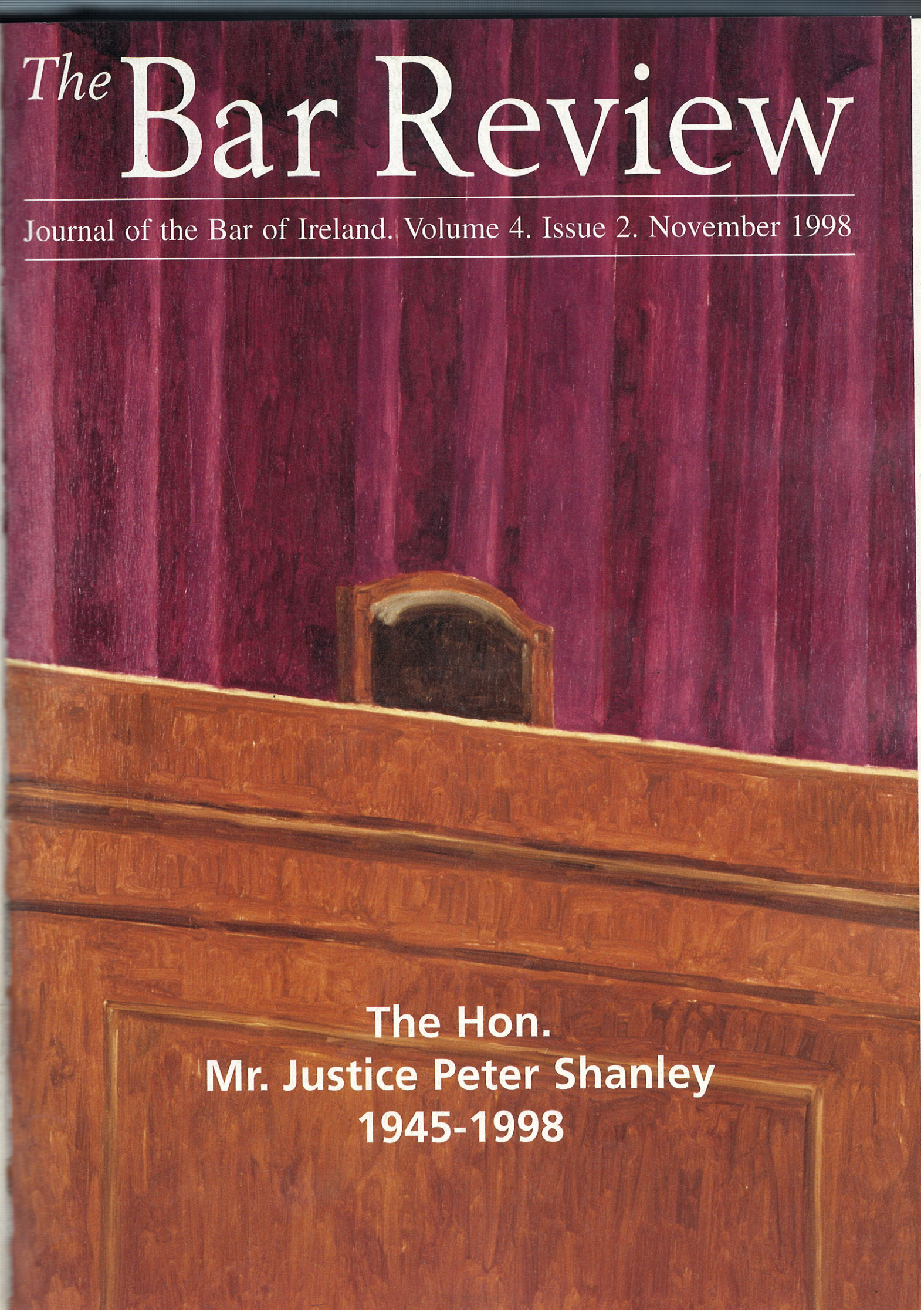
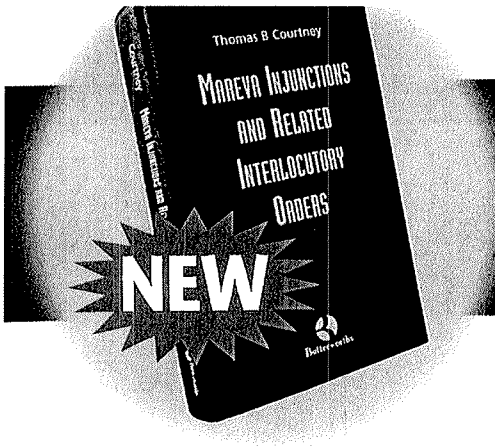
The Bar Review

Journal of the Bar of Ireland. Volume 4. Issue 2. November 1998



The Hon.
Mr. Justice Peter Shanley
1945-1998



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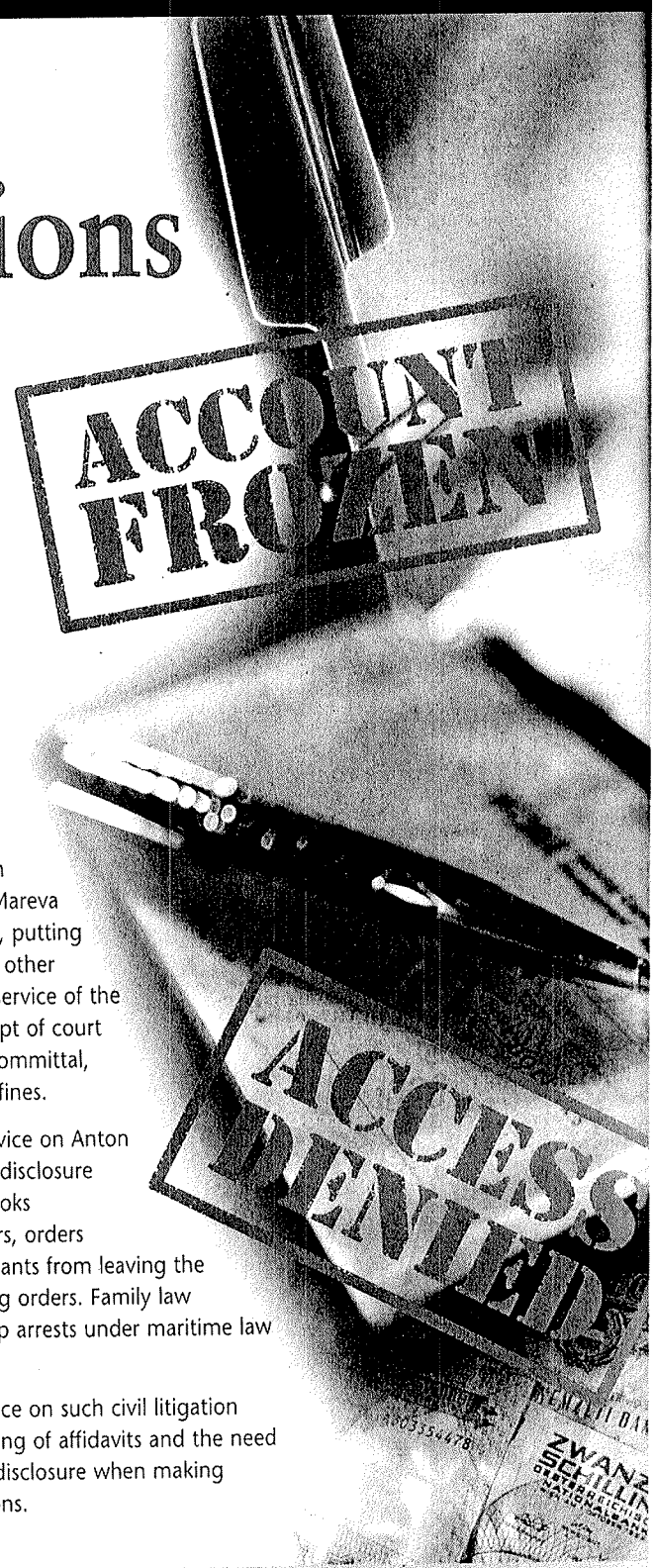

By Thomas B. Courtney, BA, LLB, Solicitor

Asset freezing orders are becoming increasingly common and when applying for a Mareva Injunction, practitioners need to act swiftly and are unlikely to have much time for research. This is why Butterworths are publishing this important new book, the first to deal exclusively with Mareva Injunctions and associated orders, from an Irish perspective.

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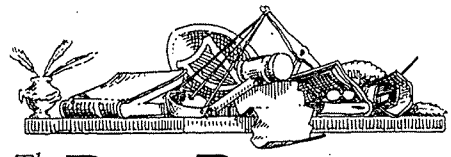

The Bar Review

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Editorial Changes at the Bar Review

The Editorial Board are happy to thank Jeanne McDonagh for her work as Editor of the Bar Review during Edel Gormally's absence on maternity leave earlier this year. Edel has now returned to the position of Editor of the Review. In this capacity she will be based in the Bar Council offices at extension 5198 and also from home at 278 3773. All correspondence may be directed to Edel at the Bar Council Offices in Church Street. Jeanne remains with the Bar Council to deal with press and related matters.

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Irish Council for Civil Liberties Censorship Working Group Programme for Coming Year

The ICCL Censorship Working Group has an extensive programme of work for the coming year. As well as its long standing concern with censorship of the arts, the Group this year hopes to deal with restrictions on the news media particularly with defamation and privacy laws. It is also hoped that the Working Group should be in a position to begin a comprehensive review of censorship legislation within the next year. The working Group would welcome new members, new female members are particularly welcome to achieve an appropriate gender balance. Those interested in joining can contact the convenor, David Lass at Regent House, Trinity College Dublin. Fax 671 9003.

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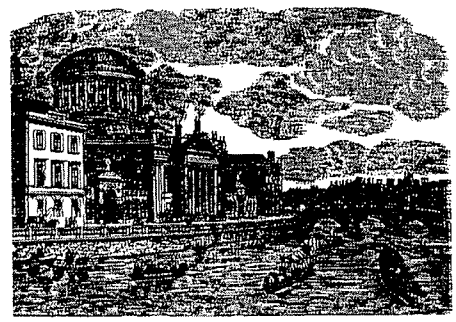
Focus Ireland Focus on Home Week

Focus Ireland is holding its second annual 'Focus on Home' from November 23rd to November 30th, 1998.

The theme for the week is 'Everybody has a right to a home' and the aim is to develop an awareness of the importance of home, and an understanding of what it is like to be out of home. To facilitate the creation of this awareness and improve the services



available to homeless people in Ireland, Focus Ireland welcomes donations from members of the legal profession interested in helping it achieve its aims.

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Soccer Club News

Annual Mixed Five – a – Side Tournament will be held in early December. All Law Library members and staff are welcome. People may sign up as individuals or as a team. Contact: Dara Hayes at ext 4752.

Monday Night Soccer in Crumlin

Soccer played every Monday night. Some places still available on Law Library team. Contact James Doherty at ext. 4963

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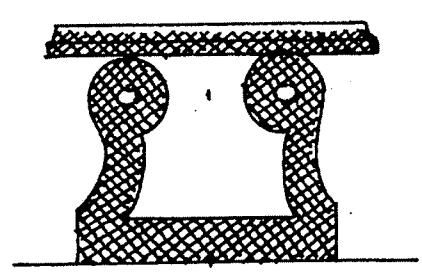
New Volume of Irish Student Law Review now available

Vol. 6 of the ISLR will be published this month. Edited by students at the King's Inns, this journal provides an outlet for analysis of current legal issues. The latest volume includes articles on jurisprudence, family law, legal history, environmental law, criminal law, torts and the law of evidence. For a copy of this volume, contact Douglas Clarke, c/o King's Inns.



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Mr. Justice Paul Carney indicates that early pleas of guilty will be taken into account at sentencing

Mr. Justice Paul Carney has indicated in a recent judgment that early pleas of guilty will be taken into account at sentencing. In the relevant case, Mr. Justice Carney unconditionally suspended the final two years of the Accused's sentence to mark the fact that the Accused of his own accord came into court shortly after return for trial and indicated that if the case against him were put in for immediate arraignment, a plea of guilty would be forthcoming.

Mr. Justice Carney emphasized that while pleas of guilty are always rewarded with a lesser sentence than that which follows conviction by a jury save where the penalty is mandatory, such pleas of guilty frequently come on the day when the case has been fixed for trial, in other words, at the last possible opportunity. This is the point in time when the guilty plea is of least benefit to the victim, the court list and the tax payer. The plea of guilty forthcoming in these circumstances is never the less rewarded by the court and will continue to be rewarded by the court. Pleas of guilty are currently eventually forthcoming in around 40% of cases.

The Central Criminal Court is currently experiencing an annual increase of 57% in its workload. This year it will have returned for trial over 150 Bills of Indictment in cases of murder and serious sexual crime. There is now a substantial delay in contested cases being reached by the Court which results in greater stress for all concerned. To meet the demands of its workload the Court is dependant on the level of pleas of guilty which it receives at the present time being at least maintained. The earlier a plea of guilty is forthcoming, the more valuable it is to society as a whole and to the victim in particular and Mr. Justice Carney has indicated his intention to take this into account in sentencing in future cases also.

The Hon. Mr. Justice Shanley

The Examiner and other Officers of the insolvency division of the High Court assembled the recorded judgments of the late Mr. Justice Peter Shanley and arranged to have them bound. The impressive volume was presented to Peter's dear wife Marion as a testament to a distinguished and tragically short judicial career and a tribute from the Court Officers by whom he was so greatly esteemed. The collected judgments will in time give his young family an opportunity to appreciate and enjoy some of the distinctions which their father achieved as he, in his short lifetime, had enjoyed and appreciated theirs.

The assembled judgments are an immediate reminder of the extraordinary range of work which a judge of the High Court is called upon to undertake. This created no problem for Judge Shanley. He brought the same intellectual analysis to every area of the law. In his judgments he summarised the relevant facts and expressed his judgment thereon with an eloquence characterised by simplicity and clarity. The question is often posed 'for whom are judgments written?' Peter Shanley's judgments can be understood and appreciated by anyone who has occasion to read them. His judgment in *Eoghan. v. University College Dublin* (delivered 16th May 1996) was an important contribution to the vexed question of the nature of the public law element in judicial review. In *Casey v. Ingersol Rand Sales Company Ltd* (July 1996) the late Judge provided a clear and simple analysis of the troublesome provisions of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988 and *Bleming v. Patton* (January 15th 1997) illustrates the extent to which Peter Shanley, as a judge, mastered and marshalled facts with the same clarity as he had done as an advocate. However, I also recall one of Peter's earliest judgments in the deceptively simple case of *Vogel v. Cheeverstown House Ltd* (30th April 1996) for the wisdom which he displayed in reconciling the requirements of justice and the demand for humanity.

Peter particularly enjoyed his appointment as the judge in charge of the Examiner's Court List. It enabled him to take a more comprehensive view of commercial cases than is available generally to individual judges of the High Court. His interest and his experience resulted in a developing jurisprudence in relation to company law and bankruptcy which is of enormous importance to the business community and will be invaluable to those engaged in the review of legislation relating to commercial affairs.

The fluency of his judgments was based on an outstanding intellectual capacity allied to a total commitment to the work in which he was engaged. But he had another invaluable quality. He was an excellent judge of character and an astute observer of the reactions not only of witnesses but also of their legal advisors. These qualities he used in reaching his decisions but they were more obvious in the masterly cross examinations which he conducted as Counsel. Those who were present to hear his examination of expert witnesses in *Hanafin v. the Minister for the Environment* (7th February, 1996); the challenge to the credibility of witnesses in *Lac Minerals v. Chevron* (12th September 1994) or his analysis of the scientific evidence in *Hanrahan v. Merck Sharp Dohme* [1988] ILRM 629 do not need to be reminded of his awesome skill, so modestly presented. Those who did not have that opportunity, and students seeking to learn the difficult art of advocacy, could benefit greatly from an opportunity to study transcripts of those and other cases where his outstanding performance is preserved.

Peter drafted his written judgments, as he had drafted his opinions, in long hand so that they could be, and were, revised carefully and often laboriously to produce the deceptively easy style which will make his judgments a model to be followed in years to come.

It would be difficult to replace him as a lawyer and a judge. He will never be replaced as a colleague and friend.

The Hon. Mr. Justice Frank Murphy

Tenacious was a word used frequently about Peter Shanley in the aftermath of his untimely death. It applies in full measure to his contribution to the Bar Council. On a personal level, he suffered defeat on first contesting the position of Chairman (losing to Nial Fennelly) in January 1990. However, he subsequently became the first Vice-Chairman of the Bar Council upon the creation of that post and succeeded Nial as Chairman in January 1992 at a particularly difficult time for the Bar both internally and externally. On the external front, the Fair Trade Commission Report had been published during Nial Fennelly's term of office and was still very much on the political agenda. But it was perhaps for his handling of the internal difficulties which required to be faced during his time as a senior office holder of the Bar Council that Peter will, rightly, be best remembered.

There had for many years been an increasing problem with the facilities available to barristers to assist them in

their work. Not only had numbers grown at an unprecedented rate, but also the level of service that the Bar was committed to providing to clients required that facilities and services had to adapt to meet the needs of the changing time. The ability of the existing infrastructure of the Bar, based on the traditional Law Library building, to deliver the required services at the required scale had come to be questioned. That problem came to its height during Peter's term as Chairman of the Bar Council.

It is now part of history that the initial move to a new form of practice occurred on the private initiative of those who purchased offices in the Arran Square complex. It is no secret that Peter was one of the most strident opponents of that move. However, he quickly came to realise that without putting an alternative in place, a myriad of separate 'Arran Squares' would grow up with a consequent fragmentation of the Bar. It was that very clear-sighted view of the future that led ultimately to the first Church Street development, and laid the grounds for the modern Bar which is now emerging. In this too, Peter's tenacity was a vital attribute.

There were many who opposed the idea in principle. I suspect that the fact that it was being promoted by a chairman who was himself known to be among the strongest opponents of the Arran Square move at least had a calming effect on some of that opposition. However, it is not now often remembered that the initial Bar Council proposal for a development of some size on what is now the apartment portion of the Arran Square complex was effectively defeated at a General Meeting of the Bar. In such circumstances, many would have abandoned the project, but Peter eagerly grasped the opportunity presented when the site for the first Church Street development became available. The history of the bringing of that project to fruition is one which required steady but brave action on many occasions. Not least was the moment when we were informed that our Planning Application had been refused, having spent the best part of £1 million on site purchase and development. Peter knew that we were taking a chance in going ahead with site purchase and development in the absence of planning permission. It was a chance which had to be taken to ensure that the building would be completed in time to avail of the tax benefits which were an essential part of the viability of the scheme. It was a chance which he was prepared to take. His entire Chairmanship (but particularly his contribution to the premises issue) showed Peter as someone with an absolutely clear view of where he saw us going. It was an attribute that is essential at all times, but was of paramount importance then. This first Church Street development undertaken under Peter's Chairmanship of the Council was a key cornerstone in the formulation of an overall Bar Council strategy, which incorporated forward planning rather than crisis-management, and which was committed to delivering services to the Bar to ensure that barristers would be best placed to serve the needs of their clients.

On a personal level, it was a great pleasure for me to serve under him as Vice-Chairman, and also (somewhat surprisingly, given that I was one of the first proponents of the hated Arran Square project) as first Chairman of the Premises committee charged with bringing the Church Street project to fruition. The decisions taken in the early 1990's including the Church Street development and the increasing awareness of the potential for information technology as a tool to assist barristers in their professional work, has put the Bar on a new footing, and allows barristers to equip themselves adequately to change and adapt in order to continue to provide the highest standard of professional services to their clients. These changes at the time required vision, leadership, commitment and considerable personal and professional skills. Peter Shanley exemplified all of these, and more, in abundance during his time on the Council and particularly during his time as Chairman.

It is not an overstatement to say that without Peter's vision and tenacity the Bar would not be as well placed as it is today to fulfil its commitment to serve its clients to the highest possible standard. Individual clients benefit and will continue to benefit in the future from the enhanced facilities available to the Bar in delivering its services to clients. For a lawyer of Peter's ability and dedication who was committed to providing a professional service of impeccable integrity, that is perhaps the most fitting and long lasting tribute of all.

