister should be requested to furnish the appellant with the applicable rules of procedure.

The Minister should also be invited to confirm that the only material upon which the Authority will rely in considering the appeal is that material enclosed with the letter. The Minister should also be requested to provide copies of any further material upon which the original decision was made and to confirm that the reasons as set out in the letter of refusal constitute the full extent of the Minister's reasons for refusing recognition. A request should also formally be made for any material or information relevant to the appellant's case which has come to the attention of the Minister, or his servants or agents, since the making of the original decision. These requests should be made with express reference to the principles of natural and constitutional justice and procedural fairness.

Pre-appeal correspondence should also contain a request for an oral hearing, should indicate that a legal representative will make a submission on behalf of the applicant and request an interpreter, if necessary, specifying the language used by the appellant. (Note that the cost of an interpreter will be borne by the Department.)

Representatives should request the right to adduce evidence not only from the appellant but also from any other person whose evidence the appellant deems necessary, in the interests of procedural fairness.

The Minister should also be asked to ensure that all persons whose statements will be relied upon at the appeal hearing and/or who were involved in the original decision-making process refusing the appellant's application will be present at the hearing of the appeal for the purposes of cross-examination and the names of such persons should be requested.

Finally, it should be indicated that the above material and information should be furnished to the appellant in the interests of fairness and in the light of the relevant principles of natural and constitutional justice and that, in default, an application for an adjournment may be made in the interests of properly representing the appellant.

The Hearing

As previously mentioned, there exist no written rules or guidelines relating to the practice or procedure of the hearings, save the letter from the Department briefly describing the nature of the forum. The practice has been that legal submissions may be made on behalf of the appellant either before or after he or she is taken through his or her evidence. As a general rule, and notwithstanding the fact that the letter from the Department states that it is a "a non-adversarial hearing", it has been the practice that the officials from the Department cross-examine the appellant on his or her evidence. The appellant's representative may then respond to any issues which have arisen during cross-examination.

The Result

Following the hearing of the appeal, the Authority makes a recommendation to the Minister advising as to whether or not the original decision to refuse recognition should be overturned. Although the Authority has been in session and hearing appeals since August of this year, at the time of writing and to the best knowledge of this writer, no decisions at all have been communicated to appellants.

Where the Minister endorses the original decision of previous office-holders following a recommendation by the Authority, it would probably follow that moves may be made by the Department of Justice to deport the applicant. There are two possible avenues for an applicant in such a situation.

The Von Arnim letter provides that an asylum application will be examined by the Department in accordance with the 1951 UN Convention and the 1967 Protocol. However, it is expressly stated that "[t]his shall not preclude the taking into account of humanitarian considerations which might justify the grant of leave to remain in the State."[21] It is open to an unsuccessful applicant to apply to the Minister for what is often referred to as "humanitarian leave to remain" in the State. Considerations which may be taken into account include, *inter alia*, the length of time an applicant has spent in the State, the ties he or she had established (e.g. relationships) or the fact that other family members now lawfully reside in the State, having been granted either refugee status or humanitarian leave to remain.

A second option may be to seek leave to institute Judicial Review proceedings. The success or otherwise of such an application will obviously depend on the facts of each case. However, in anticipation of this possibility, and as far as possible, detailed notes should be taken throughout the

1. For a full discussion of the definition, see the Handbook on Procedures and Criteria for Determining Refugee Status, published by the Office of the United Nations High Commissioner for Refugees, Geneva (January, 1992).
2. S.I. No. 360 of 1997.
3. In addition to the categories of non-Dublin Convention applicants and Dublin Convention applicants, since June 1997 there is a third category of persons - those entering the State from Great Britain or Northern Ireland. Pursuant to a letter dated the 25th of June 1997 from the Department of Justice to Mr. Pierre Lavanchy, UNHCR Representative, the traditional common travel area has been effectively abolished and a hybrid procedure appears to be operating in respect of persons entering the State from Great Britain and the North. According to the text of the letter, "persons travelling from Great Britain or Northern Ireland to Ireland should meet normal immigration requirements for entry to Ireland and immigration officers will, in future, have power to refuse leave to land in Ireland to persons travelling from Great Britain or Northern Ireland who do not meet those requirements." The legitimacy of the creation of this "hybrid" category is suspect, not least because the U.K. is a signatory to the Dublin Convention and therefore, applicants entering this State from Great Britain or Northern Ireland should be considered Dublin Convention refugee applicants and processed in accordance with the Implementing Order.
4. See below.
5. The text of the 1951 Convention is set out at Annex II of the UNHCR Handbook, ibid., f.n. 1.
6. The text of the von Arnim letter can be found in an Appendix to the judgment in *Gutrani v. Minister for Justice and Others* [1993] 2 I.R. 427.
7. Ibid.
8. [1993] 2 I.R. 406.
9. Morris J., unreported, 18th February 1997.
10. See ibid., f.n. 1.
11. This position would appear to be supported by reference to Article 14(1) of the Universal Declaration of Human Rights which provides simply that "Everyone has the right to seek and to enjoy in other countries asylum from persecution."
12. Conclusion 15 (XXX) of the Executive Committee of the UNHCR's Programme, at para. (h)(iii)-(iv), U.N. Doc. HCR/IP/2/Eng./REV.1986(1979).
13. Note the *Anisimova* judgment, ibid., f.n. 9. Note also two Resolutions adopted by the relevant Ministers of the Member States of the European Union at London in 1992 relating to manifestly unfounded applications for asylum (adopted on 30th November, 1992) and a harmonised approach to questions concerning host third countries (adopted on the 1st of December, 1992).
14. For a more detailed discussion of these and other issues relating to refugee law, practitioners should consult G.S. Goodwin-Gill, The Refugee in International Law (2nd ed.) (Clarendon Paperbacks, Oxford, 1996); J.C. Hathaway , The Law of Refugee Status (Butterworths, 1991);R. Byrne, "The Safe Country Notion in European Asylum Law", 9 Harvard Human Rights Journal, 185 (Spring 1996); E. Guild, The Developing Immigration and Asylum Policies of the European Union (Kluwer Law International); UNHCR, "An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by the UNHCR", Vol. 1, No. 3 of the UNHCR European Series (Sept 1995).
15. See Hathaway, ibid., at p. 25. See also G. Goodwin-Gill, "Non-Refoulement and the New Asylum Seekers" (1986), 26(4) Virginia J. Intl. L. 897, at 905.
16. Note the implications of the *Anisimova* judgment in this regard, ibid., at f.n. 9.
17. Italics added.
18. Note that non-citizens are entitled to fair procedures under the 1937 Constitution: *State (Trimbole) v. Governor of Mountjoy Prison* [1985] I.R. 550. In a number of other cases, it has been established that certain fundamental rights can be invoked by aliens: *DPP v. Shaw* [1982] I.R.; Nantharantnam, 4th October 1984; *Ji Loa Lau* [1993] 1 I.R. 116; *Northants Co. Co. v. ABF* [1992] ILRM 113.
19. See ibid., f.n. 1.
20. This submission will generally form part of the material sent to the appellant by the Department; in default, it may be possible to obtain copies from the Refugee Council.
21. Von Arnim letter, ibid., at f.n. 6, at paragraph 5.

Lawyers for Refugees Rights

The recently established Lawyers for Refugee Rights group works for the protection of the rights of applicants for refugee status in this jurisdiction. The group aims to highlight breaches by this State of its international protection obligations and to act as a watchdog and, where necessary, as an advocate, for the rights the rights of such persons. The group is particularly concerned about the inadequacy of the legal aid provision in respect of such persons.

For further information, contact: Sarah Farrell, in the Law Library at 702 2934

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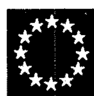
Thanks to the Bar from the Country Air Association

The Country Air Association had a very profitable fund raising day in the Law Library towards the end of last term which raised £2,430.00 and for which they would like to thank all for their kind contributions. The Association is a charitable organisation dedicated to sending needy families on holiday for one week during the summer. Those who benefit are generally families going through a hard time as a result of illness, unemployment, or who cannot afford a holiday. During 1997, 81 people holidayed, 38 of whom were children, at a total cost of £8,000.

For further details on the Association, contact: Barbara Plant, Secretary, 32 Hyde Park Ave., Blackrock, Co. Dublin

Part-Time Workers, Equality and Seniority - Europe Pulls Rank

Paddy Dillon-Malone, Barrister



A series of recent European equal pay and equal treatment cases have put in issue the fairness of a strictly "real time" or pro-rata basis of calculation of service for part-time employees. As outlined below, these decisions may have important consequences for pay increases and promotion among part-time public service employees and, more generally, for other predominantly female part-time workforces. They may also add to the proposition that the weight presently attached to seniority in matters of promotion in the public service may be more trouble than it's worth.

Job-sharing and seniority-related salary increments

Since 1984 it has been possible to share one's job at the appropriate grade and increment level within the Irish public service on a strictly 50/50 basis, but on no other. Under the rules, staff recruited on a full-time basis may participate in the scheme, in which case they retain the right to return to full-time work, whereas new job-sharing recruits are entitled to be appointed to full-time positions provided that suitable vacancies exist[1]. The overwhelming majority of participants are women and, for all such workers, the question of how their length of service is calculated has important consequences both for their entitlement to incremental pay increases within their grade and for their eligibility to be considered for promotion.

In relation to the first such concern, the rules provide that each year's job-sharing service is reckonable as 6 months full-time service, with the result that if and when a participant moves from job-sharing to full-time service, she will automatically be placed at a lower level on the full-time scale than she occupied on the job-sharing scale[2]. In real terms, she will receive less than twice what she would have earned job-sharing and, therefore, suffer an effective reduction in her hourly rate of pay.

Earlier this year, Advocate General La Pergola advised in an Article 177 preliminary reference from the Labour Court in the case of *Hill & Stapleton v Revenue Commissioners and the Department of Finance* that where, as in Ireland, a greater percentage of women than men are employed on a job-sharing basis, the "real time" pay increments awarded to those exercising the right to move from job-sharing to full-time work should not be organised in such a way as to place the participants at a lower grade in the pay scale than other workers on full-time who had the same length of service measured in years. In his Opinion, the crucial consideration was the *downward* effect of reducing the grade of a person who shared a job when she moved to a full-time position, thus introducing a retrospective disparity in the overall pay of workers performing the same duties in their employment both in terms of quality and quantity.[3]

In the earlier case of *Danfoss*,[4] the European Court of Justice laid down the principle that since length of experience goes hand in hand with experience and since experience generally enables the employee to perform his duties better, the employer need not provide special justification for recourse to the criterion of length of service in granting the employee a differential pay supplement. In *Hill & Stapleton*, Advocate General La Pergola has advised that this general statement be qualified in two ways. In paragraph 34 of his Opinion, he describes the first such qualification as follows:

> "When the employer takes an individual decision it is certainly lawful to take length of service into account as one factor in granting the employee a differential pay supplement. It may be that greater experience in the post enables the employee to work more efficiently. What does, however, give rise to doubts is the use of a criterion which generalises recourse to length of service, so as to extend it indiscriminately even to cases in which it may be unjustified. The criterion of length of service must be supported by adequate justification where it is applied to a series of work relationships in respect of which it is far from proved that length of service can be equated with competence. Different treatment of part-time and full-time workers is not justified where it is assumed, in a general way and merely on the basis of strictly proportional criteria, that workers in the first category are per se less deserving of pay supplements."

The second proposed qualification derived from the Court's acknowledgement in *Danfoss* that unlawful discrimination may arise from the circumstance that women have entered the labour market more recently than men or more frequently suffer an interruption of their career :

> "To my mind, this explanation leads us to draw a distinction between length of service reckoned in years - which the employer can take into consideration in deciding on promotions without having to establish the importance it has in the performance of specific tasks

entrusted to the employee - and length of service reckoned in hours worked, whose relevance for the purposes of progression to a higher rate of pay must, in contrast, be proved by objective evidence."[5]

The European Court of Justice has yet to deliver its judgment in *Hill & Stapleton*, but if as may be expected it follows the reasoning of Advocate General La Pergola and if indeed the Irish courts subsequently find that no objective justification exists for the indirect discrimination, the State (or any other employer whose female workforce is more likely to avail of job-sharing arrangements) will be faced with the uncomfortable result that any job-sharing scheme it designs must operate at an extra overall cost in terms of salaries when compared to the same jobs paid full-time in all cases where job-sharers move to full-time work[6]. On the one hand, this cost will tend to diminish as and when the participants return to full-time work after longer periods of part-time service, because the differential between their incremental pay entitlements and those of their comparators in full-time employment will decrease as they each move closer to the maximum of the scale. On the other hand, if and when greater reliance is placed on filling one or both halves of a job-share by external recruitment, the overall expense to the administration, and the perceived inequity of the position from the point of view of fellow workers in full-time employment, may be expected to increase.

The case is a good illustration of the often incongruous implications of employment equality decisions. For example, an employer filling job-shares wholly or in part by recruitment could attempt to ensure that neither sex predominates among the job-sharing workforce and thus avoid the increased financial consequences of changes to full-time employment. The result might also be avoided by abolishing automatic or near automatic increments within grades altogether. More generally, it is worth recalling that although a job-share may readily constitute "like work" to the full-time job[7], the equal pay guarantee will apply in this context only where a comparator of the opposite sex is employed in the workplace by the same employer or by an associated employer.

Part-time workers and seniority-related promotion

As already indicated, the equal pay guarantee does not apply to raises in salary which cannot be characterised as automatic or near automatic[8], and for this reason the anticipated decision in *Hill* may not have such far-reaching consequences outside the State and semi-State sectors. However, it is no doubt that a common feature of larger private companies is to attach great weight to seniority in the wider context of promotions, particularly at the unskilled and semi-skilled level. In two judgments delivered on 2 October 1997, the European Court of Justice has held that rules which, by reference to a strictly pro-rata calculation of service, place part-time workers in a less favourable position than full-time workers in respect of eligibility for promotion may be unlawful in circumstances where the criteria for the application of the equal treatment Directive (Directive 76/207) are otherwise satisfied and where no objective justification for the discrimination can be identified.

In the first case, *Gerster v Freistaat Bayern*, the Court was called upon to decide whether the principle of equal treatment was infringed by a system of calculation whereby part-time employees had to accrue a period of part-time service more than one third longer than that completed by a full-time official in order to become eligible for promotion[9]. The Bavarian State, supported by the Irish and UK governments, argued that the discrimination was objectively justified because the system was based on the administration's need to establish a general yardstick in terms of length of service against which the professional experience of employees could be assessed before they could be regarded as eligible for promotion to a higher grade. In its submission, civil servants who worked part-time needed to complete longer periods of service than those who worked full-time, if they were to acquire the professional skills and abilities necessary for duties at a higher level.[10]

The second case, *Kording v Senator für Finanzen*, concerned the lawfulness of a strictly pro-rata calculation of part-time service over one-half of normal working hours for the purposes of qualification for exemption from the qualifying examination for tax advisers[11]. The objective justification sought to be adduced in this case was that such an exemption should only be extended to those who were certain at least to have acquired sufficient experience through employment, the length of which has been prescribed independently of individual cases and with the same implications for all applicants.

In each case, the Court took the opportunity to reaffirm the force of its finding in the earlier case of *Nimz*[12], in the following identical terms :

> "It is impossible to identify objective criteria unrelated to any discrimination on the basis of an alleged special link between length of service and acquisition of a certain level of knowledge or experience, since such a claim amounts to no more than a generalisation concerning certain categories of worker. Although experience goes hand in hand with length of service, and experience enables the worker in principle to improve performance of the tasks allotted to him, the objectivity of such a criterion depends on all the circumstances in each individual case, and in particular on the relationship between the nature of the work performed and the experience gained from the performance of that work upon completion of a certain number of working hours."[13]

In other words, the complexity of the work is of particular significance in determining whether the discrimination is justified. In addition, in accordance with the Court's established case law, the national court may look to whether in any particular case the class of part-time employees in question was generally slower than the class of full-time employees in acquiring the relevant job-related abilities and skills, and to whether the competent authorities were in a position to establish that the measures chosen reflected a legitimate social policy aim, were an appropriate means of achieving that aim and were necessary in order to do so. If so, the mere fact that the rule affects far more women than men will not be regarded as an infringement of Directive 76/207. [14]

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The implications of *Gerster and Kording* appear therefore to be that a part-time worker who has performed duties attaching to the grade to which she aspires to be promoted will have a good claim to have the length of her part-time employment calculated on the same basis as those in full-time employment in circumstances where the usual criteria of the equal treatment Directive apply. The burden will then switch to the employer to justify the discrimination by reference to the above criteria and, in this respect, it is difficult to foresee how this quite difficult burden can be overcome in the context of most part-time work. By contrast, the burden of establishing indirect discrimination does not require proof of a causal connection between the practice complained of and the gender of the complainant, it being sufficient to show that the practice bears significantly more heavily on members of the complainant's sex than on members of the other sex.[15]

For example, whereas the complexity of a job may be a good reason for maintaining it as a full-time post only, the argument that a particular job is a complex one can be met in many cases by the point that the employer has already assigned such work to part-time employees and by the evidence of the complainant that she is already performing that work either alone or in concert with others. Similarly, in response to attempts to establish objective justifications on economic grounds, the argument that incentives must be offered to full-time employees so as to continually stimulate and invigorate their career paths may be met, as suggested by Advocate General La Pergola in his Opinions in all three cases, by the observation that this does not necessitate the exclusion of part-time workers from the same incentives[16]. In order to rely on a purely financial argument, under the test established in *Bilka* the employer must prove that the means chosen are necessary in order to satisfy a real need which cannot be satisfied in a different manner and without discrimination[17]. Furthermore, attempts at objective justification on the grounds of legitimate social policy aims will require to be most forceful given that the encouragement of part-time work as a measure favouring sexual equality is itself a strong social policy element in employment law. For example, one could imagine that considerations relating to the need for complete focus and full-time attention in the exercise of sensitive judgments affecting the public interest or the protection of health and safety might justify restricting eligibility for promotion to those who have worked full-time on similar duties. Yet even these examples may be open to challenge on the grounds that access to promotion is restricted by reference to an unwarranted generalisation.

Wider implications for seniority and promotion

The above cases show that employment equality legislation does not require an employer, in devising a promotions scheme, to establish the importance of length of service for the performance of specific tasks or to establish any other objective justification for relying on seniority in matters of promotion. Nonetheless, where such a scheme is in place and it affects a predominantly female or predominantly male part-time or job-sharing workforce in circumstances where the usual criteria of the equal treatment Directive apply, the calculation of seniority for the purposes of eligibility for promotion cannot work to the disadvantage of the part-time employees in the absence of an objective justification for the difference of treatment.

Because this last burden appears so difficult to overcome, the question must naturally arise for any such employer as to whether it is worth placing emphasis on seniority as a criterion of eligibility, as opposed to suitability, for promotion. Of course, a hypothetical employer could attempt to avoid the application of employment equality legislation in the same manner as described above in relation to the question of incremental pay by attempting to maintain a broadly gender-neutral part-time workforce. Yet such an elaborate evasion is almost impossible to imagine in practice. By contrast, the underlying logic of the above judgments may signal that there is more trouble ahead for the traditional yardstick of full-time seniority in matters of promotion.

The calculation of seniority in the public service provides a ready example of how the logic of *Gerster and Kording* might steadily erode the present system of calculating seniority, thereby undermining the notion of seniority itself as an eligibility criterion. For example, unpaid maternity leave, the soon-to-be introduced parental leave, special leave for domestic purposes, periods abroad on humanitarian duties, career breaks, and breaks for training and study purposes may all interrupt the calculation of service for seniority purposes, and might in each case be likely to be availed of by many more women than men. Why should the exclusion of these periods not also be found to be discriminatory in appropriate cases?[18] In addition, the same questions may be posed in respect of the filling of acting appointments at local government level.

In the context of the public sector, the recent decision of Mr Justice Budd in *Brides & Others v The Minister for Agriculture Food & Forestry* has confirmed not only that the comparator must be a real, and not a hypothetical, person but also that statutory authorities having functional autonomy and government Departments are not "associated employers" for this purpose.[19] In addition, it is true that in certain sectors of the public service the overall class of workers, both full-time and part-time, may be predominantly of one sex. Yet, on the other hand, the general tendency in public sector industrial relations including the recommendations of the Labour Court is to equalise the rights of part-time workers with those of full-time workers in respect of incremental pay increases irrespective of gender[20]. At the same time as these developments, the government is giving consideration to the question of how best to introduce a more flexible system of part-time work in the public sector. The above European decisions may well cause it to reflect that, if it wishes to encourage greater part-time employment, seniority as a criterion of eligibility for promotion may well be a yardstick which will become increasingly awkward and expensive to wield. ●

1. Department of Finance Circular of 27 February 1984.
2. Department of Finance Circular of 31 March 1987.
3. Case C-243/95, Opinion of 20 February 1997, paragraphs 25-30. It should be observed that the equal pay Directive (Directive 75/117) will also be infringed in circumstances where the overall pay of full-time employees is higher than that of part-time employees for the same number of hours worked on the basis of an employment relationship (including therefore a job-sharing situation but

excluding hours worked on overtime), Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, *Stadt Lengerich & Others v Helmig & Others* [1994] ECR I-5727.
4. Case 109/88 *Danfoss* [1989] ECR 3199, paragraph 24.
5. Paragraph 35.
6. La Pergola was also the Advocate General in *Gerster* and *Kording*, discussed below, and his reasoning, followed by the Court in those cases, is expressly grounded on the same premises in all 3 cases.
7. For example, the Labour Court in *Hill & Masterson* referred the matter to the European Court on the basis that the period of job-sharing was capable of giving the officer equivalent experience to that gained by a full-time worker.
8. Case C-184/89, *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297, paragraph 10.
9. Case C-1/95, Judgment of 2 October 1997.
10. Paragraph 36.
11. Case C-100/95, Judgment of 2 October 1997.
12. Op. cit., paragraph 14.
13. *Gerster*, paragraph 39; *Kording*, paragraph 23.
14. Cf. *Gerster*, paragraph 40.
15. Cf. *Nathan v Bailey Gibson Ltd & Others*, Supreme Court, unreported decision of 29 February 1996.
16. *Hill & Masterson*, paragraph 42 of the Opinion; *Gerster/Kording*, paragraph 47 and passim.
17. *Bilka v Weber von Hartz* [1986] ECR 1607, paragraph 36.
18. In relation to unpaid maternity leave, one argument which could be made, and which has been made elsewhere, is that the equal pay and equal treatment Directives, and the equality model more generally, are inappropriate and have no application to the sui generis circumstances of maternity.
19. Unreported judgment of 21 July 1997.
20. See most recently Recommendation N LCR 15621, Mayo County Council v IMPACT, issued on 27 August 1997 in the matter of part-time branch librarians.

Landmark Bill Paves the Way for the Establishment of an Independent Courts Service

The Courts Services Bill, 1997 was published on 30th October last. The Bill, establishes a new independent agency, to be known as the Courts Service, to take over the current responsibilities of the Minister for Justice for the running of the courts system. It is hoped that the Bill will be enacted by the Oireachtas before Christmas.

Launching the Bill, the Minister for Justice, Equity and Law Reform, Mr. John O'Donoghue, T.D., says that while the constitutional independence of the Courts in the exercise of their judicial functions will of course be maintained, the Bill will provide for the administration of justice under new systems and structures, operating under a Board, which are more in tune with the requirements of society as we head to the new millenium. Mr. O'Donoghue also said that he saw no reason why the new Courts Service should not be fully functional by the middle of next year.

Welcoming the bill, the Chairman of the Bar Council, Mr. John MacMenamin, S.C., said that the test of the new Courts Service will be its effectiveness in abolishing court delays and in ensuring a first class service to the public who are the consumers of the Service.

"The Minister must be praised for the timely publication of this Bill so soon after taking office and of course great credit for the Bill is also due to Mrs. Justice Susan Denham who chairs the Working Group on a Courts Commission and to the Working Group in general, whose 3rd report provided an outline for the present Bill," he said.

The Board of the new Courts Service will be chaired by the Chief Justice or by a judge of the Supreme Court nominated in place of the Chief Justice. Members of the Judiciary, the Chief Executive of the Courts Service and representatives of legal practitioners, staff and other interested organisations will also be represented on the Board. The functions of the Service will include management of the courts, provision of information to the public and maintenance of court buildings. The Chief Executive will have responsibility for the day-to-day operations of the service and will be the accounting officer for the Service required to give account in that capacity before the Public Accounts Committee and will also be reequired to give a general account in person before an Oireachtas Committee for the operations of the service if required to do so by a Committee.