– Frank Clarke, SC

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The 'Golden Rule' in Ex Parte Applications for Mareva Injunctions

THOMAS B. COURTNEY*

It has long been established that in any *ex parte* application there is a duty on the applicant to make full and frank disclosure of all material facts to the Court.[1] The principle of law which requires full and frank disclosure on an *ex parte* application is particularly necessary in an application for a Mareva injunction because it is well recognised that, if granted in a wrong case, it can give rise to great injustice.[2]

The 'Golden Rule'

All affidavits grounding applications for *ex parte* injunctive relief must represent a full and frank disclosure of all material matters which are within the deponent's knowledge.[3] This is because *ex parte* applications are heard without a defendant having any opportunity to rebut, in a replying affidavit, the evidence tendered by a plaintiff.[4] In the case of Mareva injunctions, which are commonly sought on an *ex parte* basis, the Courts have applied an exacting standard and the principle of full disclosure is sacrosanct. Sir Nicholas Browne-Wilkinson V-C in *Tate Access Floors Inc v. Boswell et al*[5] identified full and frank disclosure as being the golden rule when he said:

> "No rule is better established, and few more important, than the rule (the golden rule) that a plaintiff applying for *ex parte* relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiff, the court will discharge the *ex parte* order and may, to mark its displeasure, refuse the plaintiff further inter partes relief even though the circumstances would otherwise justify the grant of such relief."[6]

The Application of the Golden Rule to Mareva Injunctions in Ireland

Although the Supreme Court, in *Re John Horgan Livestock Ltd; O'Mahony v. Horgan*, noted the application of the duty to make full and frank disclosure in applications for Mareva injunctions, the point was not in issue in that case. Whether the plaintiff had made full and frank disclosure to the court at the previous *ex parte* hearing was raised at the interlocutory stage by the defendant in *Production Association Minsk Tractor Works and Belarus Equipment (Ireland) Ltd v. Saenko.*[8] In that case the first plaintiff (a body corporate under the laws of Belarus) and the second plaintiff (an Irish company which was a wholly owned subsidiary of the first plaintiff) successfully obtained an interim *ex parte* Mareva injunction which restrained the defendants (a married couple and their daughter) from *inter alia* dealing with their assets and bank accounts or dissipating them below £300,000. The second plaintiff was the distributing company for Ireland for the tractors produced by the first plaintiff. The first defendant, a citizen of Belarus, had been the managing director of the second plaintiff from 1 January 1993 to 31 July 1997. It was alleged that the first defendant had misappropriated monies from the second plaintiff and that he had defrauded the second plaintiff. The plaintiffs' application for an interlocutory Mareva injunction came before McCracken J. After noting that the plaintiffs had made serious allegations of fraud, McCracken J said of the claim made by the plaintiffs:

> "The amounts concerned are very large, almost £300,000 according to the grounding affidavit of this motion. It is a matter of some concern to me that after the interim order was granted, it was conceded in a replying affidavit that over £95,000 of this was in fact paid into an account of the first named plaintiff. This must have been known to the plaintiffs when the original affidavit was sworn".[9]

In applying the first of the five criteria set out by Lord Denning MR in *Third Chandris Shipping Corporation v. Unimarine SA*[10] that the plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know, McCracken J held:

> "...as I have said, I find it disturbing that the plaintiffs misled the Court on the amount claimed by some £95,000. They now concede this money was paid to them on 27 March 1995 and therefore they must have known of it."[11]

This was one of the reasons why McCracken J refused the application for an interlocutory Mareva injunction.

The most recent decision to consider the 'golden rule' in the context of a Mareva injunction is *Bennett Enterprises Inc et al v. Lipton et al.*[12] In this case the plaintiffs applied, *inter alia*[13], for a worldwide Mareva injunction to restrain the defendants from reducing the monies in two trust funds below $5m. Each of the plaintiffs were investment vehicles for clients of a company called Privacy Consultants International Inc ("Privacy"), which had offices in Panama and Costa Rica and had a mailing address in Miami, Florida, USA. From 1994 to 1997 the plaintiffs had invested monies in the trust funds, the founder of which was the first named defendant. The plaintiffs were granted interim worldwide

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Mareva relief and the defendant joined with the plaintiffs at the hearing of the interlocutory application. *Inter alia*, the defendants sought to rely upon the Supreme Court decision in *Re John Horgan Livestock Ltd; O'Mahony v. Horgan*[14] and claimed that the plaintiffs ought not to be granted Mareva relief on the grounds that they had failed to make full and frank disclosure of all relevant facts. The defendants pointed to two particular matters which it claimed amounted to a breach of the golden rule. On the first claim O'Sullivan J. said:

> "This point relates to two matters, namely, the fact that Mr [S] who has sworn the principal affidavit on behalf of the plaintiffs, is himself the subject of federal indictments in relation to alleged revenue offences committed in the early to mid-1980s in the United States.
>
> This fact was, however, known to the defendants from the beginning of their relationship with the plaintiffs and with Mr [S] but despite this they were prepared to deal with him and Privacy Consultants up to approximately November 1997. In these circumstances I am not satisfied that this is a non-disclosure which is relevant to the instant application."[15]

The second claim too was dismissed by O'Sullivan J who said:

> "Secondly, the defendants say that [the plaintiff's] affidavit failed to disclose either at all or with sufficient clarity the fact that the defendants' refusal to pay the admittedly owing money (namely, the sum of $300,000 referred to above) was upon the basis that the identity of the beneficiaries was not being revealed to the defendants and that therefore this constituted a failure to make full and frank disclosure in the affidavit grounding this application. The matter is dealt with at paragraph 60 of [the plaintiff's] affidavit sworn on the 5 May 1998 and, in my view, there is sufficient disclosure of this matter in what is a lengthy and complex affidavit accompanied by voluminous documentation. Accordingly, I cannot agree with the defendants that the application should be dismissed upon the basis that full and frank disclosure has not been made".16

A further Irish example of where the duty to make full disclosure arose in the context of a Mareva injunction is provided by an application reported in The Irish Times. In *Allied Irish Banks, plc v. Two solicitors*[17] Costello J was reported as having granted an *ex parte* Mareva injunction against two solicitors, restraining them from disposing of their assets below £30,000. A representative of the plaintiff bank was reported as having alleged on affidavit that, *inter alia*, the defendants owed a sum of money on foot of a current account; that they did not have a bona fide defence to the claim; and that the deponent had learnt that the defendants had acted as solicitors for and were themselves part of a syndicate which had won a sum of money in the National Lottery draw held the previous Saturday. Two days later[18] it was reported that the Mareva injunction was discharged by Denham J who was reported in The Irish Times as having said that the information given by the applicant had proved to be incorrect and that such was a very serious matter, especially as it had been given by professional people and that the Court would not have given the interim injunction had it been aware of the true facts. The Irish Times reported that Denham J said that the applicant had acted on false information and that an injunction was a strong weapon: anyone coming before the court seeking such a lethal weapon must have taken all steps to ensure the information put before the Court is correct.[19]

Disclosing 'Material Facts' Following 'Proper Inquiry'

In a number of cases it has been held that a plaintiff who applies *ex parte* for Mareva relief must not only disclose material facts within his actual knowledge, but also within his constructive knowledge. In *Brink's - MAT Ltd v. Elecombe et al*[20] the Court of Appeal held that a plaintiff must disclose all facts which he would have known had he made proper enquiries. In this case, which arose out of the Brink's - MAT robbery at Heathrow in November 1983, the plaintiff had obtained an *ex parte* Mareva injunction restraining nine out of the eleven defendants from disposing of their assets. Subsequently, it was ordered that the injunction be discharged as against two of the defendants on the grounds that there had been an innocent, but material, non-disclosure of facts in the information put by the plaintiff to the Judge at the *ex parte* hearing. In addressing the question of non-disclosure, Gibson LJ said of the meaning of 'material facts' that:

> "The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers."[21]

And as to the question of the disclosure of material facts which are not within the plaintiff's actual notice, Gibson LJ continued:

> "The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries...The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including:
>
> (a) the nature of the case which the applicant is making when he makes the application,
>
> (b) the order for which application is made and the probable effect of the order on the defendant...
>
> (c) the degree of legitimate urgency and the time available for the making of inquiries: see *Bank Mellat v. Nikpour* [1985] FSR 87 at 92-93 per Slade LJ."[22]

The plaintiff need not pursue every avenue of information, and is only obliged to make 'proper inquiry'. In a case of alleged fraud where time is of the essence and full and complete inquiry is thereby limited, a plaintiff's inquiries may be curtailed by reason of the urgency of the matter.

Matters which Should be Disclosed

It may be noted that an *ex parte* applicant's duty to make full and frank disclosure extends to disclosing any possible defence to his claim. In *Lloyds Bowmaker Ltd v. Britannia Arrow Holdings plc (Lavens, third party)*[23] the

Court of Appeal held that in complying with the duty to make full and frank disclosure, a plaintiff is obliged to disclose to the Court any defence which he anticipates the defendant may advance. Similarly, in *Production Association Minsk Tractor Works and Belarus Equipment (Ireland) Ltd v. Saenko et al*[24] McCracken J noted that the plaintiffs' grounding affidavit did not state any points made against it by the defendant although these points were, at that point, before the Court. Where a defendant has given notice of his intention to defend the proceedings, the plaintiff must also disclose this fact.[25]

In the wake of the Supreme Court's seminal decision in *Re John Horgan Livestock Ltd; O'Mahony v. Horgan*[26] central to a plaintiff's success in making application for a Mareva injunction is that he establishes to the Court's satisfaction the likelihood that the defendant intends to remove his assets from the State or otherwise dissipate them "with a view to evading his obligation to the plaintiff and to frustrate the anticipated order of the court". It is thought that in adducing evidence of such a likelihood on the part of a defendant (for example, that he is uncontactable, appears to have vacated his offices and has relations living abroad) a plaintiff is also obliged to disclose those matters within his knowledge which might tend to suggest otherwise (for example, that his wife is in hospital in Ireland and that he has a number of young children at school in Ireland).

The Consequence of Failing to Disclose Material Facts

Where it is discovered that there has been non-disclosure of material facts or that the plaintiff has been less than full and frank in his disclosure, the general rule is that the injunction or order thereby obtained should be automatically discharged. *In R v. Kensington Income Tax Commissioners*[27] it was said by Warrington LJ that where an *ex parte* application is granted on foot of an inaccurate grounding affidavit, the beneficiary of the Court's relief "will be deprived of any advantage he may have already obtained by means of the order which has thus, wrongly, been obtained by him."[28]

The old Irish cases of *Atkin v. Moran*[29] and *McDonogh v. Davies*[30] are authorities for the proposition that where an *ex parte* order is obtained without the plaintiff-applicant having made full and frank disclosure, the order will be automatically discharged. In Atkin v. Moran the applicant for an *ex parte* order did not disclose the existence of a particular deed before getting the order, causing Lord O'Hagan LC to say:

> "...the party applying is not to make himself the judge whether a particular fact is material or not. If it is such as might in any way affect the mind of the Court, it is his duty to bring it forward. I do not think that in the present case there was any intention to deceive or mislead. I do not decide that the deed will make any real difference in the result of the case: all I say is, that this is a matter which ought to have been referred to in the affidavit upon which the order was obtained, and therefore I am obliged to set it aside."[31]

His lordship clearly did not consider that he had any discretion in the matter but that he was obliged to discharge the order. In *McDonough v. Davies* the existence of an agreement and mortgage was not disclosed when the plaintiff obtained a charging order over stock.

> Palles CB said "[w]e think it of great importance that the utmost good faith should be always used towards the Court, and, therefore, in discharging the order, on the ground of suppression of facts, discharge it with costs".[32]

The rule that an *ex parte* order obtained without making full and frank disclosure should be automatically discharged has been restated in more recent authorities. In *Bank Mellat v. Nikpour*[33] Lord Donaldson found that a failure to make full and frank disclosure in an *ex parte* application was fatal even if the mistake was innocent. He said:

> "This principle that no injunction obtained ex parte shall stand if it has been obtained in circumstances in which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed, it is so well enshrined in the law that it is difficult to find authority for the proposition; we all know it; it is trite law...
>
> ...the court will be astute to ensure that a plaintiff who obtains an injunction without full disclosure - or any *ex parte* order without full disclosure - is deprived of any advantage he may have derived by that breach of duty...The rule requiring full disclosure seems to me to be one of the most fundamental importance, particularly in the context of the draconian remedy of the Mareva injunction. It is in effect, together with the Anton Pillar order, one of the law's two 'nuclear' weapons. If access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt but that it should be revoked."[34]

It is important, however, that a balance be struck between stripping a party of an advantage wrongfully obtained and allowing some small latitude to an innocent omission of questionable materiality. As Lord Denning MR said in the same case:

> "...it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded."[35]

This was cited with approval by Ralph Gibson LJ in *Brink's MAT Ltd v. Elcombe et al*[36] where he said that the Court has a discretion, notwithstanding proof of non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, to nevertheless continue it or to make a new order.[37] Although the 'golden rule' is that the fullest possible disclosure must be made by an *ex parte* applicant, the Courts seem to have recognised also that, on occasion, legitimate haste may give rise to innocent inadvertent inaccuracies which should not invariably impel the Court to discharge the order.[38] In the Brink's MAT case Slade LJ said:

> "By their very nature, *ex parte* applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly in heavy commercial cases, the borderline between material facts and the non-material facts can be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making *ex parte* applications, I do not think the application of the principle should be carried to extreme lengths.

> In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom *ex parte* injunctions have been granted, or of their legal advisers, to rush to the *R v. Kensington Income Tax Commissioners* principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience."[39]

It is thought that most counsel and solicitors who have acted in preparing urgent cases for *ex parte* relief will empathise with the sentiments expressed by Slade LJ.[40]

Should a Court not wish to appear to countenance continuing an *ex parte* injunction which was obtained without the plaintiff making full disclosure of material facts, it is open to the Court to discharge the first, tainted, injunction and to grant a second, fresh, injunction.[41] This is what happened in *Lloyd's Bowmaker Ltd v. Britannia Arrow Holdings plc (Lavens, third party),*[42] where both Gildewell and Dillon LLJ accepted that there was jurisdiction, in such circumstances, to grant a second, fresh, injunction if the Court is so disposed. Gildewell LJ said:

> "Certainly on the more recent authorities it is my view that the High Court would have a discretion to grant a second Mareva injunction, and it may well be that this Court would have a discretion to preserve the status quo in the mean time pending such an application, or a discretion itself to grant a second Mareva injunction."[43]

Dillon LJ adopted a more pragmatic approach. Whilst he accepted that there was jurisdiction to make a second injunction he was sceptical of the practice of making second injunctions in such circumstances. He said:

> "I find it a cumberous procedure that the court should be bound, instead of itself granting a fresh injunction, to discharge the existing injunction and stay the discharge until a fresh application is made, possibly in another court, and the court which is asked to discharge the injunction should not simply, as a matter of discretion in an appropriate case, refuse to discharge it if it feels that it would be appropriate to grant a fresh injunction. That leads me to think that there is a discretion in the court on an application for discharge."[44]

This view appears to be more in accordance with common sense. Whilst of course the Court must neither condone, nor be seen to condone, non-disclosure of material facts on *ex parte* applications, and whilst 'he who seeks Equity must come with clean hands', some discretion must surely remain in the Court as to whether or not to discharge a Mareva or other injunction in such circumstances. It is submitted that the circumstances when a Court should consider it has a discretion to continue a Mareva injunction so obtained, should depend upon: the degree of materiality of the fact which was not disclosed; whether the non-disclosure was innocent or deliberate; the plaintiff's culpability in the entire matter; and whether or not it remains, on balance, just or convenient to grant the injunction.[45]

The most far-reaching mitigation of the usual consequences of breaching the 'golden rule' is seen in the judgment of *Browne-Wilkinson V-C in Dormeuil Freres SA v. Nicolian International (Textiles) Ltd*[46] where he said that, save in exceptional cases, it is not the correct procedure to apply to discharge an *ex parte* injunction on the grounds of non-disclosure of material facts at the interlocutory stage and that the appropriate time to consider the matter was at the trial whereupon the plaintiff's undertaking as to damages may be looked to. In the course of his judgment he said:

> "...applications to discharge the *ex parte* order are frequently made at the same time as the plaintiff's motion to continue the *ex parte* injunction comes before the court *inter partes*. The result of the joining of an application to discharge the *ex parte* order with the hearing of the *inter partes* motion for an injunction is almost invariably to increase both the duration and the complexity of the interlocutory proceedings to a substantial extent.
> To discover whether an *ex parte* order has been improperly obtained, the court first has to consider the evidence as it was at the time of the application for the*ex parte* order and then a mass of evidence designed to demonstrate that that evidence was misleading or failed to make full disclosure. The real question at the time of the *inter partes* hearing should not be what has happened in the past but what should happen in the future...
> The cost in time and money to the parties in a complex case can become vast and the waste of court time quite unacceptable."[47]

The judge's misgivings about going into possibly complex issues at the interlocutory stage of proceedings are understandable. Indeed in *Re John Horgan Livestock Ltd*[48] O'Flaherty J referred to the Mareva application in that case as being a 'side-show' to the main litigation. It is thought, however, that Browne-Wilkinson V-C's views are unlikely to be followed.[49] Where an *ex parte* order is wrongfully obtained on the back of a material non-disclosure there can be no doubt but that a defendant thereby affected has the right to immediately apply to have the order discharged. To suggest that a defendant, wrongly enjoined from using his own assets, must sit back and wait until the trial of the matter in the hope of relying upon the plaintiff's undertaking as to damages seems a preposterous distortion to the scales of justice which might encourage a plaintiff to think that he had carte blanche to mislead the Court on an ex parte hearing in the knowledge that he may not be deprived of the advantage thereby obtained for perhaps two years! If Browne-Wilkinson V-C's suggestion has any basis it can only be where there has been a purely technical or accidental breach of the 'golden rule', all other proofs for a Mareva injunction have been met and justice requires the injunction to continue to the trial of the substantive issues.

Deliberate Non-Disclosure of Material Facts

Different considerations should, however, apply in a case where a plaintiff's grounding affidavit is misleading by reason of the deliberate

non-disclosure of material facts and it is submitted that an *ex parte* injunction so obtained should, upon the discovery of such non-disclosure, be automatically discharged. In *Ali & Fahd Shobokshi Group Ltd v. Moneim et al*[50] the fact that there had been a deliberate suppression of material fact in the *ex parte* application was instrumental in Mervyn Davies J's decision to discharge the injunction. In that case the plaintiff obtained a Mareva injunction following an *ex parte* application. In the grounding affidavit it was alleged, inter alia, that the defendant had obtained three specific sums of money by fraud during the course of his employment with the company. What was not disclosed was that the defendant's private account, into which the sums were allegedly paid, had been used openly and extensively for the company's business; that the defendant had given the directors of the plaintiff company a general power of attorney to operate the account; that substantial sums were paid into and out of the account over a number of years; and that statements on the account had been available to the plaintiff-company etc. Following an analysis of these and other matters which had not been disclosed on the application for *ex parte* relief, the judge concluded that over the years the parties had conducted most complicated accounting transactions and that an account could well have shown that the defendant was owed monies by the plaintiff. In discharging the Mareva injunction, Mervyn Davies J held:

> "...I cannot regard the non-disclosure as 'innocent' as that word is explained in the quotation above. In fastening on three comparatively small sums as the principal foundation of the *ex parte* application one may, I think, readily infer that there was an intention not to disclose, at any rate at that stage, the fact that the group and the brothers and [the defendant] had been engaged together in the most complex financial transactions...I doubt whether an order would properly have been granted if a better and truer picture of the parties' financial dealings had been painted. The whole story would have smacked of the need for an account rather than seeking to assert three specific claims."[51]

It seems certain that where non-disclosure is found by a Court to have been deliberate (as opposed to innocent) an *ex parte* injunction thereby obtained should be automatically discharged. Whatever the subsequent merits of a plaintiff's case, the Court must have regard to his prior conduct and where this shows that he has deliberately misled the Court, he should be denied equitable relief in those and related proceedings.

Conclusion

The importance of the duty to make full and frank disclosure to the Court when applying for an *ex parte* order is one which cannot be overstressed. All litigants are convinced of the rights of their own case and, when seeking injunctive relief, of their entitlement to that relief. With the best will in the world even the most honest of litigants may tend to be economical in disclosing those matters which point against them and their entitlement to injunctive relief. It is the responsibility of their legal advisors to ensure, as far as they can, that any affidavit sworn makes full disclosure of all material facts. ●

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* *solicitor, author of Mareva Injunctions and Related Interlocutory Orders (1998) Butterworths.*

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1 See Atkin v. Moran (1871) IR 6 EQ 79, McDonogh v. Davies (1875) IR 9 CL 300, R v. Kensington Income Tax Commissioners [1917] 1 KB 486. See also Goldrein & Wilkinson, Commercial Litigation: Pre-Emptive Remedies, (2nd ed; 1991) at pp 27-32; 24 Halsbury's Laws of England, (4th ed reissue; 1991) at pp 517; and Spry, Equitable Remedies (4th ed; 1990) at pp 484-490.

2 As noted by O'Flaherty J in Re John Horgan Livestock Ltd; O'Mahony v. Horgan [1995] 2 IR 411 at 422.

3 Indeed, all ex parte applications must make full and frank disclosure of all material facts: Atkin v. Moran (1871) IR 6 EQ 79, McDonogh v. Davies (1875) IR 9 CL 300, R v. Kensington Income Tax Commissioners [1917] 1 KB 486. See also, Clohessy, "Mareva Injunctions", (1994) CLP 151.

4 On ex parte applications for Mareva and other relief, see Courtney, Mareva Injunctions and Related Interlocutory Orders, (1998) Butterworths at Chapter 8.

5 [1990] 3 All ER 303.

6 At 316c-d.

7 [1995] 2 IR 411.

8 High Court of 25 February 1998 (McCracken J). See also The Irish Times of 27 February 1998 and the Supreme Court appeal reported in The Irish Times of 7 March 1998.

9 At p 2 of the transcript.

10 [1979] 2 All ER 972 at 984; [1979] QB 645 at 668-669.

11 At p 4 of the transcript.

12 High Court of 19 June 1998 (O'Sullivan J); which judgment has only recently become available.

13 See, generally, Courtney, Mareva Injunctions and Related Interlocutory Orders, (1998) Butterworths at Ch 7.

14 [1995] 2 IR 411.

15 At pp 5, 6 of the transcript of the judgment.

16 At p 6 of the transcript of the judgment.

17 The Irish Times of 3 June 1992 (Costello J).

18 The Irish Times of 5 June 1992 (Denham J).

19 The 'Golden Rule' requiring full disclosure by an applicant in an ex parte application exists in all common law jurisdictions. In Australia, for example, in Town & Country Sport Resorts (Holdings) Pty Ltd v. Partnership Pacific Ltd (1988) 97 ALR 315 the Federal Court of Appeal said (at 317): "A party who seeks the granting of an injunction on an ex parte basis has a duty to place before the court all relevant matters including such matters which would have been raised by the respondent in his defence if he had been present"; see also Thomas A Edison Ltd v. Bullock (1912) 15 CLR 679 and, for a recent consideration of the duty to make full an frank disclosure in the context of a Mareva injunction, see Hayden et al v. Teplitzky et al [1997] 230 FCA (9 April 1997).

20 [1988] 3 All ER 188.

21 At 192g-h: R v. Kensington Income Tax Commissioners [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR citing Dalglish v. Jarvie (1850) 2 Mac & G 231 at 238 and Thermax Ltd v. Schott Industrial Glass Ltd [1981] FSR 289 at 295 per Browne Wilkinson J cited as authority.

22 At 192h-j. See also Bank of Nova

Scotia v. Priority Corporate Services Inc et al, (1997) Supreme Court of British Columbia of 29 December 1997 (Morrison J) where it was found that a Mareva-plaintiff had made a material non-disclosure, that significant information had been within the plaintiff's knowledge for some time and also that the application was not urgent.

23 [1988] 3 All ER 178.

24 High Court of 25 February 1998 (McCracken J).

25 Mexican Co v. Maldonado[1890] WN 8.

26 [1995] 2 IR 411. See generally, Courtney, Mareva Injunctions and Related Interlocutory Orders, (1998) Butterworths at Chapter 6.

27 [1917] 1 KB 486.

28 At 509. See also the Supreme Court of British Columbia's decision in Gulf Islands Navigation Ltd v. Seafarers International Union of North America (Canadian District) et al [1959] 27 WWR 652.

29 (1871) IR 6 EQ 79.

30 (1875) IR 9 CL 300.

31 At 81. Holcombe v. Antrobus 8 Beav. 412, De Feucheres v. Daues 11 Beav 46 and St Victor v. Devereaux 6 Beav 584 cited in support.

32 At 304.

33 [1985] FSR 87.

34 At 90 and 91,92.

35 [1985] FSR 87 at 90.

36 [1988] 3 All ER 188. See also High Speed Printing Ltd et al v. Mendoza Court of Appeal of 26 September 1986 (Lexis transcript) where Woolf LJ accepted (at p 4 of the transcript) that there must remain in the court a discretion as to its decision with regard to whether it continues an injunction where there has been non-disclosure.

37 At 193. See also Dormeuil Freres SA v. Nicolian International (Textiles) Ltd [1988] 3 All ER 197.

38 See Eastglen International Corp v. Monpare SA (1986) 136 NLJ 1087.

39 [1988] 3 All ER 188 at 194, 195.

40 In National Financial Services Corp v. Wolverton Securities Ltd et al (1998) Supreme Court of British Columbia of 6 February 1998 (Henderson J) the difficulty in striking a fair balance was put thus: "Disclosure must be full in the sense that it must be adequate to the demands of the particular application. It must also be fair to the absent defendant. On the other hand, an ex parte chambers application is not a trial and should not be turned into one by demands for an unrealistic standard of disclosure".

41 See Yardley & Co Ltd v. Higson [1984] FSR 304.

42 [1988] 3 All ER 178.

43 [1988] 3 All ER 178 at 185.

44 [1988] 3 All ER 178 at 187.

45 In Girocredit Bank Aktiengesellschaft Der Sparkassen v. Bader et al (1998) Court of Appeal for British Columbia of 25 June 1998, Goldie J accepted that it had been accepted in England that a reviewing judge had a discretionary scope to reinstate an injunction or order where the material non-disclosure was innocent. In that case, however, it was found that the non-disclosure was not innocent.

46 [1988] 3 All ER 197.

47 At 199j - 200c.

48 [1995] 2 IR 411 at 422.

49 It was not followed by Mervyn Davies J in Ali & Fahd Shobokshi Group Ltd v. Moneim et al [1989] 2 All ER 404 who said "...it would not be right to require a defendant to wait until after trial to seek damages for non-disclosure. On the contrary, a defendant should be at liberty to require the discharge of an ex parte Mareva order (without its immediate reimposition) as soon as he can show non-disclosure of a substantial kind".

50 [1989] 2 All ER 404.

51 [1989] 2 All ER 404 at 413.

Recent Developments in Family Law

SARA PHELAN, BARRISTER

The Author recently attended a Conference in the School of Law, Trinity College Dublin, entitled "Recent Developments in Family Law".

In all, seven papers were presented at the conference, covering a wide range of topics as follows;

- Practice and Procedure in Divorce Applications (Nuala Jackson, Barrister)
- Can Separation Agreements Pave the Way for Non-Contentious Divorces? (Eugene Davy, Solicitor)
- The Implications for Practitioners of the Statutory Changes Relating to the Sale and Mortgage of the Family Home (Paul Coughlan, Barrister & Lecturer in Law, Trinity College Dublin)
- Legal Complications Affecting Non-Marital Couples (Anne Dunne, Senior Counsel)
- Practical Aspects of Domestic Violence Litigation (Rosemary Horgan, Solicitor)
- What Has Been Happening in Nullity Applications in the Nineties (William Binchy, Regius Professor of Law, Trinity College Dublin)
- Practical Steps in Child Abduction Litigation (Sarah Farrell, Barrister)

This article outlines salient points raised in three of papers presented: Practice and Procedure in Divorce Applications by Nuala Jackson, Barrister, Can Separation Agreements Pave The Way For Non-Contentious Divorces? By Eugene Davy, Solicitor and Practical Aspects Of Domestic Violence Litigation by Rosemary Horgan, Solicitor. A comment on the other papers presented at the conference will follow in the next issue of the Bar Review.

Practice and Procedure in Divorce Applications

The paper on Practice and Procedure in Divorce Applications by Nuala Jackson, Barrister, concentrated on the lesser known and more contentious procedural aspects of applications for a decree of divorce and not the general procedure *per se*.

The Family Law (Divorce) Act, 1996 (the Act of 1996) commenced on the 27th day of February, 1997 and thus was in force for almost twenty months as at the date of the conference. Section 38 of the Act of 1996 gives full concurrent jurisdiction in relation to applications for a decree of divorce to the Circuit Court (properly referred to as the Circuit Family Court) and the High Court and a significant proportion of applications for a decree of divorce are being dealt with at Circuit Court level. Where the rateable valuation of land to which the proceedings relate exceeds £200 then, if proceedings are commenced in the Circuit Family Court, that Court shall *(emphasis supplied)* by virtue of section 38(2), on application to it by someone having an interest in the proceedings, transfer the proceedings to the High Court[1]. However, if the rateable valuation of the land exceeds £200 and both parties are in agreement, the Circuit Family Court has full jurisdiction to hear the application for a decree of divorce. Thus, it is not strictly necessary to plead rateable valuation in the Family Law Civil Bill, although in practice it remains common to plead same.

The High Court

Applications for a decree of divorce

Applications for a decree of divorce in the High Court are commenced by way of Special Summons (together with a verifying Affidavit and Affidavit of Means) and in accordance with the Rules of the Superior Courts (No. 3), 1997 (S.I. No. 343 of 1997). Thus the procedure remains largely unchanged from that pertaining to applications for a decree of judicial separation and Rule 4 of the Rules of the Superior Courts specifies the information to be contained in the verifying Affidavit[2].

Affidavit of Means

Where financial relief is being sought an Affidavit of Means must be filed and served with the verifying Affidavit (not the Special Summons) in accordance with Rule 6 of the Rules of the Superior Courts. The Affidavit of Means should be in like format to that prescribed by the Circuit Court Rules (No. 1), 1997 (S.I. No. 84 of 1997). Interestingly, there is no provision for the filing and serving of an Affidavit of Means by a Respondent in such cases where a replying Affidavit is not being filed by the Respondent. However, directions may be sought from the Master of the High Court in this regard pursuant to Rule 6(3) and in any event the statutory obligation pursuant to the provisions of section 38(6) of the Act of 1996 still applies[3].

Affidavit of Welfare

An Affidavit of Welfare must also be filed and served in cases involving dependent children, in accordance with Rule 7 of the Rules of the Superior Courts and again this is in like format to that prescribed by the Circuit Court Rules (No. 1), 1997 (S.I. No. 84 of 1997) with the exception that it is to be

declared rather than being sworn! Rule 7 does not specify a time limit within which the Affidavit of Welfare is to be filed and served by the Applicant but the Respondent must file and serve his/her Affidavit of Welfare within the period of twenty-one days from the service upon him/her of the Applicant's Affidavit of Welfare.

Defence and Counterclaim

Defending and Counterclaiming is by way of replying Affidavit in accordance with Rule 17 of the Rules of the Superior Courts. It is somewhat of an anomaly that a Respondent must defend and counterclaim by way of a sworn document when the same onus is not placed upon an Applicant! Interestingly, Rule 17 does not prescribe time limits for the filing and serving of a replying Affidavit and therefore it is difficult to envisage the operation of a 'default procedure' like that applicable in the Circuit Family Court[4].

High Court vs. Circuit Court

Heretofore one of the advantages of instituting family law proceedings in the High Court was the significantly shorter waiting period in that court. However, this is no longer the case in the Dublin Circuit area and generally speaking Circuit Family Court cases are listed without undue delay. Unfortunately the same does not apply to all Circuits! The complexity of the issues, the likely duration of the proceedings and the value of the assets will also be taken into account in deciding to issue divorce proceedings in the High Court whereas the issue of costs and the stipulation in the legal aid scheme that proceedings be instituted in the first level of court having jurisdiction to determine the case concerned are factors which favour issue in the Circuit Court.

Order 70A of the Rules of the Superior Courts, 1986 as amended by the Rules of the Superior Courts (No. 3), 1997 (S.I. No. 343 of 1997) and more specifically Rule 15 thereof, states that the High Court may remit proceedings at its discretion subject to the interests of justice and that such an application may be made at any time after the entry of an Appearance.

The Circuit Family Court

Applications for a decree of divorce

Applications for a decree of divorce in the Circuit Family Court are commenced by way of Family Law Civil Bill and in accordance with Rule 4 of the Circuit Court Rules (No. 1), 1997 (S.I. No. 84 of 1997)[5]. Rule 5 of the Circuit Court Rules specifies the information to be contained in the Family Law Civil Bill. It is hoped that greater uniformity will be achieved in the near future so that applications pursuant to, *inter alia*, the provisions of the Family Law (Maintenance of Spouses and Children) Act, the Guardianship of Infants Act, 1964 and the Domestic Violence Act, 1996 would also be by way of Family Law Civil Bill.

Appearance and Defence

In accordance with Rules 9 and 10 of the Circuit Court Rules, a Respondent has ten days within which to enter an Appearance and a further ten days within which to file and serve a Defence. These time limits are similar to the time limits applying in other civil matters, thus bringing a uniformity of pleading to all civil law at Circuit Court level, but it was submitted that they are not particularly suitable in the family law arena. In many areas of civil law a Defence is simply a traverse of the Civil Bill. However, in family law proceedings a Defence (and Counterclaim) must be accompanied by a section 7 certificate, an Affidavit of Means (and an Affidavit of Welfare if appropriate) and in many cases the information required for the supporting documentation will have to be requested from third parties. Perhaps the time limits as set out in Rules 9 and 10 require further examination bearing in mind the level of documentation required prior to filing ones Defence?

Motions for Judgment

Rule 11 of the Circuit Court Rules deals with Motions for Judgment. Motions for Judgment in default of appearance or in default of defence are commonplace given the short time limits allowed for entry of an Appearance and filing and serving of a Defence by virtue of Rules 9 and 10 of the Circuit Court Rules as outlined above.

The 'fourteen-day letter'

Prior to issuing a Motion for Judgment in default of defence, Rule 11(b) states that the Applicant must serve a 'fourteen-day letter' on the Respondent giving the Respondent notice of the Applicant's intention to serve a notice of motion for Judgment in default of appearance/defence and at the same time consenting to late filing of a Defence within the period of fourteen days from the date of the letter. Rule 11(b) is somewhat confusing in that it refers to Judgment in default of defence and then Judgment in default of appearance/defence leading one to ask whether the 'fourteen-day letter' applies singularly to Judgment in default of defence or to both Judgment in default of appearance and Judgment in default of defence? It was submitted that the intention of the Circuit Court Rules was that the 'fourteen-day letter' would apply only to Judgment in default of defence but, by virtue of the imprecise phraseology of Rule 11(b), the prevalent view is that the 'fourteen-day letter' should be served in both instances. In any event, if the 'fourteen-day letter' has the desired effect then the overall level of costs in a particular case could be reduced if the need to issue a motion for Judgment is rendered unnecessary by the effects of the 'fourteen-day letter'.

Costs

Rule 11(d) of the Circuit Court Rules provides that the Respondent shall pay to the Applicant the appropriate sum for his/her costs of a motion for Judgment, if the Respondent *inter alia* delivers a Defence to the Applicant not

later than seven days after the service of the notice of motion for Judgment in default of appearance/defence. However, the majority of the Judges of the Circuit Court will not award the costs of the motion to the Applicant (irrespective of when the Appearance was entered or when the Defence was delivered), unlike the normal practice in relation to similar applications to the Circuit Court civil list. Rule 11(d) is somewhat anomalous in itself, in that it provides for costs to be awarded against the Respondent when the default is only seven days (or less) after the service of the notice of motion for Judgment in default of appearance/defence but no provision for costs is made when the default is longer!

Motions for Judgment 'by Consent'

By virtue of Rule 11(h) of the Circuit Court Rules, a motion on notice for Judgment 'by consent' may be brought by the Applicant where a Defence has been filed in accordance with Rule 10 of the Circuit Court Rules and the parties are in agreement in relation to all issues. The Court may give Judgment in the terms agreed between the parties or alternatively may give directions in relation to the service of a Notice of Trial/Notice to fix a date for Trial as to the Court appears just. Thus the role of the Court pursuant to the provisions of section 5(1) of the Act of 1996 is recognised by Rule 11(h). Unfortunately this procedure, with its inherent safeguards, has not particularly been availed of to date and most practitioners favour the Judgment in default of appearance/ defence procedure. The advantage of Rule 11(h) and the Judgment 'by consent' procedure is that a Defence will have been filed by the Respondent, together with an Affidavit of Means (and an Affidavit of Welfare if appropriate), and the court is thus in the position to determine whether "such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family"[6].

It should be noted that even in cases of Judgment in default of appearance/ defence, the statutory obligation pursuant to the provisions of section 38(6) of the Act of 1996 applies and thus, in proceedings under sections 13, 14, 15(1)(a), 16, 17, 18 or 22 of the Act of 1996[7] each of the spouses is under an obligation to furnish to the other spouse "such particulars of his or her property and income as may reasonably be required for the purposes of the proceedings". Interestingly, section 38(6) makes no reference to disclosure of debts, liabilities and expenses. Failure to comply with section 38(6) may result in an application to court by virtue of section 38(7) to request the court to direct compliance.

Section 7 certificate

Rule 10 of the Circuit Court Rules states that the section 7 certificate, indicating that the Respondent has been advised by his/her Solicitor in relation to other methods of resolving matrimonial disputes[8] should be filed with the Defence. However, the Act of 1996 states, at section 7(4), that the certificate should accompany the entry of an Appearance and thus the statute takes priority. In any event, it was submitted that this approach is more logical and a Respondent should be alerted to alternative methods of resolving matrimonial disputes at as early an opportunity as possible in the proceedings.

The role of the County Registrar

The Courts and Court Officers Act, 1995 increased the jurisdiction of the County Registrar and by virtue of same the County Registrar has jurisdiction to hear and determine applications for liberty to issue and serve proceedings outside the jurisdiction, substituted service, discovery, Judgment in default etc.. With respect to motions for Judgment in default it was submitted that the County Registrar has jurisdiction to hear and determine such applications when the relief sought in the motion does not require the imprimatur of the court. Thus, in relation to a motion for Judgment in default, the County Registrar has jurisdiction to extend the time for late entry of an Appearance/filing of a Defence but it was submitted that the County Registrar does not have jurisdiction to enter Judgment, even if same is by consent, since the provisions of the Family Law (Divorce) Act, 1996 do not confer jurisdiction on the County Registrar to grant a decree of divorce.

Application pursuant to the provisions of section 18 of the Act of 1996

An application pursuant to the provisions of section 18 of the Act of 1996 (for an order for the provision for the surviving spouse out of the estate of the other spouse) may also be made to either the High Court or the Circuit Family Court where an order pursuant to section 18(10) of the Act of 1996 (i.e. blocking the application of section 18) was not sought and made at the time of, or subsequent to, the granting of the decree of divorce. Thus, the 'clean break' principle does not apply to Irish divorce law.

It was submitted that an order pursuant to section 18(10) of the Act of 1996 constitutes financial relief, insofar as it provides a potential financial benefit to one party and loss to the other in precluding future claims upon the estate of the spouse obtaining the section 18(10) relief, and thus, if such relief is being sought, an Affidavit of Means ought to be filed. However, it should be noted that the term 'financial relief' is not defined in either the Act of 1996, the Rules of the Superior Courts or the Circuit Court Rules.

Miscellaneous procedural matters arising from the Family Law (Divorce) Act, 1996

Section 25

Section 25 of the Act of 1996 specifies that certain orders of the District Court (generally maintenance orders) will not be stayed by virtue of an appeal to the Circuit Family Court unless the court which made the original order, or the court to which the appeal is being brought, directs otherwise.

Section 26

Section 26 of the Act of 1996 deals with orders which are already in existence when an application for a decree of divorce comes before the Circuit Family Court. By virtue of section 26(2) such orders continue in force as though they had been made under a corresponding provision of the Act of 1996 or alternatively the Circuit Family Court, pursuant to the provisions of section 26(1), may direct that those orders be discharged. It was submitted that, in order to avoid doubt, the Circuit Family Court should be asked to confirm/renew the orders previously made and if discharge of a previously made order is sought, the Circuit Family Court must specifically direct such discharge.

Section 39

Section 39 of the Act of 1996 deals with the exercise of jurisdiction by the court in relation to the granting of a decree of divorce. Section 39 indicates that if either spouse is domiciled in the State at the date of the institution of the proceedings or has been ordinarily resident in the State for a period of one year prior to the institution of the proceedings the Irish courts will have jurisdiction to determine the claim. Curiously, the Domicile and Recognition of Foreign Divorces Act, 1986 will recognise a foreign divorce if, and only if, either of the parties to the divorce was domiciled in the jurisdiction which granted the divorce and yet the Act of 1996 permits the Irish courts to grant a decree of divorce based upon one years ordinary residence in the State!

Section 38(3) of the Act of 1996 specifies which circuit has jurisdiction to determine proceedings brought at Circuit Court level. The relevant circuit is the circuit in which any of the parties to the proceedings ordinarily resides or carries on any business, profession or occupation. It would therefore appear that if both parties are domiciled in the State but not ordinarily resident here in the year prior to the institution of the proceedings, the Applicant has no choice but to bring proceedings in the High Court!