The Minister for Justice, Equality and Law Reform will be accountable to the Dail for the activities of the service as is now the case under the present system of courts administration. In this regard the Annual Report and 3 year strategic plan of the Courts Service will be laid before the Houses of the Oireachtas by the Minister. ●

Recent Developments in Probate and Succession Law

Teresa Pilkington, Barrister

Section 117 of the Succession Act, 1965

This is the section whereby children of a testator may apply to court seeking an order that provision be made for them from that testator's estate. With such an application the court must be satisfied;

(a) that the testator failed in his moral duty to make proper provision for the child and;

(b) whether, even in light of such failure, the court will proceed to make provision for that child out of the estate.

Points to Note;

- S 117 only applies where the testator dies wholly or partially testate.

- The court cannot make an order under this section which will affect the legal right of the surviving spouse.[1]

Amendment

S117 (6) is amended by s 46 of the Family Law (Divorce) Act 1996. This amendment reduces the time limit for making a section 117 application to SIX MONTHS from the taking out of representation to a deceased's estate[2].

This time limit is very important as in *MPD v MD*[3] Carroll J held that the period of limitation in s117 (6) went to the very jurisdiction of the court thereby preventing it from making any order if an application is made outside this time limit.

Recent Caselaw: *Browne v Sweeney & McCarthy*[4]

Facts: The Deceased testatrix was a widow with four children. Prior to her death in 1992, she had made substantial provision for each child. Under the terms of her will she made a number of pecuniary legacies to her grandchildren and left the residue, comprising the bulk of her substantial estate, to five named charities. There was no provision in the will for any of her children. The evidence before the Court was to the effect that the Deceased believed she had made adequate and proper provision for them in her lifetime.

The Applicant was the Deceased's son who had issued proceedings pursuant to s 117. Whilst he acknowledged that his mother had made provision for him in her lifetime, due to his problems related to alcohol and drug abuse he had dissipated all of these monies. At the date of his mother's death he was an unemployed married man with three dependent minor children. His argument was that, notwithstanding the provision made for him by the Deceased in her lifetime, the question of whether proper provision had been made for him should be considered in light of his circumstances as they existed at the date of her death.

Mr Justice Lavan reviewed the case law in the area[5] and held that there had been no failure by the Deceased in making proper provision for the Applicant. In his view the fact that she had made a *substantial inter vivos* provision in favour of the Applicant was enough to relieve the Deceased of the requirement to make additional provision for him in her will. With regard to a suggestion by the Applicant that a discretionary trust might be set up so as to negate any suggestion that any additional monies awarded by the Court might again be dissipated, the Court took the view that this was not necessary in view of its finding that proper provision had already made for the Applicant. Mr Justice Lavan also pointed out that, in light of the express wording of s117, it may only be invoked by children of a testator and not on behalf of or for the benefit of grandchildren.

This case is presently under appeal.

The Family Law Act, 1995 and The Family Law (Divorce) Act 1996

A will is revoked by the subsequent marriage of the testator[6]. Nowhere in the 1996 Act is it explicitly stated that a decree of divorce has the same effect. Accordingly it may be necessary to advise persons granted a divorce to review their will.

Section 18 of the Family Law (Divorce) Act 1996

This is a new provision entitling spouses who have been granted a divorce decree to apply to court, up to six months after a Grant of Representation, for an order that provision be made for the applicant from the estate of the deceased spouse.

Points to Note;

- before granting relief the court must examine all relevant circumstances[7]
- no provision can be made for a spouse who has remarried[8]
- the courts should not make greater provision for the applicant than he/she would be entitled either by way of legal right share or on intestacy under the Succession Act, 1965 ('the 1965 Act') if the marriage had not been dissolved[9],
- provisions for notification by the personal representative and the applicant spouse[10]
- application can be made at the time of the divorce or at any time within the lifetime of both spouses that the provisions of s 18 are not to apply, in effect a 'blocking order' preventing a Court making an order under this section[11].

Section 25 of the Family Law Act 1995

There is also provision in s 25 of the Family Law Act, 1995[12] for a spouse, whose marriage has been dissolved, to bring a court application that provision be made out of the estate of his/her former spouse where that marriage was dissolved by a foreign court.

The provisions are similar if not identical to the s18 provisions set out above and now also have a six month time limit from the issue of a Grant of Representation[13]. The only substantive difference appears to be that, pursuant to s25, the Court can have regard to the conduct of the surviving spouse as the question of desertion is specifically referred to[14].

Time Limits

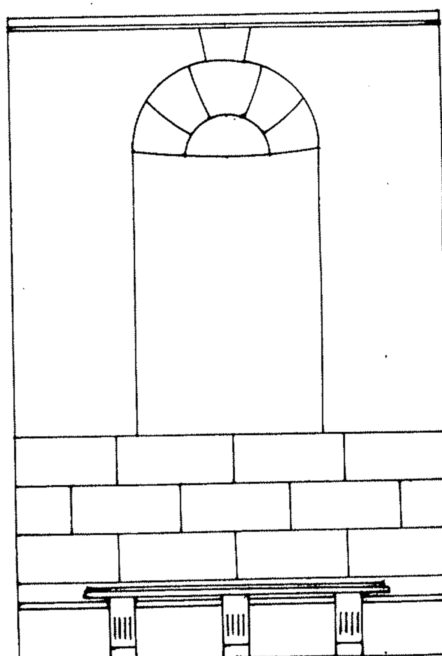
It is presumably due to the six month time limit imposed under s18 of the 1996 Act and s25 of the 1995 Act above that a similar time limit is also imposed in relation to s117 applications. The rationale for doing so in relation to s117 applications is not clear. Certainly any impetus for amending s117 appeared to be directed towards extending the possibility of an application by children in respect of an intestate estate, rather than further restricting an already stringent time limit.

Intestacy - Part VI of the Succession Act, 1965

Under s.6 of the Family Law (Miscellaneous Provisions) Act 1997 an additional section, s. 72 A is added to the Succession Act to the following effect;

> "72A. - Where the estate, or part of the estate, as to which a person dies intestate is disclaimed after the passing of the Family Law (Miscellaneous Provisions) Act, 1997 (otherwise than under section 73 of this Act), the estate or part, as the case may be, shall be distributed in accordance with this Part-
>
> (a) as if the person disclaiming had died immediately before the death of the intestate, and
>
> (b) if that person is not the spouse or a direct lineal ancestor of the intestate, as if that person had died without leaving issue."

Prior to this enactment there was some doubt as to the effects of a disclaimer by a beneficiary entitled to a share of a deceased's estate on intestacy. It has been argued[15] that where there is a disclaimer in such circumstances that the benefit disclaimed passes to the state as ultimate intestate successor.[16]



The effect of the new enactment is that the benefit disclaimed forms part of the deceased's estate and accordingly passes to that deceased's next of kin according to the intestacy rules.

Section 111 of the Succession Act, 1965

O'Dwyer v Keegan[17]:

This case examines s 111 of the 1965 Act which is the section providing for the entitlement of a spouse to a specific portion of the deceased spouse's estate where that spouse died testate, known as the legal right share.

Facts: Thomas Cummins ('the husband') died on 2 February 1995. At the time of his death his wife Kathleen was in a coma and she died twelve hours later without recovering consciousness. Both died testate and there were no children. The husband left some £2.4 million but made no provision in his will for his wife. The question therefore arose as to whether on the death of her husband, his widow acquired a half share in his estate.

In the High Court Kelly J held that s 111 did not in this case give rise to an automatic transfer of a half share of the husband's estate to his wife, rather it was a right exercisable by the surviving spouse. As Mrs Cummins had not exercised her right to claim her legal right share her estate was not now entitled to it.

The Supreme Court reversed this decision. Barron J, giving the decision of the Court, held that the proper interpretation of the section was that a legal right share, as defined in s111, vests on death[18]. The Court also held that the absence of any procedure for notification of the surviving spouse of his/her entitlement to avail of the legal right share was fatal for the alternative interpretation upheld in the High Court. The Court also noted the importance of certainty in the area of probate so that those making wills would know with certainty as to how their assets would be distributed.

Construction of a Will

O'Connell v Bank of Ireland[19]

Facts: Mrs O'Connell, a widow, made a will leaving the contents of her house to the Plaintiff, her nephew. She made no bequest in relation to the house itself. There was evidence before the court, which Barron J stated he fully accepted, that Mrs O'Connell had been advised by a neighbour that when making a will she should ensure that she dealt with the house and its contents, as otherwise the contents did not form part of her bequest of the house. Mrs O'Connell told this neighbour and the Plaintiff that she had made her will leaving the house and its contents to him.

As there was no contradiction on the face of the will Counsel for the Plaintiff conceded that they could not rely upon *Rowe v Law*[20] for the admission of extrinsic evidence under s 90 of the 1965 Act. Rather they sought to rely upon *Curtin v O'Mahony*[21] where the court had altered the terms of a will without the need for extrinsic evidence.

Barron J distinguished the present case from *Curtin v O'Mahony* on the basis that in that case the intention of the testator could be discerned form the terms of the will itself. The judge held that in the present case the testatrix's intention had been frustrated by omission, not by anything on the face of the will itself. Whilst the judge stated that he was fully satisfied on the evidence as to what the testatrix intended to do, he was bound to uphold the terms of the will which was clear in its terms.

This case is presently under appeal. ●

1. s117 (3)
2. The time limit was formerly twelve months
3. [1981] ILRM 179
4. H.Ct unrept Lavan J, 5 July 1996.
5. including *F.M v T.A.M* 106 I.L.T.R. (1972) 82 and *C v C* [1989] I.L.R.M. 815
6. s18, Wills Act, 1837.
7. s18(1), (3) & (5)
8. s 18(2)
9. s 18(4)
10. s18(5) to s 18(8)
11. s18 (10)
12. as amended by s52 of the Family Law (Divorce) Act, 1996
13. s25 (1)
14. S25(1)
15. Irish Tax Review, March 1992 edition
16. s 73 of the 1965 Act.
17. H.Ct. [1997] 1 ILRM 102, S.Ct. Unrept, 8 May 1997
18. Both the High and Supreme Court relied upon the case dealing with a right of election pursuant to s 115 of the 1965 Act, *In re Urquhart* [1974] I.R. 197
19. H Ct unrept, Barron J 27 March 1996
20. [1978] I.R. 55
21. [1992] 2 I.R. 562

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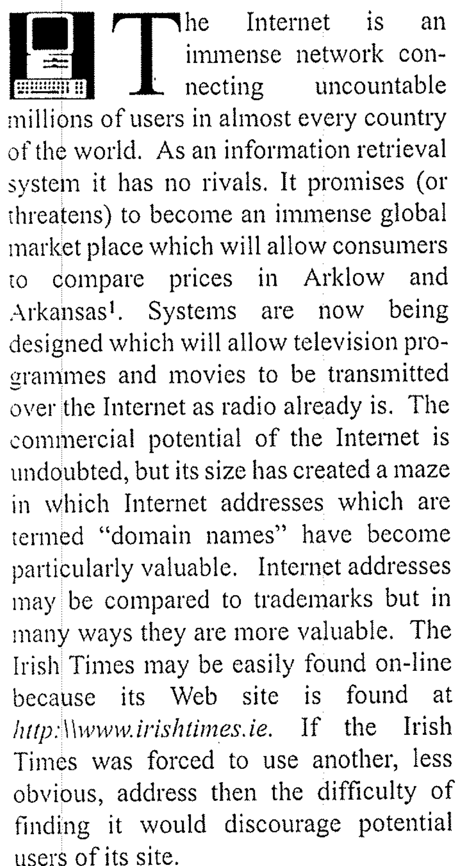
- International humanitarian law obligations

Domain Names on the Internet

Denis Kelleher, Barrister



The Internet is an immense network connecting uncountable millions of users in almost every country of the world. As an information retrieval system it has no rivals. It promises (or threatens) to become an immense global market place which will allow consumers to compare prices in Arklow and Arkansas[1]. Systems are now being designed which will allow television programmes and movies to be transmitted over the Internet as radio already is. The commercial potential of the Internet is undoubted, but its size has created a maze in which Internet addresses which are termed "domain names" have become particularly valuable. Internet addresses may be compared to trademarks but in many ways they are more valuable. The Irish Times may be easily found on-line because its Web site is found at *http:\\www.irishtimes.ie.* If the Irish Times was forced to use another, less obvious, address then the difficulty of finding it would discourage potential users of its site.

As the Internet developed in the USA and the majority of users reside there, most of the controversy over Internet addresses has been in America and it has usually concerned the most valuable ending: "*.com*" used to delineate commercial sites One of the great tales of the Internet, tells how students in various American campuses realised the potential value of Internet addresses. They registered the names of prominent companies as Internet addresses and when these companies finally woke up to the potential of the Internet they were faced with the choice of either commencing embarrassing litigation or buying the addresses. Most of the companies chose to pay. Unlike most such tales, there would appear to be a considerable grain of truth in this one. Rolex was recently appalled to discover that *Rolex.com* was registered to a woman in Colorado, USA. Less principled users have registered the names of charities or in one case *UNHCR.com*[2].

Rules for registering domain names

The register of Irish domain names (those ending in .ie) is administered by UCD. They have straight-forward rules for registration which should go some way towards ensuring that disputes such as this do not arise in Ireland. The Irish rules for obtaining a domain name contain stringent provisions on availability and reachability. For a domain name to be available it must correspond with reasonable closeness to the name of the applicant or to an abbreviation or trademark by which the applicant is well known. If the proposed name is either already in use or appears likely to be claimed by another, then another name must be chosen. This provisions will protect names such as *IBM.ie* or *Dublin.ie.* If, in the opinion of the naming authority, a name is likely to lead to confusion another name must be selected. At present, it is not possible for an individual or company to register more than one domain name in the "ie" domain.

Although the UK does not limit the type of domain names which can be registered in the same fashion as in Ireland, the UK domain name has a dispute resolution service. The rules for the UK subdomain provide that NOMINET UK (the administrator of the UK domain) may cancel or suspend the registration of a name if NOMINET UK is informed that legal action has been commenced over the use of the name, the name is being used in a manner likely to confuse internet users or NOMINET UK believes that either of these two events is likely to occur. If a dispute over the use of a domain name does arise then NOMINET UK will try to establish whether an acceptable resolution to the dispute can be found following an "impartial intervention" by a staff member of NOMINET UK. If any party is dissatisfied with the decision to suspend (or not to suspend) the use of a name, NOMINET UK may refer the matter to an independent expert. If the parties are not satisfied with the recommendation of the expert and NOMINET's resulting decision then they will be offered a mediation or Alternative Dispute Resolution service [3]. The rules for the *.co.uk* domain which is intended to be used by commercial enterprises specify that if two applications are made for the same name then the one which is received first will have prior claim,[4] *ltd.uk* and *plc.uk* domains also exist.

The Irish and UK rules for registering domain names illustrate how difficult it is to regulate this area. Both systems have defects: the legal basis on which the Irish rules reserve certain names such as *IBM.ie* may be questioned. Preserving the integrity of a trademark or business name is the job of the proprietor of that business or trademark, not third parties. Although the Controller of Patents and Trademarks does carry out a similar function, his office and duties are clearly defined by statute unlike the administrator of the Irish domain. The English rules allow NOMINET UK to suspend or cancel the registration of a name if a court action is commenced in respect to it. If this were to be done it could be

argued that NOMINET UK was usurping the role of the courts and pre-empting the courts decision.

The recent experiences of NOMINET UK in the English High Court may suggest that the administrators of domain names may become wary of arbitrating or investigating disputes over domain names and that they may ultimately prefer to leave these matters to the courts. *Pitman Training -v- NOMINET UK*[5] concerned the Pitman publishing company which was founded in 1849. It eventually comprised a publishing house, a training business and an examination business and in 1985 the company was split up and sold off. Each of these businesses used the name 'Pitman' and as they all traded in separate markets this was not a problem. On the 15th February 1996 Pitman publishing applied for the domain name *Pitman.co.uk* and was duly granted it. Pitman Publishing did not use the domain name immediately as it felt that it was important for it to carefully plan and develop its Web-site. However on the 15th of March 1996 the domain name '*Pitman.co.uk*' was also registered to PTC Ltd a franchisee of Pitman Training Ltd[6]. Nobody was able to explain how the domain name came to be transferred, but when Pitman Publishing realised what had happened in December 1996 it produced "...a considerable volume of correspondence both between the parties and eventually solicitors...". The offer of mediation was refused and solicitors were appointed by all sides and Pitman Training Ltd and PTC commenced an action against Pitman Publishing. The plaintiff's claimed that the defendants were engaging in passing off, Scott VC rejected this "strange proposition" noting that Pitman Publishing had been trading under the name Pitman for nearly 150 years. Scott VC also rejected the plaintiffs' claim that the defendant's were tortiously attempting to interfere with the contract between the plaintiffs and the plaintiff's service provider. The plaintiffs also claimed that the defendants were committing a tortious abuse of process when they wrote to NOMINET UK demanding that the domain name be restored to them and threatening legal proceedings if it was not[7]. Scott VC was of the view that describing this letter as extortionate or oppressive was "inapposite" and "grotesque". As he held that the plaintiffs had no viable or reasonably argued cause of action against the defendants he dismissed the plaintiff's application for an interlocutory injunction and allowed the defendants to use the *pitman.co.uk* domain name.

If a dispute were to arise in Ireland over the ownership of a domain name two causes of action would suggest themselves: an action for infringement of a trademark and the tort of passing off. Both of these remedies were invoked in a recent case which came before the English Courts, that of *Harrods -v- Lawrie & others*[8]. The Plaintiff was the well-known London Department store who had first registered its name in 1917. In 1995 Harrods became aware that the defendant, who resided in England, had registered the domain name *harrods.com* in the USA. Once the plaintiff became aware of this it made representations to the American authorities and the domain name was suspended before it could be used by the defendant. However the defendant refused to release the name to Harrods and although he was effectively prevented from using the domain name so was the plaintiff. The Plaintiff therefore commenced an action before the English Courts and ultimately a consent order was made which was satisfactory to the Plaintiff. The interesting feature of this case is that although the domain name was actually registered in the USA all the parties to the action were resident in England. The American authority responsible for administering domain names indicated that it considered that England was the appropriate jurisdiction in which to decide the case and that it would comply with any order which the English Courts made.

Infringement of Trademark

The law on trademarks in Ireland was recently updated by the Trademarks Act, 1996 which implemented a Council Directive to approximate the laws of the member states relating to trade marks[9]. A trade mark is any sign capable of distinguishing goods or services of one undertaking from those of other undertakings[10] and it may consist of words (including personal names)[11]. Once a trade mark is registered it exists as a property right[12] and the proprietor of the mark will have exclusive rights in that mark; if the mark is used without his consent within the state then he may bring an action for infringement[13]. The proprietor of the mark will have access to all the remedies of the court such as injunctions, damages and accounts that might be available to the owner of any other property right[13] and he may also have get an order for the erasure of the infringing material[15] or for the delivery up of infringing material[16].

A recent American example of infringement of a trademark was *Planned Parenthood -v- Richard Bucci (Trading as Catholic Radio)*[17]. The Plaintiff had been using its name since 1942, it had registered its trade mark since 1955 and the Plaintiff operated a web site under the domain name *ppfa.org*. The defendant was the host of a radio show and was active in the anti-abortion movement, he operated web-sites at *www.catholicradio.com* and *lambofchrist.com*. On August 28th, 1996 he registered the domain name *plannedparenthood.com* and set up a web-site under this name which disseminated anti-abortion literature. The plaintiff sought an injunction to restraining the defendant, alleging that the defendant had chosen this name with "the specific intent to damage Planned Parenthood's reputation and to confuse unwitting users of the Internet". The defendant's counsel admitted that the defendant's intention in using the disputed domain name was to appeal to a wider audience, specifically those who held pro-abortion views, his object was "...to reach, primarily, catholics that are disobedient to natural law". On this basis the Court was willing to find as fact that the defendant's object was to attract Internet users who were seeking the plaintiff's homepage. The defence was essentially that the defendant's actions were protected as free speech, but this was rejected by the court which found that the plaintiff's name and the domain name were nearly identical. The plaintiff was able to establish specific instances where Internet users seeking the plaintiff's website instead found the defendant's. When they did so the defendant's web-site went to considerable lengths to hide its true identity and on this basis the court granted an injunction restraining the defendants. The difficulty with the application of the law of trade marks to

domain names is that a domain name may be similar to more than one trademark.

If the Trademarks Act 1996 is to be invoked in any dispute over a domain name then the plaintiff must be able to establish that he is the proprietor of a registered trademark and that the defendant is infringing upon it. This may be difficult if both parties can legitimately claim that they both are entitled to use that domain name. This problem was recently faced by the Amercian federal courts in *Gateway 2000 -v- Gateway.com Inc & Alan Clegg* [18]. The plaintiff was the well known computer company established in 1985 and the defendant was a computer consultant offering a variety of services. The defendant began to use the name *gateway.com* as his Internet address in May of 1988 and he had registered the domain name in August of 1990. The plaintiff requested that the defendant relinquish the name *gateway.com* on the basis that Internet users who were seeking the plaintiff were instead finding the defendant's site. However the defendant refused and the plaintiff ultimately sought an injunction alleging that the defendant was diluting and infringing its trademark. The court noted that the defendant was legitimately using the domain name for his business and that he was not a "cyber-squatter" who had merely registered the domain name with the intention of extracting money from the plaintiff. The plaintiff was refused a preliminary injunction by the US federal district court because *inter alia* it was not able to establish that it had used the term "Gateway" to identify itself prior to the defendant's first use of it.

Another possible difficulty with using the Trademark Act 1996 is section 15 of the Act which provides that the owner of a trademark may not prevent an individual from using his own name or address, this presumably applies to electronic addresses as well as postal ones. It would be open to a court to decide that once an electronic address or domain name is allocated to an individual or family then an action by a business with a similar name could not succeed. So if a family named McDonald were to register the name *mcdonalds.ie* they might raise section 15 as a defence to an action brought by the fast-food chain.

Passing Off.

An alternative remedy in a dispute over domain names is given by the law of Passing-off[19], although it must be said that only the bravest of counsel would draft proceedings in such a dispute without making reference to the law on Trademarks. The essence of the tort of passing off is that one party is seeking to fool consumers into believing that his products are those of another and so benefit from his goodwill. The elements of the tort were summarised by Budd J. in *Polycell Products Ltd -v- O'Carroll and others*[20]:

"The legal principles affecting an action for "passing off" are well established. To establish merchandise in such a manner as to mislead the public into believing that it is the merchandise or product of another is actionable. It injures the complaining party's right of property in his business and injures the goodwill of his business. A person who passes off the goods of another acquires to some extent the benefit of the business reputation of the rival trader and get the advantage of his advertising."

A relevant and recent Irish case is that of *Muckross -v- Randles*[21]. The facts in this case were broadly similar to those which might arise in a a dispute over a domain name. The plaintiff company ran a hotel "The Muckross Hotel" in Kerry which had been established in 1795. The company had bought the Hotel in 1990 and had spent over £3 million on its acquisition and refurbishment. The name of the plaintiffís Hotel was changed to "The Muckross Park" and a promotional campaign was commenced, but in 1992 the defendants began to build a hotel nearby called "The Muckross Court Hotel". It was established in court that the similarities between the two names led to considerable confusion, notably with regard to the addressing of post. Persons seeking employment at one hotel had gone to the other and guests booked into the plaintiffís hotel had actually arrived at the defendant's. Evidence was also given that invoices,. travel agents, goods and phone calls had all been misdirected. Since the defendants refused to change their name the plaintiffís sought an injunction restraining the defendants from using the word "Muckross" in the title or name of their premises.

The parties agreed that "...the general proposition of passing off is that there is a passing off when someone who intends to do business with the plaintiff in fact does business with the defendants thinking that he is doing business with the plaintiff...[22]. Barron J. noted that it was not necessary to establish an actual incidence of deception in a case[23] but he felt that the actual decision as to whether or not there is sufficient evidence of likely deception was essentially a matter for the court[24]. He found as fact that the term "The Muckross" had acquired a secondary meaning which referred to the plaintiffís hotel and he granted relief to the plaintiff[24]. The significance of this case is that it suggests that if the Irish courts will remedy the confusion caused by similar postal addresses they will probably be willing to recognise the confusion caused by similar internet addresses or domain names. It is not necessary for a business to be established in the state for it to bring a case for passing off. In *C & A Modes -v- C & A (Waterford) Ltd*[26] the Supreme Court held that the UK clothing chain could sustain a claim for passing off even though it did not carry on business in Ireland[27].

Conclusion.