Comment

It was noted that the procedures are working relatively well on a procedural level but unfortunately the substantive law is still largely an unknown entity and a body of jurisprudence has not yet been established. However, the ancillary reliefs available following the granting of a decree of divorce by virtue of the Act of 1996 were already available in relation to a decree of judicial separation by virtue of the Act of 1995 and the Judicial Separation and Family Law Reform Act, 1989 and thus the reliefs themselves are not novel. The main effect of a decree of divorce is that there is no continuing spousal relationship and the possibility of second families will certainly impinge on subsequent applications in relation to variation of maintenance etc. Thus, it is somewhat difficult to come to terms with the context and implications of a decree of divorce, given the relatively short period of time during which same has been available in this jurisdiction.

Can Separation Agreements Pave The Way For Non-Contentious Divorces?

The paper on this topic by Eugene Davy, Solicitor, commented that prior to the decision of the Supreme Court in *P.O'D. v. A.O'D.*[9] the law was somewhat uncertain as to the finality of separation agreements and whether or not the existence of same would prevent either party from applying to court for relief under the Judicial Separation and Family Law Reform Act, 1989 (the Act of 1989) and the Family Law Act, 1995 (the Act of 1995).

In *Courtney v. Courtney*[10] Dodd J. dismissed the Petitioner's Petition for a decree of *divorce a mensa et thoro* on the basis that the existence of a separation agreement was a bar to the relief sought and in *K. v. K.*[11] McKenzie J. refused to grant a decree of *divorce a mensa et thoro* to the Petitioner on the basis that a separation agreement was already in existence since 1980 and thus the parties already had the right to live separately and apart and the decree of *divorce a mensa et thoro* would give the spouses no greater rights. However, in *H.D. v. P.D.*[12] the Supreme Court held that a spouse who had previously entered into a written consent in relation to an application for a decree of *divorce a mensa et thoro*, one of the terms of which prevented the spouse from seeking any further maintenance, was not prevented from making an application under the Family Law (Maintenance of Spouses and Children) Act, 1976 the Act of 1976. It was not possible, according to the Supreme Court, to contract out of the Act of 1976. Likewise in *N.(C) v. N.(R)*[13] Her Honour Judge McGuinness (as she then was) held that, despite the existence of a separation agreement since 1986, the Applicant could apply for reliefs under the Act of 1989 since the reliefs available under the said Act were far more important and more comprehensive than the relief of a decree of *divorce a mensa et thoro*. Her Honour Judge McGuinness held that variability rather than finality was a general characteristic of family law matters and thus a separation agreement could not be immune from such variability.

A rather different view was taken by the Supreme Court in *F. v. F.*[14] in relation to an application under the Act of 1989 when a consent had already been entered into by the parties in the 1980's in relation to an application for a decree of *divorce a mensa et thoro* and relief pursuant to the Family Law (Protection of Spouses and Children) Act, 1981. Blayney J. stated that the effect of a decree of judicial separation was the same as that of the former decree of *divorce a mensa et thoro* and essentially there was no difference between the two. Therefore the relief as sought by the Applicant was refused. It should be noted that Blayney J. distinguished the present case from that of *H.D. v. P.D.*[15], in that the issue in *H.D. v. P.D.* (i.e. maintenance) was very different from the issues in the present case. Denham J., in her judgment, recognised that certainty and finality are important in the area of family law and although the concepts of certainty and finality cannot be applied to certain areas e.g. maintenance, the general law regarding certainty should be applied unless excluded by law or justice.

The facts in *P.O'D. v. A.O'D.*[16] were very similar to those in *N.(C) v. N.(R)*[17] and again a separation agreement had been entered into by the parties prior to the coming into operation of the Act of 1989. The Respondent sought to have the Applicant's claim under the Act of 1989 dismissed on the grounds of estoppel and *res judicata* and the Supreme Court held that where a separation agreement provides that the parties are

to live separately and apart, the granting of a decree of judicial separation would be superfluous. Keane J., in his judgment, also stated that where the parties have entered into a binding agreement it would be unjust to allow one party unilaterally repudiate that agreement.

Thus, the existence of a decree of *divorce a mensa et thoro* or a separation agreement will bar the parties from seeking relief under the Act of 1989 or the Act of 1995. However, a decree of divorce is significantly different to a decree of judicial separation and thus the existence of a decree of *divorce a mensa et thoro* or a separation agreement will not prevent the parties from seeking a decree of divorce under the Family Law (Divorce) Act, 1996 (the Act of 1996) although it should be noted that the ancillary reliefs available under the Act of 1996 are very similar to those available under the Act of 1989 and the Act of 1995.

Separation Agreements and Divorce

Section 5(1) of the Act of 1996 states that prior to granting a decree of divorce the court must be satisfied that such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family (emphasis supplied). In this context it should be noted that Article 41.3.2 of the Constitution does not specify dependent members of the family but rather "any children of either or both of (the spouses) and any other person prescribed by law". Thus, the court cannot be bound in any way by the provisions of a separation agreement although the contents of same may guide the court in circumstances where the separation agreement has recently been entered into by the parties and both parties have had independent legal advice.

By virtue of the provisions of section 20(3) of the Act of 1996, the court shall have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force in deciding whether to make orders pursuant to sections 12, 13, 14, 15(1)(a), 16, 17, 18 or 22 of the Act of 1996[18]. Curiously, section 20(3) of the Act of 1996 places no similar onus on the court in relation to the terms of a decree of judicial separation! Thus, the court must have regard to the terms of a separation agreement but can ignore same if it so chooses.

Comment

It was submitted that a court will not be inclined to re-open issues between the parties to an application for a decree of divorce, which were the subject of a separation agreement in the past, especially if the terms of the said separation agreement were seen to be reasonably fair at the time and if the separation agreement was negotiated in a fair and reasonable manner. The recent decisions in *F. v. F.*[19] and *P.O'D. v. A.O'D.*[20] lend credence to this viewpoint and it may be that the courts will tend towards certainty and finality where possible, whilst always bearing in mind their constitutional and statutory obligation to ensure that proper provision in the circumstances is made for the spouses and children/dependent members of the family.

By virtue of these constitutional and statutory obligations it cannot be said definitively that separation agreements will pave the way for non-contentious divorces. In addition, the decision in *D. v. D.*[21] clearly states that parties cannot contract out of maintenance obligations and the welfare of the dependent members of the family must also be taken into account as at the date of the granting of a decree of divorce and not at the date of the signing of a separation agreement at some point in time in the past. It may be that a provision in a separation agreement to the effect that 'the agreement is intended to be in full and final settlement of all present and future financial and property claims which either party may have against the other' will influence the court into not looking behind the separation agreement – only time will tell!

Practical Aspects Of Domestic Violence Litigation

The paper on Practical Aspects Of Domestic Violence Litigation by Rosemary Horgan, Solicitor considered various aspects of the Domestic Violence Act, 1996 as follows.

The Domestic Violence Act, 1996 (the Act of 1996) commenced on the 27th March, 1996[22]. The main thrust of the Act of 1996 was

(1) to protect spouses and children and other dependent persons, and persons in other domestic relationships where the threat to their safety or welfare is at risk because of the conduct of another person in the domestic relationship,
(2) to increase the powers of An Garda Siochana to arrest without a warrant in certain circumstances, and
(3) to provide for the hearing, at the same time as the hearing of applications under the Act of 1996, of applications to court for other orders e.g. in relation to custody and access, maintenance etc..

The remedies available under the Act of 1996 include the barring order[23], the interim barring order[24], the protection order[25] and the safety order[26].

Interim barring order

The interim barring order is an interlocutory order which may be granted by the District Court or the Circuit Court pending the determination of an application for a barring order. The effect of an interim barring order is that a respondent is barred from residing at a place where the applicant or a dependent person resides pending the final determination of the proceedings. The criteria for the granting of an interim barring order are (i) that there is an immediate risk of significant harm to the applicant or any dependent person if the order is not made immediately and (ii) that the granting of a protection order would not be sufficient to protect the applicant or any dependent person. Such an order may be granted *ex parte* in exceptional cases. However, the essence of an interim order is that it is for a short period of time and only affects the respondent until the respondent is given a chance to put his/her side of the case forward. It was submitted that the interim barring order may fall into disrepute and render injustice unless a speedy return date is given for the hearing of the case[27]. In some instances the return date can be up to six weeks after the interim barring order has been granted and the respondent

may be barred from his/her place of residence for that period of time!

It was further noted that the service of a barring summons is by ordinary pre-paid post and thus an application to the District Court must be made in order to obtain a copy of the 'Information' upon which the interim barring order was made. Unlike the Circuit Court, where an application for an interim barring order is generally grounded upon affidavit, the respondent may not be aware of the case put forward by the applicant in the District Court and the 'Information' is generally quite concise and may not contain all the facts outlined to the court.

An interim barring order is available to entitled persons who have commenced proceedings for a barring order.

Protection order

The protection order is also an interim order and lasts until the determination of the barring order or safety order proceedings. The protection order does not put the respondent out of his/her home but orders the respondent not to use violence or threaten to use violence against, molest or put in fear the applicant or any dependent person and if the parties do not reside together the respondent should not watch or beset the place where the applicant or dependent person resides. A protection order is available to entitled persons who have commenced proceedings for either a barring order or a safety order.

Barring order vs. safety order

A barring order is available to (i) spouses, (ii) cohabitants who have lived as husband and wife for six months in aggregate out of the previous nine months, (iii) a parent of an adult child and (iv) a Health Board on behalf of an entitled 'aggrieved person' who may be an adult or a dependent person[28]. It should be noted that if the parties are not married to each other then the party seeking the barring order must have an interest in the property greater or equal to that of the respondent whom they are seeking to bar[29].

A safety order is available to (i) spouses, (ii) cohabitants who have lived as husband and wife for six months in aggregate out of the previous twelve months, (iii) a parent of an adult child, (iv) persons of full age residing in mainly non-contractual relationships (e.g. same-sex couples and adult siblings) and (v) a Health Board on behalf of an entitled 'aggrieved person' who may be an adult or a dependent person[30].

It is important to note that the remedy of a barring order and that of a safety order are mutually exclusive and thus the court cannot grant a safety order when a barring order, but not a safety order, is sought but the proofs adduced are not sufficient to grant a barring order[31]. Thus each remedy must specifically be sought by the applicant. The safety order has the same effects as a protection order whereas the barring order bars the respondent from the place where the applicant or dependent person resides.

Comment

Unfortunately, the Act of 1996 does not cover all categories of person who may suffer from domestic violence i.e.

- Persons who are affected by a decree of nullity and fail to qualify as cohabitants
- Cohabitants who do not satisfy the residence requirements or property entitlement requirements for a barring order
- Adult siblings who want a barring order
- People who have a child in common but who have not cohabited
- A parent who wants to bar an adult child but the property is owned by the adult child

Neither does the Act of 1996 specify statutory criteria which the court should take into account in deciding whether to make orders under the Act. This contrasts unfavourably with section 16 of the Family Law Act, 1995 and section 20 of the Family Law (Divorce) Act, 1996 where the criteria which the court should take into account, in deciding upon the ancillary reliefs to the granting of a decree of judicial separation or decree of divorce, are specified in some detail. Thus the only criteria in relation to relief pursuant to the Act of 1996 is that the court must have reasonable grounds for believing that the safety or welfare of the applicant or any dependent person requires the relief sought to be granted. "Welfare" is defined by the Act of 1996 to include physical and psychological welfare[32] but the Supreme Court in *O'B. v. O'B.*[33] held that for a barring order to be granted there must be serious misconduct on the part of the offending spouse and this must amount to behaviour which is over and above that which every spouse bargains for in accepting the other for "better or worse" and that the "ordinary wear and tear of married life is not sufficient". Thus, are the criteria relied upon to bar a cohabitant or adult child less stringent than those relied upon to bar a spouse and how seriously must the welfare of the applicant or any dependent person be affected before the courts can grant a barring order? •

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1 See Rule 18 of the Rules of the Superior Courts (No. 3), 1997 (S.I. No. 343 of 1997) for the pleading requirements following such a transfer.

2 Rule 4 also applies to applications for a decree of judicial separation, relief after a foreign divorce or separation outside the State, declarations as to marital status, the determination of property issues between spouses/formerly engaged couples and relief pursuant to section 25 of the Family Law Act, 1995 (the Act of 1995), section 18 of the Act of 1996 and section 15A of the Act of 1995. Nullity proceedings in the High Court are still commenced by way of Petition.

3 Infra.

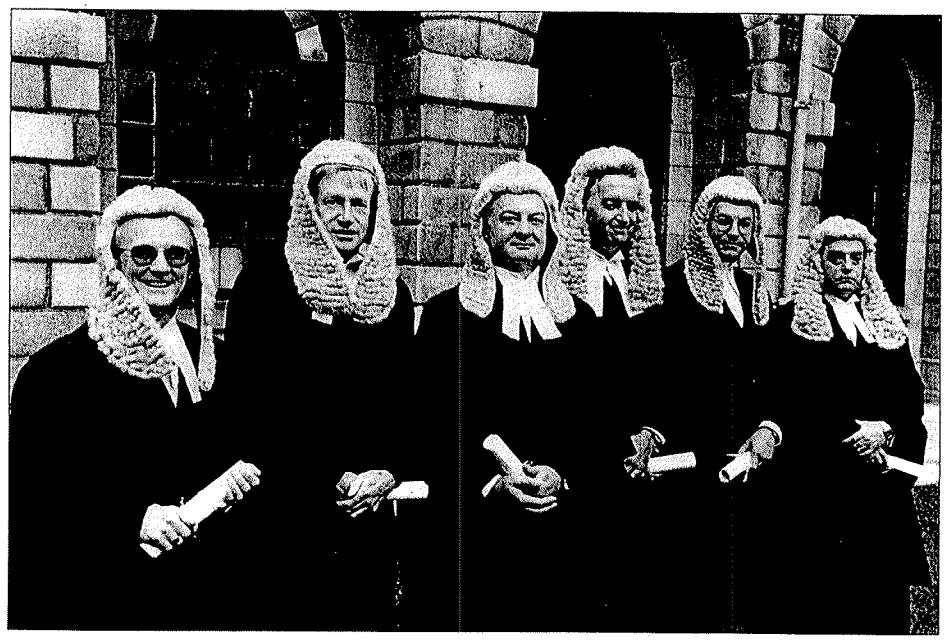
4 Infra.

5 By virtue of Rule 4 of the Circuit Court Rules applications for a decree of judicial separation, relief after foreign divorce or separation outside the State, nullity, declarations of marital status, the determination of property issues between spouses/formerly engaged couples and relief pursuant to section 25 of the Family Law Act, 1995 (the Act of 1995), section 18 of the Act of 1996 and section 15A of the Act of 1995 are also commenced by way of a Family Law Civil Bill.

6 Section 5(1) of the Family Law (Divorce) Act, 1996.

7 i.e. applications in relation to maintenance, property adjustment orders, the family home, financial compensation orders, pension adjustment orders, orders for the provision for a spouse out of the estate of the other spouse and variation orders.
8 e.g. marriage guidance counselling, mediation, separation agreements and judicial separation.
9 (Unreported, Supreme Court, 18th December, 1997).
10 [1923] 2 I.R. 31.
11 [1988] I.R. 161.
12 (Unreported, Supreme Court, May, 1978).
13 [1995] 1 Fam.L.J. 14.
14 [1995] 2 I.R. 354.
15 Supra.
16 Supra.
17 Supra.
18 i.e. applications in relation to maintenance, property adjustment orders, the family home, financial compensation orders, pension adjustment orders, orders for the provision for a spouse out of the estate of the other spouse and variation orders.
19 Supra.
20 Supra.
21 Supra.
22 but section 6 commenced on the 1st January, 1997.
23 Section 3 of the Domestic Violence Act, 1996.
24 Section 4 of the Domestic Violence Act, 1996.
25 Section 5 of the Domestic Violence Act, 1996.
26 Section 2 of the Domestic Violence Act, 1996.
27 c.f. O'Riordan R., The Bar Review, June 1996.
28 Section 3 supra.
29 Section 3(4) supra.
30 Section 2 supra.
31 Sections 2(8) and 3(11) supra.
32 Section 1 of the Domestic Violence Act, 1996.
33 [1984] I.R. 182.

New Senior Counsel



From left: John Whelan, S.C., Declan McGovern, S.C., Desmond O'Neill, S.C., Frank Callanan, S.C., Bernard Barton, S.C, Stephen J. Roche, S.C. Noel McMahon, S.C., was also recently appointed a Senior Counsel but is not photographed here.

From left: James Gilhooley, S.C., Joseph McGettigan, S.C., John Edwards, S.C., Felix McEnvoy , S.C., Michael Cush, S.C., James O'Leary, S.C.

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KING'S INNS NEWS

Do you know about the friendship between Jan Austen and Tom Lefroy?

A fine portrait of The Honorable Tom Lefroy, Lord Chief Justice (1852-1866) by Stephen Catterson-Smith, the Younger, hangs in the Dining Hall in King's Inns (top left, facing the High Table). As a lawyer Lefroy had many strings to his bow. However, here we are more interested in him as being the only man with whom Jane Austen ever admitted to having been in love.

The earliest of Jane Austen's letters to survive was addressed to her sister Cassandra and was written on 9 January 1796. The main theme of the letter was a description of the ball attended the night before at the home of :Tom Lefroy's aunt in Hampshire. This was attended by the "dazzling stranger from Ireland, Tom Lefroy" or "my Irish friend" as Jane liked to call him. It was the third ball that she and Tom had attended together.

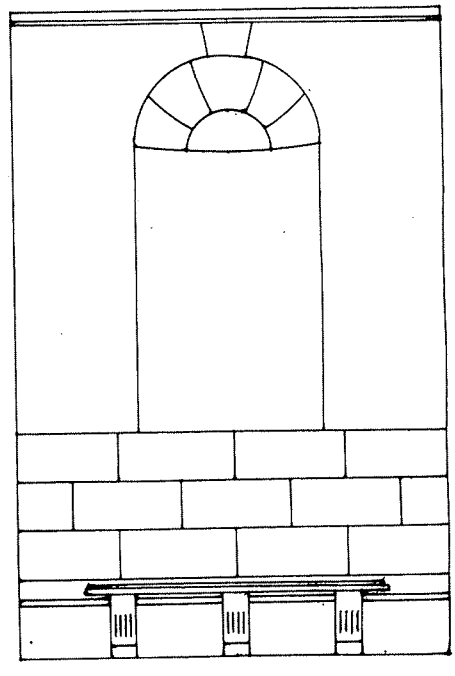
It was a polite custom for gentlemen to call on ladies they had partnered on the day after the dance. Thus Jane wrote to Cassandra saying that during the visits they spoke about the recently published Tom Jones, thereby letting her know just how free and even bold their conversation had been.

The time came for Tom Lefroy to leave Hampshire and she wrote to Cassandra "the day has come on which I am to have my last meeting with Tom Lefroy and when you receive this, it will be over". But she was in love and so too was Tom Lefroy. He confessed as much to a nephew when he was an old man even if he did qualify it by saying it was "boyish love".

The Lefroys were Hugenots who had to make their way diligently in their adopted country . Tom's father had been an army officer and had made an unwise marriage. Five daughters preceded Tom, the eldest son, and he was dependent on a great-uncle who had already put him through college in Dublin and was now financing his law studies in London. The expectations of the whole family were clearly laid on him and he could not be allowed to ruin his future by entangling himself in a love affair with a penniless girl.

Tom's aunt in Hampshire was worldly-wise enough to realise that any prospect of marriage between them was out of the question. Therefore, she sent Tom packing so that "no more mischief might be done" and she blamed him because he had behaved so badly towards Jane. The implication is clear that Jane took his intentions seriously.

Tom did reappear in Hampshire once or twice but was kept away from the Austens. Jane wrote in November 1798, nearly three years after their brief romance, that "I was too proud to make any enquiries ..... but on asking my father afterwards where he was, I learnt that he had gone back to London on his way to Ireland, where he was called to the Bar and means to practice". So Jane never saw Tom Lefroy again after his Christmas visit of 1795. In 1799 Tom Lefroy married a Wexford heiress, the sister of a college friend. He continued to work hard at the Bar, fathered seven children and, as the years went by, he became extremely successful and deeply pious at the same time. He sat for eleven years in Parliament as a Tory and was appointed Lord Chief Justice of the Queen's Bench in 1852.



King's Inn Car Park

We would like to thank the members of the Law Library who have taken car spaces for 1998/1999 in King's Inns private car park. If during the year you have any problems, please contact David Curran at telephone 874 4840.

The car park is now at full capacity. We regret that we were unable to accommodate all who were on our waiting list.

A New Look Entrance Hall at King's Inns

The next time you visit the main building in King's Inns, taken a minute or two to contemplate the architectural purity that is Gandon's last public entrance hall.

Recently, the King's Inns Council gave the go-ahead for the uncovering of the eight granite pilasters in the hall. It would appear that over a period of 160 years, layer upon layer of paint had been added to the pilasters. In fact, by means of a chemical biopsy it was established that eight layers of paint had to be removed by means of a series of poultices. The result is as James Gandon had proposed – powerful Wicklow granite holding up this great execution. The glass enclosures at the two doors and the large wooden cupboards have been removed. A new colour scheme has been put in place on the walls and vaulted roof. The marble busts have gone to the Library thereby freeing up the alcoves and enabling the onlooker to marvel at the depth of the walls. A feeling of spaciousness has emerged. The hall has been virtually returned to Gandon's objective of "decorative austerity" as presented in his plans to the Benchers in June 1800.

James Gandon may have been unhappy and a little frustrated with the Benchers in 1807 when he retired to Lucan. The changed attitude of the present generation to his architectural objectives would have put more than a little spring into his step.

Camilla McAleese, Under-Treasurer, King's Inns

Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 4. Issue 2. November 1998

A directory of legislation, articles and written judgments from 17th September 1998 to 29th October 1998.
Judgment information compiled by the Legal Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative Law

Bailey v. Mr. Justice Flood
Supreme Court: Hamilton C.J., Denham J., Barrington J., Keane J., Murphy J.
28/07/1998

Judicial review; discovery; tribunal of inquiry; certiorari; fair procedures; order sought quashing orders of discovery which the tribunal of inquiry made in relation to bank accounts held by the appellants; whether respondent acted in breach of fair procedures by failing to inform the appellants of intention to make orders, by failing to afford appellants the opportunity to make representations and by failing to direct service of orders on appellants; Tribunals of Inquiry (Evidence) Act, 1921; Tribunals of Inquiry (Evidence) Act, 1979
Held: Respondent acted in breach of constitutional justice and fair procedures; orders for discovery and production of documents quashed

Sheriff v. Corrigan
High Court: Carney J.
31/07/1998

Judicial review; prison officer; misconduct; loss of promotion; disciplinary penalty; requirements of natural and constitutional justice; whether decision-making process in accordance with the principles of natural justice; whether dictates of fairness required the holding of an oral hearing
Held: Application dismissed; requirements of natural justice adhered to; oral hearing not required

Article
State Duty and The Irish Language
Nic Shuibhne, Niamh
1998 DULJ 33

Animals

Statutory Instruments
Wildlife (Wildbirds) (Open Seasons) (Amendment) Order, 1998
SI 332/1998

Wildlife (Wild Mammals) (Open Seasons) Order, 1998
SI 331/1998

Arbitration

Article
International Arbitration Of Intellectual Property Disputes Patent Agents, Registered Trade Mark Agents And The Arbitration (International Commercial) Act 1998
Bridgeman, James
1998 2 (2) IIPR 11

Library Acquisition
Russell, Francis
Russell On Arbitration
21st Ed / By David St John Sutton, John Kendall And Judith Gill
London Sweet And Maxwell 1997
N398

Building & Construction

Statutory Instrument
Building Regulations Advisory Body Order, 1998
SI 348/1998

Charities

Library Acquisition
St John Moore, Geoffrey
Charities and Caring Groups The Regulation Of Charities
A Void That Needs To Be Filled
1998 Charities Directory 1998 [Supplement To ILTR] 3
N215.C5

Children

Article
Child Offenders: The Changing Response Of Irish Law
Hanly, Conor
1998 DULJ 113

Commercial Law

The Wise Finance Company Ltd. v. O'Regan
High Court: Laffoy J.
26/06/1998

Land; possession; charge on the land; lease; application for substituted relief; plaintiff registered owner of charge on defendant's lands; subsequent lease of lands; application by receiver of lessee company to be joined as notice party; locus standi; whether lease valid; whether receiver eligible for appointment; validity of charge; whether plaintiff was an unlicensed moneylender; whether the business of the lender at the date the transaction was effected consisted wholly or mainly of the business of lending money on the security of land; s.18(13) of Conveyancing Act, 1881; s.6 Moneylenders Act, 1900 as amended by s.136 Central Bank Act, 1989; article 2 Money-Lenders Act 1900 (Section 6(e)) Order, 1993; s 135(1), Companies Act, 1963 as substituted by s.170 Companies (Amendment) Act 1990
Held: Application refused

Articles
Co-Operatives New Legislation For Industrial And Provident Societies?
Quinn, Anthony P
1998 ILTR 182

Restraint Of Trade - Some Recent Developments
Chandran, Ravi
1998 CLP 168

The Investor Compensation Act 1998
Clarke, Blanaid
1998 CLP 164

Creditors' Rights To Have Directors Restricted - A New Development
Walker, Brian
1998 CLP 159

Developments In English Law On Taking Fixed Security Over Book Debts
Webb, Mathew
1998 IBL 195

Local Government And Private Enterprise - Can They Mix?
Butler, Pat
1998 IBL 151

Multi-Seller Conduits: The Future Of Securitisation?
Downey, Conor
1998 IBL 128

The Framework Basics Of Securitisation
Downey, Conor
1998 IBL 19

Legal Service Providers In The Irish Capital Markets
Foy, Agnes
1998 IBL 102

Morris V Agrichemicals - The Availability Of Charge-Backs
Grebauer, Hans
1998 IBL 80

The Insomniac's Guide To Comparative Advertising (Part 1)
O'Hanlon, Niall
1998 IBL 155

Statutory Instruments
Financial Transfers (Republic Of Serbia) Order, 1998
SI 263/1998

Financial Transfers (Republic Of Serbia) (No 2) Order, 1998
SI 346/1998

Investor Compensation Act, 1998 (Appointment Of Members Of Investor Compensation Company) Regulations, 1998
SI 352/1998

Investor Compensation Act, 1998 (Commencement) Order,1998
SI 266/1998

Investor Compensation Act, 1998 (Prescription Of Bodies)
Regulations, 1998
SI 280/1998

Company Law

Articles
Corporate Responsibility In Light Of The Separation Of Ownership And Control
Clarke, Blanaid
1998 DULJ 50

Creditors' Rights To Have Directors Restricted - A New Development
Walker, Brian
1998 CLP 159

Too Much Law And Not Enough Order?
Igoe, Pat
1998 (August/September) GILSI 26

Library Acquisition
Bruce, Martha
Rights And Duties Of Directors
London Butterworths 1998
N261

Constitutional

Mac Cárthaigh v. Éire
An Chúirt Uachtarach; Ó hAimiltín P-B, Ó Flaitheartaigh B., Ó Bearáin B., Ó Múrchú B., Ó Loinseagh B.
15/07/1998

Giuiré; Gaeilge; cabhair ateangaire; riachtanasaí triail de réir cirt;deacrachtaí ag baint le ateangaireacht; an bhfuil an t-iarratasóir i dteideal trial os comhair giúiré atá igcumas Gaeilge a thuiscint gancabhair ath-teangaire; Airteagal 8 agus Airteagal 38 de Bunreacht na Éireann
Coinníodh: Diultaíodh don achomharc; dá mbeadh ar gach ball den ghiúiré bheith in ann cúrsaí dlí a thuiscint as Gaeilge gan ateangaire, chuirfí formhór de mhuintir na hÉireann ar leataobh

Mac Cárthaigh v. Éire
Supreme Court; Hamilton C.J., O'Flaherty J., Barron J., Murphy J., Lynch J.
15/07/1998

Jury; Irish language; interpretation; requirement of a fair trial in due course of law; difficulties with interpretation; whether the applicant is entitled to a trial before a jury who can understand Irish without the aid of an interpreter; Arts. 8 & 38, Constitution
Held: Application refused; if every member of the jury had to have sufficient competence in Irish to understand matters of the law, then the majority of the people of Ireland could not serve on the jury

Contract

Forshall v. Walsh
Supreme Court; Barrington J., Lynch J., Barron J.
31/07/1998

Damages; negligent misstatement; negligent misrepresentation; vicarious liability; fraud; agreement to purchase Lamborghini cars; cars not supplied to plaintiff company; advice given by bank official to the plaintiff; vicarious liability on part of defendant bank; major conflicts of evidence; credibility of various witnesses; whether the trial judge's assessment of the various witnesses was wrong; whether the finding by the trial judge that a particular witness was "credible", was a primary finding of fact with which an Appeal Court could not interfere; whether a defendant bank official fell short of the standard of care he owed to the plaintiff
Held: Appeal dismissed; ample evidence to support all findings from witnesses whom the trial judge considered to be credible

Article
The Hand Of God In Contracts Of Insurance
McHugh, Damien
1998 IBL 67

Library Acquisitions
Anson Sir, William Reynell
Anson's Law Of Contract
27th Ed \ By J. Beatson
Oxford Oxford UniverSIty Press 1998

Quigley, Conor
European Community Contract Law
London Kluwer Law International 1997
C233

Copyright Patents & Design

Mandarim Records Ltd. v. Mechanical Copyright Protection Society (Ireland) Ltd.
High Court: Barr J.
05/10/1998

Power CD; definition; "record"; statutory interpretation; whether Power CD's constitute "records" for the purposes of the Copyright Act, 1963; whether definition of record excludes added visual dimension of a Power CD; whether statutory interpretation should include unforeseen advances in technology; ss 2 & 13, Copyright Act, 1963
Held: Declaration granted; Power CD's constitute records within the meaning of s. 13 Copyright Act, 1963

Articles
European Directive On Comparative Advertising
Daly, Maureen
1998 2 (2) IIPR 26

European Union Influences On The Future Of Irish Copyright Law
Clark, Dr Robert
1998 IBL 58

Biotechnology And Its Patenting Under The New EC Directive
Duffy, Assumpta
1998 2 (2) IIPR 23

Irish Music Rights Organisation
Duffy, Hugh
1998 2 (2) IIPR 16

International Arbitration Of Intellectual Property Disputes Patent Agents, Registered Trade Mark Agents And The Arbitration (International Commercial) Act 1998
Bridgeman, James
1998 2 (2) IIPR 11

The Law On Industrial Design In Ireland
Shortt, Peter B
1998 2 (2) IIPR 5

Trade Mark Law: "Likelihood Of Confusion" And "Likelihood Of Association" Under EC Trade Mark Law: A Case Note On Sable BV V Puma Kg
Lambert, Paul
1998 ILTR 218
At War With Piracy
Scales, Linda
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Criminal Law

DPP v. Murphy
Supreme Court : O' Flaherty J., Denham J., Barrington J., Keane J., Lynch J.
29/07/1998

Arrest; warrant; consultative case stated; statutory interpretation of s.6, Criminal Justice (Miscellaneous Provisions) Act, 1997; whether evidence must be adduced that accused arrested otherwise than under a warrant prior to admitting in evidence the certificate referred to in s.6; whether certificate appropriate form of proof
Held: Appeal upheld; s.6, Criminal Justice (Miscellaneous Provisions) Act, 1997, does not require the district court to be satisfied that a person has been arrested otherwise than under a warrant prior to admitting in evidence the certificate referred to therein

Sports Arena Ltd. v. Judge Devally
High Court: Kinlen J.
30/07/1998

Judicial Review; conviction; refusal of circuit court judge to accede to applications to state case to Supreme Court; whether any essential legal point in application for case stated; whether any points raised were of such a substantial nature that it was essential in the interests of justice to submit them to the Supreme Court; ss 4 & 5, Gaming Lotteries Act, 1956; s16, Courts of Justice Act, 1947
Held: Application refused

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Damages

McKenna v. Mc Elvaney
High Court: Johnson J.

24/07/1998

Damages; motor vehicle accident; death of plaintiff's husband arising from accident; assessment of damages in respect of loss of maintenance; whether deceased's accounts reliable; whether plaintiff's evidence as to weekly income from deceased reliable
Held: Damages awarded for loss of maintenance; evidence unreliable

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Safety, Health And Welfare At Work (Biological Agents) (Amendment) Regulations, 1998
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Environmental Law

Watson v. The Environmental Protection Agency
High Court: O'Sullivan J.
06/10/1998

Judicial review; genetic engineering; genetically modified organisms; licensing; genetically modified sugar beet plant; application for licence to carry out limited field trials; standard by which the Environmental Protection Agency (EPA) must decide whether to grant consent for licence; whether standard required in relation to the grant of such a licence is higher under Irish law than that set by European Law; whether EPA erred in law and acted ultra vires in imposing a condition attaching to the consent allowing a person other than the EPA to agree matters referred to in that condition; whether court complied with the requirements of natural and constitutional justice in relation to applicants right of objection; whether applicant has locus standi; whether consent was granted in breach of the requirements of natural and constitutional justice; whether EPA complied with Regulations Environmental Protection Agency Act 1992, Genetically Modified Organisms Regulations, 1994, Council Directive of the 23rd April, 1990 on the Deliberate Release into the Environment of Genetically Modified Organisms
Held: Relief refused

Statutory Instrument
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SI 268/1998

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Plaice (Control Of Fishing In Ices Divisions VIIF And VIIG) Order, 1998
SI 304/1998

Sea Fisheries (Driftnets) Order, 1998
SI 267/1998

Garda Siochána

Mc Glynn v. The Commissioner of An Garda Síochána

High Court: Kinlen J.
31/07/1998

Judicial review; alleged breaches of discipline; larceny; disciplinary proceedings; investigation; previous criminal proceedings arising out of same incidents; proceedings dismissed; evidence obtained in breach of applicant's constitutional rights; whether full and substantive hearing in the district court; whether direction given by district court after full and substantive hearing; whether disciplinary complaints distinguishable from criminal charges; regs. 9 & 38, Garda Síochána (Discipline) Regulations, 1989; Criminal Justice Act, 1984; s. 2, Larceny Act, 1916
Held: Application granted; disciplinary inquiries suspended

D.P.P. v. Devlin
High Court: Budd J.
02/09/1998

Case stated; dismissal of charge under s. 49, Road Traffic Act 1961; failure of arresting garda to comply with regs 4 & 8 Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987; whether district judge correct in dismissing charge; whether district judge correct in law in holding that the breach of reg. 8 entitled him to dismiss the charge; whether district judge correct in holding that arresting garda ought to have called on other garda to assist in the roles of duty i.e. arresting, investigating and as a member in charge; whether practicable to obtain another garda to act as member in charge; whether district judge adjudicated the impact of the breach of regulations on the admissibility of evidence
Held: District Judge incorrect in dismissing charge on the basis that no actual adjudication was made on the impact of the breach of regulations on admissibility of evidence; district judge incorrect in holding that arresting garda ought to have called on other members of the gardaí to assist in the three roles of duty

Harbours

Statutory Instrument
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Health

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Injunctions

Bennett Enterprises Inc. v. Lipton

High Court: O'Sullivan J.
19/06/1998

World-wide Mareva injunction; trust funds; jurisdiction of the court; alleged breach of contract; reduction of monies in trust funds; whether plaintiffs failed to make full and frank disclosure; whether particulars of plaintiffs claim adequately set out; whether failure of plaintiffs to establish that defendant holds assets within the jurisdiction fatal to application; whether sufficient evidence to establish risk of assets being removed or dissipated for the purpose of the defendant evading his obligation to the plaintiff; whether adequate undertaking as to damages where plaintiffs have no assets within the jurisdiction but where defendant in possession of funds belonging to plaintiffs
Held: Injunction granted

Controller of Patents, Designs and Trade Marks v. Ireland
High Court: Kelly J. (ex tempore)
31/07/1998

Injunction; implementation and bringing into operation of ss 4 & 5, Intellectual Property (Miscellaneous Provisions) Act, 1998; Copyright Amendment Bill, 1998; amendment to office of Controller of Patents, Designs and Trade Marks; discovery; whether court has jurisdiction to grant the reliefs sought; whether the ordinary principles applicable to an application for an injunction are appropriate; whether serious issue to be tried; whether the Act interferes with judicial review proceedings brought by the plaintiff; whether the Act interferes with the independence of the plaintiff's office; whether the manner in which the legislation was procured is cognisable by the Court; whether damages are appropriate remedy; whether the balance of convenience favors the granting of injunction
Held: Orders refused

Insurance

Bowes v. Motor Insurer's Bureau of Ireland
High Court: Budd J.
02/09/1998

Road traffic accident; uninsured motorcycle; uninsured motorcyclist; fatal injury to motorcyclist; insurance claim; Motor Insurer's Bureau of Ireland (M.I.B.I.); no claim brought against deceased's estate; whether plaintiffs could proceed directly against M.I.B.I. for personal injury, loss and damage sustained in accident; whether liability on the part of the M.I.B.I to compensate the plaintiffs in accordance with the M.I.B.I. Agreement (1988); whether claim against deceased's estate now statute barred; s. 9 Civil Liability Act, 1961
Held: Plaintiffs did not have a direct cause of action against M.I.B.I.

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SI 359/1998

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SI 316/1998

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SI 298/1998

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SI 257/1998

Waterford County Borough Local Electoral Areas Order, 1998
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Urban Renewal Act, 1998 (Commencement) Order, 1998
SI 271/1998

Medical Negligence

Lynch v. O'Connor
Supreme Court: Hamilton C.J., O'Flaherty J., Barrington J., Keane J., Murphy J.
29/07/1998

Professional negligence; breach of duty of care; conflict of expert evidence; infant plaintiff born with skin tag; ligation procedure carried out; plaintiff diagnosed with spina bifida; occupational therapy arranged for plaintiff with little effect; whether failure to ensure plaintiff was regularly monitored after ligation procedure; whether, as a result, plaintiff did not receive the benefit of occupational therapy at an earlier stage; whether plaintiff's condition was thereby exacerbated; trial judge dismissed plaintiff's claim; whether new trial should be ordered on issue of liability; whether trial judge should have resolved conflict of evidence; whether defendant under a continuing duty to monitor progress of plaintiff for indefinite time even though no indication of abnormality; whether procedure adopted by defendant had inherent defects which should have been obvious to a reasonable person.
Held: Appeal dismissed

Negligence

Holohan v. The Minister for Defence
High Court : Kinlen J
30/07/1998

Personal Injuries; negligence; fracture to right hand; damages claimed in respect of personal injuries suffered during the course of army war-time training; whether defendants vicariously liable; whether there was negligence in the design or execution of the work; whether the principle of duty of care in tort applies to simulation war-time training; whether defendants exercised sufficient control over negligent soldier
Held : Defendants vicariously liable

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Brooks Thomas Ltd. v. IMPACT Ltd.
Supreme Court: Denham J., Lynch J.,

Barron J.
29/07/1998

Discovery; procedure; delay; action for breach of contract, negligence and misrepresentation; motion for discovery; whether documents sought related to any issues in dispute; whether the documents in question would directly or indirectly advance the respondents' case; whether documents in question would damage the appellants' case; O. 31, r.12, Rules of the Superior Courts
Held: Discovery not necessary; motion for discovery dismissed

Irish Press PLC v. E.M. Warburg, Pincus & Co. Int. Ltd.
Supreme Court : O'Flaherty J., Murphy J., Lynch J.
29/07/1998

Security for costs; joint venture; alleged negligent advice, misrepresentation and breach of fiduciary duty; whether respondents have a stateable case against appellants; whether appellants have a stateable defence to respondents claim; whether there are special circumstances to justify not making an order for security for costs; whether appellant discharged onus of proof of respondents inability to meet potential costs; ss. 205 & 390, Companies Act ,1963
Held: Appeal dismissed; appellants did not establish sufficient evidence of respondents inability to pay the costs of the appellants if and when so ordered

Superwood Holdings PLC v. Sun Alliance
Supreme Court : Hamilton CJ., O'Flaherty J., Murphy J.
21/07/1998

Fire; compensation; insurance; alleged fraud; assessment of damages; lodgment; settlement of appellant companies claims in so far as they relate to the fourth named respondent; application for extension of time for acceptance of lodgment; whether Supreme Court should entertain an appeal against orders made by a trial judge during the course of hearing an action; whether proceedings between the appellants and the fourth named respondents have been finally determined; O. 22, r. 12, Rules of the Superior Courts
Held: Appeal allowed

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26/1998 - Turf Development Act, 1997
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Abbreviations

BR = Bar Review
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GILSI = Gazette Incorporated Law Society of Ireland
IBL = Irish Business Law
ICLJ = Irish Criminal Law Journal
ICLR = Irish Competition Law Reports
ICPLJ = Irish Conveyancing & Property Law Journal
IFLR = Irish Family Law Reports
IIPR = Irish Intellectual Property Review
ILTR = Irish Law Times 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

The references at the foot of entries for Library acquisitions are to the shelf mark for the book.

Section 117 of The Succession Act, 1965:

TERESA PILKINGTON, BARRISTER

Recent Amendment of S. 117

Section 117 (6) is amended by Section 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 (the former time limit was twelve months).

This is an exceptionally short statutory time limit. In the case of *MPD -v- MD*[1], Carroll J. held that the period of limitation specified in Section 117 (6) (then 12 months) went to the very jurisdiction of the court thereby preventing it from making any order if an application is made outside of this time limit. As Carroll J pointed out, if an application is made outside of this strict time limit both the right and the remedy are barred. Therefore the court has no jurisdiction to make an order under Section 117 unless the persons prejudiced by such an order would actively consent to an order being made by the court.