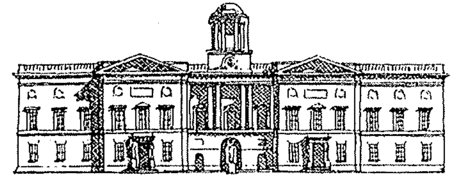
Inevitably the administration of domain names has serious international implications. It is therefore unsurprising that the World Intellectual Property Organisation (WIPO) has turned its attention to the allocation of domain names. A Memorandum of Understanding was signed on May 1, 1997 in Geneva which provides for the creation of seven new generic top-level names (gLTDs) for the naming of sites on the Internet. A set of dispute resolution procedures are also provided for, to deal with conflicts that may arise between holders of second-level domain names in the seven new gTLDs and owners of trademarks (or other forms of intellectual property). The procedures which will be administered by the WIPO centre, are particularly directed toward issues such as the registration of famous trademarks as domain names by third parties who intend to sell the domain names to the trademark owners for large sums. The envisaged dispute resolution

activities will include on-line mediation services and on-line arbitration under the WIPO rules, and a set of procedures referred to as Administrative Challenge Panel (Panel) procedures. The rules for these procedures are being created at present by WIPO and its committees[28].

The debate on how to regulate Internet addresses is now in full swing on the Internet and it will go on for a long time. Part of the problem is that domain names are not dusty legal documents, they are vital pieces of electronic information which are in constant use. Solutions which would be acceptable to lawyers may not be attractive to users or be technically feasible. Furthermore, while owning an individual domain name may be valuable, this pales beside the potential returns of controlling the registration and distribution of those names, the method of regulating domain names will determine whether a fortune is to be made out of administering that regulation. The size of the Internet means that finding a consensus will be particularly difficult, while the rapid pace of technological change on the Internet means that even if a consensus can be found by then it may be obsolete. It should also be pointed out that in the view of some technological change and the development of Internet directories may ultimately reduce the significance of domain names[29]. ●

Denis Kelleher is a practising Barrister and is a co-author, together with Karen Murray BL, of "Information Technology Law in Ireland" published by Butterworths 1997.

1. See generally, Kelleher & Murray, Information Technology Law in Ireland, Butterworths, 1997.
2. The Economist, 8th June 1996.
3. NOMINET UK, Rules for the .uk Domain and Subdomains, 10 July 1997, Rule 3.
4. NOMINET UK, Rules for the co.uk domain, 25 July 1996.
5. per Scott VC, 22nd May 1997.
6. PTC used the address pitman.co.uk on publicity material which was sent to 1,500 companies and individuals, it received two e-mails in reply.
7. The claim was based on *Speed Seal Products Ltd. -v- Paddington* 1986 1 All ER 91 and the dissenting judgement of Denning MR *Goldsmith -v- Sperrings Ltd,* 1977 1 WLR 478.
8. Unreported, See Gardner, The Harrods Case: Protecting your name on the Internet. Computers and Law, April/May 1997, p24.
9. No 89/104/EEC of 21st September 1988. See Kelleher & Murray , Information Technology Law in Ireland, Butterworths, 1997, p110.
10. Section 6(1).
11. Section 6(2).
12. Section 7.
13. Section 13.
14. Section 18.
15. Section 19.
16. Section 20.
17. (1997 US Dist LEXIS 3338, 1997 WL 133313),
18. (1997 US Dist. LEXIS 2144)
19. See Kelleher & Murray , Information Technology Law in Ireland, Butterworths, 1997, p 118.
20. 1959 Ir.Jur.Rep. 34 at 36, quoted by McMahon & Binchy, Irish Law of Torts, p544.
21. 1995 1 IR 130.
22. per Barron J. at p 135.
23. Referring to *Worcester Royal Porcelain Company Ltd., -v- Locke & Co.* Ltd. 1902 19 RPC 479.
24. Referring to: *Berkeley Hotel Company Ltd. -v- Berkeley International (Mayfair) Ltd.,* 1972 RPC 237; *Parker-Knoll Ltd -v-Knoll International Ltd.,* 1962 RPC 265; *Office Cleaning Services Ltd. -v- Westminister Window and General Cleaners Ltd,* 1946 63 RPC 39;
25. See also *An Post -v- Irish Permanent PLC,* 1995 1 IR 140. See also the English cases of *Bollinger v Costa Brava* 1960 Ch 262 and *Erven Warnink BV v Townend* 1979 A.C. 731.
26. 1976 IR 198.
27. See also *Adidas -v- Charles O'Neill & Co. Ltd.* 1983 ILRM 112.
28. See press release issued following the twenty first session of the General Assembly of the World Intellectual Property Organisation, held September 22 to October 1, 1997, at Geneva.
29. See interview with Dr. Niall O'Reilly of UCD Computing services, the administrator of the .IE domain in the July 1997 edition of Computerscope.



KING'S INNS NEWS

Richard Tuite is the new Director of Education at the King's Inns since 3rd November, 1997. He comes to the Inns after a 14 year spell with Calor Teoranta where he served in a number of areas including Commercial and Legal Director since 1995. A recent graduate of the Kingís Inns, he was called to the Bar in 1992. He also holds a Bachelor in Mechanical Engineering from UCD, an MBA from the University of Toronto and a Diploma in Computer Studies from Trinity College Dublin. He is a former President of the Rotary Club, a member of the Board of the National College of Art (1993-96) and the Irish representative on the Competition Law Advisory Committee of OECD

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Lancefort and Locus Standi

Locus standi in planning matters following the decision in Lancefort Ltd v An Bord Pleanala

Conor Dignam, Barrister

Two recent cases[1] have dealt with the *locus standi* of limited companies to litigate matters arising from the Local Government Planning and Development) Acts 1963 to 1993 and have reached radically different conclusions on the issue. However the view expressed by Lynch J in *Malahide Community Council Ltd v Fingal County Council* is *obiter* and for the present the law is as decided by Morris J in *Lancefort Ltd v An Bord Pleanala & Ors.*

The rule in relation to *locus standi* in judicial review proceedings is contained in Order 84 of the Rules of the Superior Courts and requires an applicant for leave to have "a sufficient interest in the matter to which the application relates. Walsh J in the State *(Lynch) v Cooney* [2] states that "the question of whether or not a person has sufficient interest must depend upon the circumstances of each particular case" and that the rules "must be flexible so as to be individually applicable to the particular facts of any given case."

The facts in the *Lancefort case*, which arose from the proposed development of the site bounded by Fleet St., Westmoreland St. and College St. for the construction of a hotel, office accommodation and retail bank, are that the planning authority granted the developer permission to develop the site subject to certain conditions, which the developer appealed against to An Bord Pleanala. An Taisce appealed the decision of the planning authority to An Bord Pleanala on different grounds. Following an oral hearing the Board granted permission to the developer subject to conditions in a decision dated 11 December 1996.

An Taisce considered and rejected the possibility of seeking to challenge the decision of the Board by way of judicial review. Mr. Michael Smith, a prominent member of An Taisce to whom An Taisce had delegated the function of opposing the development, and a group of people associated with him "reached a consensus that the achievement of shared objectives and aims would best be secured by the co-ordination of joint action through the contemplated company limited by guarantee to which such individuals would subscribe and through which they would actively work thereby pooling their efforts to the optimum effect."[3] The contemplated company, the Applicant in the judicial review proceedings, was incorporated on the 18th December 1996.

The Respondents in the judicial review proceedings, An Bord Pleanala, challenged the *locus standi* of the Applicant on the grounds that the Applicant company was incorporated only on a date subsequent to the decision of An Bord Pleanala and only for affording the true applicants (Mr. Smith and his associates) a shield against an award of costs. It was also submitted that as the Applicant company had no assets or property and therefore could not suffer any loss or consequence of the decision of the Board[4] the Court should exercise its discretion to refuse leave to seek judicial review.

These submissions were rejected by Morris J who stated his satisfaction that Mr. Smith and his associates did not fall into the category of persons described by Henchy J as *"the crank, the obstructionist, the meddlesome, the perverse and the officious man of straw"*[5] but were in fact people who had a genuine interest in and who had worked tirelessly towards the protection of listed and historical buildings in Dublin and throughout the country. Mr. Smith in his capacity as the individual delegated by An Taisce to oppose the development had filed objections, canvassed the support of public representatives, attended at the oral hearing and voiced An Taisce's opposition to the subject development.

Having expressed his satisfaction in these terms Morris J accepted as the law the statement of the Supreme Court in *SPUC Ltd v Coogan*[6] and *Cahill v Sutton*[7] that the essential question in assessing whether a plaintiff who has no personal standing in relation to a particular matter is whether that plaintiff has a bona fide interest in and concern for that matter[8].

Morris J also relied on Henchy J's statement in *Cahill v Sutton* that

> "it is undesirable to go further than to say that the stated rule of personal standing may be waived or relaxed if, in the particular circumstances of the case, the Court finds that there are weighty contravening considerations justifying the departure from the rule." [9]

Having been satisfied that Mr. Smith and his associates had a *bona fide* interest and concern in the proceedings Morris J held that, by virtue of the rule that judicial review proceedings must be commenced within a period of two months from the date of the delivery of the decision, to rule that the company had no *locus standi* would have had the effect of depriving Mr Smith and his associates of access to the courts and this constituted weighty countervailing considerations justifying departure from the normal *locus standi* rule.

While on the facts of the case there can be no denying that Mr Smith and his group of associates had, prior to the institution of the judicial review proceedings, exhibited a genuine interest and concern

in planning and associated matters amounting to the required *bona fide* interest in an objective sense[10] the position of Lancefort Ltd, the Applicant company, is less clear. An Bord Pleanala made its decision granting permission to the developers on 11 December 1996. Lancefort Ltd was not incorporated until the 18th December and as such was obviously established for the purpose of challenging the decisions of the Board, a fact which it appears, was accepted by Mr. Smith in his affidavit[11]. It is settled law that an incorporated body such as Lancefort Ltd does not establish a *bona fide* concern and interest merely by relying upon provisions of its articles and memorandum of association. It appears, therefore, that in order for Morris J to be satisfied that the Applicant company had established a *bona fide* concern and interest he lifted the veil of incorporation and examined the members of the company rather than the incorporated body itself.

Whether or not this is the correct approach is cast into some doubt by the obiter dicta of Lynch J in the second recent case *Malahide Community Council Ltd v Fingal Community Council* where he stated

> "assuming that the Applicant does not own any buildings or lands which it might seek to develop or which might be affected by planning applications made by other parties, I find it difficult to see how a limited company incorporated under the Companies Acts 1963 - 1995 can be affected by planning objections, decisions or applications. As an artificial body or peson lacking the five senses of human persons, it can never experience the pleasure of open spaces, beautiful gardens and woods or the physical satisfaction of sports facilities: it can never be nauseated by foul smells nor deafened by noisy industry or loud and raucous music nor have a cherished view of open spaces obstructed by new buildings. Good bad or indifferent planning decisions cannot affect this artificial corporate body in any way, except by increasing or diminishing its asset value if it owns lands or buildings favourably or unfavourably affected by such decisions. In the absence of economic interests it seems to me that a limited company is not an appropriate body to litigate matters arising from the Local Government (Planning and Develop ment) Acts 1963 to 1993". [12]

In the instant case the Applicant company had no direct interest in the matter being litigated and as such fell into the category identified by Lynch J has being an inappropriate body to litigate planning matters.

It is submitted that both approaches are to some extent correct. It is indeed difficult to see how a corporate body *per se* in the absence of economic interest can have the required "sufficient interest" in matters arising from the planning legislation to have *locus standi* to litigate such matters. However the law as it stands, in particular since *SPUC Ltd v Coogan* and as accepted by Morris J in the *Lancefort* case, is that a corporate body which has no economic interest but which has established a *bona fide* interest and concern in such matters has sufficient interest and therefore *locus standi* to litigate such matters. Due to the particular facts in the *Lancefort* case (the company not having any past track record upon which to base a claim of a *bona fide* interest) it would be easy to see how Morris J could have followed the approach of Lynch J in the *Malahide* case. However it is submitted that on the facts Morris J's approach is the preferable one having regard to the justice of the case, the fact that an application for security for costs was imminent at the time of these proceedings, a fact referred to by Morris J in his decision, and having regard to Walsh J's statement in *The State (Lynch) v Cooney* that "restrictive rules about standing are, in general, inimical to a healthy system of administrative law".[13] ●

1. Lancefort Limited v An Bord Pleanala & Ors. Unreported Morris J 6/6/97 Malahide Community Council Limited v Fingal County Council Unreported Lynch J 14/5/97
2. The State (Lynch) v Cooney (1982) IR 337
3. As stated in Mr, Smith's affidavit in Lancefort Ltd v An Bord Pleanala & Ors
4. The Respondent relied on the Malahide Community Council case
5. Cahill v Sutton (1980) IR 269
6. Society for the Protection of the Unborn Child Ltd v Coogan (1989) IR 734
7. (1980) IR 269
8. Walsh J in Spuc Ltd v Coogan (1989) IR 734
9. (1980) IR 269 at page 285
10. O'Brien v Nenagh Urban District Council
11. Lancefort Ltd v An Bord Pleanala at page 5
12. Malahide Community Council v Fingal County Council at page 33-34
13. The State (Lynch) v Cooney (1982) IR 337

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The Local Government (Planning and Development) (Amendment) Bill 1997

Michael O'Connor, Barrister

Tackling the Problem of Incomplete and Abandoned Developments

The Local Government (Planning and Development) (Amendment) Bill, 1997 represents one of the flickering embers of the previous Government. Introduced by Mr. Sean Ryan and backed by the Government, it had received virtually no Dail scrutiny or debate at the dissolution of the 27th Dail.[1] It is hoped that the present Government may consider this brief piece of proposed legislation and adopt it as a worthwhile initiative.

The changes proposed under the Bill are twofold. First, it is proposed that Section 25(2) of the principal Act be amended to include a paragraph allowing for regulations to be made requiring applicants to submit information on permissions previously granted to those applicants or to connected persons. The amendment would allow a planning authority to force an applicant to disclose if such previous permissions had been complied with and if developments had been completed in accordance with any conditions imposed.

In effect, this proposal aims to allow a planning authority assess an applicant's track record and *bona fides*, at or before the time a decision is made to grant that applicant a further permission. The analysis on which such a proposal is based runs as follows:

The Grant of Planning Permission is a privilege as opposed to a right and the successful applicant enters a "contract" of sorts with the Planning Authority. Under this "Contract" a developer will usually see his asset value greatly enhanced and, occasionally, by way of conditions, will even receive valuable amendments to his proposal. In return for this, it is submitted that the successful applicant is under a duty to carry out the development in accordance with the grant. It is submitted that it is not an unreasonable extension of this principle that a developer should be obliged to either carry out the development within the statutory life of the Grant[2] which is five years (subject to extension)[3] or else be obliged to notify the planning authority of its intention not to proceed. It is a source of considerable frustration to planning authorities and the public generally that developers can obtain the benefit of a grant of planning permission without being forced to enter a consultative arrangement with the authority regarding its intentions and while this is not included in the proposed amendments, the Bill would allow for prior misconduct of developers to be a factor in any subsequent planning applications by rogue developers.

It could be argued that the amendment to Section 25 is unnecessary given that Section 25 (2) (c) provides that applicants may be required to furnish any specified information with regard to their applications. However, it is open to doubt whether this provision would enable mandatory requirement of information which, while highly relevant, is extraneous to the application at an objective level.

The second proposal for change in the Bill provides for the amendment of Section 26 (i) of the principal Act to include among the matters which an authority is restricted to considering in deciding an application, the fact that having regard to the information furnished vis. a vis. the applicant's planning history, whether the authority is satisfied on reasonable grounds that there is a real and substantial risk that the development would not be carried out and completed within a reasonable period of time and in a accordance with any conditions made.

The effect of this amendment is to allow a planning authority to deny an applicant the benefit of the doubt on the basis of prior misconduct. The changes would also extend the effectiveness of the planning register[4] and would unmask habitual rogue developers at the important pre-decision stage. The novelty of the proposals is all the more striking given the absence of any similar provisions in other jurisdictions.[5]

Conclusion

The proposals outlined in this Bill are by no means unassailable either on the rationale or philosophy that underlines them or in their likely application in practice. The proposal to force disclosure of previous non compliance with planning conditions or a permission may well offend against the privilege against self-incrimination. Many enforcement sections in the Planning Acts[6] provide for large fines and/or imprisonment. Assuming that this problem could be

overcome by a clause limiting the use of such information gathered in this way, substantial problems remain. It would be difficult in practice to ensure that any information received would not indirectly lead to enforcement proceedings against the applicant. Attendant upon these circumstances it is likely that full disclosure would seldom be forthcoming and there would need to be some sanctions for incomplete disclosure. The proposed reforms also run contrary to the idea that planning permission runs with the land as opposed to being the property of the developer. Despite the difficulties outlined, it is submitted that there is a good deal of merit in the proposed reforms and particularly in the present economic climate which has seen huge growth[7] and confidence among developers there is a definite need to proceed with caution in the control of development. It is submitted that it is reasonable and prudent that legislation should provide for some means of combatting the problem of over optimistic developers and their legacy of planning wastelands. Borrowing figures[8] for housebuilding in particular have caused concern among economic commentators and if such concerns are reasonable, the reforms proposed in the 1997 Bill may be a useful preventative measure to ensure that abandoned and incomplete developments are kept to a minimum. ●

1. Dail Debates Vol 478 No. 6 1st May 1997
2 Local Government Planning and Development Act 1982, Section 2
3. Where substantial works have been carried out within 5 years - Local Government Planning and Development Act 1982. See also *French Church Properties Ltd v. Wexford Co. Co.* [1992] 2 IR 268
5. The Principal Act, 1963, Section 8 Sources: "PLANNING APPLICATIONS, APPEALS AND PROCEEDINGS" Fifth Edition. Hant,Robinson, Williams 1996 - Sweet and Maxwell "STATUTORY PLANNING IN VICTORIA" Eccles and Bryant, 1991 - Butterworths.
6. Most notably, Sections 24, 31, 32 and 35 of the Principal Act and Section 26 of the Local Government Planning and Development Act 1976
7. Department of Environment Figures: Housing development up 12% compared with 1st quarter of 1996. Multiple Accommodation developers accounted for approximately 60% of the total housing development in 1996. 1993-1996: Planning permissions up by 48%.
8. Borrowing for house purchase/building in 1996 was double the 1987 figure. See "The Private Housing Market Review and Outlook to 2000 and Beyond" by DKM Consultants Limited, May 1997

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The Bar Review
Volume 3. Issue 2. November 1997. ISSN 1339-3426

A directory of legislation, articles and written judgments received from 24th September to 5th November 1997.
Judgment information compiled by the researchers in the Judges Library, Four Courts
Edited by Desmond Mulhere, Law Library, Four Courts, Dublin 7

Administrative

Cobh Fisherman's Association Ltd. v. Minister for the Marine
High Court: O'Sullivan J.
29/08/1997

Judicial review; certiorari sought; licensing application; locus standi; natural justice; sand and gravel extraction licence granted by Minister; Environmental Impact Statement submitted; whether Minister should have published a notice; whether applicants should have been given an opportunity to make representations and objections; whether Minister should have considered additional information with regard to determining licence; whether consent of Minister for Finance required; ss.19 and 19A Foreshore Act, 1933
Held: Application dismissed; Minister not obliged to consider additional material

Statutory Instruments

Equality and Law Reform (transfer of departmental administration and ministerial functions) order, 1997
S.I.297/1997
Commencement date: 8.7.97

Justice (alteration of name of department and title of minister) order, 1997
S.I.298/1997
Commencement date: 9.7.97

Articles

Lambert, Paul
Free press - fair trial : a comment
1997 ILTR 176

Meehan, David
Freedom of information act 1997 : public and private rights of access to records held by public bodies
1997 ILTR 178

Agriculture

Statutory Instrument

Agriculture, food and forestry (alteration of name of department andtitle of minister) order, 1997
S.I.302/1997
Commencement date: 12.7.97 Date signed: 8.7.97 Date received: 6.10.97

Article

Maguire, Barbara
Agricultural chattel mortgages
1997 CLP 170

Animals

Statutory Instrument

Wildlife (wild birds) (open seasons) (amendment) order, 1997
S.I.363/1997
Commencement date: 31.7.97

Children

Article

Spencer, John
The evidence of children - the English experience
2(9)(1997) BR 382

Commercial Law

Statutory Instrument

Credit Union Act, 1997 (commencement) order, 1997
S.I.403/1997
Commencement date: 1.10.97

Articles

Breslin, John
The Central Bank act 1997 : the new definition of banking business
1997 CLP 160

Lavery, Paul
Confidentiality obligations
1997 CLP 164

Hyland, Niamh
The Irish takeover panel act 1997
2(9)(1997) BR 408

Company Law

Statutory Instrument

Companies (fees) order, 1997
S.I.358/1997
Commencement date: 15.9.97

Constitutional

Gilligan v. Criminal Assets Bureau
High Court; McGuinness J.
26/07/1997

Constitutionality of legislation; Proceeds of Crime Act, 1996; powers of Criminal Assets Bureau to freeze/dispose of assets; proportionality; whether forfeiture proceedings civil or criminal in nature; indicia of criminal offence; appropriate burden and standard of proof; whether unjust attack on property rights; whether failure to protect right to a fair trial and presumption of innocence; whether failure to protect right to

silence
Held: Constitutional invalidity not established; courts would be particularly vigilant in respect of disclosure of information and admissability of hearsay evidence

Article

Hogan, Gerard
The Sinn Fein funds judgment fifty years on
2(9)(1997) BR 375

Copyright, Designs & Patents

Article

Walley, Pauline
Some practical aspects of copyright law
3(1)(1997) BR 7

Criminal Law

Statutory Instruments

Criminal Evidence act, 1992 (section 29) (commencement) order, 1997
S.I.371/1997
Commencement date: 6.10.97

Criminal Justice Act, 1994 (section 46(1)) (no 2) order, 1997
S.I.366/1997
Commencement date: 2.9.97 Date signed: 2.9.97 Date received: 13.10.97

Criminal Justice Act, 1994 (section 47(1)) (no 2) order, 1997
S.I.367/1997
Commencement date: 2.9.97

Criminal Evidence Act, 1992 (section 29) (commencement) order, 1997
S.I.371/1997
Commencement date: 6.10.97 Date signed: 8.9.97 Date received: 13.10.97

Prisons Act, 1970 (section 7) order, 1997
S.I.257/1997
Commencement date: 4.6.97

Articles

Wright, Rosalind
In the front line against fraud
1997(Aug/Sept) GILSI 17

Bacik, Ivana
The validity of search warrants
1997(4) P & P 7

Defamation

Article

Murray, Karen
Cross border defamation
1997 ILTR 157

Education

Statutory Instrument

Secondary schools (Admissions criteria) regulations (Northern Ireland)
1995
S.I. 303/1995 (N.Ireland)

Employment

Maher v. Irish Permanent Plc.
High Court: Laffoy J.
29/08/1997

Suspension; investigation; dismissal; breach of disciplinary procedures; breach of constitutional right to fair procedure; whether investigation complied with Defendants' disciplinary code and fair procedures; relationship of an employer and an employee
Held: Employment not to be terminated pending further disciplinary procedure in accordance with the principles of natural justice

Article

Boyle, David P
The Organisation of Working Time Act 1997 - an overview
1997 ILTR 130

Equity & Trusts

Article

Moore, Geoffrey
The law of fundraising : time for change
1997 ILTR 154

European Community Law

Statutory Instruments

European Communities (energy labelling of household combined washer-driers) regulations, 1997
S.I.319/1997
Commencement date: 1.8.97

European Communities (materials and articles intended to come into contact with foodstuffs) (amendment) regulations, 1997
S.I.335/1997
Commencement date: 28.7.97

European Communities (occupational benefit schemes) regulations, 1997
S.I.286/1997
Commencement date: 1.7.97

European Communities (retirement of farmers) regulations, 1997
S.I.283/1997
Commencement date: 1.5.97

Library Acquisition

Van der Woude, Marc
E.C. competition law handbook 1996/97 edition
London
Sweet & Maxwell
1997
W110

Evidence

Statutory Instrument

Criminal Evidence Act, 1992 (section 29) (commencement) order, 1997
S.I.371/1997
Commencement date: 6.10.97 Date signed: 8.9.97 Date received: 13.10.97

Article

Spencer, John
The Evidence of Children - the English Experience
2(9)(1997) BR 382

Family Law

Article

Jackson, Nuala E
High court divorce procedures
3(1)(1997) BR 34

Information Technology

Article

Ferriter, Cian
Technology in the Courts
2(9)(1997) BR 386

International Law

Article

Carney, Tom
Japan - Taxes on Alcoholic Beverages
1997 ILTR 170

Judicial Review

Article

Bradley, Conleth
Judicial review - procedural limitations and the restatement of substantive principles
1997(4) P & P 4

Legal Profession

Article

Clarke, Frank
The International Bar Association
2(9)(1997) BR 399

Licensing

Article

Boyle, Rosario
Public houses - can they be "extended" in the District Court?
2(9)(1997) BR 401

Local Government

Statutory Instruments

Local authorities (traffic wardens) act, 1975 (section 3) (offences) regulations, 1997
S.I.395/1997
Commencement date: 1.10.97

Local government (equalisation) fund (County Clare) order, 1997
S.I.266/1997
Commencement date: 19.6.97

Local government (financial provisions) act, 1997 (commencement) order, 1997
S.I.263/1997
Commencement date: 1.7.97

Local government (local variation of car tax rates) regulations, 1997
S.I.265/1997
Commencement date: 19.6.97

Local government (value for money) unit (establishment) order, 1997
S.I.264/1997
Commencement date: 1.7.97

Pensions

Articles

National pensions policy initiative
1997(Aug/Sept) GILSI 25

Brady, Eamon
Pension lawyers response to The National Pensions Policy Initiative
2(9)(1997) BR 398

Redmond, Mary
Access to pension schemes - national and European perspective for a typical workers
1997 ILTR 135

Planning

Mahon v. I.R.F.U.
Supreme Court: Denham J., Barrington J., Keane J.
01/08/1997

Restraining order; planning permission; use of land for pop concerts; anticipated unauthorised use of land; whether High Court has jurisdiction to grant injunction in relation to anticipated breach of planning code; policy of strict interpretation of planning code; whether statutory injunction can be expanded by the court's general equitable jurisdiction; whether judicial review proceedings are an automatic bar to seeking an injunction; whether a future application for injunction can be made; s.27 Local Government (Planning and Development) Act, 1976
Held: High Court had no jurisdiction to grant injunction in relation to an anticipated breach of planning code; no jurisdiction to extend statutory injunction; judicial review proceedings do not constitute an automatic bar to a s.27 application

Practice and Procedure

Lough Neagh Exploration Ltd. v. Morrice
High Court: Laffoy J.
27/08/1997

Security for costs; limited company incorporated outside the state; principles applicable; prima facie case; discretion of court; whether plaintiff would be able to pay costs of the defendants; special circumstances to be considered by court; conduct of applicant; financial position; right of access to court; O.29 Rules of the Superior Courts; s.390 Companies Act, 1963
Held: Plaintiff ordered to furnish security for costs

Doyle v. Commissioner of An Garda Siochana
High Court: Laffoy J.
27/08/1997

Discovery; jurisdiction of the Court; victims of car bomb; entitlement to access information of An Garda Siochana; whether the Court has an inherent jurisdiction to grant relief where discovery is the sole cause of action; extent of that jurisdiction; United Kingdom violation of Article 2 of the European Convention for the Protection of Human Rights; Article 25 European convention for the Protection of Human Rights
Held: Court does not have jurisdiction; application dismissed.

Ulster Bank Ltd v. Byrne
High Court: O'Donovan J.
10/07/1997

Discovery; whether documents relevant to the issue; whether Respondents is

likely to have or have had the documents in their possession, custody or power; whether any particular oppression or prejudice will be caused to the Respondents which is not capable of compensation by payment of costs
Held: Discovery ordered against documents relevant to the issue

Melly v. Moran
High Court: McGuinness J.
19/06/1997

Leave sought to institute proceedings; alledged wrongful detention; committal to mental institution; damages sought; leave sought by plaintiff to issue proceedings against doctor; patient with history of chronic schizophrenia; whether defendant acted with reasonable care in committing plaintiff to mental hospital; s.260 Mental Treatment Act, 1945
Held: Plaintiff adequately examined by defendant; leave to institute proceedings refused

Statutory Instruments

Rules of the Superior Court (no 5), 1997
S.I.346/1997
Commencement date: 13.8.97

Rules of the Superior Courts (no 7), 1997
S.I.348/1997
Commencement date: 13.8.97

Library Acquisition

Woods, James
District Court P & P in civil, licensing and family law proceedings
James V. Woods
1997
N363.2.C5

Articles

Dignam, Conor
Order 16 - Third Party Procedure and The Civil Liability Act 1961
1997(4) P & P 2

McGrath, David
Renewal of summons under order 8 of the rules of the superior courts
3(1)(1997) BR 36

New superior court rules in personal injury litigation
3(1)(1997) BR 14

Gibney, Ita
Trial by media
1997(Aug/Sept) GILSI 12

Real Property

Rylands v. Murphy
High Court: Laffoy J.
29/08/1997

Sale of premises; vacant possession; incumbrances; specific performance; delay in completion of sale; order for attachment and committal sought; whether conveyance of premises to be executed; interest due
Held: Order for attachment and committal refused; conveyance of premises to be executed

Statutory Instrument

Registration of Title Act, 1964 (central office) order, 1997
S.I.340/1997
Commencement date: 18.8.97

Library Acquisition

Wylie, John C W
Irish land law
3rd ed
Dublin Butterworth (Ireland)
1997
N60.C5

Revenue

Shelbourne Greyhound Stadium Limited v. Commissioner of Valuation
High Court: McGuinness J.
22/01/1997

Hereditament; rateable valuation; semi-State body; whether current investment in the future development of the hereditament must be regarded; whether the non-profit element of the hereditament should be considered ; s. 11 Valuation (Ireland) Act, 1852; Valuation Act ,1986
Held: Planned investment in future development to be considered in deciding estimated capital value of the hereditament; non-profit element of hereditament properly considered

Hibernian Insurance Company Limited v. Macuimis
High Court: Carroll J.
25/07/1997

Excess management expenses; whether expenses are expenses of management; meaning of management expenses within the meaning of s. 15 Corporation Tax Act,1976; whether revenue/capital issue is to be considered in "expenses of management"; distinction between expenses of management and expenses by management; s. 428 Income Tax Act,1967; s.146 Corporation Tax Act,1976
Held: Expenses incurred not expenses of management

Library Acquisition

Moore, Alan
Tax acts 1997-1998 : income tax, corporation tax, capital gains tax
Dublin Butterworth Ireland
1997
M335.C5.Z14

Road Traffic

Statutory Instrument

Road Traffic Act, 1961 (section 103) (offences) regulations, 1997
S.I.396/1997
Commencement date: 1.10.97

Article

Dignam, Conor
Consent and the Use of Leased Vehicles
2(9)(1997) BR 403

Sea & Seashore

Statutory Instrument

Marine (alteration of name of department and title of minister) order, 1997
S.I.301/1997
Commencement date: 12.7.97

Social Welfare

Statutory Instruments

Social welfare (consolidated contributions and insurability) (amendment)

(no 2) (refunds) regulations, 1997
S.I.291/1997
Commencement date: 18.6.97
Social welfare (consolidated contributions and insurability) (amendment) (no 3) (homemakers) regulations, 1997
S.I.292/1997
Commencement date: 26.6.97

Social welfare (consolidated payments provisions) (amendment) (no 5) (homemakers) regulations, 1997
S.I.293/1997
Commencement date: 26.6.97

Torts

Articles

Pierse, Robert
Recent developments in special damages
1997 ILTR 159

Kelly, Vivion
Hearing loss in the army
3(1)(1997) BR 29

Transport

Statutory Instruments

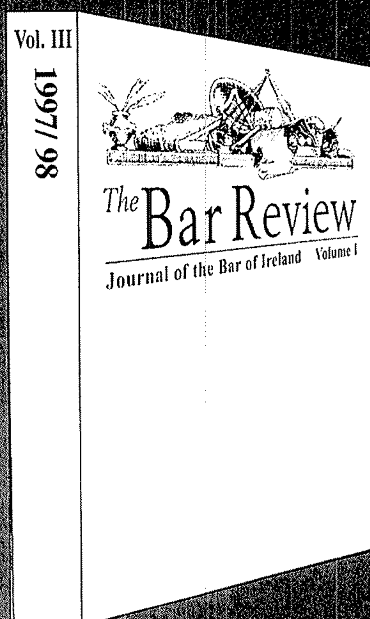
Stock exchange act, 1995 (determination committees) rules of procedure, 1997
S.I.380/1997
Commencement date: 10.9.97

Transport, Energy and Communications (alteration of name of department and title of minister) order, 1997
S.I.299/1997
Commencement date: 12.7.97

Practice Direction

Order 59 rule 14 of the Circuit Court Rules, 1950 which provides that "Where there is no Rule provided by these Rules to govern practice or procedure, the practice and procedure of the High Court may be followed" shall not be applied by the Circuit Court in relation to the provisions of Statutory Instrument No. 348 of 1997, Rules of the Superior Courts, (No. 7) of 1997 and, pending the introduction of Circuit Court procedures in relation to the provisions of section 45 of the Courts and Court Officers Act, 1995, (No. 31 of 1995), the existing practice and procedure of the Circuit Court shall continue to operate.

Dated 16th October, 1997
Diarmuid P. Sheridan
Acting President of the Circuit Court



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At a Glance

European provisions implemented into Irish Law up to 31/10/97.

Information compiled by Mary Smartt, Law Library, Four Courts, Dublin 7.

European Communities (energy labelling of household combined washer-driers) regulations, 1997
S.I.319/1997
(DIR 96/60, 92/75)
Commencement date: 1.8.97

European Communities (materials and articles intended to come into contact with foodstuffs) (amendment) regulations, 1997
S.I.335/1997
(DIR 96/11)
Amends SI 307/1991 DIR 90/128
Commencement date: 28.7.97

European Communities (occupational benefit schemes) regulations, 1997
S.I.286/1997
(DIR 96/97, 86/378) Amends s65, s69, s70, s71(1) of the pensions act, 1990
Barber v Guardian Royal Exchange Assurance Group EC C-262/88
Commencement date: 1.7.97

European Communities (retirement of farmers) regulations, 1997
S.I.283/1997
(DIR 72/160) Amends SI 116/1974
Commencement date: 1.5.97

Court Rules

Rules of the Superior Courts (no 5), 1997
S.I.346/1997
Commencement date: 13.8.97

Rules of the Superior Courts (no 7), 1997
S.I.348/1997
Commencement date: 13.8.97

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

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London
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1997
W110

Woods, James V
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James V. Woods
1997
N363.2.C5

Wylie, John C W
Irish land law
3rd ed
Dublin Butterworth (Ireland)
1997
N60.C5

Acts of the Oireachtas 1997

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

1/1997 - Fisheries (commission) Act, 1997
signed 12/02/1997
commencement on signing

2/1997 - European Parliament Elections Act, 1997
signed 24/02/1997
commenced 21/04/1997 by S.I. 163/1997

3/1997 - Decommissioning Act, 1997
signed 26/02/1997

4/1997 - Criminal Justice (miscellaneous provisions) Act, 1997
commenced in part on 04/04/1997

5/1997 - Irish Takeover Panel Act, 1997
commences in part 14/04/1997 by S.I. 158/1997
remainder commences 01/07/1997 by S.I. 255/1997

6/1997 - Courts Act, 1997
commenced on signing 20/03/1997

7/1997 - Dublin Docklands Development Authority Act, 1997
commences in part 27/03/1997
remainder commences 01/05/1997 by S.I 135/1997.

8/1997 - Central Bank act, 1997
commences 09/04/1997 by S.I.150/1997

9/1997 - Health (provision of information) Act, 1997
commenced 01/04/1997

10/1997 - Social Welfare Act 1997
commenced in part in act
commenced in part by S.I. 161/1997 (08/04/1997)
commenced in part by S.I. 250/1997 (04/06/1997)
commenced in part by S.I. 248/1997 (09/06/1997)

11/1997 - National Cultural Institutions Act, 1997
commenced in part by S.I. 222/1997

(02/06/1997 & 01/01/1998)

12/1997 - Litter Pollution Act, 1997
commenced 01/07/1997 by S.I. 213/1997

13/1997 - Freedom of Information Act
signed 21/04/97

14/1997 - Criminal Law Act, 1997
commences 22/08/1997

15/1997 - Credit Union Act
commenced in part by S.I. 403/1997

16/1997 - Bail Act
to be commenced by S.I.

17/1997 - Committees of the Houses of the Oireachtas (compellability, privileges and immunities of witnesses) Act
signed 5.05.97

18/1997 - Family Law (miscellaneous provisions) Act,
signed 05.05.97

19/1997 - International Development Association (amendment) Act, 1997
signed 07.05.97

20/1997 - Organisation of Working Time Act
sub-section 3 to be commenced by S.I.
remainder to commence 21/04/1998

21/1997 - Housing (miscellaneous provisions) Act
commenced 01/07/1997 by S.I. 247/1997

22/1997 - Finance Act
commenced in part by S.I. 313/1997

23/1997 - Fisheries (amendment) Act
to be commenced by S.I.

24/1997 - Universities Act
commenced by S.I. 254/1997

25/1997 - Electoral Act
commenced by S.I.245/1997 & 233/1997

26/1997 - Non - Fatal Offences Against the Person Act
signed 19.05.97

27/1997 - Public Service Management (no.2) Act
signed 19.05.97

28/1997 - Chemical Weapons Act
commenced 01/07/1997 by S.I. 269/1997

29/1997 - Local Government (financial provisions) Act
commenced by S.I. 263/1997 (apart from s7)

30/1997 - Youth Work Act
commenced 19/06/1997 by S.I. 260/1997

31/1997 - Prompt Payment of Accounts Act
commences 02/01/1998 by S.I. 239/1997

32/1997 - ICC Bank Act
commenced 21/05/97

33/1997 - Licensing (combating of drug abuse) Act
commenced 21/06/1997

34/1997 - Hepatitis C Compensation Tribunal Act
to be commenced by S.I.

35/1997 - Registration of title (Amendment) Act, 1997
signed 16/07/1997

36/1997 - Interperation (amendment) act, 1997
signed 04/11/1997

Government Bills in Progress

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

Air navigation and transport (amendment) bill, 1997
2nd stage - Dail

Arbitration (international committee) bill, 1997
1st stage - Dail

Children bill 1997
Passed in Dail

Courts Service bill, 1997
1st stage - Dail

Europol bill, 1997 -
Passed in Dail

Electoral (amendment) bill, 1997
1st stage - Dail

Irish film board (amendment) bill, 1997
1st stage - Dail

Local government (planning and development)(amendment)(no.2) bill, 1997
1st stage - Seanad

Merchant shipping (commissioners of irish lights) bill, 1997
Committee - Seanad

Seventeenth amendment of the constitution bill, 1997
APBH

Taxes consolidation bill, 1997
committee - Dail

Private Members Bills in Progress

Eighteenth amendment of the constitution bill, 1997
2nd stage - Dail

Abbreviations

BR = Bar Review
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GILSI = Gazette Incorporated Law Society of Ireland
ICLJ = Irish Criminal Law Journal
ICLR = Irish Competition Law Reports
ICPLJ = Irish Conveyancing & Property Law Journal
ILTR = Irish Law Times Reports
IFLR = Irish Family Law Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = Irish Tax Review
JISLL = Journal Irish Society Labour Law
MLJI = Medico Legal Journal of Ireland
P & P = Practice & Procedure

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Disclosure in Personal Injuries Actions

David O'Neill, Barrister

1. The Background of Privilege

Traditionally, most information obtained by a party in the course of preparing for litigation has attracted legal professional privilege[1]. Parties have not been obliged to disclose in advance the evidence of the witnesses that they intend to call[2], or even the names of those witnesses[3], unless such disclosure is otherwise relevant[4]. This observation applies with particular force to medical and other expert report's in accident cases[5]. A number of justifications have been offered for this privilege. It allows each party a degree of privacy in preparing his case[6]; otherwise there would be a risk that each party would hassle his opponent on a continuing basis for newly created documents. It encourages each party to look for evidence secure in the knowledge that if he turns up something unhelpful, he will not have to disclose it. Witnesses may speak confidentially to a party or his advisers, thus, especially perhaps with regard to expert witnesses, enabling the lawyer to obtain a critical assessment of the strength of his own client's case. It secures each legal team against the appropriation of their skill and effort by the opponent. Without the privilege, there would be a risk that parties would rely on their opponents' efforts to procure evidence instead of searching it out themselves[7].

2. Cards on the Table

Nevertheless, over the past 30 years there has been something of a reaction to this method of conducting litigation[8]. To allow a party maintain privilege up to the date of trial inevitably means that his opponent goes into Court oblivious of the evidence to be adduced against him. Consequently, the opponent may go to trial confident in his case, only to be disabused of his confidence when he hears the other side's evidence for the first time. There has been a substantial move towards conducting litigation with one's "cards on the table"[9]. Were each party obliged to disclose his evidence in advance, both would be fully aware of the strengths and weaknesses of their cases, and better positioned to consider settlement[10]. Disclosure would enlighten the parties as to the issues that were going to arise at trial. Side-issues, and matters not in dispute could be admitted or otherwise removed from the dispute. Each party would know the case he had to meet. Furthermore, the element of surprise would be eliminated, and each party would be given the opportunity to investigate his opponent's evidence, and to prepare in advance for cross-examination. This would discourage perjury and reveal flaws in the opponent's evidence[11]. Facilitating cross-examination may be especially important where experts are to give evidence, because a party and his legal advisers are likely to require the assistance of their own expert to understand the opponent's expert evidence before the legal adviser can prepare questions to be put to the opponent's expert in cross-examination[12]. Disclosure of expert opinion, and sometimes witness proofs as well, at the very least in some classes of proceedings, and in many cases in all, is now the invariable rule throughout the common law world[13]. The Republic of Ireland is one of the last countries to conform to this trend.

3. The Statutory Framework

S. 45 of the Courts and Court Officers Act, 1995[14], makes provision for the advance disclosure of information in personal injuries actions in the High and Circuit Courts, and empowers the Superior and Circuit Courts Rules Committees, with the concurrence of the Minister for Justice, to make Rules permitting disclosure of such information notwithstanding that it may be covered by legal professional privilege[15].

The information covered by the Section includes:

(i) any report or statement from any expert intended to be called to give evidence of medical or paramedical opinion in relation to any issue in the case;

(ii) any report or statement from any other expert of the evidence intended to be given by him in relation to an issue in the case;

(iii) the names and addresses of all witnesses intended to be called by a party to give evidence of facts in the case[16];

(iv) a full statement of all items of special damage together with appropriate vouchers or statements from the witnesses by whom such damages would be proved at trial;

(v) a written statement from the Department of Social Welfare (now the Department of Social Community and Family Affairs) showing all payments made to a plaintiff since the date of the accident or an authorization from the plaintiff to the defendant to apply for such information; and

(vi) such other relevant information or documentation (as may be provided for by Rules of Court) as will facilitate the trial of personal injuries actions[17].

The Rules that have, in fact, been promulgated make no provision for the disclosure of the additional material envis-

aged in heading (vi) with the possible exception of a Rule requiring a defendant to disclose any social welfare receipts obtained by him[18]. However, it is not unlikely that in future, at least in High Court actions, a party will have to take a written proof from every witness and exchange a reasonable time before trial all such proofs with similar proofs taken by his opponent as a precondition to calling the witnesses in question, such proofs to stand as the evidence in chief of the witnesses, as is the case in England[19]. No Rules of Court have, as yet, been made to implement s. 45 in the Circuit Court, although such implementation will undoubtedly occur in time, and will probably take the same form as the Rules promulgated in respect of High Court actions.

4. The New Rules

(a) To what Actions do they apply?

In the High Court, the section has been implemented by the Rules of the Superior Courts (No. 7), 1997[20], which introduces a new Part VI into O. 39. These Rules came into force on 1 September, 1997[21]. However, the provisions implementing the duty to disclose the information described in (i) and (ii) above do not apply to actions in which notice of trial was served prior to 1 June, 1997, while the provisions implementing the duty to disclose the information described in (iii), (iv) and (v) above, do not apply to actions first listed for trial prior to 1 July, 1997: see the Practice Direction of 15 September, 1997. The new Part VI is defined as applying to "any claim for damages in respect of any personal injuries to a person howsoever caused" other than an action in which a claim which would entitle the plaintiff to a trial by jury is joined[22]. "Personal injuries" are defined to include any disease and any impairment of a person's physical or mental condition[23]. Unfortunately, unlike their Northern Ireland equivalent[24], they are not defined to include the death of any person, and therefore it is uncertain whether the Rules now under discussion apply to fatal injuries cases, although this was almost certainly intended. It is also unclear whether these provisions would apply, for example, to an action for negligence against a solicitor for failing to institute an action for personal injuries within the prescribed limitation period. In England, a provision for a different aspect of discovery which was limited to "a claim in respect of personal injuries to a person or in respect of a person's death"[25], was held to apply to such an action[26].

(b) Medical Negligence Actions.

It should be noted that the Rules apply to all personal injuries actions: no specific provision is made for medical negligence actions. In Northern Ireland, no disclosure is required in such actions where liability is still in issue[27]. In England, disclosure in such actions is at the discretion of the Court[28], rather than being automatic as it is in most other personal injuries actions[29], although admittedly the current practice there is to order disclosure[30]. The reason advanced in England for the exception was that, in the absence of any general rule requiring the exchange of witness statements, disclosure of medical reports was intended to assist parties in assessing the nature and quantum of damages claimed, whereas in medical negligence actions, such disclosure is likely to assist a party, especially a plaintiff, to ascertain in advance the other party's evidence regarding liability[31]. Practitioners here would certainly follow the first part of this reasoning, but they would be taken aback at the suggestion that such disclosure would favour the plaintiff. Medical negligence proceedings have one of the highest failure rates of any form of personal injury action. Plaintiffs face grave difficulties in trying to show that treatment deviated in some way from standard medical practice, or that the standard practice suffers from some obvious defect[32]. Often, they also have severe problems in finding witnesses. Now, in addition, a medical negligence plaintiff must disclose all medical or paramedical information supplied to him, whether that information is going to form part of his evidence or not, for the perusal of the defendant and his experts, as much as three months before the defendant comes under a similar obligation. The defendant then has the luxury of having his experts draw their reports in terms calculated to provide complete answers to any awkward points raised by the plaintiff. If the plaintiff's reports are weak enough, or if they contain sufficient damaging extraneous comments that would never form part of the plaintiff's case, the defendant may choose not to prepare reports at all. Perhaps counsel might some day raise the same doubts as were raised by Ormrod L.J. in *Rahman v. Kirklees Area Health Authority*[33] whether a "personal injuries action" included an action for medical negligence, but the broad definition of "personal injuries" the absence of any reference whatsoever to medical negligence in the Irish Rules governing disclosure, and the rough treatment subsequently afforded the *Rahman* decision in England[34], are unlikely to assist him. In the meantime, plaintiffs in medical negligence cases might well be advised to apply under O. 39 r. 52, discussed below, to dispense with the requirement to disclose medical or paramedical information, although whether this Rule is drawn in terms wide enough to allow a blanket objection to disclosure, rather than an objection to disclosing particular documents, is open to question.

(c) What Information must be disclosed?

Reports and statements for the purpose of s. 45(1)(a)(i) and (ii) are defined to include the report or statement of any expert whatsoever whom the party required to make disclosure intends to call as a witness, and a lengthy enumeration of examples is provided[35]. It is submitted that this definition only includes reports and statements prepared by the expert for the purpose of the litigation, and does not, for example, extend to a party's medical records, which are the property of the doctor who prepared them[36]. It is important to remember that the Rules only apply to reports and statements from an expert who is going to be called as a witness; a party may still consult a succession of doctors or other experts before choosing which to call, and only reports and statements from the latter must be disclosed. Furthermore, the reports remain subject to legal profes-

sional privilege until they are disclosed[37]. The duty to disclose a report or statement from a medical or paramedical witness may be greater than the duty to disclose a report or statement from any other expert. S. 45(1)(a)(i) speaks of any report or statement from any expert intended to be called to give evidence of medical or paramedical opinion. S.45 (1) (a)(ii), on the other hand, speaks of any report or statement of the evidence intended to be given by any other expert. This would indicate that all information supplied to the disclosing party by any medical or paramedical expert whom he intends to call must be disclosed, probably irrespective of whether the party intends to adduce it in his direct evidence, and possibly irrespective of whether it would be possible for the opponent to rely on it in cross-examination[38]. On the other hand, he need only disclose information supplied to him by any other expert he intends to call if he intends to rely on that information at trial[39]. It is unclear whether a party qualified to give expert evidence himself, or a party's own employee or agent who is so qualified, must disclose a report of that evidence: in England it has been held that he must[40], but there the rules speak of "a report of any expert evidence which is to be adduced"[41], whereas the Irish Rule speaks of evidence from an expert whom it is intended to call. It is suggested that the Irish Rule would certainly apply to a party's employee or agent, and should be construed to cover a situation where, in effect, he calls himself as an expert. A report should include both the expert's opinion and the factual information on which that opinion is based[42]. In England, it has been held that a party must not only disclose that part of an expert's opinion that is favourable to him, but also any unfavourable matter upon which the expert might be cross-examined, such as where an engineer suggested a number of possible causes of the accident in a covering letter accompanying his report[43], although the correctness of this decision has been doubted[44]. Any map, drawing, photograph, graph, chart, calculation or like matter referred to in a report must also be disclosed. A report should be signed and dated by its author, and should state his qualifications, although, unlike in Northern Ireland[45], this is not expressly required by the Rules. Although an expert may properly consult with a party's legal advisers in the course of preparing his report, it is important that the report is the independent work of the expert, and is not influenced by the exigencies of the litigation[46], or "settled" by counsel[47]. The definition also covers any copy of such a report or statement, howsoever made, recorded or retained, where the original has been concealed, destroyed, lost, mislaid or is not otherwise readily available[48]. It seems implicit in this provision that if the original report or statement is available it must be disclosed: it would not be enough, as it is in Northern Ireland[49], to supply a photocopy. Furthermore, and most importantly, the definition includes any report, statement, note or letter, made by any person not an expert which reports, records, notes or conveys any relevant opinion from the expert whom it is intended to call[50]. Therefore, for example, a solicitor's note of a telephone conversation with an expert would have to be disclosed. The Rules exclude from the requirement of disclosure any report, statement or letter from a private investigator[51].