The implication of this time limit going to the very jurisdiction of the court is that factors which may prevent the running of time in other areas of law, such as fraud or persons acting under a disability, do not aid an applicant (minor or otherwise) wishing to make a section 117 application, but who has failed to do so within the statutory time limit.

Proceedings under S. 117

If the proceedings are to be instituted in the High Court then a Special Summons is issued, in the Circuit Court, by way of Equity Civil Bill,

A brief summary of Section 117:

Unlike the position of a surviving spouse, children of a testator dying wholly or partially testate are not guaranteed specific shares in the estate. The right to bring such an application is conferred upon all children of a testator.[2]

In order to succeed, pursuant to the provisions of s. 117, the child of a testator must be able to show:-

1. That the testator has failed in his moral duty (either by will or in his lifetime) to make proper provision for the child in accordance with his means and,
1. Whether even in the light of that failure, the court will proceed to make provision for that child out of the estate.

There is now a body of decided case law where the courts have sought to interpret this section and consider ways in which it might exercise its discretion.

The entitlement of a child to make such an application is not an unfettered one and a number of points should be noted with regard to the section itself.

Important points to note regarding section 117:

(a) It only applies where a testator dies wholly or partially testate (in other words it has no application in relation to an intestacy).[3]

(b) Section 117 (3) provides that the court cannot make an order under this section which affects the legal right of the surviving spouse or, if the surviving spouse is the mother or father of the applicant child, any devise or bequest to that spouse or any share to which that spouse is entitled on an intestacy. Therefore, if the spouse is the mother or father of the applicant child then no order can be made pursuant to Section 117 which affects any devise or bequest of that spouse, whether arising under the will or intestacy. So, for example where the surviving spouse is a step-parent of the applicant child the court can make an order affecting any devise or bequest by the testator to that step-parent or the share of that step-parent on intestacy. However, the step-parent would still be entitled to their legal right share.[4]

Summary of the Caselaw

The basic criteria which has been universally adopted for determining entitlement is that set out by Mr. Justice Kenny in the case of *FM -v- TAM*[5] as follows;

> 'An analysis of section 117 shows that the duty which it creates is not absolute because it does not apply if the testator leaves all his property to his spouse, (section 117 (3)), nor is it an obligation to each child to leave him something. The obligation to make proper provision may be fulfilled by will or otherwise and so, gifts or settlements made during the lifetime of the testator in favour of a child or the provision of an expensive education for one child when the others have not received this, may discharge the moral duty. It follows, I think, that the relationship of parent and child does not of itself and without proper regard to other circumstances create a moral duty to leave anything by will to the child. The duty is one not to make ade-

quate provision but to make proper provision in accordance with the testator's means ... The court, therefore, when deciding whether the moral duty has been fulfilled, must take all the testator's property .... into account ... It seems to me that the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death and must depend upon

(a) The amount left to the surviving spouse or the value of the legal right share if the spouse elects to take this.
(b) The number of the testator's children, their ages and position in life at the date of the testator's death.
(c) The means of the testator.
(d) The age of the child who is being considered and his/her financial position and prospects in life.
(e) Whether the testator has already made proper provision for that child in his lifetime.

The existence of the duty must be decided by objective considerations. The court must decide whether the duty exists and the view of the testator that he did not owe any is not decisive'.

In that case relief was granted to an only child who had been adopted and whose father had failed to recognise his son for this reason.

The above was approved by the Supreme Court in *C -v- C*[6] as being a correct statement of the law. In that case Finlay C.J., delivering the judgment of the court, added a further principle which in his view represented a qualification of the above. He stated;

> 'I am satisfied that the phrase contained in s117(1) 'failed in his moral duty to make proper provision for the child in accordance with his means' places a relatively high onus of proof on an applicant for relief under the section. It is not apparently sufficient from these terms in the section to establish that the provision made for a child was not as great as it might have been, or that compared with generous bequests to other children or beneficiaries in the will, it appears ungenerous. The court should not, I consider, make an order under the section merely because it would on the facts proved have formed different testamentary dispositions. A positive failure in moral duty must be established.'

In the consideration given by the courts to this area, a number of matters can be discerned;

1. The applicant child can be;
(a) of full age and may have made his/her own way in the world.[7]
(b) it is irrelevant if that applicant child is adopted or born outside of marriage.[8]
(c) it is also irrelevant if the applicant may not have enjoyed any particularly close relationship with the parent or may not have assisted or looked after the parent in any particular way.[9]
2. With regard to the requirement by Kenny J in *FM v TAM* that the existence of a moral duty must be judged at the dated of the testator's death, subsequent case law has held that any relevant factors occurring after the date of death might also be considered.[10]
3. The test of a moral duty is always an objective one.[11] A testator may conscientiously believe that he has made proper provision for all his children but still be found by a court to have failed to make proper provision pursuant to s 117.
4. In considering s 117 (2), which requires the court to consider the application from the point of view of a just and prudent parent, the comments of Mr Justice Costello in *L v L*[12] have often been quoted with approval. He stated;

> 'A parent acting prudently and justly must weigh up carefully all his moral obligations. ..... But a just parent in considering what provision he should make for each of his children during his lifetime and by his will, must take into account not just his moral obligations to his children and to his wife, but all of his moral obligations. Again, to give an example, a father may have aged and infirm parents who are dependent upon him and to whom he owes a moral duty. When acting justly and prudently towards his own children he would have to bear in mind his obligations to his own parents; the provision he makes for his own children may have to be reduced because of his other obligations.'

Mr Justice Barron stated *In the Goods of J.H. Deceased;*[13]

> 'The position of an applicant child cannot be taken in isolation. The quantum of what is proper provision in any particular case is not absolute but is dependent upon all the matters which the court must take into account.'

5. Once the courts have established a failure of moral duty on the part of a parent they have shown great flexibility in the exercise of their discretion to make provision for children.[14]
6. If a bequest to charity might possibly be affected by a s 117 application then the Attorney General, as protector of charities, must be put on notice of the proceedings.[15]

The Supreme Court again considered a section 117 in the recent case of *EB v SS & G McG,*[16] where the facts were somewhat unusual. The Applicant (son) made a s 117 application in relation to his deceased mother's estate. The deceased testatrix was a widow with four children. Prior to her death in 1992 she had made substantial provision for each child (each had approximately received the sum of £275,000 after tax). Under the terms of her will she made a number of pecuniary legacies to her grandchildren and left the residue, comprising some £300,000 in total, to five named charities. There was no provision in her will for any of her children. The evidence before the court, by the Deceased's solicitor, was to the effect that the deceased believed she had made adequate and proper provision for them in her lifetime. The court also accepted that at the time of making her will the Deceased was aware that the applicant had in fact squandered all of the money given to him and was now in relatively straitened financial circumstances.

Whilst the Applicant acknowledged that the deceased had made provision for him in her lifetime, by the time of her death all the monies had been completely dissipated by him. The Applicant was an unemployed forty year old man, married (now separated) with three dependant children (aged 12,10 and 8). He had worked for a period of time in his late father's business and had also, with his father's financial assistance, completed an Arts degree at Trinity College. His father had also purchased a house for him and one of his sisters jointly. However in the mid '80s

the Applicant developed serious problems with alcohol and drug abuse. The court accepted that from 1993 (after his mother's death) he no longer took alcohol and drugs. At the time of the trial he was in receipt of social welfare assistance of £135.00 per week, had no savings, with his only asset being a 50% share in the house referred to above. In instituting Section 117 proceedings he argued that, notwithstanding the provision made for him in his lifetime, the question of whether that constituted proper provision should be considered in light of the circumstances existing at the date of his mother's death, who at that time was well aware of his personal circumstances.

In the High Court Mr. Justice Lavan reviewed the case law in this area, including *F.M v T.A.M*[17] and *C v C*[18] referred to above and held that there had been no failure by the deceased in making proper provision for the applicant.

The applicant appealed to the Supreme Court who, by majority, upheld the judgement of Lavan J. The majority judgement was delivered by Keane J. who considered whether there had been a failure of moral duty on the part of the Deceased testatrix. He endorsed the view taken by Finlay C.J. in *C v C*[19] as quoted above and reiterated that the question was not what a court would do if theoretically faced with the same facts but rather whether the actual decision taken by the testatrix represented a failure of moral duty on her part. He held that it did not. Keane J. pointed out that the Applicant could not argue that the Deceased had not treated him generously in his lifetime. In his view it was clearly open to a responsible and concerned parent to take the view that, as the considerable financial assistance already furnished to the Applicant had proved unsuccessful, to make further provision for him might well have had the same effect, even if provided through the mechanism of a trust.

In his dissenting judgement, Barron J. stated that he would allow the appeal. In his view the duty to make proper provision for children is a moral one enforceable by law. A positive failure in that moral duty must be established. He also quoted from his earlier decision of *In the Goods of J.H. Deceased*[20] to the effect that such a failure of moral duty will usually arise where one child has a particular need which the means of a testator may be able to satisfy. In his view there was such a need in this case. Furthermore, Barron J. took the view that in looking at the question of that person's needs that his or her legal and moral responsibilities must also be considered. In this case these included the Applicant's needs and responsibilities towards his wife and children and the Deceased had not taken these into consideration. Accordingly the Deceased should have separately considered the needs of each of her children. In his view three factors were involved; first, that the Plaintiff had considerable need to meet his obligations, secondly, that the Deceased had the means to seek to alleviate this and thirdly, having regard to all the claims upon her the Deceased should have made some provision to alleviate that need. On the facts Barron J. considered that a supervised trust, only to be used for the needs of the Applicant's children, should be provided. In his view, whilst the Applicant might have difficulty in arguing that adequate provision had not been made for him by the Deceased, that in reality the application was being brought seeking to benefit the Applicant's children and the court was entitled to have regard to this. In arriving at his decision Barron J was conscious of the danger of straining the construction of the words used in s 117 and suggested that the legislature might give further consideration to this matter. Keane J, specifically referring to this aspect of Barron J's judgment, stated that s 117 did not permit the court to extend the protection afforded to children to grandchildren and to do so was to extend the category of applicants to an extent that had not been envisaged by the legislature.

General Comments

In the writer's view it is regrettable that the only legislative amendment to section 117 was to shorten an already narrow time limit. In light of the decision of *PD vMD*[21] additional legislative safeguards may be required to prevent those suffering from a disability being prevented from making an application outside of the statutory time limit.

It has also been suggested that, as Part IX of the Succession Act applies only to a person who dies wholly or partially testate, the failure of the Statute to extend s. 117 to cover cases on intestacy is a major limitation. If one of the principal purposes of the section is to ensure that children are protected then the Court cannot exercise any jurisdiction where, in an intestate estate, a child with special needs takes the same proportionate share as his or her siblings and additional provision cannot be provided by the courts. ●

1 [1981] I.L.R.M. 179
2 Prior to the enactment of The Status of Chidren Act, 1987 (operative date 14 Jnne 1988) only marital children could bring such an application
3 See the discussion by Carroll J in RG v PSG [1980] ILRM 225 as to what constitutes a testate estate. In that case the testator had appointed his wife, who predeceased him, sole executrix and universal legatee. The Deceased's will was therefore inoperative and devolved upon intestacy. Carroll J held that, as the state of testacy is dependent upon the effectiveness of the execution of the will (as opposed to the effectiveness of disposing of property), the Deceased died testate and accordingly his eldest son was entitled to bring a s 117 application.
4 J.R v J.R [1979] ILRM 236 @ 238
5 [1970] 106 I.L.T.R. 82
6 [1989] I.L.R.M. 815
7 FM v TAM, O'H v R [1986] ILRM 563, H.L v Governor & Co of Bank of Ireland [1978] ILRM 160
8 Section 31 of The Status of Children Act, 1987 and the Adoption Act, 1952
9 See comments of McWilliam J in JH v AIB [1978 ILRM 203 @ 207
10 In the Goods of J.H. Deceased [1984] I.R. 599 & 607
11 JR v JR [1979] ILRM 236, FM v TAM, ibid
12 [1978] I.R. 288
13 [1984] I.R. 599, the entire passage at p 607 is stated by Blayney J in J de B v H De B [1991]] 2 I.R. 105 as 'a very clear analysis of how sub s 2 of s117 should be construed'.
14 H.L v Governor & Co of Bank of Ireland [1978] ILRM 160, In the Goods of J.H. Deceased
15 per Keane J in EB v SS & G McC [1988] 2 ILRM 141 and Bank of Ireland v O'Connell, uprept S Ct March 1998
16 EB v SS & G McC [1988] 2 ILRM 141
17 ibid
18 ibid
19 ibid
20 ibid
21 ibid

Company Law enforcement in Ireland - Fact or Fiction?

FINTAN J.O'CONNOR, BARRISTER

INTRODUCTION

The recent comments by the Tanaiste and Minister for Enterprise Trade and Development Ms. Harney at the SIPTU conference in Galway to the effect that no crime committed by a company whether large or small would go unpunished are to be welcomed given the scant regard that has been paid to the enforcement of Company Law in Ireland in the past.

The lack of enforcement, it is suggested, has not been due to a want of legislation, although some of the legislation might usefully be redrafted, but to the need for the will and a proper structure with which to enforce the law.

Given that at the end of 1997 there were just under 165,000 companies listed on the Register of Companies, of which 749 are Public Limited Companies, the scale of the task of ensuring compliance with, and the necessity for enforcement of, the requirements of companies legislation may thus be gauged.

THE LEGISLATIVE FRAMEWORK

The domestic regulatory framework within which companies operate in Ireland is bounded by two primary pieces of legislation, the Companies Act 1963 and the Companies Act 1990. In between these there are a further five amending Acts.[1]

In addition to the domestic legislation there are, as might be expected, a number of European Union pieces of legislation with which companies also have to contend. While much of this legislation has been implemented by way of separate Statutory Instrument in its own right[2] some E.U. Directives, such as Council Directive 88/627/EEC of 12th December 1988, (Sections 90 - 96 Companies Act 1996) have been implemented through incorporation in other Companies Acts.

The requirements of other EU Directives have been addressed, although not explicitly referred to, by sections of various Acts. The requirements of the Fourth Directive in relation to limited companies accounts, for instance, are covered by the 1986 Companies (Amendment) Act, and the requirements of the Insider Dealing Directive of November 1989 have been incorporated in Part V of the 1990 Companies Act.

The above framework provides the fundamental regulatory requirements with which companies must comply. However legislation in other areas also has a major impact on companies. They have to comply with the provisions of legislation in areas such as Tax, Competition, Labour, Health and Safety, Environment and Bankruptcy. They must also comply with the requirements of the Stock Exchange and the Takeover Panel and of course have to deal with an increasing range of consumer protection legislation such as the Consumer Credit Act , the Sale of Goods and Supply of Services Act 1980 and the Product Liability Directive.

The focus of this article is however on the Companies Acts 1963 - 1990.

OFFENCES UNDER THE COMPANIES ACTS.

There are in excess of 300 distinct offences in the Companies Acts 1963 - 1990 of which there are at least 170 different offences contained within the Companies Acts 1963. Offences range from the common or well known offence of failure to file returns to the less well known and somewhat more esoteric offence under the EC (Merger and Division of Companies) Regulations 1987, Reg. 21 (2) of failure to publish in Iris Oifiguil notice of the delivery to the registrar of companies of the order of the court confirming the merger within fourteen days of its delivery.

The difficulty in enforcing Companies legislation lies more in policing and identifying breaches than in prosecuting. The reason for this is that many offences are committed through a failure to undertake action or failure to act within a specific timeframe. Policing such lack of action, even retrospectively, requires considerable resources to monitor the multitude of actions being taken by companies every day of the week and requires considerable focus on a train of action to ensure that all steps required by a particular aspect of legislation have been carried out, in the correct sequence, within the relevant timeframe and with appropriate notification to all concerned.

Many of the offences under the Companies Acts are administrative in nature and will not be regarded as an offence unless, as for example in S 22 (2) (b) of the Companies (Amendment) Act 1986, "in the opinion of the court the offence was committed wilfully," or, as in S.224 (5) Companies Act 1963 "a person without reasonable excuse..... makes default."

These are subjective standards and do not facilitate the prosecution of such offences, indeed one could debate what standard of proof is necessary in such situations. Would it be sufficient to convict a director of an offence, as a result of which he might be imprisoned, on the balance of probabilities, where the core issue is whether or not the offence was committed wilfully or without reasonable excuse?

Given that many of the offences under the Companies Acts are administrative in nature in many instances no person or body will suffer a detriment

as the result of the occurrence of an offence and thus, in contrast with prosecutions under Criminal legislation for instance, there is no injured party to initiate the prosecution process by bringing the offence to the notice of the relevant prosecuting body.

Summary proceedings for an offence under the Companies Acts 1963 - 1990 may be brought by the Minister or the Director of Public Prosecutions. Specific provision is made in respect of a number of offences for prosecutions to be brought by the Registrar of Companies.

COMPLIANCE AND ENFORCEMENT

The single measure of compliance which is available relates to the filing of returns by companies.

Under Section 125 of the Companies Act 1963 every company with a share capital (Section 126 applies the same requirement to companies without a share capital) is required to, at least once in every year, make a return to the registrar of companies containing specified information and with annual accounts annexed[3]. The return to be made within sixty days after the annual general meeting for the year.[4]

Table 1 illustrates the rate of compliance with the above requirements.

Thus it can be seen that almost 90% of companies do not comply with the most basic, most obvious and most visible requirement under the Companies Acts 1963 - 1990.

Some companies will react to warnings and notices and file outstanding returns. Table 2 illustrates the number of companies on the register which were up to date with their returns as at the end of 1997. S. 371 C.A. 1963: companies and any officer in default are allowed 14 days after the receipt of a notice to remedy the default.

Therefore even after being warned and given an opportunity to rectify matters almost 60% (making allowance for the 20,000 companies first registered in 1997) of companies on the register have failed to comply with the requirement to file. This may give some indication of the extent to which the remainder of the approximately 170 offences in the Companies Act 1963 are committed.

Some comparison is necessary, if only to put the scale of the situation in

TABLE 1

YEAR	COMPANIES DUE TO FILE	COMPANIES FILED ON TIME	COMPLIANCE RATE
1994	121,282	19,442	16%
1995	123,279	22,341	18%
1996	128,663	21,261	17%
1997	136,245	17,801	13%

TABLE 2

YEAR	COMPANIES DUE TO FILE	COMPANIES UP TO DATE	COMPLIANCE RATE
1994	121,282	47,476	39%
1995	123,279	49,061	40%
1996	128,663	50,259	39%
1997	136,245	49,242	36%

TABLE 3

	1994/95	1995/96	1996/97	1997/98
Compliance rate: Accounts	95%	95%	95%	96%
Annual returns	93%	92%	91%	94%

TABLE 4

OFFENCE	*NUMBER OF ACTIONS*							
	1994		1995		1996		1997	
Failure to file returns		%		%		%		%
Companies: Prosecutions	1979		626		43		-	
Convictions	1418	72	546	87	26	60	-	-
Directors: Prosecutions	103		116		-		107	
Convictions	43	42	55	63[8]	18[9]		30	28
Liquidators: Prosecutions					2		1	
Convictions					N/A[10]		1	
Acting as an Auditor while not qualified (S.187 C.A. 1990) Convictions:					1		3	

context.

In the United Kingdom the percentages outlines in Table 3 have been achieved for the same requirements as outlined above i.e. 1) the timely filing of accounts and 2) the timely filing of returns.

The percentages relate to returns and accounts filed within the prescribed time period.

In the U.K.[5] there are approximately 1,070,000 active companies on the register. Staffing levels in the UK Companies Office are 824 full time staff giving approximately 1298 companies per staff member.

The same figures for the Companies Registration Office are 165,000 active companies and 120[6] staff or approximately 1375 companies per staff member. Therefore comparison of activity levels is feasible.

Prosecution of offences under the Companies Acts 1963 - 1990 is only one of the activities undertaken by the Companies Registration Office. Other activities relate to the actual maintenance of the register, e.g. change of company names, change of directors, change of other particulars such as address, financial year. Another key element of its' activities is to facilitate and manage the provision of access for members of the public to the information which is maintained on the register.

PROSECUTION OF OFFENCES

Table 4[7] illustrates the number and type of offence prosecuted in the years 1994 - 1997

The table raises some questions. First, why is there such a disparity between the number of companies prosecuted and the number of directors prosecuted, particularly in light of the offence under Section 125 (2) Companies Act 1963 : if a company fails to comply with this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding £1,000.

The term "Officer" is defined as including directors: Section 2 (1) Companies Act 1963.

Secondly, why is the conviction rate for directors lower than for companies, obviously there may be particular circumstances in individual cases, but in general one would expect to see similar rates of conviction for both. If the company is convicted how can an officer escape?