A party may withdraw reliance on a disclosed report, statement or witness by confirming in writing that he no longer intends to call the author of the report or statement or the witness[52].

(d) Within what Time must the Information be furnished?

The following timescale for disclosure is set down by the new Rules.

1. The plaintiff must deliver to the defendant or his solicitor all his experts' reports and statements within three months of the action's being set down[53].
2. He must within two months of the action's first being listed for hearing furnish:

   a) the names and addresses of all witnesses whom he intends to call;

   b) a full statement of all items of special damage, together with appropriate vouchers or statements of witnesses by whom it is intended to prove such loss; and,

   c) unless he has authorized the defendant in writing to apply for this information, a written statement from the Department of Social, Community and Family Affairs showing all social welfare payments made to him since the accident[54].
3. He must also deliver any further report or statement, or details of any further witness intended to be called by him, within 28 days of receiving that information[55].
4. Within three months of receiving an expert's report or statement from the plaintiff, the defendant must deliver the like report of any expert intended to be called by him to the plaintiff[56]. This seems to envisage that a defendant must deliver his medical reports within three months of obtaining the plaintiff's medical reports, his engineer's report within three months of obtaining the plaintiff's engineer's report, and so on, like for like.
5. Similarly, within two months of receiving the names and addresses of the plaintiff's intended witnesses, and details of the special damages claimed by him, and social welfare payments received by him, the defendant must furnish the names and addresses of his own intended witnesses[57]. The Rule also provides that he must disclose a statement of any social welfare receipts of his own[58], although this would at first sight appear to be ultra vires, s. 45(1)(a)(v) referring specifically only to the plaintiff's social welfare receipts. Possibly the extension can be justified under s. 45(1)(a)(vi) which allows the making of Rules to require disclosure of any further information that will facilitate the trial of personal injuries actions.
6. A defendant who receives a subsequent report or statement or details of witnesses, or who has not received and disclosed such information within the time prescribed, but subsequently receives it, must disclose the information within 28 days of such receipt[59]. It is therefore apparent that a defendant's obligations are dependant on the plaintiff's complying with his obligations. This is one of the main objections to the system created by these Rules. They give the defen-

dant a golden opportunity to frame parts of his own evidence by reference to the evidence to be given by the plaintiff. No effort is made to ensure mutuality of disclosure. Should the defendant's advisers decide that the information disclosed by the plaintiff is more favourable than anything that they could report, they need not prepare any written advices or reports, and therefore come under no obligation to disclose such information to the plaintiff.

(e) Between what Parties must there be Disclosure?

The duty of disclosure appears to be limited to plaintiffs and defendants between whom some issue is joined. It does not appear to apply between co-plaintiffs, co-defendants, or as between a plaintiff or defendant on the one hand, and a third party on the other[60]. Nor is a defendant under any additional obligation because he makes a counterclaim: if the plaintiff fails to deliver a certain report, the defendant is under no duty to deliver the like report, even if it relates to a positive claim being made by him against the plaintiff[61]. It is true that O. 39 r. 45(1) provides that the word "parties" includes plaintiffs, defendants, third parties and notice parties as appropriate[62], but this does not clearly give any extended meaning to the words "plaintiff" or "defendant".

(f) Means of Disclosure.

Service of any report, statement or information may be effected by letter in writing enclosing the report, statement or information, and may be effected in any manner permitted by the Rules, including ordinary prepaid post[63]. The letter must state that the service is for the purpose of complying with s. 45 of the Courts and Court Officers Act, 1995[64], and must also draw the attention of the party receiving a report or statement to the procedures available under O. 39 r. 47 for having the contents thereof admitted in evidence[65]. The Court may, on the application of any party, or of its own motion, require a party to file an affidavit verifying any disclosure or service required by O. 39, Part VI, if it thinks it to be necessary[66].

(g) Dispensing with Disclosure.

A party may also apply, initially *ex parte,* but on notice if the Court then directs, for an order dispensing with the requirement to disclose any particular expert's report or statement[67]. The injustice occasioned by these Rules to plaintiffs in medical negligence actions has already been discussed. Such plaintiffs might try to obtain an order under this Rule dispensing with disclosure generally. However, the Rule does not appear to envisage the making of such a blanket order, but merely to allow a party to apply for relief from the duty to disclose a particular document. For example, a party might wish not to disclose certain information in writing obtained by him from a medical or paramedical witness whom he intended to call, where he did not intend to rely on that information in evidence. Documents indicating fraud by the opponent might also be excluded from disclosure, since the opponent, were he warned of the information, might fabricate counter-evidence to meet them.

(h) Admissibility in Evidence of Information Disclosed.

The 1995 Act also provided for the admissibility in evidence, notwithstanding the rules of hearsay and privilege, of any information disclosed under s. 45,[68] and this provision is implemented by O. 39 r. 47. The party disclosing an expert's report or statement may at any time before trial serve notice on the other party requiring him to admit the report or statement in evidence, obviating the need to call the expert to give oral evidence of its contents[69]. The notice must be in the prescribed form, Form No. 1 in Appendix D, Part IV[70]. The other party is deemed to have refused to admit the report or statement in evidence if he does not reply to the notice within 28 days of his having received it[71]. Similarly, a party who has obtained disclosure of a report or statement may at any stage prior to the trial of the action serve a notice on the party who disclosed it consenting to its being admitted in evidence, and requesting him to likewise consent to its admission in evidence without the need to call the expert to give oral evidence[72]. The party making the request may make it subject to such exceptions as he may specify in the notice[73]. The request must be made in the prescribed form, Form No. 2 in Appendix D, Part IV[74]. Again, the party to whom request is made is deemed to have refused to admit the report or statement in evidence if he does not reply to the notice within 28 days of his having received it[75].

A similar notice may be served at any stage before trial by a party who has disclosed any statement of the evidence supporting a claim for special damages made by him or of the social welfare payments received by him requiring the admission of such statements as evidence of their contents[76]. It appears that the other party may also serve a notice consenting to the admission in evidence of these statements and requesting the other party to likewise consent, since O. 39 r. 47(3) provides that the procedure under O. 39 r. 47(2) shall apply as nearly as possible to such statements, but confusingly and wrongly it assumes that a notice under O. 39 r. 47(2) is a step to be taken consequent to a notice under O. 39 r. 47(1), when in fact they are alternatives. Where the report or statement itself contains hearsay, the parties may agree to exclude it, or a party taking objection to its admissibility may apply to the Court on notice seeking an order that the part of the report or statement that is hearsay not be admitted in evidence, or be proved by admissible evidence[77]. The distinction between a party requiring his opponent to admit the party's own report, and requesting his opponent to admit the opponent's report is an important one, because the terms of O. 39 r. 48(1) suggest that a party can only be ordered to comply with a requirement of O. 39, Part VI. Therefore, a party can obtain a Court order directing that his own reports or statements be admitted in evidence, but could not obtain such an order in respect of his opponent's reports or statements. However, the opponent or his solicitor may be ordered to pay the costs incurred in needlessly calling a witness through the opponent's unreasonable failure to comply with a request for the admission of his report[78].

5. Enforcement and Sanctions

The 1995 Act further provided for the imposition of penalties for non-compliance with the requirements of the Act and the Rules made thereunder[79]. A party complaining that another party has failed to comply with the requirements of those Rules must bring a motion on notice, grounded on an affidavit, seeking the Court's directions in relation to the alleged default[80]. The application should be brought before the Master of the High Court, who, under O. 63 r. 1(11), has power to make an order on an application for directions as to procedure in any action or matter. On this application, the Court, if it is satisfied that the party alleged to be in default has failed to comply with any requirement of those Rules, may order that the respondent comply with the Rules forthwith or within such time as the Court may fix. It should be noted, as suggested above, that the Court's power would not appear to be limited to ordering compliance with Rules requiring the disclosure of reports, statements or information, but extends to ordering a party to admit in evidence a report or statement disclosed by the party complaining of the default, since that party is entitled to "require" such an admission, rather than merely requesting it. However, the Court cannot, it appears, order a party to comply with a "request" to consent to the admission in evidence of a report or statement disclosed to him by his opponent. These powers are quite different to those in force in England, and possibly also to those in Northern Ireland. In both of these jurisdictions, the primary method of enforcement is the exclusion of evidence: if a party has not disclosed the report, he cannot disclose the evidence[81]. In England, the power to exclude undisclosed evidence is expressed to be without prejudice to any other method of enforcement, such as the striking out of pleadings, but the Rules expressly exclude enforcement by proceeding for contempt of Court. In Northern Ireland, the position is less clear, O. 25 r. 8 and O. 72 r. 9(3) providing that the Court may, in default, stay an action or strike out a defence "or make such other order as to the Court may seem meet", but it is arguable that without express inclusion, this does not extend to directing compliance upon pain of the penalties for contempt. The position in the Republic is that such consequences may follow, and this, as we shall see, has important implications for the use that may lawfully be made of a disclosed report or statement. The Court may also make such other order as the justice of the case may require, such as an order that the evidence shall not be adduced in default of compliance, or that in default, the defaulting party's claim or defence be struck out, and the Court is also given a general discretion as to the award of costs[82]. In particular, it seems to be envisaged that a party who fails to allow an expert's report, or a statement of the evidence in support of a claim for special damages, or of social welfare receipts, to stand as evidence of the facts recorded therein, could be obliged to pay the costs of any witness called to give oral evidence as a result of such non-compliance[83]. If the non-compliance only comes to light at trial, the Court may again make such order as it thinks fit, including an order prohibiting the adduction of the evidence to which the non-compliance relates, or adjourning the trial, on such terms as to costs or otherwise as it thinks fit, to permit compliance[84]. A party may, if the other party will not consent to such adduction, seek leave to adduce evidence notwithstanding that it has not been disclosed[85].

Very importantly, it is further provided that where a party's solicitor has acted unreasonably or unduly delayed in failing to comply with a requirement under s. 45, or with a request contained in a notice served under the Rules, or where the solicitor has otherwise been in default without reasonable excuse, the Court may order him to personally bear any of the costs incurred as a result of such failure, delay or default as have been or may be awarded to any other party[86]. This places a solicitor at much greater risk of an award of costs being made against him personally than under most other provisions of the Rules. The principles governing the award of costs against a solicitor personally in most other instances are set out in the decision of the House of Lords in *Myers v. Elman*[87]. The Law Lords said that this penalty may be imposed for breaches of duty by a solicitor that would not render the solicitor liable to being struck off the rolls, and that it is a jurisdiction intended both to punish the solicitor and to indemnify the party put to needless expense by the solicitor's default[88]. Although the penalty may be imposed even though no dishonesty is alleged against the solicitor, the Law Lords held that there must be more than a mere mistake or error of judgment by the solicitor. The applicant in such a case must show that there was serious dereliction of duty[89] or gross negligence[90] on the part of the solicitor. However, in Northern Ireland, the jurisdiction to award costs against a solicitor is now governed by O. 62 r. 11, which is in terms not dissimilar to O. 39 r. 48(2), and under which an order may be made once the solicitor has been shown to have incurred costs unreasonably or improperly, or by failing to conduct the proceedings with reasonable competence and expedition. There is no longer a requirement that the solicitor be shown to have been guilty of gross negligence or a serious dereliction of duty[91]. It was held in England that, under their old scale of costs, still applicable in this jurisdiction, costs awarded against a solicitor in such circumstances should be taxed on the party-and-party basis[92]. However, since, contrary to the decision of Sachs J. in *Edwards v. Edwards*[93], the jurisdiction is not solely compensatory, but is partly punitive, the Court may have jurisdiction to order their taxation on the solicitor-and client basis.

6. Use of the Disclosed Information in the same Proceedings

The Rules concerning the admission in evidence of disclosed reports and statements are silent as to the use to which such statements may be put apart from being used in substitution for the oral evidence of a witness who is not called. For example, it is not clear whether a party can consent to his opponent's expert reports' standing as the expert's evidence in chief while still insisting that the expert be called so that he can be cross-examined. Nor is it clear to what extent such a report, which, but for the requirement of disclosure, would be a privileged document, may be used to cross-examine its author, if he is called as a witness, or may be put to other witnesses. It is submitted that disclosure waives privilege for all purposes, so the author of a report or statement may be

cross-examined on it, but that in the absence of consent to its use in evidence, it is not evidence, and cannot, as such, be put to any other witnesses, although, of course, counsel may use it in determining what questions to ask. If the party disclosing a report withdraws reliance on it and no longer intends to call the author, any consent he has given to the use of the report in evidence is probably vitiated, at least once the other party has been notified that the evidence is not going to be adduced. The same lacuna exists in the Northern Ireland Rules governing the admissibility of disclosed medical reports, but when disclosure of expert evidence was made mandatory in the commercial list it was expressly provided that the Court may direct that the experts' reports stand as their evidence in chief, and that whether or not the evidence is referred to in chief, the party to whom it has been disclosed may put it to the witness in cross-examination[94]. In England, O. 38 r. 42 allows any party to whom any expert report has been disclosed to put that report in evidence.

Where medical reports were disclosed voluntarily in an effort to settle proceedings, it was held that, in the absence of special circumstances, such as where the disclosure showed the extent of the injuries to be much greater than had originally been thought, a defendant would not be given leave to make a late lodgement in reliance on the report shown to him[95]. It is unclear whether a similar principle will apply under the new Rules.

7. Use of the Disclosed Information in other Proceedings

Where documents are produced to a party in the course of discovery, he obtains the documents subject to an implied undertaking not to use the documents for any ulterior or collateral purpose without leave of the Court[96]. The question whether this undertaking applies to the use of reports and statements disclosed under the Rules just discussed is complicated by the fact that the English Rules on the matter are somewhat different in form to those in Northern Ireland and the Republic. The use to which expert reports disclosed under the English provisions might be put was considered by Hobhouse J. in *Prudential Assurance Co. Ltd v. Fountain Page Ltd*[97], where a party who had obtained such a report had used it for the purpose of proceedings before the Courts of Texas. The judge observed that the implied undertaking only applied if failure to disclose could be punished as contempt. All the English Rules required was that if a party wished to adduce expert evidence, he had to disclose it in advance. On this basis the judge held that disclosure of the expert's report was voluntary, and that the implied undertaking on discovery did not apply to it. He contrasted s. 2(3) of the *Civil Evidence Act, 1972*[98], which overrode legal professional privilege[99], and English O. 38 r. 42, which provides for the use of disclosed reports in evidence by the person to whom they were disclosed, with the provisions governing disclosed witness statements, the privilege in which was preserved[100], and which could only be used in evidence if the disclosing party called the witness[101]. Hobhouse J. therefore concluded that the expert report, once disclosed, could be used by the party to whom it was disclosed without restriction. He reached a different conclusion with regard to witness statements. He did not think that the implied undertaking as such could apply to a disclosed witness statement because the Rules did not make disclosure of witness statements compulsory, but only made the calling of a witness conditional on the prior disclosure of his evidence. However, since the Rules (at the time of his decision) preserved legal professional privilege in the statements[102], and since the statements could not be used at trial unless the witness was called, they were subject to a duty akin to that attaching to "without prejudice" communications, and the receiving party owed a duty to the Court not to use the document for a collateral or ulterior purpose, breach of which would be contempt of Court. In the Republic, it is submitted that the provisions governing the disclosure of reports and statements are more akin to those that governed the disclosure of witness statements in England when Hobhouse J. gave his decision. Admittedly, the Irish Rules are made under a provision that allows them to be made notwithstanding the rules of legal professional privilege, a factor Hobhouse considered relevant in holding that the undertaking did not apply to expert reports in England. But a party who has obtained disclosure of a report from his opponent cannot, it appears, force his opponent to allow the report to be put in evidence[103], although he could obtain an order requiring the opponent to allow his own report, once disclosed, to be adduced[104]. Furthermore, that a party is allowed to withdraw reliance on a report which he has disclosed if he notifies his opponent in writing that he no longer intends to call the witness in question[105] might indicate that no party may rely on the report unless the expert in question is called at trial, or at least where the opponent has been notified that he will not be called. But the most important factor, which leads this author to conclude that the implied undertaking on discovery applies with full rigour to such information, is that in the Republic, the Court has power to make an order for disclosure[106], breach of which would be contempt of Court, rather than merely having power to take action in default, such as striking out pleadings or prohibiting the adduction of evidence.

8. Application to Existing Actions

The new Rules came into force on 1 September, 1997. However, in accordance with the Practice Direction of 15 September, 1997, the obligation to disclose medical or paramedical opinion and expert evidence does not apply in respect of actions set down for trial before 1 June, 1997. The obligation to disclose witnesses' names and addresses, details of special damages claimed and the evidence in support thereof, and, where the other party has not been authorized to apply for this information, a statement of social welfare receipts since the accident, does not apply to actions which were first listed for hearing before 1 July, 1997.

9. Medical Examinations

A matter that is not dealt with in the new Rules is the medical examination of a party, and the disclosure of any report created as a result of such an examination. It had long been the practice in Northern Ireland to stay a plaintiff's

action where his medical condition was in issue until he had submitted to a medical examination[107], and this practice was subsequently adopted in England[108]. However, in both jurisdictions, a stay would not be granted if the plaintiff had a stated reasonable objection to the examination[109]. From this condition developed a rule that the plaintiff could make his examination dependent on his being provided with a copy of the report prepared as a result thereof[110], and this in turn could be made dependent on the plaintiff agreeing to disclose his own report[111]. The Rules in other jurisdictions expressly confer on the Courts a power to require a party to submit to a medical examination[112]. Whether a Court in the Republic may grant such a stay is unclear; it is this author's impression that there is a practice of doing so, but there are no decided cases on the point, and a strong argument could be made that a Court cannot by this stratagem force a party to submit to a violation of his constitutional right to bodily integrity, at least in the absence of statutory authority. The Northern Ireland Rules now usefully provide that where one party has been afforded a medical examination by another party, the first party must disclose any medical evidence obtained as a result of the examination[113].

Despite the use of the term "medical evidence" it appears that this report must be disclosed even if the party at whose behest the examination is carried out decided not to use the report at trial, which it appears would not be the case in the Republic under the new Rules.

10. Conclusions

The exchange of evidence before trial, and especially expert evidence, facilitates cross-examination in some cases, and probably reduces surprise in others. Such disclosure at least has the merits of being directly relevant to the case, which is more than can be said of many documents produced in the ordinary course of discovery. Yet it is by no means without its difficulties. The main objections to disclosure are as follows.

1. For a start, what the Winn Committee recommended was that expert reports be exchanged[114]. They were under no illusions about the consequences of the plaintiff's having to disclose his reports first; if the defendant was satisfied that they were less damaging than his own, he would accept them, and call no medical evidence. Thus, especially if the plaintiff has no right to obtain the report of his examination by the defendant's doctor, the defendant could obtain an unjust advantage from the prior obligation of disclosure placed on the plaintiff. Furthermore, the defendant is given the chance to prepare his reports, if any, by reference to the information disclosed by the plaintiff. The unfairness of these provisions is such that they might well be open to challenge as being an unconstitutional and ultra vires exercise by the Superior Courts Rules Committee of their rule-making power.
2. It might be said that the exchange of expert evidence is less important to cross-examination in personal injuries cases than it might be in other actions, since the evidence in personal injuries cases tends to be more standard and less complex than, say, in environmental pollution or patent cases.
3. Increased disclosure may lead to more surprise, rather than less, because it offers a broader opportunity to each party to develop his contentions[115]. This is not necessarily to be criticized - it may signify a more thorough examination of all aspects of a case -, but it is probably not what was envisaged in framing the Rules.
4. Following from the last point, while it is true that exchanging evidence will mean that a point made by an opponent's expert will not go unanswered, it may also encourage experts to find some answer to every point made by the other side, where silence would have been more candid.
5. One purpose of obtaining a medical report is to enable a party's legal advisers to advise candidly on the party's prospects. However, if the report is going to have to be disclosed, including aspects the party's counsel might otherwise have left to the opponent to elicit on cross-examination, there will be a great incentive to employ "reliable" witnesses, resulting in a deterioration in the quality of advice and evidence. In a recent editorial in Counsel, Anthony Speaight observed[116]:

   "Expert witnesses used to be genuinely independent experts, men of outstanding eminence in their field. Today they are in practice hired guns: there is a new breed of litigation hangers-on, whose main expertise is to craft reports which conceal anything that might be to the disadvantage of their clients. The disclosure of expert reports, which originally seemed eminently sensible, has degenerated into a costly second tier of written advocacy."

   However rosy Mr Speaight's view of the past may be, the case of *Vernon v. Bosely (No. 2)*[117] is no recommendation for the present dispensation. Furthermore, where any evidence is rendered inadmissible unless disclosed in advance, there is a temptation to include in the proof disclosed every conceivable point the witness might wish to testify to. This has become an extremely serious problem in England with regard to witness statements[118].
6. Any increase in the volume of pre-trial drafting or disclosure will, from the client's point of view, have a deleterious effect on the overall cost of litigation since its effect is to "front-load" costs so that they are borne in the great majority of cases which settle. Disclosure almost certainly facilitates settlements, since it allows the parties appreciate their strengths and weaknesses, and also, for the same reason, makes settlements fairer. But in so doing, it transfers some of the costs of trial to the interlocutory stage where they are borne by parties who might have hoped to have avoided such costs by not going to trial.

The widespread adoption of disclosure provisions throughout the common law world akin to the Rules recently introduced in this jurisdiction may vouch for their success. The potential difficulties posed by the cross-examination of experts probably justify the disclosure of their evidence in advance, at least in some cases, although it may be doubted whether these would include most personal injury actions. Similarly, the disclosure of witnesses' names and addresses is cheap and not unduly burdensome. However, this author would view the prospect of compulsory disclosure of

witness statements in all actions with some disquiet; the value of this procedure, which may well be on the agenda, has yet to be proved. To conclude, it occurs to this author that the facilitation of early settlement has become the fetish of the day. It is fashionable to regard the trial of an action as a failure[119]. Interlocutory procedures were geared towards trial. Discovery traditionally proceeded on the basis that a party was not entitled to see his opponent's evidence - that he would see at trial -, but that he was entitled to see in advance anything that might help him which his opponent would want to conceal[120]. Now, there is a shift in other jurisdictions towards limiting discovery and requiring all evidence to be disclosed in advance, partly to facilitate settlement. But perhaps this is to confuse the functions of settlement and trial. Settlement is about the resolution of disputes without State compulsion. A trial is the doing of justice in accordance with law, an adjudication, backed by the power of the State, upon the rights of citizens by applying the law to all the relevant facts that can be ascertained.

The desire to see that settlements are as fair and fully informed as possible must be tempered by the appreciation that settlements are entered into largely for the purpose of avoiding the cost, trouble and uncertainty of trial, which purpose will be frustrated by shifting the burden of costs from the trial to interlocutory procedures. That desire must also be tempered by an appreciation of the Court's duty to do justice in accordance with the evidence. The word-processor and the photocopier have added substantially to the burden of discovery, while, as we have seen, the preparation of witness statements and, to a lesser extent, expert reports, may also involve significant costs. However, the two forms of disclosure differ importantly in their purposes. The purpose of discovery is to enable the party seeking it to get at information that another person would prefer to keep to himself, and which the party could not otherwise obtain. By contrast, the purpose of disclosing witness statements and expert reports is merely to advance the time at which a party becomes aware of his opponent's evidence from trial to some time beforehand. It is not intended to increase the overall information available to the parties and, through them, to the Court. Discovery is therefore the more important device for ensuring a fair trial. Because discovery and the disclosure of witness statements and expert reports are each expensive procedures, advocates of such disclosure may seek to recoup the cost of it by restricting discovery. This temptation to fund expensive interlocutory procedures geared towards increasing the number of settlements by reducing the parties' and thus the Court's fact-finding powers must be resisted. ●

The Author is currently preparing a post-graduate thesis on "Pre-trial Disclosure of Information:Practice and Procedure"

1. Confidential communications of a professional nature between client and solicitor or vice versa, and whether or not through agents specially identified for that purpose, for the purpose of seeking or providing legal advice (as opposed to legal assistance, where a lawyer is chosen to effect a transaction which the client could effect, because someone with legal knowledge is more likely to carry it out effectively: see Smurfit Paribas Bank Ltd v. A.A.B. Export Finance Ltd [1990] 1 I.R. 469, S.C. (R.O.I.)) are always privileged: Greenough v. Gaskell (1833) 1 My. & K. 98, App. in Ch. (Eng.). Anderson v. Bank of British Columbia (1876) 2 Ch. D. 644, C.A. (Eng.), Wheeler v. La Marchant (1881) 17 Ch. D. 675, C.A. (Eng.). Communications between a client or solicitor and a third person, including the client's agents generally, for the purpose of getting up evidence or enabling the solicitor to provide advice are privileged provided that (1) litigation was contemplated at the time the communication was made, and (2) getting up evidence or facilitating the provision of advice was the dominant purpose of the communication: House of Spring Gardens Ltd v. Point Blank Ltd, Unreported (on this point), Costello J., 20 December, 1982, H.C.(R.O.I.), at p. 44 of the judgment, Silver Hill Duckling Ltd v. Minister for Agriculture [1987] I.R. 289, H.C. (R.O.I.), Southwark & Vauxhall Water Co. v. Quick (1878) 3 Q.B.D. 315, C.A. (Eng.), Wheeler v. La Marchant, ante, Grant v. Downs (1976) 135 C.L.R. 674, H.C. of Aus., per Barwick C.J., dissenting, Waugh v. British Railways Board [1980] A.C. 521, H.L. (Eng.).
2. Nolan v. Irish Land Commission [1981] I.R. 23 per Costello J. in the H.C., Benbow v. Low (1880) 16 Ch. D. 93, C.A. (Eng.), Re Strachan [1895] 1 Ch. 439, C.A. (Eng.), O'Rourke v. Darbishire [1920] A.C. 581, H.L. (Eng.), Brookes v. Prescott [1948] 2 K.B. 133, C.A. (Eng.).
3. Anon. (1681) 2 Chan. Cas. 84, L.C. (Eng.), Hunter v. Sharp (1866) 13 L.T.(N.S.)R. 592, Q.B. (Eng.), Eade v. Jacobs (1877) 3 Ex. D. 335, C.A. (Eng.), Marriott v. Chamberlain (1886) 17 Q.B.D. 154, C.A. (Eng.).
4. McAvoy v. Goodyear Tyre and Rubber Co. (Great Britain) Ltd [1971] N.I. 185, H.C. (Q.B.) (N.I.).
5. Woolley v. North London Ry Co. (1869) L.R. 4 C.P. 602, C.P. (Eng.), Cassey v. London, Brighton & South Coast Ry Co. (1870) L.R. 5 C.P. 146, C.P. (Eng.), Parr v. London, Chatham & Dover Ry Co. (1871) 24 L.T.(N.S.)R. 558, Ex. (Eng.), Skinner v. Great Northern Ry Co. (1874) L.R. 9 Ex. 298, Ex. (Eng.), Malden v. Great Northern Ry Co. (1874) L.R. 9 Ex. 300n., Ex. (Eng.), Pacey v. London Tramway Co. (1877) 2 Ex. D. 440n., C.A. (Eng.), Friend v. London Chatham & Dover Ry Co. (1877) 2 Ex. D. 437, C.A. (Eng.).
6. Naylor v. Preston Area Health Authority [1987] 1 W.L.R. 958, C.A. (Eng.).
7. Williams, Discovery of Civil Litigation Trial Preparation in Canada (1980) 58 Can. Bar Rev. 1.
8. Naylor v. Preston Area Health Authority [1987] 1 W.L.R. 958, C.A. (Eng.), per Sir Frederick Lawton.
9. The phrase seems to have originated in the title of a Working

Paper circulated by the Winn Committee, see Report of the Committee on Personal Injuries Litigation, 1968, Cmnd 3691 (the "Winn Committee Report"), para. 132.

10. Cp. McLean Bros and Rigg Ltd v. Jones & Co. (1892) 66 L.T.(N.S.)R. 653, Div. Ct (Eng.), disapproved in Budden v. Wilkinson [1893] 2 Q.B. 432, C.A. (Eng.), Wigmore, Evidence in Trials at Common Law, Chadbourn Revision, Little, Brown & Co., Boston, 1976, Vol. 6, ß 1845, and see generally The Supreme Court Practice, 1997, London (1996), Vol. 1, pp. 650-651, where the benefits of exchanging witness statements are set out.
11. Wigmore, op. cit., ß 1845.
12. Cp. Final Report of the Committee on Supreme Court Practice and Procedure, 1953, Cmnd 8878 "the Evershed Committee Report", para. 289.
13. See, for example, in Northern Ireland, O. 25 and O. 72 r. 9, R.S.C. (N.I.), in England, O. 25 r. 8(1), O. 38 rr. 2A, 36 and 37, R.S.C. (Eng.), in the Australian Federal Court, O. 10 r. 1(2), F.C.R. (Aus.), in New South Wales, Pt 36 rr. 4A and 13A, S.C.R. (N.S.W.), in the Northern Territory of Australia, Rr. 33.07, 33.08, 33.09, 33.12, 48.35, R.S.C. (N.T.), in the Canadian Federal Court, R. 482, F.C.R. (Can.), in the General Division of the Ontario Court, R. 36.01(3), R.C.P. (Ont.), and in the United States Federal District Courts, F.R.C.P. 26(a)(2).
14. No. 31 of 1995.
15. S. 45(1).
16. Disclosure of witnesses' names and addresses was recommended by the Committee on Court Practice and Procedure (R.O.I.), 3rd Interim Report, Jury Trials in Civil Actions (1966), para. 42. The Committee further recommended that a party who approached a witness whose name was disclosed for a statement should, on being refused such a statement, be entitled to apply to Court for an order that the witness make a sworn statement. This last recommendation has not been implemented by the 1995 Act or the 1997 Rules. Disclosure of witnesses' names and addresses was rejected by the Evershed Committee, apparently for fear that it might lead to tampering with witnesses: Evershed Committee Report, para. 301: and by the Winn Committee: Winn Committee Report, para. 370.
17. S. 45(1)(a).
18. O. 39 r. 46(5), R.S.C. (R.O.I.).
19. O. 38 r. 2A, R.S.C. (Eng.).
20. S.I. No. 348 of 1997.
21. Rules of the Superior Courts (No. 7), 1997, S.I. 348 of 1997, Art. 3.
22. O. 39 r. 45(1)(a), R.S.C. (R.O.I.).
23. O. 39 r. 45(1)(d), R.S.C. (R.O.I.).
24. O. 25 r. 1, R.S.C. (N.I.).
25. O. 24 r. 7A, R.S.C. (Eng.).
26. Paterson v. Chadwick [1974] 1 W.L.R. 890, H.C. (Q.B.) (Eng.).
27. O. 25 r. 1, R.S.C. (N.I.). In the Northern Territory of Australia, parties to medical negligence proceedings must disclose their expert reports, but they may exclude from the copies disclosed any expression of opinion on the question of liability: R. 33.09, R.S.C. (N.T.).
28. O. 25 r. 8(5)(b), R.S.C. (Eng.), O. 38 r. 37, R.S.C. (Eng.).
29. O. 25 r. 8(1)(b)(i), R.S.C. (Eng.).
30. Naylor v. Preston Area Health Authority [1987] 1 W.L.R. 958, C.A. (Eng.).
31. Rahman v. Kirklees Area Health Authority [1980] 3 All E.R. 610, C.A. (Eng.).
32. Cp. O'Donovan v. Cork Co. Co. [1967] I.R. 173, S.C. (R.O.I.).
33. [1980] 3 All E.R. 610, C.A. (Eng.).
34. Naylor v. Preston Area Health Authority [1987] 1 W.L.R. 958, C.A. (Eng.).
35. O. 39 r. 45(1)(e), R.S.C. (R.O.I.). The experts specified are accountants, actuaries, architects, dentists, doctors, engineers, occupational therapists, psychologists, psychiatrists and scientists.
36. Dunn v. British Coal Corpn [1993] I.C.R. 601, C.A. (Eng.).
37. Derby & Co. Ltd v. Weldon (No. 9), The Times, 9 November, 1990, C.A. (Eng.).
38. The distinction between the reports of an expert whom it was intended to call and the evidence that it was intended to lead from him was recognized by the Winn Committee, and the more extensive duty of disclosure rejected by them at para. 283.
39. Ibid.
40. Shell Pensions Trust Ltd v. Pell Frischmann & Partners [1986] 2 All E.R. 911, H.C. (Q.B.) (Eng.).
41. O. 38 r. 37, R.S.C. (Eng.).
42. Ollett v. Bristol Aerojet Ltd [1979] 1 W.L.R. 1197, H.C. (Q.B.) (Eng.).
43. Kenning v. Eve Construction Ltd [1989] 1 W.L.R. 1189, H.C. (Q.B.) (Eng.).
44. Derby & Co. Ltd v. Weldon (No. 9), The Times, 9 November, 1990, C.A. (Eng.). Whether Kenning v. Eve Construction Ltd [1989] 1 W.L.R. 1189, H.C. (Q.B.) (Eng.), would be followed in this jurisdiction may depend on the extent to which the Courts will allow disclosed reports to be used on cross-examination: in England, the Rules expressly permit such use: O. 38 r. 42, R.S.C. (Eng.).
45. O. 25 r. 9(1), R.S.C. (N.I.).
46. Whitehouse v. Jordan [1981] 1 W.L.R. 246, H.L. (Eng.), per Lord Wilberforce.
47. Ibid., per Lord Fraser.
48. O. 39 r. 45(1)(f)(i), R.S.C. (R.O.I.).
49. O. 25 r. 9(1), R.S.C. (N.I.).
50. O.39 r. 45(1)(f)(ii), R.S.C. (R.O.I.).
51. O. 39 r. 45(1)(g), R.S.C. (R.O.I.).
52. O. 39 r. 46(7), R.S.C. (R.O.I.).
53. O. 39 r. 46(1), R.S.C. (R.O.I.).
54. O. 39 r. 46(2), R.S.C. (R.O.I.).
55. O. 39 r. 46(3), R.S.C. (R.O.I.).
56. O. 39 r. 46(4), R.S.C. (R.O.I.).
57. O. 39 r. 46(5), R.S.C. (R.O.I.).
58. Ibid.
59. O. 39 r. 46(6), R.S.C. (R.O.I.).
60. This restriction, it is submitted, results from the manner in which the defendant's obligations are made dependent on the plaintiff's compliance with his obligations. In Northern Ireland and England, for example, the plaintiff's obligation is separated from that of other parties. The plaintiff is made to deliver a medical report

with his statement of claim in personal injuries cases: O. 25 r. 2, R.S.C. (N.I.) , O. 18 r. 12(1A), R.S.C. (Eng.): but otherwise all parties are on the same footing with respect to expert reports, which generally must be disclosed to all other parties: O. 26 r. 4, O. 72 r. 9(1), R.S.C. (N.I.), O. 25 r. 8(1), O. 38 r. 37(1), R.S.C. (Eng.). Ordinarily, the Courts desire to see disclosure effected by mutual exchange: Matthews and Malek, Discovery, London (1992), p. 327.

61. Specific provision for plaintiffs and defendants in a counterclaim is made elsewhere in the Rules, for example, in relation to the Third Party Procedure: see O. 16 r. 13, R.S.C. (R.O.I.).
62. O. 39 r. 45(1)(c), R.S.C. (R.O.I.).
63. O. 39 r. 46(7), R.S.C. (R.O.I.).
64. No. 31 of 1995.
65. O. 39 r. 46(7), R.S.C. (R.O.I.).
66. Ibid.
67. O. 39 r. 52(1), R.S.C. (R.O.I.).
68. Courts and Court Officers Act, 1995, No. 31 of 1995, s. 45(4).
69. O. 39 r. 47(1), R.S.C. (R.O.I.).
70. Ibid.
71. Ibid.
72. O. 39 r. 47(2), R.S.C. (R.O.I.).
73. Ibid.
74. Ibid.
75. Ibid.
76. O. 39 r. 47(3), R.S.C. (R.O.I.).
77. O. 39 r. 50, R.S.C. (R.O.I.).
78. O. 39 r. 48(2), R.S.C. (R.O.I.).
79. Courts and Court Officers Act, 1995, No. 31 of 1995, s. 45(1)(b).
80. O. 39 r. 48(1), R.S.C. (R.O.I.).
81. O. 25 r. 6, R.S.C. (N.I.), O. 72 r. 8(6), R.S.C. (N.I.), O. 38 r. 36(1), R.S.C. (Eng.).
82. O. 39 r. 48(1), R.S.C. (R.O.I.).
83. O. 39 r. 51, R.S.C. (R.O.I.), R.S.C. (R.O.I.), App. D., Pt IV, Forms 1 and 2.
84. O. 39 r. 49, R.S.C. (R.O.I.).
85. O. 39 r. 52(2), R.S.C. (R.O.I.).
86. O. 39 r. 48(2), R.S.C. (R.O.I.).
87. [1940] A.C. 282, H.L. (Eng.).
88. Myers v. Elman [1940] A.C. 282, H.L. (Eng.).
89. Myers v. Elman [1940] A.C. 282, H.L. (Eng.), per Viscount Maugham, Edwards v. Edwards [1958] P. 235, H.C. (Prob., Div. & Adm.) (Eng.).
90. Myers v. Elman [1940] A.C. 282, H.L. (Eng.), per Lords Atkin and Wright, Edwards v. Edwards [1958] P. 235, H.C. (Prob., Div. & Adm.) (Eng.).
91. Sinclair-Jones v. Kay [1989] 1 W.L.R. 114, C.A. (Eng.).
92. Edwards v. Edwards [1958] P. 235, H.C. (Prob., Div. & Adm.) (Eng.).
93. [1958] P. 235, H.C. (Prob., Div. & Adm.) (Eng.).
94. O. 72 r. 9, R.S.C. (N.I.).
95. Brennan v. Iarnród Éireann [1992] 2 I.R. 167, H.C. (R.O.I.).
96. Ambiorix Ltd v. Minister for the Environment (No. 1) [1992] 1 I.R. 277, S.C. (R.O.I.), Countyglen plc v. Caraway [1995] 1 I.L.R.M. 48, H.C. (R.O.I.), Greencore Group plc v. Murphy [1995] 3 I.R. 520, H.C. (R.O.I.).
97. [1991] 1 W.L.R. 756, H.C. (Q.B.) (Eng.).
98. 1972 c. 30.
99. Cp. Courts and Court Officers Act, 1995, No. 31 of 1995, ss. 45(1)(a) and 45(4) in the Republic, and the Administration of Justice Act, 1985, 1985 c. 61, s. 64(1) in Northern Ireland, which are also expressed in terms overriding any privilege attaching to reports to be disclosed.
100. Then O. 38 r. 2A(8), R.S.C. (Eng.). This provision is no longer in force.
101. Then O. 38 r. 2A(4), R.S.C. (Eng.). Now O. 38 r. 2A(6), R.S.C. (Eng.).
102. O. 38 r. 2A(8), R.S.C. (Eng.).
103. O. 39 r. 47(2), R.S.C. (R.O.I.).
104. O. 39 r. 47(1), R.S.C. (R.O.I.).
105. O. 39 r. 46(8), R.S.C. (R.O.I.).
106. O. 39 r. 48(1), R.S.C. (R.O.I.), O. 39 r. 49, R.S.C. (R.O.I.).
107. McDowell v. Strannix [1951] N.I. 57, H.C. (K.B.) (N.I.), Ross v. Tower Upholstery Ltd [1962] N.I. 3, C.A. (N.I.).
108. Edmeades v. Thames Board Mills Ltd [1969] 2 Q.B. 67, C.A. (Eng.).
109. Anderson v. Irwin [1966] N.I. 156, C.A. (N.I.), Edmeades v. Thames Board Mills Ltd [1969] 2 Q.B. 67, C.A. (Eng.), Lane v. Willis [1972] 1 W.L.R. 326, C.A. (Eng.), Starr v. National Coal Board [1977] 1 W.L.R. 63, C.A. (Eng.).
110. McGinley v. Burke [1973] 1 W.L.R. 990, H.C. (Q.B.) (Eng.), Clarke v. Martlew [1973] Q.B. 58, C.A. (Eng.). This rule had been suggested over 100 years previously by Montague Smith J. in Cassey v. London, Brighton & South Coast Ry Co. (1870) L.R. 5 C.P. 146, C.P. (Eng.).
111. Ginley v. Burke [1973] 1 W.L.R. 990, H.C. (Q.B.) (Eng.).
112. E.g. in New South Wales, Pt 25 rr. 2, 4 and 5, S.C.R. (N.S.W.), in the Northern Territory, R. 33.04, R.S.C. (N.T.), in the Federal Court of Canada, R. 467, F.C.R. (Can.), in the General Division of the Ontario Court, R. 33, R.C.P. (Ont.), and in the United States Federal District Courts, F.R.C.P. 35(a).
113. O. 25 r. 3, R.S.C. (N.I.).
114. Para. 279. Admittedly, the implementation of this recommendation has been somewhat diluted in Northern Ireland and England by the requirement that the Plaintiff deliver a medical report with his statement of claim.
115. Levine, A Comparison between English and American Civil Discovery Law with Reform Proposals, New York (1982), pp. 3-4.
116. A Bonfire of the Paper Mountain, Counsel, November/December, 1994, p. 4 at p. 5.
117. [1997] 1 All E.R. 614, C.A. (Eng.).
118. See Bawdon, Witness Statements, Counsel, November/December, 1994, p. 13, Lord Woolf's Interim Report: Access to Justice, London (1995), Ch. 22, para. 6.
119. Cp. Naylor v. Preston Area Health Authority [1987] 1 W.L.R. 958, C.A. (Eng.), per Donaldson M.R. at p. 968: "...the procedure of the courts must be, and is, intended to achieve the resolution of disputes by a variety of methods, of which a resolution by judgment is but one, and probably the least desirable."
120. Nolan v. Irish Land Commission [1981] I.R. 23, H.C. and S.C. (R.O.I.), per Costello J. (as he then was) in the H.C.

Procedural Errors in International Litigation: The United Meat Packers Case

Jonathan Newman, Barrister

Introduction

Jurisdiction over international litigation is one of the very few areas where technical mistakes in procedure and drafting can result in a case being struck out by the courts. While usually just a source of cost and inconvenience, striking out may result in the complete loss of the plaintiff's remedy where it occurs after the action's limitation period has elapsed[1]. The Supreme Court's recent *ex tempore* judgment in *United Meat Packers (Ballaghaderreen) Ltd. v. Nordstern Allgemeine Versicherungs AG and others*[2] indicates how the Court currently approaches technical errors made in cases brought both under the national rules on jurisdiction contained in Order 11 of the Rules of the Superior Courts and the newer European rules set out in the Brussels and Lugano Conventions[3]. The result is a more forgiving attitude towards mistakes. However, this liberal approach, in so far as it applies to errors made in Order 11 cases, contrasts with that adopted in recent decisions of the High Court and the English Court of Appeal. Above all, *United Meat Packers* is a salutary tale of how defective proceedings in international litigation can result in a welter of technical court applications and the incurring of substantial costs.

Summary of Irish Courts' Jurisdiction

When instituting proceedings against a foreign-resident defendant, there are five different jurisdictional categories into which the case may fall. Most of the categories are characterised by a particular procedure that must be followed in instituting the proceedings.

I: At common law the Irish courts have jurisdiction over any proceedings commenced by a summons served on a foreign defendant while he is, albeit temporarily, in the State[4]. The usual procedure for initiating domestic proceedings applies. After service the defendant may bring an application before the Irish court to set aside the service of the summons and strike out the proceedings on the basis that Ireland is not *forum conveniens* for the proceedings[5].

II: Order 11, Rule 1, of the Rules of the Superior Courts provides that where a foreign defendant would have to be served with any summons abroad, the Irish courts may take jurisdiction over the case if it falls within one of the Rule's seventeen headings.[6] However, the issue and service of proceedings out of the jurisdiction is subject to supervision by the courts. Rule 1 stipulates that a plaintiff who wishes to assert the Irish courts' jurisdiction under Order 11 must obtain court leave prior to issuing and serving the summons[7]. At that *ex parte* hearing the plaintiff must demonstrate in a grounding affidavit that the case falls within one of the headings set out in Rule 1 and that the State is *forum conveniens*[8]. The leave order must state the precise heading of Rule 1 within which the case falls[9]. The decision to grant leave may be challenged by the defendant after service.[10]

III: Where a defendant is resident in a country which is party to the Brussels Convention and is being sued in respect of a civil or commercial matter, this EU Convention determines the jurisdiction of the Irish courts[11]. When jurisdiction over a case is allotted to the Irish courts by the Convention, the plaintiff is entitled under the 1989 Rules of the Superior Courts to issue and serve the summons on the oreign defendant *without* the court's leave.[12] The summons must, however, bear indorsements specifying, in particular, the precise provision of the Convention upon which the plaintiff relies in asserting the Irish court's jurisdiction[13]. The defendant may bring a motion to set aside the summons on the basis that the Irish courts do not in fact have jurisdiction under the Convention[14].

IV: Where a defendant is resident in an EFTA country (or certain EU member states which were formerly EFTA states) and the case concerns a civil or commercial matter, the Lugano Convention's rules on jurisdiction apply[15]. The Convention's rules are almost identical to those of the Brussels Convention, the Lugano Convention having been concluded between the EU and EFTA states. In United Meat Packers it was assumed that the 1989 Rules of the Superior Courts apply to Lugano Convention cases just as they apply to Brussels Convention cases. This assumption is questioned below.

V: Specialised conventions operate in fields such as maintenance and maritime claims[16].

No Overlap

The Brussels and Lugano Conventions operate to the complete exclusion of the common law and Order 11 jurisdictional rules if either Convention is applicable to a given case.[17]

Possible Mistakes

The potential for procedural and

drafting mistakes in instituting proceedings is obviously considerable. What happens if a practitioner institutes proceedings in reliance upon the wrong set of rules (Order 11 instead of the Brussels Convention, for example)?; or picks the right set of rules, but relies on the wrong rule within that set (the wrong heading of Order 11, or the wrong provision of the Brussels Convention, for instance)? Is the defendant entitled to have the proceedings struck out completely?

Facts of United Meat Packers

In *United Meat Packers* the plaintiff company sued the defendant insurers on foot of an insurance contract covering UMP's meat-plant, which had burnt down. UMP sought to institute proceedings for breach of contract against a number of defendants, several of whom were Swiss. At this time the Lugano Convention had not yet come into effect between Switzerland and Ireland, so the plaintiff relied upon Order 11 to found the Irish courts' jurisdiction over the proceedings against these defendants.

An application was brought for leave to issue and serve notice of the summons on the Swiss defendants, relying on heading (e)(ii) of Order 11, rule 1. Heading (e)(ii) provides that leave may be given in respect of an action concerning a contract made by or through an agent trading or residing in the State on behalf of a foreign principal. UMP's grounding affidavit averred that there was such an agent. An order granting leave was given by Geoghegan J in the High Court on this basis, reciting that the court had jurisdiction under Order 11, rule 1(e).

As the Swiss defendants had not dealt through an Irish agent, they brought a motion in the High Court to set aside the service of the notice of the summons upon them and strike out the proceedings.

Plaintiff's Arguments

The plaintiff relied on two arguments in order to defeat the motion:

- the order granting leave remained good because, on the evidence set out before Geoghegan J, leave could instead have been obtained under heading (e)(iii) of Order 11. This provides that leave may be given for an action concerning a contract breached in Ireland or governed by Irish law. UMP's grounding affidavit had, by mistake, failed to aver that the case fell within this sub-heading.

the order granting leave was now irrelevant, as this summons could have been issued without any leave under the 1989 Rules. This was because between the application for leave and the subsequent issue of the summons, the Lugano Convention had come into force. As the Lugano Convention would, on the facts of this case, allot jurisdiction to the Irish courts, the court should let this case proceed as a Lugano Convention case and permit the Convention indorsements required by the 1989 Rules to be now added to the summons by way of amendment.[18]

Two Mistakes

Due to the fortuitous timing of the introduction of the Lugano Convention, UMP was able to plausibly contend that its case could be prosecuted under Order 11 or the Lugano Convention.

However, whether UMP chose to go down the Order 11 track or the Convention track, defects in UMP's procedure would have to be cured by the court if its proceedings were not to be struck out. If UMP continued to rely on Order 11, it had to overcome the mistake of originally getting its facts wrong and relying on the wrong sub-heading in obtaining leave. If it now chose to rely on the Lugano Convention, this would make the defective obtaining of leave irrelevant (because no leave is necessary), but UMP would have to overcome the fact that its summons did not bear the indorsements required by the 1989 Rules in Convention cases.

Mistake A: Wrong Sub-Heading Used in Order 11 Proceedings

In the High Court Carroll J struck out UMP's proceedings against the Swiss defendants.[19] The plaintiffís affidavit grounding its leave application had specifically averred to facts within heading (e)(ii) of Order 11 and therefore it must be assumed that leave had been given squarely on this agency ground. She could not now assume that Geoghegan J would have granted leave on foot of heading (e)(iii) on the evidence which had been before him.