Table 4 almost the entire activity in relation to the enforcement of the Companies Acts for the periods in question with the major exception of the restriction, (section 150 C.A. 1990) or disqualification, (section 160 C.A. 1990) of directors. Section 150 sanctions relate to the winding up of companies and associated insolvency, and section 160 relates to disqualification as a result of being indicted on an indictable offence in relation to a company or involving fraud or dishonesty. Currently 108 people are restricted and only one person is disqualified.

However even in the context of restriction there is a difficulty in policing the enforcement of the relevant legislation. This difficulty is perhaps caused more by the way the legislation is drafted than anything else.

For instance, under section 150, Companies Act 1990, the Court is obliged by the terminology of the section, (The Court shall..) to declare a person restricted unless subsequent mitigating factors can be applied. There is no obligation on a liquidator in the section however to bring an application concerning the restriction of a Director. Practice directions have led to the situation whereby such applications are brought as a matter of course by liquidators. Consider however the situation in a voluntary winding up which need never appear in a courtroom, how are the directors of companies being wound up voluntarily to be restricted if this was appropriate.?

Of course not all the responsibility for prosecution of offences rests with the Companies Registration Office, it is in fact limited in the offences it can prosecute. But it may, thanks to the information it receives, have a more important role in highlighting offences which have been committed.

While the Office of the Director of Public Prosecutions has a specific role to play in prosecuting offences under the Companies Act 1963 - 1990, prosecutions by the DPP are rare and seen only as an "add-on" to other criminal offences. No statistical records are maintained by the Office of the DPP in respect of such prosecutions. Perhaps this is not surprising given the low level of resources in the Office of the DPP and its primary function in prosecuting all other forms of crime in the State.

The role of the Minister in prosecuting offences under Companies Acts 1963-1990 is of interest.

In many instances the Minister is given specific power to prosecute, indeed section 240, Companies Act 1990, effectively gives the Minister carte blanche to bring summary proceedings in relation to offences under the Companies Act. While there is no difficulty in the Minister having such power *per se* the practicalities behind the Minister being involved in the prosecution of offences is questionable to say the least.

The Minister also has powers under sections 8, 14 and 19 of the Companies Act 1990 in relation to investigations of companies which the current Minister has used on a number of occasions in recent times as a visible manifestation of the enforcement of company law. It is interesting to note however that the Minister for instance could not make an application for disqualification of any director or other officer or any person found to be in default as a result of such investigation.

A second aspect of the role of the Minister is also of interest. This is where certain prosecutions, even certain actions which on the face appear innocuous, require either special exemption from the Minister or cannot be prosecuted without permission from the Minister. A good example of this is section 196 (1) Companies Act 1963. This section requires that the name, and nationality if not Irish, of Directors should appear on all business letters on or in which the company's name appears and which are sent by the company to any person. It is an offence under section 196 (4) Companies Act 1963 not to comply.

However section 196 (2) Companies Act 1963 allows the Minister to grant an exemption from this requirement if there are, in the Ministers opinion, special circumstances which exist to make such an exemption necessary.

Furthermore, section 196 (5) Companies act 1963 states that no proceedings shall be instituted under the section except by, or with the consent of, the Minister.

The necessity and the practicality of the Minister being involved in such 'weighty' matters is questionable. It would seem far more appropriate to have such matters remain within the realm of the Companies Registration Office and to allow the Registrar the power to grant an exemption or prose-

cute if necessary.

It is clear from even the brief treatment of the subject above that the enforcement and prosecution of offences under the Companies Acts 1963 -1990 is at best haphazard and at worst virtually non existent.

Existing bodies have an overlap of responsibility and there is little separation of function between administrative and enforcement procedures. The responsibility for the prosecution of offences is too widespread, the ability to police the legislation is limited, and there is no clear focal point of overall responsibility for enforcement or prosecution.

This is not to be overly critical of the bodies concerned. They are fulfilling their brief as they were established to do and no doubt as best they can with the available resources. What perhaps needs changing is the brief that the various parties hold.

THE FUTURE

While the record to date in terms of company law enforcement is poor it appears that the country may be at a turning point in this regard and the Government now has an opportunity, and hopefully the will, to implement appropriate structures and subsequently a stricter regime of compliance and enforcement.

The current structure of enforcement in Ireland is based, naturally it might be said, on that of our closest neighbour the United Kingdom. However as has been shown the structure in place is fractious, with overlaps and in certain areas is not well resourced.

A country the size of Ireland does not need a plethora of enforcement agencies , or agencies for which company law enforcement is a peripheral activity. What is required is a single agency tasked with overseeing the entirety of the legislation outlined earlier in this article. Such an agency would be independent of direct control by Government and would be a specialist agency focusing solely on the issue of compliance with, and enforcement of, Company Law. It could encompass the functions and tasks undertaken by the Companies Registration Office and by the Stock Exchange and the Office of the DPP in respect to company law. It would also have very close links to the Criminal Assets Burea , the Garda Fraud Office, and the Revenue Commissioners. This would not affect the independence of these bodies but should generate sharing of information and concerted action where appropriate.

Perhaps the nearest model which could be examined is the Securities and Exchanges Commission (SEC) in the United States, and the variations of it which exist in other countries such as Australia and Singapore.

The SEC has a broad mandate to protect investors in securities markets. The Commission also regulates firms engaged in the purchase or sale of securities, the providers of investment advice and investment companies. The SEC is composed of five principal divisions. Three of which have particular relevance to the discussion in this article. These are :

Division of Corporation Finance which has responsibility for ensuring that disclosure requirements are met by publicly held companies.

Division of Enforcement which is charged with enforcing all aspects of federal securities laws including investigating possible violations.

Office of Compliance Inspections and Examinations, this office is responsible for conducting and co-ordinating all compliance inspection programs of brokers, dealers, self regulatory organisations, investment companies and advisers, clearing agencies and transfer agents. The Office determines whether these entities are in compliance with the federal securities laws with the goal of protecting investors.

It is not suggested that an exact duplication of the SEC would be appropriate in an Irish context but it may provide a model as a starting point for taking a fresh look at the enforcement environment in Ireland.

Current consideration of the establishment of a Financial Services Regulator should perhaps take cognisance of the need for such an agency and there is no reason why regulation of the Financial Services Industry could not also be carried out within the context of a Company Law enforcement agency .

The first step in the process of restructuring has perhaps been the formation of the Company Law Working Group.

On the 7th August 1998 the Tanaiste announced the setting up of a working group comprising Government and independent members to advise on improving compliance with and enforcement of company law.

The working group, under the Chairmanship of Mr Michael Mc Dowell S.C. has among its tasks;

To review the compliance arrangements and enforcement regimes for company law.

To consider the respective roles for the parties responsible for compliance and enforcement particularly the courts, The Minister for enterprise Trade and Employment, the Director of Public Prosecutions and the Registrar of Companies.

Identify and evaluate the legislative organisational and resource issues affecting compliance and enforcement.

The Working Group is expected to make appropriate recommendations to address these issues and further to examine the resources and structures necessary to achieve a more frequent updating of companies legislation.

The Working group is expected to report to the Tanaiste by the 30th November 1998.

Hopefully the outcome of the Working Group will be a practicable and implementable solution which will not prove to be too awkward a nettle for politicians to grasp. •

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1 Companies (Amendment) Acts 1977, 1982, 1983, 1986, 1990.

2 EC (Companies) Reg's 1973, EC (Stock Exchange) Reg's 1984, EC (Mergers and Divisions of Companies) Reg's 1987, EC (European Economic Interest Grouping) Reg's 1989, EC (Stock Exchange) (Amendment) Reg's 1991.. EC (Group Accounts: Companies) Reg's 1992, EC (Transferable Securities and Stock Exchange) Reg's 1992, EC (Credit Institutions Accounts) Reg's 1992.

3 Section 128 C.A. 1963, Sections 7-12 C.(A) A. 1986.

4 ection 127 (1) C.A. 1963.

5 ource: Companies House Annual Report 1997/98

6 It is indicated in the Companies Report 1997 that the figure for staff has recently been increased from 80 to 120.

7 Source: Companies Reports 1996, 1997

8 See no.4 (includes 18 convictions from 1996)

9 These convictions refer to prosecutions taken in 1995, no new prosecutions were taken in 1996.

10 Not available.

Acht Teanga

CORMAC Ó DÚLACHÁIN, BARRISTER

An mhí seo caite bhí Comhdháil Idirnáisiúnta i gCill Iníon Leinín a phléigh Reachtaíocht Teanga. Ina measc iad siúd a bhí i láthair bhí Coimisinéir na dTeangacha Oifigiúla Ceanada mar aon le cainteoirí ón Ísiltír, ón Iodáil, ón Spáinn, ón Bhreatain Bheag agus ó Albain. Bhí sé d'aidhm ag an chomdháil staidéar a dhéanamh ar reachtaíocht teanga i dtíortha eile agus breathnú ar ról agus struchtúr na n-eagras Stáit maidir le cur i gcrích na reachtaíochta.

Faoi láthair tá sé de chuspóir ag Rialtas na hÉireann Acht Teanga a thabhairt isteach. Is é An tAire Stáit Eamon Ó Cuiv atá freagrach as an bheartas seo, agus tá sé ag tabhairt faoi le díogras. Mar aon leis an Chomhdháil Idirnáisiúnta a eagrú, d'fhoilsigh Comhdháil Náisiúnta na Gaeilge "Pléchaipéis maidir le hAchta Teanga" agus d'fhoilsigh Coiscéim leabhar "I dTreo Deilbhcáipéise d'Acht Teanga Éireannach" curtha in eagar ag Dáithí Mac Cárthaigh BL.

Tuigeann lucht na gaeilge go bhfuil easnamh dlithiúil ar chosaint agus forbairt na Gaeilge. Ceann de na fadhbanna a bhaineaan le forbairt straitéis dlí ná na gnéithe éagsúla a bhainean le ceist na Gaeilge. Tá gnáthóg teanga i gceist sé sin "linguistic habitat", gnáthóg na Gaeltachta agus na Galltachta. Tá an teanga féin i gceist – cearta an teanga agus cearta na daoine ar mhian leo í a úsáid.

Is suimiúil go bhfuil Achtanna Teanga i bhfeidhm i mórán stát eile. Ní ábhar é a bhaineann le mion teangacha amháin. Tá sé le sonrú go bhfuil mórán teangacha faoi bhrú. I gcomhtheacs an Aontais Eorpaigh tuigtear ó thaobh polasaí chultúrtha de go bhfuil brú ollmhór ón mBéarla ar gach teanga Eorpach.

I gcomhtheacs idirnáisiúnta tuigtear go gcaithfear teangacha agus cultúir a chosaint trí straitéis dlí a chur i bhfeidhm. Tá tíortha eile ag gníomhú ar bhun féin-chosanta, féin-mheasa agus féin-mhuinín, tá dearcadh oidhreachta le sonrú ina gcuid smaointe agus reachtas. Ar bhealach an-bhunúsach tugann gach Stát tachaíocht dá theanga fein.

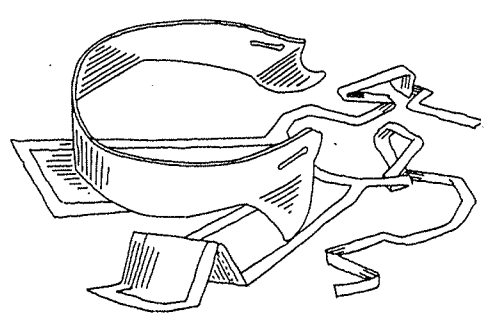
Nuair a thosaigh an díospóireacht faoi Acht Teanga sa tír seo bhí béim á cur ar fhealsúnacht na gceart pearsanta. Tá tuiscint anois ann go bhfuil i bhfad níos mó i gceist. Ní ionann cosaint ceart pearsanta agus straitéis cosanta agus forbartha teanga. Más ceart pearsanta é teanga a úsáid, tá ceart ann gan é a úsáid. Chun straitéis dlí a roghnú caithfear teacht ar thuiscint ar suíomh na Gaeilge sa saol i gcoitinne.

Sa tír seo tá faillí ollmhór á dhéanamh ag an Stáit maidir le aitheantas oifigúil don Ghaeilge. Is beag Acht, Ionstraim Reachtúil nó Foirm Oifigiúil a bhfuil teacht air anois as Gaeilge. Tá tábhacht faoi leith ag baint le haistrúcháin oifigiúil. Is é an dlí a bhronnann orainn na tearmaí teanga a úsáidtear i gcursaí an tsaoil. Gach bliain cuireann an dlí, idir Éireannach agus Eorpach, lenár stór focal is coinceapanna, is cuid di fhás aon teanga an próiséas seo. Is í seo an tearmaíocht bhunúsach a bhaineann le plé, cumarsáid agus díospóireacht na linne. Gan chóras éifeachtach aistrúcháin tá an Ghaeilge á tachtadh agus á marú ag an Stát. Níl anseo ach sampla amháin den éagóir atá á déanamh ar an teanga féin agus ar lucht a húsáide.

Le fada an lá tá béim faoi leith ar thachíocht an Stáit agus Comhlachtaí an Stáit do chur chun cinn na Gaeilge. Ach tá an saol agus an státchóras ag athrú. Tá seirbhísí poiblí á soláthar trí chomhlachtaí príobháideacha ar bhonn ceadúnais; mar shampla Esat i gcursaí teilechumarsáide, nó raidió áitiúil mar shampla eile. Níl aon struchtúr dlí éifeachtach faoi láthair ann chun cearta cumarsáide as Gaeilge a chosaint sa ré nua seo.

Le forbairt na teicneolíochta ríomhaireachta tá deis ann i bhfad níos mó seirbhísí as Ghaeilge a sholáthar, cursaí aistrúcháin a shimpliú agus seirbhísí teanga a sholáthar. Ach níl sé seo ag tarlú, ach a mhalairt. Tá córas agus struchtúr ríomhaireachta á chur in áit agus á fhorbairt ag an Stát nó le cead an Stáit gan aon tuiscint ná béim ar thionchar an chórais sin ar an teanga nó ar an teicneolaíocht nua a úsáid chun leasa na teanga. Déan iarracht síneadh fada a chur le do ainm ar an idirlíon! Tá an Stát ag íoc as infheistíocht ollmhór i ríomhairí sna scoileanna, ach ní bheidh formhór na gcláracha ríomhaireachta sin inúsáidte as Gaeilge. Níl teacht ar fhoclóir, spellcheck ná theasarus don ghaeilge ar ríomhaire. Is easpa é seo maidir le bun-struchtúir aon teanga na laethanta seo.

Is chun díriú ar na ceisteanna seo agus ar cheisteanna eile atá Acht Teanga á éileamh. Acht a leagfadh síos cearta, oibleagáidí agus spriocanna ní hamháin i dtaobh freagrachtaí agus réimsí rialtais ach i dtaobh stádas na teanga i saol iomlán na tíre. Sa chomhthéacs seo tá mórán le foghlaim ó na straitéis dlí atá in úsáid chun forbairt a dhéanamh ar chearta oibrithe, ar chearta na mban agus ón infrastruchtúr i leith chosaint na timpeallachta. I dtaobh Acht Teanga, ceann de na moltaí is tabhachtaí ná Coimisinéir nó Ombudsman don teanga a cheapadh a bheadh freagrach as feidhmiú agus as éifeacht an Achta. Is cinnte go mbeidh díospóireacht bhríomhar amach anseo nuair a fhóilseofar an Bille Teanga. ●



Suing for Foreign Copyright Infringement in Ireland

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Introduction

Copyright infringement cases regularly involve the violation of copyright under several national laws. However, until last year the UK courts maintained the view that it was not possible to sue in respect of both domestic and foreign infringements of intellectual property rights in one set of UK proceedings. This bar was founded on common law principles which are also part of Irish law. In a series of cases the UK courts have now determined that, under the Brussels and Lugano Jurisdiction Conventions, infringements of intellectual property rights (including copyright) taking place anywhere in the Contracting States (comprising the EU and EFTA states) may now be litigated before the UK courts in many instances. This sudden reversal largely stems from a desire to keep up with the Dutch courts, which have for some time heard claims for infringement of foreign patents. It is probable that the Irish courts will adopt a similar view. This article reviews developments in relation to copyright and summarises the current position as the author sees it.

International Copyright Infringement

Consider the following examples of cross-border copyright infringement:-

1. Unlicensed CDs containing the work of an Irish software firm are manufactured in the Netherlands and sold to a UK company. The UK company sells, in the UK, the unlicensed copies to an Irish company, which imports them into Ireland and sells them here.
2. An Irish person is making, without a licence, a newly-released commercial sound recording available on the web. A large number of US and UK visitors to the site, in particular, have acquired the recording.

In the first scenario the activities of the Dutch and UK companies do not violate Irish copyright law. Copyright law is purely national in character: it only refers to the commission of infringement in the state in question. The Irish Copyright Act 1963 adheres to this principle. As a result, the only person potentially liable for infringement under the 1963 Act (and the Regulations implementing the Software Copyright Directive) is the Irish importer and distributor. The Dutch and UK companies do however violate Dutch and UK copyright laws respectively, in particular their national provisions implementing the Software Directive.

The second scenario is a little ahead of its time. Pending the implementation of two international measures it is doubtful to what extent making a copyright work available via the internet constitutes infringement by the site provider. Assuming these measures are implemented in Ireland (anticipated in the new copyright legislation) and elsewhere, in this scenario the Irish person would be violating Irish copyright law by making the copyright work available to the Irish public. However, the making available of the work to the US and UK publics would probably not violate Irish copyright law, only the laws of the US and the UK respectively.

Advantages Of Hearing Foreign Copyright Claims

A very attractive possibility in these scenarios would be for the copyright owner to institute proceedings before the Irish courts in which he might:-

(1) have separate claims for infringement of Irish and foreign copyright laws heard together in the one set of proceedings; and
(2) obtain remedies in respect of the infringement of each national law.

Until recently this appeared to be impossible. Instead a plaintiff was required to institute separate local proceedings in respect of each infringement in the courts of the place of each infringement, seeking a remedy for the infringement carried out in that state alone. Conducting parallel foreign proceedings is costly and awkward for plaintiffs. Even if judgment is secured, there may remain the problem of enforcing against an Irish resident a foreign judgment handed down by a non-EU/EFTA court. If judgment against an Irish-resident defendant is obtained in, say, US infringement proceedings, that judgment is not enforceable in Ireland. Therefore, particularly when the defendant is Irish-resident, the possibility of suing in Ireland in respect of infringements both Irish and foreign is extremely attractive.

Foreign Copyright Claims Not Admissible

The traditional view, that the courts would not entertain claims for infringement of copyright abroad, remained uncontroverted until very recently. In *Deff Lepp v. Stuart-Brown* the plaintiffs (the Deff Leppard group) owned, under UK law, the copyright in a sound recording which was being illicitly copied in Luxembourg. The Luxembourg company sold the recordings to a Dutch company which sold them on to the English first defendant.

That sale took place in the Netherlands. The recordings were then imported by the English first defendant. The plaintiff sought to sue the Luxembourg and Dutch companies in the English courts for, *inter alia*, breach of Luxembourg and Dutch copyright legislation. The English court refused to hear these claims for breach of copyright against the foreign defendants.

In *Tyburn Productions v. Conan Doyle* film producers brought proceedings against the heir to the copyright of Sir Arthur Conan Doyle when she intimated that she might inform US film distributors that a film made by the plaintiffs violated her copyright. If she were to do so, the US distributors would not distribute the film. The producers brought English proceedings seeking a declaration that the film did not infringe the US copyright held by the defendant. The English court held that it could not adjudicate upon the issue of whether a foreign copyright law had been infringed or not.

Rationale For Bar

The reasons behind the bar, which was applied uniformly in respect of copyright, registered trade marks and patents, were two-fold. Originating in long-standing rules of common law, it is probable that the reasoning was equally applicable in Ireland.

No Jurisdiction Over Foreign Intellectual Property

The UK courts viewed themselves as having no jurisdiction to hear a case relating to the violation of a foreign intellectual property right. The long-standing rule of the common law is that, for reasons of public policy, the courts have no power to hear litigation relating to title of, or trespass upon, foreign land. In *Deff Lepp* and *Tyburn* it was held to be well-established that, being the creation of national law, foreign intellectual property rights were comparable to land situated in the foreign state to whose law they owed their creation. Accordingly, actions for infringement of foreign intellectual property rights could not, just like actions for trespass to foreign land, be heard.

Foreign Intellectual Property Rights Not Justiciable

At common law where a foreign tort (e.g. infringement of copyright) is being sued upon in Ireland, the courts must apply in the proceedings both the law of the forum and the law of the place where the foreign tort occurred. In other words, the plaintiff has to show (a) that, if the events in question were to have occurred in Ireland, the plaintiff would have a cause of action against the defendant under Irish law; and (b) that the plaintiff has a cause of action against the defendant under the law of the place where the tortious events did in fact occur. This 'double actionability' approach has recently been abolished in the UK. The common law rule is still applied in Ireland, despite severe criticism.