The Supreme Court took a much more liberal line. O'Flaherty J said that the sole issue was whether there was evidence before Carroll J which established that the High Court had jurisdiction over the proceedings under Order 11 and, in particular, heading (e) of that Order. The High Court, in his opinion, clearly did have jurisdiction under heading (e) on the overall facts presented. The Court was willing to cure any defect in the proceedings using the broad curative power provided for in Order 28, rule 12 - presumably this would involve amending UMP's original grounding affidavit so as to refer to the new sub-heading relied upon.

The Authorities

UMP had succeeded, at the hearing of the motion challenging the leave order, in raising a new jurisdictional argument to justify that earlier grant of leave. While, in making out its new argument, UMP relied on facts which it had mentioned earlier before Geoghegan J, those facts had not then been attributed with any legal, jurisdictional, significance by it. Instead, at that first hearing different facts had been given a different legal significance.

The courts have long exercised the Order 11 procedure with care. The seventeen headings of Order 11 amount to a very broad *prima facie* jurisdiction over foreign defendants. The need to obtain leave protects a prospective foreign defendant by testing a claim that the State has jurisdiction prior to the defendant being served. Before the Supreme Court judgment in *United Meat Packers*, the Irish and English authorities agreed that this meant that the real basis of jurisdiction relied upon by the plaintiff must be first tested at the *ex parte* hearing, rather than later on when the defendant has been put to the trouble of bringing a

motion to challenge that leave.

In *Campbell v. Holland Dredging Ltd.*[20] the plaintiff had been given leave to sue in Ireland in reliance on heading (e) of Order 11, Rule 1. This heading only covers contract claims, while the plaintiff's claim in the summons was solely in tort. To justify the leave when its discharge was later sought, the plaintiff argued that, in any case, she could just as well have sued in contract; and, furthermore, on the facts leave could instead have been given under heading (h). Keane J discharged the leave and struck out the claim: while the plaintiff could have sued in contract, her actual claim was in tort and so leave had been wrongly given. To let the order stand would not be consistent with the care which the courts must exercise in assuming jurisdiction."[21] Nor could Keane J retrospectively alter the leave so as to instead refer to heading (h) as he had no power to alter the order of another High Court judge.

In *Metall v. Donaldson*[22] the plaintiff wished to sue the foreign defendant for breach of trust. It obtained leave under Order 11 on the basis that a tort had been committed in England[23]. Fearing that a breach of trust might not be a tort at all, at the hearing of a motion to discharge the leave the plaintiff sought to amend its summons so as to now plainly allege the tort of fraud. The English Court of Appeal held that breach of trust was not a tort, refused the sought amendment and struck out the claim. The Court ruled that a plaintiff who had, on the basis of his legal claim, obtained leave under a particular heading of Order 11, was not entitled to later alter the nature of his claim in order to better justify that grant of leave[24]. A plaintiff must stick with the same legal claim at every stage. The rule in Metall has been approved and regularly applied by the English courts.[25]

The case-law therefore penalises the plaintiff who does not get his true case in order at the *ex parte* stage. Why this lack of flexibility? *Metall* explains it on two grounds. First, the defendant must be able to rely on the documents with which he is served - the summons and the leave order - as accurately setting out the jurisdictional argument of the plaintiff. He can then decide whether to contest the court's jurisdiction. If fresh jurisdictional arguments can be subsequently introduced by plaintiffs, defendants might be put at a disadvantage. This, in the author's view, is not a sound reason for preventing fresh arguments from being made to justify the grant of an earlier leave order: if a defendant is surprised by a new argument, why can he not be compensated by costs and/or an adjournment, as in domestic proceedings?

Secondly, the Court in *Metall* said that Order 11 is designed to ensure that a plaintiff sets out his case fully and clearly at the *ex parte* hearing so that the court knows the nature of the case before it. Otherwise, the Court seems to have feared, the decision whether to assert jurisdiction by giving leave has to be made on the basis of what is, unbeknownst to the court, merely a provisional case. This accords with Keane J's emphasis in Campbell on the care that must be exercised by the court in Order 11 proceedings.

This point can perhaps be better explained from another angle. Order 11 is a highly unusual procedure: it requires court leave to be obtained before mere service is performed. Clearly it views service on a foreign resident as a very serious matter, as an exceptional assertion of the State's jurisdiction. If it is possible to justify obtaining leave, through fresh arguments, after it has already been obtained, the necessity and the onus of presenting one's case fully and accurately at the *ex parte* stage is lost. One need only properly justify the serious step of obtaining leave after it has been obtained. It is like saying that a plaintiff only needs to properly and accurately justify obtaining an ex parte injunction after obtaining the injunction.

In *United Meat Packers* the plaintiff sought to rely on a different set of facts - rather than, as in *Metall* and *Campbell*, a different legal claim - in order to better justify the earlier grant of leave. It is hard to see how this distinction might be of significance. Each case involved the plaintiff trying to put a new legal 'spin' on the facts earlier presented. Furthermore, relying on different facts may involve the plaintiff altering his jurisdictional argument if anything more patently than his relying on a different legal claim.

The Right Approach?

Carroll J's strict approach in *United Meat Packers* appears to be more in accord with the authorities than that of the Supreme Court. Which approach is preferable?

Order 11 sets up an exceptional level of supervision over the service of proceedings on foreign residents. The Supreme Court's approach, if generally applied, would weaken that structure of pre-emptive supervision by enabling plaintiffs to obtain leave on the basis that this will only have to be properly justified after service.

Nonetheless, at the heart of this more flexible attitude lies a core of realism: as a practical matter, is the service of an Irish summons on a foreign resident really an event of such significance that it must be attended by so much judicial circumspection? Probably not. If we had more modern and precise rules on jurisdiction, which did not assert such a potentially broad area of jurisdiction as Order 11 does, we could arguably dispose altogether with the need for leave prior to service.

Mistake B: Using Order 11 When Brussels or Lugano Convention Applies

In its alternative argument UMP sought to convert the case from Order 11 proceedings into Lugano Convention proceedings. The Supreme Court specifically accepted UMP's initial point that these proceedings, having been issued after the coming into force of the Lugano Convention, could in principle be brought in the State under the Convention's provisions. The High Court did not disagree with the point. Therefore, the key question in both courts was simply whether these proceedings, having been initiated under Order 11, could in practice now be converted into Lugano Convention proceedings. This required that the court permit the issued summons to be amended by adding the indorsements required by the

1989 Rules in Brussels and Lugano Convention cases.

In seeking this permission, UMP relied on a Supreme Court decision, *Doran v. Power*[26]. In *Doran* the plaintiff issued and served Irish proceedings on a French defendant, founding the courts' jurisdiction on the Brussels Convention. In accordance with the 1989 Rules, the summons bore indorsements referring to that Convention and was served without leave. The Supreme Court subsequently held that the Irish courts only had jurisdiction under a maritime convention. The Court did not, however, strike out the proceedings. Instead it granted the plaintiff liberty to amend its documents, presumably by deleting the Brussels Convention references, and so switch the action's jurisdictional basis mid-stream.

Carroll J in the High Court refused to permit the amendments. She distinguished *Doran* on the ground that it involved switching between two jurisdiction conventions where no leave was necessary to institute proceedings in either case. Doran could not be applied where it was sought to switch between the mutually exclusive tracks of Order 11, where leave was necessary and had here been obtained by the plaintiff, and the Lugano Convention, where no leave was necessary.

The Supreme Court, however, permitted UMP to amend their existing summons by adding the Lugano Convention indorsements and so take the proceedings out of the Order 11 track. The only difference that O'Flaherty J could see between this case and *Doran* was merely formal: here indorsements would have to be added, while in *Doran* they were deleted.

The Right Approach?

It is submitted that there is no reason to take a harsh line with procedural and drafting errors made in cases which should properly be brought under the Brussels or Lugano Conventions. In *United Meat Packers* and *Doran*, the Supreme Court treated these defects with the same liberality as errors made in domestic proceedings. In domestic proceedings the rule is that defects will be cured except where it would cause such grave prejudice to the defendant that there can be no sufficient compensation in costs and/or by an adjournment[27].

The 'domestic approach' is apt here because proceedings brought under the Conventions are similar to domestic proceedings in that the summons can be issued and served without leave. All that is unusual is that the proceedings must bear indorsements referring to the relevant Convention. Where procedural errors are made, such as leaving out the indorsements and seeking leave under Order 11, or referring to the wrong Convention or Convention provisions in the indorsements, all that is needed is an amendment to the plaintiff's documents to set things straight.

This contrasts with the position in relation to defects in cases which should properly be brought under Order 11[28]. These defects may involve bypassing or undermining the courts' supervision of the service of Irish summonses on foreign residents in Order 11 cases. For instance, a plaintiff's mistaken reliance on the Brussels or Lugano Conventions in a case that should properly be brought under Order 11 will result in him failing to obtain the court's leave prior to service. Curing this omission is obviously not comparable to just adding indorsements to a summons[29].

1989 Rules Apply to Lugano Convention Cases?

In *United Meat Packers* it was accepted, apparently without argument, that the 1989 Rules - which govern the procedure to be followed in Brussels Convention cases - also govern the procedure to be adopted in Lugano Convention cases. This has been assumed to be correct for the purpose of the comments above.

The Lugano Convention has, as mentioned, force of law in the State by reason of the 1993 Act. There can be no doubt that the 1989 Rules should apply in Lugano Convention cases. However, nowhere in the 1989 Rules is the Lugano Convention mentioned.

Only in the High Court did the issue of whether the 1989 Rules govern Lugano Convention cases receive detailed consideration. Carroll J said that, as the 1993 Act provides that it and the 1988 Act (which gives effect to the Brussels Convention) "shall be construed together as one"[30], the 1989 Rules must be seen as also setting out the procedure to be followed in Lugano Convention cases.

It is respectfully submitted that this is faulty reasoning. The 1989 Rules are not part of, nor were they made under, the 1988 and 1993 Acts. In any case, the 1989 Rules define their applicability in a precise manner that hardly leaves any room for construction. The Rules only apply "to proceedings which are governed by the terms of the 1968 Convention and the 1988 Act.[31]" The definition of "the 1968 Convention" contained in the Rules refers only to the Brussels Convention[32]. To boot, the definition of the same term in the 1988 Act, even as amended by the 1993 Act, omits any reference to the Lugano Convention[33].

This leaves the procedure to be followed in Lugano Convention cases in limbo[34]. Similarly, no amendments to the Rules have been made regarding the maritime conventions to which the State acceded in 1989[35]. Failing to expressly provide for these conventions serves to mislead practitioners and increase the likelihood of unnecessary proceedings.●

1. *Leal v. Dunlop Ltd.* [1984] 2 All ER 207 is an English example of this occurring in the international litigation context.
2. Div. SC, 24 June 1997; Irish Times, 1 Sept., 1997.
3. For a broader analysis of Irish court practice in this field, see Newman, Treatment of Jurisdictional Errors In International Litigation, (1996) 18 DULJ (ns) 79.
4. *Maharanee of Baroda v. Wilkenstein* [1972] 2 QB 283.
5. Ord.12, r.26 of the Rules of the Superior Courts, 1986. For a full discussion of the principle of forum conveniens, see The Spiliada [1987] AC 460.
6. For example, heading (f) of r.1 permits a plaintiff to sue a foreign defendant in Ireland in respect of a tort committed within the jurisdiction.

R.8 provides that foreign nationals should only be served with a notice of the summons.

7. See also Ord.5, r.14(1).
8. See Ord.11, rs.2 and 5; and *Brennan v. Lockyer* [1932] IR 100. The use of the term forum conveniens here is, strictly, inaccurate: see *Kelly v. Cruise Catering* [1994] 2 ILRM 394.
9. *Shipsey v. British & South American Steam Navigation Co.* [1936] IR 65.
10. Ord.12, r.26.
11. Arts.1 to 4. The Convention may also apply in certain other cases: see Art.4, first paragraph. The Convention, as amended, is given force of law by the Jurisdiction of Courts and Enforcement of Judgments Acts, 1988 and 1993. All EU Member States, except Austria, Finland and Sweden, are parties.
12. Ord.5, r.14(2) and Ord.11A, r.2. All references are to the 1986 Rules as amended by the Rules of the Superior Courts (No.1), 1989, SI No.14 of 1989.
13. Ord.4, r.1A, and Ord.5, r.14(2). See also Ord.19, r.3A.
14. Ord.12, r.26 and *Campbell v. van Aart* [1992] ILRM 663.
15. Arts.1 to 4 and 54B. The Convention was given force of law by the Jurisdiction of Courts and Enforcement of Judgments Act, 1993. The EFTA states are Norway, Switzerland and Iceland. It may also be possible to use the Convention in respect of the former EFTA states, Austria, Finland and Sweden, which have not yet ratified the Brussels Convention.
16. See the Maintenance Orders Act, 1974, and the Jurisdiction of Courts (Maritime Conventions) Act, 1989.
17. Arts.1 to 3 of both Conventions.
18. Art.8 of the Convention gives jurisdiction to a policy-holder's home courts.
19. [1996] 2 ILRM 260.
20. High Court, March 3, 1989.
21. At p.5.
22. [1990] QB 391.
23. Ord.11 of the Supreme Court Rules is in similar terms to the Irish Ord.11.
24. Following *Parker v. Schuller* (1901) 17 TLR 299.
25. See *Excess Insurance v. Astra Insurance* [1996] LRLR 380; *Spargos Mining v. Atlantic Capital*, May 9, 1996; *DSQ Property v. Lotus Cars*, Times, June 28, 1990, and *Walton Insurance v. Deutsche Ruck*, Times, Nov. 28, 1990 (all CA); and also *Grupo Torras v. Al Sabah* [1995] 1 Ll.R 374.
26. [1996] 1 ILRM 55.
27. See *DPP v. Corbett* [1992] ILRM 674.
28. See *Bell v. Exxetor*, Times, Nov. 15, 1989.
29. The English courts will generally not forgive such an error: see Leal, supra, n.1.
30. S.1(2). See n.11 for full titles of Acts.
31. Ord.11A, r.1.
32. Ord.11A, r.8. The English Rules were specifically amended in 1992.
33. S.1(1) and (3), 1988 Act, and s.3, 1993 Act.
34. This cannot mean that leave should be obtained in Lugano cases: that would involve relying on the jurisdictional rules of Ord.11 ousted by the Convention.
35. See n.16 and *Doran*, supra.

Trinity Law School Launches Scholarship Scheme with Generous Support from the Bar

The legal profession is sometimes perceived as being exclusive and elitist with university law departments being dominated by students from private school backgrounds rather than working class backgrounds. In order to redress its imbalance somewhat and to challenge the public perception of the legal profession, the Trinity College Law School has just launched a unique Scholarships Scheme, which has been made possible through the support of the Bar Council and the generosity of individual members of the Bar.

The Scheme provides that up to three funded places in Law are to be awarded each year from October 1997, to students facing economic or social difficulties who might not otherwise have had the opportunity of attending university. These students are selected through the Trinity Access Project ("TAP"), a pilot project which aims to encourage an aspiration to third level education in students from seven designated schools in Dublin. The designated schools include the Liberties Vocational School, Bull Alley, the Christian Brothers School, James' Street and the Mercy Secondary School, Goldenbridge.

Any student in the leaving cert year in one of these schools, who is eligible for a local authority grant, may apply for a Scholarship place in the Law School. The selection is made through a combination of interview and leaving cert results. Although scholarship students do not have to achieve the CAO points for law, they must perform to a certain minimum standard academically. Successful students receive financial assistance amounting to £1,500 per annum, nett of their local authority grant. Once the students have entered the Law School, there is support in place to continue to assist them throughout their undergraduate years and into their professional careers. The TAP is especially delighted that the the Bar Council has sponsored one full scholarship.

When the Scheme is running to full capacity, there will be up to three funded students in each of the four years, amounting to a total cost of up to £20,000 per year. The Law Alumni Association is committed to continuing its fundraising efforts to ensure that these costs are met. Donations may be made for the benefit of the Scheme, through the Trinity Foundation. We would welcome contributions or suggestions about the Scholarships Scheme and of course we would always welcome assistance in fundraising.

For further information contact: Ivana Bacik, Law School, Trinity College Dublin.

International Commercial Arbitration and the International Arbitration Bill, 1997

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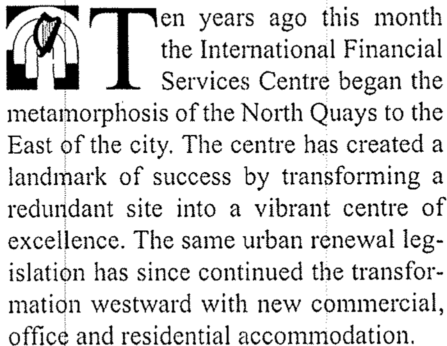

Ten years ago this month the International Financial Services Centre began the metamorphosis of the North Quays to the East of the city. The centre has created a landmark of success by transforming a redundant site into a vibrant centre of excellence. The same urban renewal legislation has since continued the transformation westward with new commercial, office and residential accommodation.

The Law Library's Distillery Development on Church Street, represents a significant investment in urban renewal. It also represents an significant investment in the future of the legal profession through the provision of a centre for alternate dispute resolution.

While it is desirable that disputes are resolved by the parties themselves, it is clear that legal support is necessary to resolve many disputes. It is also desirable that consumers of legal services should have a choice, in so far as it is practical, in deciding how to resolve their domestic or international disputes.

Traditionally dispute resolution has been in the form of litigation within a jurisdictional forum. Where matters of public law are concerned that service can only be provided by the national courts. However, matters of private law can be resolved privately and by binding arbitration which is enforceable by the courts nationally and internationally.

The recently published International Arbitration Bill 1997 is critical to the development and success of international arbitration in Ireland. It was introduced to the Dail on 2 October last and will hopefully pass all stages this term.

The purpose of the Bill, as stated in the Explanatory Memorandum, is to enable Ireland to adopt the UNCITRAL Model Law so as to provide a framework for international commercial arbitration in the State. In adopting the Bill Ireland is following a well recognised trend.

International Arbitration and the UNCITRAL Model Law

Since its adoption by the United Nations Commission on International Trade Law on the 21 June 1985, some 25 other jurisdictions have adopted the Model Law. As international trade expanded after the oil crises in the 1970's there were two major international instruments relating to international commercial arbitration: the 1958 New York Convention, an international treaty adhered to and implemented by Ireland by the Arbitration Act, 198O, and the Arbitration Rules of the United Nations Commission on International Trade Law adopted on 15 December 1976. The latter is, of course, limited to arbitration procedure and has effect as a contractual instrument.

It became clear that a uniform model law was desirable. At its twelfth session in 1979 the Commission requested the secretariat to prepare a preliminary draft which would be discussed in consultation with interested international organisations. After due deliberation the UN General Assembly adopted the Law on 21 June 1985 recommending "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitration procedures and the specific needs of international commercial practice." (See: Holtzmann HM and Neuhaus JE: A guide to the UNCITRAL Model Law on International Commercial Arbitration - Legislative History and Commentary (1989). 1307 pp.)

The Model Law applies to commercial arbitration. Commercial is given a wide interpretation. In limiting the scope there may be conflict as to whether the Arbitration Acts, 1954 and 1980 or the Model Law applies.

The International Council for Commercial Arbitration with the assistance of the International Bureau of the Permanent Court of Arbitration at The Hague provide a comprehensive commentary on arbitration in 60 jurisdictions, including those 25 which have adopted the Model Law, in four volumes of the International Handbook on Commercial Arbitration (Klewer, Supplement 22, September 1996).

A detailed commentary on the Model Law itself and on the UNCITRAL Arbitration Rules is provided by Dr Aron Broches in the fourth volume

That Handbook provides comprehensive comparative precedents by way of outline national reports in respect of some 60 countries. The Irish report, by Max Abrahamson, is in Volume II.

The International Arbitration Bill ("the Bill')

The Bill formally adopts the Model Law and includes the text thereof in its Schedule. As outlined in the explanatory memorandum to the Bill, the Model Law

is divided into eight chapters covering matters including the form of the arbitration agreement, the composition of the arbitral tribunal, conduct of proceedings, the making of an award and grounds for setting aside of awards and their recognition and enforcement. References hereunder to sections - there are sixteen- are to the Act and references to articles are to the Model Law.

The Irish Branch of the Chartered Institute of Arbitrators has been asked to give its considered views on three issues concerning the Bill; the finality of High Court decisions, the question of interest and the liability of arbitrators which are key areas of the Bill.

Finality of High Court Decisions

The issue is whether all High Court decisions with regard to arbitration enforcement should be final and unappealable under Articles 6 and 27 of the Model Law.

The matter of appeal is not dealt with in section 7. Six Articles of the Model Law deal with the matter: five provide that there be no appeal while the sixth leaves the decision of the Court open to appeal.

Article 6 defines the Court or other authority for certain functions of arbitration assistance and supervision as referred to in Articles 11(3), 11(4), 13(3), 14, 16 (3) and 34(2). Accordingly, references to Article 6 include, by extension, references to those six Articles also.

Article 11(3) and 11(4) refer to the appointment of the arbitrator where the parties or the arbitrators appointed by them fail to appoint. Article 11 (5) provides that such court decision shall be subject to no appeal.

Article 13(3) makes the decision of the Court unappealable, in a reference on an unsuccessful challenge to the arbitral tribunal.

Article 14(1) also makes the reference to the Court to terminate the mandate of the arbitrator where the arbitrator is unable or fails to act. The decision of the Court is not appealable.

Article 16(3) makes the decision of the Court unappealable where a reference is made on a plea of the arbitration tribunal's competence to rule on its own jurisdiction. Such provision is in ease of parties who could otherwise be bound by the arbitrator's decision on its own competence, but limits the right to appeal from the court's decision.

Finally, Article 34(2) provides that the Court may set aside an award only where the applicant furnishes the proofs required by that Article or the Court finds that the subject matter of the dispute is incapable of settlement or that the award is in conflict with public policy. The grounds are more extensive than those contained in Section 38 of the Arbitration Act, 1954 (power of the Court to set aside the award on the grounds of misconduct) but are tightly defined.

There is no restriction on appeal Article 34 (2) of the Model Law as the matter is technically out of the hands of the arbitration tribunal which is *functus officio* as the matter is at enforcement stage.

This is the only function of the Court that should be subject to appeal. All others functions are supportive rather than substantial. To allow appeal in other cases is to prolong disputes.

Section 7 goes beyond that which most other jurisdictions which adopt the Model Law provide. It provides: The functions specified in Article 6 of the Schedule shall be performed by the (High Court). The expanded section provides a useful relationship to the Model Law and to related sections in the Bill. Moreover it provides for summary procedure for applications.

Necessity for provisions relating to Interest in section 9

The Model Law does not deal with interest.

The provision is non mandatory in the Bill. The parties are free to agree their own provisions regarding interest. In this regard, the Bill follows the wording of section 49 of the English 1996 Act which are commented on at pages 193- 196 of Harris, Planterose and Tecks: The Arbitration Act 1996: A Commentary (Blackwell Science), 1996.

The matter of interest has been the subject of some doubt in this jurisdiction. (See Mellowhide Products Ltd. v. Barry Agencies Lid (1983) ILRM 152. and, in relation to arbitrators, the Hotel Holyrood receivership case (McStay v. Assicurazioni Generate SPA (1989) IR 248 (HC) and (1991) ILRM 237 (SC)).

The arbitration clause in McStay provided that the arbitrator should have power to give directions as to the right of the parties and as to the time and manner of payments including (if he should think fit) the amount of interest (if any) to be payable on such amount and the period in respect of which interest (if any) should be payable.

The arbitrator determined that, as he had in law no jurisdiction or power to do so, he was not entitled as arbitrator to adjudicate on the claim for interest prior to the date of the award.

In the High Court, Carroll J. in refusing the plaintiff his application for an order directing the arbitrator to state a case as to his jurisdiction to award interest, upheld the determination of the arbitrator as binding on the parties without having to decide whether the decision was in fact erroneous but conceded that there was an arguable case on both sides (at 251).

The Supreme Court (Finlay CJ, Hederman J. concurring; O'Flaherty J. dissenting) held, inter alla, having considered s 22 of the Courts Act, 1981 and *Chandris v. Isbrandisen-Moller* (1951) KB 240 that it was not proper to express any view as to whether the decision which the arbitrator had expressly made on his jurisdiction was or was not correct in law (at 245).

The Supreme Court also held (at 244) that the arbitrator did not have any express power to adjudicate on the question of the plaintiff's entitlement to interest in respect of any period prior to the award by virtue of the terms of the arbitration agreement.

Accordingly, the question of an inherent power to award interest was not decided.

O'Flaherty J. in a dissenting opinion, held, at 247, that the arbitrator does not have power to award interest at common law. Under statute the power is limited to interest on the sum awarded (s. 34 of the Arbitration act, 1954). The power in s.22 of the Courts Act, 1981, is expressly reserved to a judge, rather than to á court.

On the construction of the interest clause, the dissenting judge held that the parties had so empowered the arbitrator (at 247).

Finlay CJ. referred to the possibility of injustice flowing from the legal consequences of the agreement (245); O'Flaherty J. referred to a party who recovers many years later an award without interest as not simply getting his rights; ie. his just entitlement (at 247).

In England, 'Arbitrators were first given statutory power to award interest in s. 19A of the Arbitration Act, 1950 by virtue of the Administration of Justice Act, 1982. As McStay shows such power was not transferred to arbitrators by the Courts Act, 1981.

In order to avoid possible injustice and uncertainty the power to award interest should be given in the widest terms. It should not, however, be compulsory. It should, however, apply in default of agreement. To put the matter beyond doubt the Chartered Institute recommend a non-mandatory provision in terms of the English provision in section 49 of the Arbitration Act, 1996 which corresponds to the text of section 9.

It should be borne in mind the provisions of section 34 of the 1954 Act are amended by the substitution of the text of section 16 of the Bill which is identical to the text of section 9.

It should also be stressed that the Court's power to award compound interest is regarded as exceptional and arises in limited circumstances under equitable jurisdiction. (See *President of India v. La Pintada Cia Navegacion SO* (1984) 2 All ER 773 at 779 and (1985) AC 104 at 116 and, more recently, *Westdeutche Landesbank Girozentrale v. Islington London Borough Council* (1996) 2 All ER 961 at 974h.; 985b; 999d-lOOOd and lOOla-c, where both dissenting judges Goff and Woolf LJ considered that compound interest should be awarded on the grounds that equity can and should order compound interest in aid of the common law right to recover moneys paid under an ultra vires contract. but Brown-Wilkinson did not deem it right to develop the law in the manner proposed (999g-h).

In 1978 the English law Reform Commission: Law of Contract: Report on Interest (Law Com. No 88) decided not to make any recommendation for change as to the equitable jurisdiction regarding interest where money has been obtained or withheld by fraud or where it has been misapplied by someone in a fiduciary position. Paragraph 21 of the Report referred to the inherent power of the Court to order the payment of interest at whatever rate is equitable in the circumstance and may direct that such interest be compounded at appropriate intervals." The Commission took the view that it would not be appropriate to impose any statutory controls upon the exercise of the equitable jurisdiction to award interest, beyond the controls that are already in existence.

Notwithstanding the limited circumstances in which the Courts award compound interest, where the parties do not otherwise agree the widest powers should be given to the arbitrator.

Restriction on Liability of Arbitrators

All commentators agree with the necessity of immunity for arbitrators other than where there is bad faith. The Bill extends this immunity to an employee, agent or advisor of an arbitrator and to an expert appointed under Article 26.(section 11(1)).

The recommendation of immunity of the arbitral institutions, other than in bad faith, ensures the certainty and finality of arbitrators awards (section 11(2)) .

The Bill extends this immunity to witnesses, barristers and solicitors.

Consolidation of Proceedings and Concurrent Hearings

Section 8 of the Bills permits the parties to resolve related disputes with expediency and with the minimum of time and cost. The text is as follows:

(1) The parties to an arbitration agreement may agree
(a) that the arbitral proceedings shall be consolidated with otherarbitral proceedings, or
(b) that concurrent proceedings shall be held on such terms as may be agreed

(2) The arbitral tribunal has no power to order consolidation of proceedings or concurrent hearings unless the parties agree to confer such power on the tribunal.

The provision relates to related claims, such as disputes in the main contract and related claims in the sub-contract where references are separate. Such related disputes arise under civil engineering and construction contracts involving subcontractors who must wait until a dispute is resolved between the main contractor and the employer. In accordance with party autonomy, the provision, as in section 35 of the English Arbitration Act, 1996 is non mandatory.

There is no such provision in the Model Law. In Hong Kong and British Columbia the Model Law has been amended to allow consolidation in certain circumstances.

The International Chamber of Commerce

The standard International Chamber of Commerce Arbitration Clause is as follows:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrations appointed in accordance with the said Rules. (ICC Rules of Arbitration in force as from January, 1, 1998)

The International Chamber of Commerce (ICC) which as 7164 enterprises and organisations in 114 countries, operates through over 60 National Committees including an Irish Committee

We are, of course, learning from international experience in this regard. The International Court of Arbitration in Paris administers over 400 requests for arbitration each year. In 1996, eight of the claimants and two respondents were Irish.

The Court of Arbitration in Paris have already appointed members of the Bar and of the Irish Branch of the Charteres Institute of Arbitrations as chairpersons and members of arbitral tribunals in significant international references.

The first member of the Court was Eoghan Fitzsimons, SC (1988 -90 and 1990 - 93). David Byrne was appointed for 1993 -96 and 1996-96 with Roderick Murphy, SC as the alternate Irish member. The term of appointment is to the end of the decade.

During such term it is planned to build the groundwork for international arbitration in Ireland by developing and fostering arbitration as a viable method of resolving commercial disputes in general and international commercial disputes in particular.

As relatively few professionals have extensive experience in foreign arbitration it is necessary to provide training in international aspects of dispute resolution. The Dublin Institute of Technology ran a successful Diploma in International Arbitration Law in 1990 - 91. University College Dublin have agreed to offer graduates a Diploma in International Arbitration to commence early in 1998.

Diplomas, Bills, Courts of Arbitration, Appointing Bodies all provide the life blood for a vibrant International Commercial Arbitration Centre which it is hoped will put a new and agreeable spirit into the Distillery! ●

New Chairman Elected to Irish branch of the Chartered Institute of Arbitrators

Mr. Roddy Murphy, SC, has been elected Chairman of the Irish branch of the Chartered Institute of Arbitrators. He is also a member of the International Court of Arbitrators in Paris. The principal function of the Institute is to promote greater awareness of the benefits of arbitration and to educate and train arbitrators. The Chairman's role includes the appointment of appropriate arbitrators to conduct and determine disputes referred to the Chartered Institute. Over a hundred such cases were referred in the past year.

●

Annual Dinner of the Irish branch of Chartered Institute of Arbitrators

to be held on Friday, 5th December, 1997 in the Kingís Inns

Special Guest, Dr. Robert Brennan, President, International Court of Arbitrators

Contact: Geraldine Cosgrave at 662 7867

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Bar Council Arbitration Clause

The Bar Council have drafted the following clause for members use by incorporation by reference into an agreement that a dispute may be determined by way of arbitration. An express reference to the Bar Council Arbitration clause is sufficient since O'Hanlon J in *Sweeney v. Mulcahy*, H.C. unreported, 13/11/92. 1993 expressly recognised the concept of arbitration clauses being binding by way of incorporation.

"The parties adopting or incorporating this clause agree that all existing disputes and differences arising between them are hereby referred to arbitration and that the parties shall agree upon an arbitrator within 7 days of the date of adoption or incorporation of this clause and that in default of agreement as to the arbitrator and on the application of either party to the Bar Council, the Chairman of the Bar Council (at the date of such an application being received by the Bar Council) shall appoint an arbitrator to adjudicate upon and determine the matters in dispute and difference between the parties and such arbitrator shall give such awards as he considers appropriate including interim awards, and a final award, and the reference of disputes and differences pursuant to this clause is hereby deemed to be a reference to arbitration pursuant to the provisions of the Arbitration Act, 1954-80 (or any statutory modification or reenactment thereof) and this clause is deemed to be an arbitration agreement for the purposes of the said Acts and the said arbitration shall be governed by the said Acts and conducted in accordance with the Bar Council Arbitration Rules relating to the conduct of such arbitrations."

DRUNKEN DRIVING AND THE LAW, *Mark De Blacam, Published by Roundhall, Sweet & Maxwell, £26.00, reviewed by Paul Gardiner, Barrister*

The First Edition of "Drunken Driving and the Law" was published in 1986.

In the Preface to this, the Second Edition, the Author notes that "many changes have taken place in the law relating to drunken driving since the publication of the First Edition of this book nine years ago". This is, perhaps, an understatement.

The public outcry that surrounded the introduction of the Road Traffic (Amendment) Act 1994 was such that the government was forced to ameliorate the perceived inequity of the Act by the introduction of graded penalties in the Road Traffic (Amendment) Act 1995.

This book deals in a comprehensive fashion with the law as changed and helpfully provides in the Appendix the relevant sections of the 1994 Act and 1995 Act.

The text is divided into nine chapters, starting with an interesting historical introduction to the problem of drunk driving and the genesis of the law.

The following five chapters deal with the various steps in the prosecution of an accused for drunken driving and the discursive style of the text disguises the wealth of research which evidently went into its writing. In fact, much of the value of this book is to be found in the numerous and comprehensive footnotes.

The final three chapters of the book deal with practice and procedure in the District Court. These chapters are of immense value to any practitioner who ever has cause to defend a client, whether on a drunken driving charge or otherwise, in the District Court. They cover in a clear and concise fashion all of the matters which any lawyer representing an accused in the District Court should be aware of. The chapter on appeals and other review procedures being perhaps the most useful!

I would recommend this book to any legal practitioner who has cause to attend in the District Court on a criminal matter and, in particular, of course on a drunken driving Summons.

The only drawback with the book, and it is one which cannot be avoided in this very active field of law, is that it deals with the law up until 1995 and thus, per force, cannot deal with the changes since then.

No doubt the Third Edition will bring matters right up to date, particularly following the inevitable introduction of a further reduction in the alcohol limit which will be brought about by the European Union.

Unusually for a legal textbook, and particularly a textbook dealing with such a technical area of law, Drunken Driving and the Law is an easy (and dare I say it) interesting read.

AN EYE ON THE WHIPLASH AND OTHER STORIES, *Henry Murphy, Published by Blackhall Publishing, £9.99 (paperback) £16.95 (hardback), reviewed by Jack Fitzgerald, SC.*

Law Library,
Four Courts, Dublin 7

Sir,

Who is Henry Murphy, ?

This book was sold to me as "A Whip on the Eyelash" - I bought it thinking it was concerned with sexual deviancy and that it would help me in my extensive criminal practice. By the time it landed on my desk the title had been changed and I found that I was the central figure in this printed drivel. It is an attack on me and my practice. Every rule is broken by this book: the rules of the Law Library; the rules of Natural Justice; of Loyalty; the rule that permits only barristers past the front doors. It is an attack on my professional standing, my virility and my intelligence. (A similar attack was attempted on my old friend, Horace Rumpole many years go by a colleague who had notions of becoming a funny man. Horace made a firm stand. A couple of quick shots across the bow and no more was heard from that source; Mortimer I believe, was his name).

Henry Murphy is indeed a Nom de Plume. Hiding behind it is a man or woman in need of exposure. Some clues may be found in the style. It suggests someone who has studied the science, (certainly not literature) - perhaps a failed sportsman - someone who may have fancied himself as a poet - a person of no humour and clearly of no practice. Definitely not a Chancery Practitioner. More likely with some experience on the running down side, (the "money for old rope" boys). Vitriol gushes from this pen in oilwell quantities. No one is spared.

Let me straighten the record. I do not sit inside the door of the Library like "a Dutch whore". I do not have copious eyebrows. I do not have an inferiority complex. I was on the winning side in the case about the fight in the End of the Road pub. I am not on the "C" team of Counsel for J. Arnold O'Reilly & Co., Solrs. I do not lust after the beautiful Afric. (I cannot deny that I have on occasion found the beauty of my colleague, Afric has moved me. The detail of her physical attributes is an unnecessary invasion of Afric's privacy and mine. Anyway it is her mind which is attractive). Why refer to my involvement in the drafting and settling of proceedings as "counsel setting the whole daft ball rolling"?

Demosthenes (Athens, First Century, B.C.) was often heard to say "Can you cover for me, I should be back by twelve?"

The attack on the distinguished solicitor, J. Arnold O'Reilly is outrageous. J Arnold O'Reilly only briefs counsel of the highest skill and integrity; his handwritten Attendances on the brief are really quite easy to read; he never phones my home after midnight, (well, not often). J Arnold O'Reilly holds me in high esteem and briefs me as a fearless counsel. He

has never accused me of cowardice in the face of the Court. If J Arnold O'Reilly hands me a note of a suggested question when I am in mid cross-examination, it is always to the point; I always use it; it often has a devastating effect on the outcome of the case. I never crumple up the piece of paper and ignore it. Why is it necessary to point out that the office of J Arnold O'Reilly, Solicitor, is situate between a sex shop and a chinese take-away?

Nobody escapes in this book. If you are the Judge who likes a drink, you are here. If you are a Judge who goes to discos, (or the concert hall), this is you. If you are a barrister who, at 11.00 am at the door of the Court, needs to be in bed rather than heading into combat, you are in this book. Any barrister who has ever felt "not up to the job" is here, as is any counsel who ever felt "we can't lose this one". If you are The Great Man, watch out. If you are an Engineer who never uses the word "hole"- preferring "hazard" or "triphazard", he has you. If you are the Senior who often says "there will be no offer" just before giving reasonable money, here you are. If you are the ageing silk who just wants to be left alone, see yourself here. The Junior on the make is here, the Junior who will never make it is here. Why describe Ms. Wilkinson as "fresh and seductive as summer night?" What has this to do with the practice of law. What judge would notice?

Here is a Round Hall with private investigators dressed as clowns, men dressed as nuns, - bra and panties showing. This stuff is weird. Is it supposed to be funny? These are Halls of Justice, not a red light district nor a cartoon film. The constant mention of women's legs is another thing; I was telling one of the Guards in the Bridewell about that and he said the author is clearly sick and may even be dangerous.

IGNORE THIS BOOK. Don't read it, buy it, look at it, refer to it, give it, accept it; don't condemn it; do not above all, sue on it. This is what the author is after. Don't fall into his trap.

Fiat Iustitia Ruat Coelum on Henry Murphy

- Dermot McNamara, B.L

DIARY

The Medico-Legal Society of Ireland Programme for Session 1997-1998

Lectures take place at 6.30 in The United Service Club, St. Stephenís Green, Dublin 2

Wednesday, 26th November 1997;
"Wardship - A Legal and Medical Perspective"
Ms Nuala Mc Loughlin, B.L., Assistant Registrar of Wards of Court

Wednesday, 28th January, 1998
"Incest - A Lawyer's View"
Patrick Gageby, SC

Wednesday, 25th February, 1998
ëSuicide - Yesterday and Todayí
Dr. Dolores Dooley, Lecturer in Medical Ethics, UCC

Wednesday, 25th March, 1998
ëThe Presidential Addressí
Ms. Emer OíDonoghue, Solicitor.

Members and their guests are invited to dine at 8.30 after each lecture. Annual Subscription is £20.00. Further information contact: Mary MacMurrough Murphy, Law Library.

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Irish Centre for European Law

Briefing on Competition Law:
Public Undertakings and Understandings with Exclusive Rights
Wednesday Evening, 26th November, 1997Westbury Hotel, Dublin
6.15 pm to 9 pm

This briefing analyses the effect of EC and Irish competition law on public undertakings and understandings with exclusive rights and their competitors, assesses the evidential burdens to be surmounted in litigation involving these enterprises and investigates the remedies available. It will be of benefit to all persons involved in the management of public undertakings, their competitors, customers and suppliers.

Fee: £60 per member, £90 per non member.
Contact: ICEL: 608 1081

●

Bar Choir

Bar Choir Annual Carol Service and Reception will take place in the Law Library on

Monday, 15th December, 1997
at 4.15pm
The Round Hall Musical Society Presents

●

Trial by Jury by Gilbert and Sullivan

on the 4th, 5th, and 6th December, 1997
in Green Street Courthouse
at 8.00pm

Tickets: £55.00 (includes supper)
(Special price of £15.00 for members of 5 years and under
on Wed., 3rd December)

Proceeds to the following charities:
Bar Benevolent Fund
Solicitors Benevolent Fund
Temple Street Childrenís Hospital

Contact: Gordon Duffy (702 4417) or Mary Rose Gearty (702 4810)

●

Soccer Club News

Saturday, 22nd November, 1997
Match against Kildare Solicitors
in Grangegorman

Sunday, 7th December,
Aughrim Street, Christmas Mixed 5-A-Side tournament

Saturday, 13th December,
Match against Kingís Inns
in Grangegorman

Every Monday night, the Club plays a friendly match on astro-turf in the Guinness grounds in Crumlin from 6-7 pm

Every Wednesday night, the club runs an indoor 5-A-Side in the Sports Complex in Coolock from 9-10.

FORENSIC ACCOUNTING - YOUR QUESTIONS ANSWERED

Forensic Accounting is a relatively new concept in Ireland.
Set out below are answers to the questions we are most frequently asked.

WHAT IS FORENSIC ACCOUNTING?

Forensic Accounting is the application of business skills and accounting knowledge to the solution of legal problems which involve financial valuation and assessment.

WHAT DOES A FORENSIC ACCOUNTANT DO?

A Forensic Accountant is an extension of the legal team and is responsible for preparing or reviewing financial evidence. It has been proven that thorough, reasoned and well structured forensic accounting reports greatly increase the chances of a satisfactory settlement -whether acting for a Plaintiff or Defendant

IN WHAT SORT OF DISPUTES SHOULD I CONSULT A FORENSIC ACCOUNTANT?

Whenever there is a financial or business dispute. Typical cases where we have acted include:

- Personal injury and loss of earnings
- Negligence and professional malpractice
- Fraud and white collar crime
- Matrimonial and separation proceedings
- Commercial Litigation

WHAT ADVANTAGES DOES A FORENSIC ACCOUNTANT HAVE OVER A NORMAL ACCOUNTANT?

There are several:

Independence - we do not undertake other professional work for our Forensic Accounting clients e.g. Audit, Accounting and Taxation.
Courtroom evidence - we approach all our work and prepare our reports on the assumption we will be required to give evidence in court.
Objectivity - we bring a new viewpoint to each case
Experience and specialisation - benefit from our wide business and professional experience.

WHO HAVE YOU WORKED FOR?

Insurance companies
Publicly quoted and semi-state companies
Private companies of all sizes
Private individuals

WHAT ARE YOUR QUALIFICATIONS?

Our Directors are all Chartered Accountants. In addition to extensive international business and professional experience, we have members of the Association of Certified Fraud Examiners, the Chartered Institute of Arbitrators and the Institute of Taxation in our firm.

ON WHAT BASIS DO YOU CHARGE FEES?

Fees are based upon the time spent in performing our investigation, preparing our report and any subsequent involvement.

I HAVE A CASE BUT I AM NOT SURE WHETHER TO ENGAGE A FORENSIC ACCOUNTANT. WHAT SHOULD I DO?

Ask us to review the case. We will do this without obligation and in total confidence.

We will provide you with a short report detailing the areas which need to be considered together with an estimate of our costs.

WHO SHOULD I CONTACT?

Any one of our Directors:
Jim Hyland, Peter Johnson or David Hyland at

JAMES HYLAND AND COMPANY
Forensic Accountants
at
Carmichael House, 60 Lr Baggot Street, Dublin 2
Tel: 01 475 4640 Fax: 01 475 4643
or
26/28 South Terrace, Cork
Tel: 021 319 200 Fax: 021 319 300
E-mail: jhyland@indigo.ie

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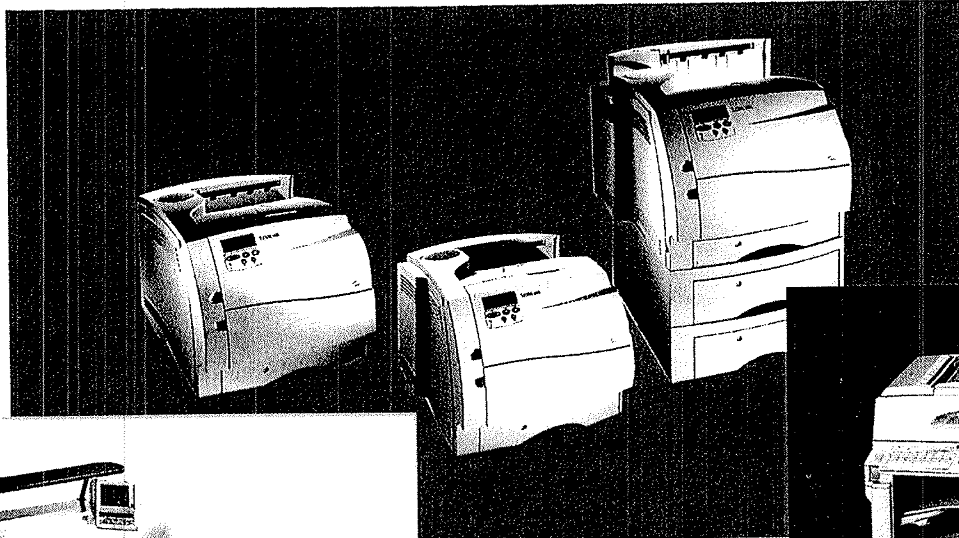

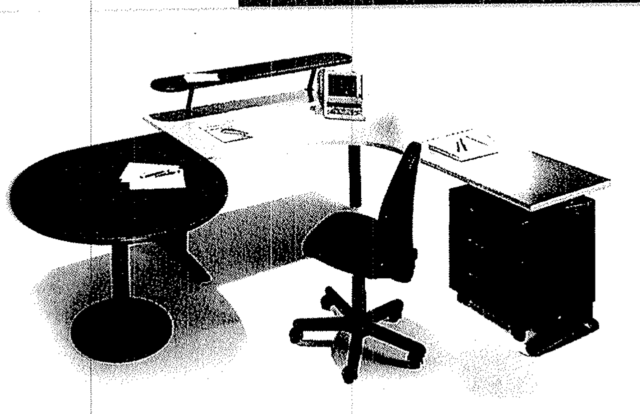

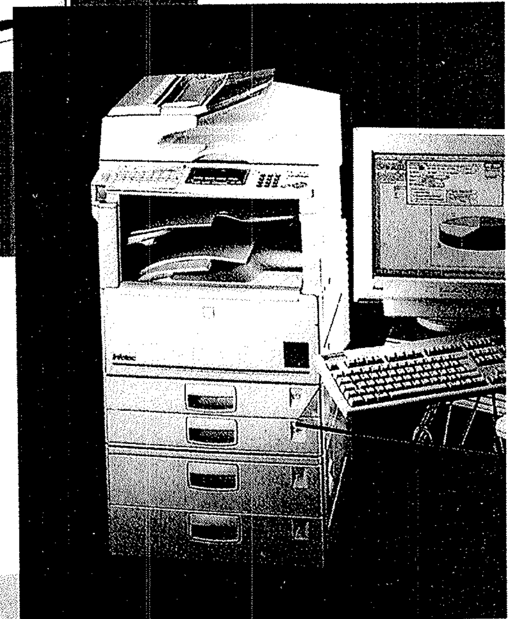

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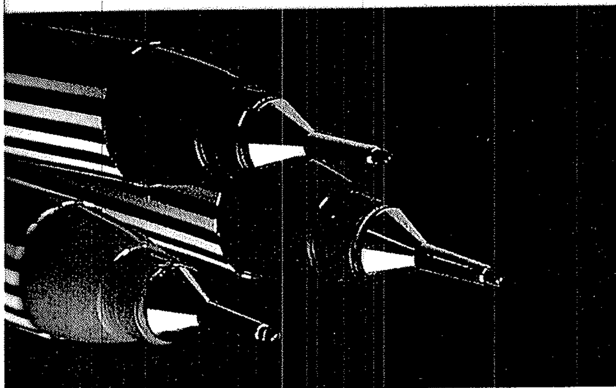

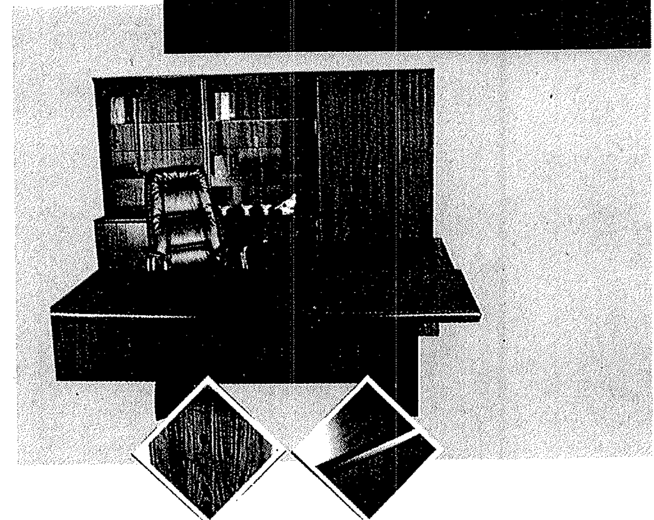

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