This doctrine took its Byzantine course in the *Deff Lepp* and *Tyburn* cases. It was held that in litigation alleging violation of foreign copyright law it was, as a matter of law, impossible for a plaintiff to demonstrate that limb (a) was satisfied. When the events constituting the infringement were fictionally moved to England, what was supposedly done in England was still just a violation of a copyright granted by a foreign state. The violation of, say, Dutch copyright in the UK was not a violation of UK copyright legislation. Only copyright granted under UK legislation could be violated in the UK. In other words, the statutory origin of the copyright the plaintiff was suing on could not be fictionally moved, only the location of its infringement.

Judicial Reluctance

Whatever their merits, these two principles represented an explicitly stated judicial unwillingness to adjudicate upon rights granted by foreign intellectual property legislation. Courts were (and on occasion remain) reluctant to apply an unfamiliar foreign law, enacted by a foreign government primarily for the economic well-being of its own citizens, with results that would be felt within the foreign state.

The New UK Approach

In *Pearce v. Ove Arup* the plaintiff, a UK citizen, alleged that the defendants (the first of whom was English and the remainder Dutch) had copied, in constructing a town-hall in the Netherlands, an architectural plan drawn up the plaintiff for a London Docklands building. The infringing reproduction (i.e. the construction of the building according to the plaintiff's plans) took place in Holland and so only Dutch copyright law had been violated.

In the High Court in *Pearce*, Lloyd J noted that this was an attempt to claim, as against all defendants, for infringement of Dutch copyright in the English courts. Following *Deff Lepp* and *Tyburn*, that was not possible.

However, the plaintiff argued that a refusal by the English court to hear a claim for the violation of Dutch copyright would violate the Brussels Convention. This argument was upheld.

Impact Of Brussels And Lugano Conventions

The Brussels Convention of 1968 and its EFTA counterpart, the Lugano Convention of 1988, determine which national court or courts in the EU/EFTA area have jurisdiction over a given case. The basic rule is that a defendant should be sued where he is domiciled (art.2 of both Conventions), but the plaintiff is permitted to instead sue in other specified locations at his own election. In respect of a tort, under art.5(3) a plaintiff may also sue where the harmful event occurred (e.g. where the breach of copyright occurred). Furthermore, a plaintiff may sue all the co-defendants in an action in the place of domicile of any one of them (art.6(1)). The plaintiff has the choice and a court may not decline jurisdiction if it is properly identified by the Conventions as having jurisdiction. The Conventions have effect in Ireland under the Jurisdiction of Courts and Enforcement of Judgments Acts 1988-1993.

Lloyd J noted in *Pearce* that here the English court was identified by art.2 as having jurisdiction over the first, English-domiciled, defendant. Art.6(1) gave jurisdiction to the court over the Dutch co-defendants.

Lloyd J then noted that the European

Court of Justice had frequently stipulated in Convention case-law that the Convention must not be interpreted in a manner which impairs its effectiveness. Furthermore, a plaintiff 'should not have to waste his time and money risking that [a particular national court] may find itself less competent than another.' To accept jurisdiction under arts.2 and 6(1) - as the English court was obliged to do - but then to strike out the claim in reliance on the two common law rules above would be quixotic and deprive the plaintiff of the use of the Convention's fundamental rule of jurisdiction.

Accordingly both common law rules were necessarily overridden by the Convention. The plaintiff could sue all the defendants in the UK and the court would simply apply Dutch copyright law.

This decision was subsequently discussed with apparent approval by the Court of Appeal in *Fort Dodge v. Akzo* (applying comparable thinking to patents). For other examples of the adoption of the new approach see also *Coin Controls v. Suzo* (patents); *Mecklermedia v. Congress* (trade marks); and *Mother Bertha v. Bourne*, (copyright).

The reasoning in *Pearce* appears unanswerable and so there is at present no reason to doubt that a similar approach would be adopted by the Irish courts.

Analysis: Limitations On The New Power

The rule emerging from *Pearce* is that an action in respect of breach of copyright anywhere in the EU/EFTA area may be brought in an English (or Irish) court if that court is allotted jurisdiction over the case by the Brussels or Lugano Conventions. However, that broad rule is undoubtedly subject to a number of important limitations.

Must Sue at Defendant's Domicile or Place of Central Infringement

Art.5(3) permits a plaintiff to bring a tort action in "the place where the harmful event occurred". This is an alternative place of jurisdiction to the defendant's domicile. The decision of the Court of Justice in *Shevill v. Presse Alliance* sets limits to the art.5(3) jurisdiction. A defamatory newspaper article was published in France and distributed inter alia in the UK. The plaintiff, a UK resident, sued for libel in the UK relying on art.5(3) of the Brussels Convention. The Court of Justice held that:-

(1) art.5(3) permits a plaintiff to sue at the place of the defendant's harmful act or in any place where the plaintiff suffered harm.
(2) if the plaintiff sues in the place where the defendant committed the harmful act, the plaintiff may sue and recover for all the resulting harm suffered throughout the EU/EFTA area.
(3) the same applies if the plaintiff sues at the place of the defendant's domicile under art.2.
(4) if the plaintiff instead sues in a place where the plaintiff simply suffered harm, the plaintiff may only recover for the harm suffered in that place.

Therefore, Shevill could sue in France and recover for all the damage she suffered in the Contracting States as France was where the defamatory article was 'issued and put into circulation' by the defendant (ruling 2 above); or as France was where the defendant was domiciled (ruling 3). If Shevill sued in the UK, where the paper was distributed, she could recover only for the damage to her reputation sustained in the UK (ruling 4).

The Court was attempting to limit the number of courts with full, international, jurisdiction. How does this impact on international copyright claims? Take the example of a UK-domiciled company which manufactures unlicensed CDs in Ireland for distribution throughout the EU/EFTA area. It is submitted that, by analogy with Shevill, the plaintiff may:-

(1) sue the UK company in the UK under art.2 in respect of all infringements throughout the EU/EFTA area;
(2) sue the UK company in Ireland under art.5(3) for all infringements throughout the EU/EFTA area, as Ireland is where the act of making and issuing the CDs – resulting in knock-on infringements throughout Europe - was centred; or
(3) sue the UK company in any other EU/EFTA state, but only in respect of the infringement occurring in that state.

The place of the 'central' act of infringement by the defendant will tend to coincide with the place of its domicile.

Issues Must Overlap To Bring In Foreign Co-Defendants

In *Pearce* art.6(1) was used to enable the Dutch co-defendants to be sued in the UK, the UK defendant being sued in the courts of his domicile. All parties were sued for breach of Dutch copyright law alone.

Art.6(1) is advantageous for plaintiffs. It does, however, possess a significant limitation. The Court of Justice requires that, in order to justify bringing all defendants to the home-court of one of them under art.6(1), issues as between the plaintiff and the home-defendant and foreign co-defendants respectively must overlap.

The question is whether 'the actions brought against the various defendants are related..., that is to say [that] it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.' When laying down this test, the Court referred to art.22 which utilises these terms. Art.22 jurisprudence indicates, it is submitted, that actions are related when they involve at least one parallel legal or factual issue.

Accordingly proceedings against two or more defendants should be heard together if separate proceedings against them would involve, for instance:-

(a) the same issue of fact, such as the existence of a common design between the parties to infringe;
(b) the interpretation of a provision of the one national copyright law or of parallel provisions of different national laws harmonised pursuant to an EU copyright directive; or
(c) the interpretation of documents (e.g. licences) in identical terms.

This analysis has, however, been thrown into doubt by *Fort Dodge v. Akzo*. The English Court of Appeal held that actions against UK and Dutch defendants for infringement of identical

UK and Dutch patents respectively could not be heard together as each action involved a distinct national law. The decision may well be good: the factual issues in the actions involved different events taking place in different states. The legal issues could not be said to be the same as patent infringement laws remain technically unharmonised. What is disturbing is that the Court of Appeal clearly believed that, for art.6(1) to apply, there must be the danger of separate proceedings against the defendants reaching decisions involving mutually exclusive legal consequences: i.e. two courts reaching contradictory decisions in applying one national law to one and the same set of facts. It is not enough that separate proceedings would involve parallel, similar, issues, rather the courts would have to be confronted by the one and the same issue. Such an interpretation would massively reduce the utility of art.6(1): in order for it to bite defendants would have to be accused of infringing one national law through one and the same act.

It is submitted that that conclusion clearly contradicts the Court of Justice's jurisprudence, summarised above. The Court of Appeal did feel sufficiently unsure of this view to refer this and other issues to the Court of Justice for a preliminary ruling.

Rules Summarised

It is submitted that, drawing together the above strands, the position is as follows:-

(1) an Irish court cannot hear a claim for violation of a foreign state's copyright law where the defendant is not resident in the EU/EFTA area, the Conventions being inapplicable and the common law bars on litigation applying instead.

(2) an Irish court, if it has jurisdiction over an Irish-domiciled defendant under art.2 of the Conventions, may hear all claims for copyright infringement committed by that defendant anywhere in the EU/EFTA area.

(3) the same applies if an Irish court has jurisdiction over a foreign defendant under art.5(3) on the ground that the central act of infringement, creating knock-on infringements in other states, took place here.

(4) in these cases the Irish court may:-

(a) award damages for infringements committed anywhere in the EU/EFTA area;

(b) grant injunctive (including interlocutory) relief restraining infringement anywhere in the EU/EFTA area.

(1) the Irish court should apply the law of the place of infringement to each infringement.

(2) if an Irish court has jurisdiction under art.5(3), but Ireland is not where the defendant's central act of infringement took place, the court may not hear claims for infringement elsewhere in the EU/EFTA area. ●

Organising Barristers' Files with Windows 95/98

NIALL O'NEILL, BARRISTER

Introduction

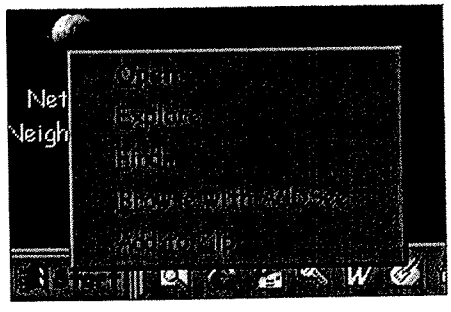
This article is for any Barrister who is a novice computer user and wishes to organize his or her computer files. If a Barrister is using a computer for word processing he or she should be completely at ease with moving files and creating folders on a disk to avoid the inevitable buildup that results from the lack of organization. The term 'file' can mean nearly anything stored on a computer but it most commonly refers to a word-processing document.

There are many ways that a Barrister might want to organize files depending on the type of practice he/she has. In the example for this article files are stored for each Solicitor according to whether they are pleadings, fee notes, or letters.

Using Windows

Windows can arrange files on any disk including the floppy disk by putting them into folders. Folders can be parent folders containing sub-folders. For this example I am going to create a 'Solicitors' folder and in the 'Solicitors' folder I am going to create a sub-folder with the name of every solicitor. In each of those sub-folders I am going to have other sub-folders for pleadings, fee notes, and letters.

To create folders and organize the computer Windows has a program called 'Explorer'. Explorer does just that, it allows you to explore the contents of the computer showing all disk drives, folders, and files. It can be started a number of ways but a simple way is to move the mouse pointer over the 'Start' button on the bottom left of the screen and press the right mouse button (also known as right-click). A menu will appear that may contain various options including 'Explore'. Choose 'Explore' by left-clicking it. If the Explorer window is not taking up the full screen then left-click on the 'Maximize' button which is one place to the left of the 'X' or exit button at the top right of the window.



Using Explorer

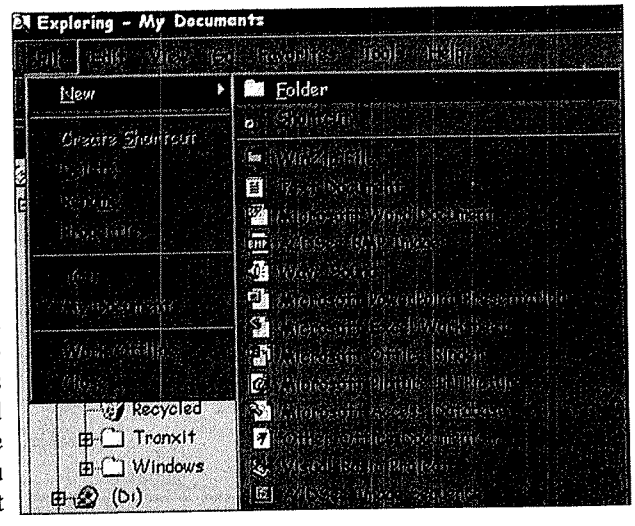
Explorer is divided into two panes. The left pane shows the structure of your computer including drives and folders. Any drive or folder that contains sub-folders has a small plus sign or minus sign just to the left of it. The sign can be left-clicked to expand or collapse the contents of the drive or folder. Therefore, if you see a plus sign beside a folder you know it contains sub-folders. The right pane shows the contents of a selected folder. To select a folder and show the contents you can either left-click once on a folder in the left pane or double-click a folder if it is on the right pane.

If the 'C:' drive is expanded you will see a folder called 'My Documents'. Most applications including Microsoft Word save files in this folder. The problem is that when you have hundreds of files it can become unmanageable. As 'My Documents' is always used I am going to create my sub-folders in it.

Explorer only knows where a folder is to be created depending on the contents of the right pane. So if I want to create a sub-folder of 'My Documents' then I must ensure that the 'My Documents' folder has been clicked on the left pane so that its contents are showing on the right pane.

To create a folder click on 'File' in the menu at the top of the window and then 'New' -> 'Folder'. A new folder with the highlighted text 'New Folder' appears in the right pane. Press the 'Del' key to delete the text and then type in 'Solicitors' and press Enter key.

Next, I want to start creating folders for each of my Solicitors. That means I must show the contents of the new 'Solicitors' folder. This can be done by either making sure 'My Documents' is expanded on the left pane and then clicking once on 'Solicitors' or double-clicking 'Solicitors' on the right-pane. Once that is done the right pane will show nothing as there is nothing contained in the folder yet. Now I want to create a folder for each individual Solicitor. Again click on File ->New -> Folder from the menu and enter a Solicitor name e.g. 'Clinton & Co.'. I can



continue this process for all my Solicitors.

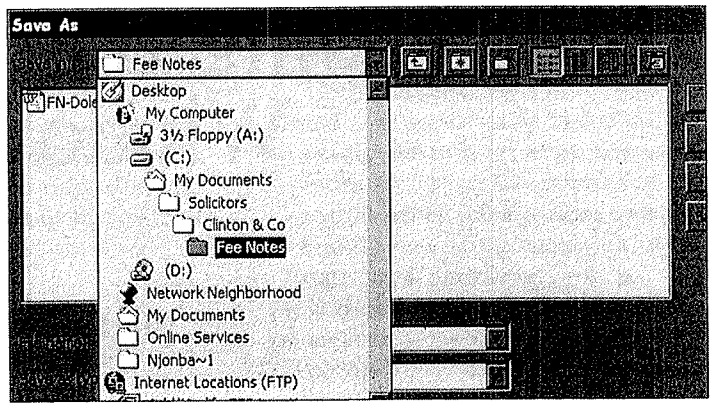
Finally, I want to set up the 'Letters', 'Pleadings', and 'Fee Notes' sub folders.

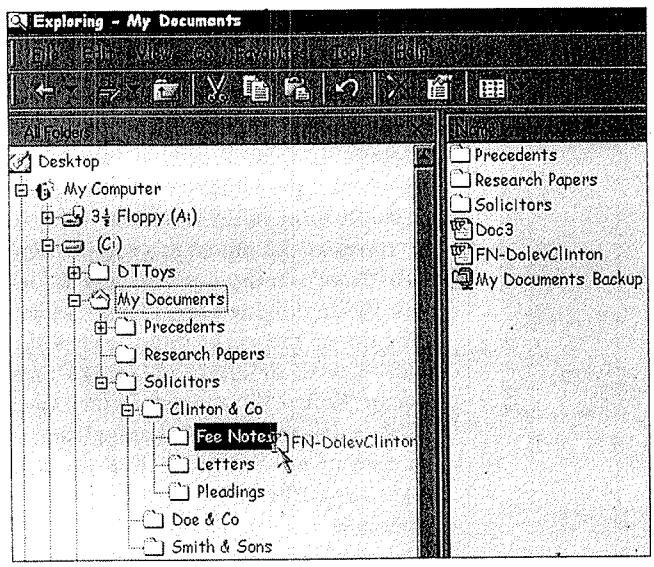
So again I must:

Ensure the contents 'Clinton & Co.' are being shown in the right pane.

Click File->New->Folder from the menu and call the new folder 'Pleadings'.

Now repeat for 'Letters' and 'Fee Notes' and continue for all the other Solicitors.





Moving Files in Explorer

After you have created your new structure you may want to move all your old files from 'My Documents' to the new folders. For example I may want to move the file 'FN-Dole v Clinton' to the 'Fee Notes' folder of 'Clinton & Co' solicitors. A simple way of doing this is known as 'Drag and Drop'. In the picture right the new file structure on the left pane is expanded so even though I have the contents of 'My Documents' displayed on the right pane I can see the 'Fee Note' folder of 'Clinton & Co' solicitors on the left pane. What I want to do is literally drag the file 'FN-Dole v Clinton' over across the screen and drop it on the 'Fee Notes' folder. To do this I left-click on the file but I do not release the mouse button. Then, while still pressing the left button I move the mouse pointer over to the desired folder until it is highlighted and then release the mouse button.

To select more than one file you must left-click at a spot next to the files you wish to move and holding the left mouse button down, drag a box around the files. You will see the files highlighted. Now you can move them just as if it was one file. It might take a little practice to know where to click in order to highlight the correct files.

Sometimes when dragging and dropping you might think that a file has simply disappeared. Usually this happens when a file has been accidentally dropped in a folder next to or on the way to a target folder.

Accessing the folders from Windows Applications

Most programs written for Windows 95/98 such as Word use the standard 'File Dialog Box' for opening and saving files. If you open or save a file now in Word you will see the contents of 'My Documents' include the new 'Solicitors' folder. The 'File Dialog Box' can be thought of as Explorer 'upside down'. There is a list box at the top called 'Look in:' when opening files and 'Save in:' when saving files. There is a small down arrow which when clicked reveals the folder structure of the computer in a way equivalent to the left-pane in 'Explorer'. The main part of the 'File Dialog Box' shows the contents of the folder equivalent to the right pane of 'Explorer'.

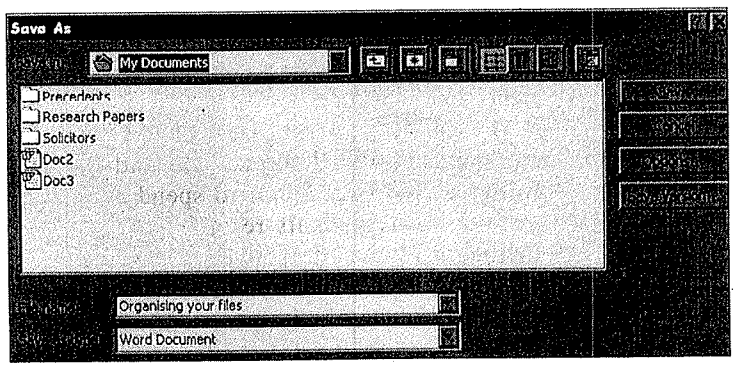
If you now want to access sub folders you must double-click on their parent folders. So to get to the 'Fee Notes' sub-folder of 'Clinton & Co' I must double-click on 'Solicitors', then on 'Clinton & Co', and then on 'Fee Notes'. The name of the folder you wish to save in or open files in must be displayed in the list box to insure the folder is properly chosen. A common mistake is for a user to see the folder in which he/she wishes to save files displayed in the contents section but not opened. The user then thinks he is saving files in the desired folder because he can see it on the screen.

To go back up to 'My Documents' you can quickly browse the folder structure by clicking the down arrow on the list box and choosing the folder you wish to go back to.

You can also go back by pressing the 'Up One Level' button to the right of the list box.

Conclusion

How you wish to organize your files is entirely up to you and the way your practice runs. For example if you had cases where many documents would be generated then it would make sense to have folders with the names of cases. If there are hundreds of cases you might create more folders based on different legal subjects. The advantage of becoming comfortable with the techniques outlined in this article such as creating folders and 'drag and drop' is that when you wish to change the file structure it is a very simple process. ●



Review of the 1997 Annual Report of The Health & Safety Authority

MICHÉAL Ó SCANAILL, BARRISTER.

The 1997 Annual Report of the Health and Safety Authority makes for very interesting reading. The publication of the Report is timely in that public awareness of the importance of safety at work has never been higher. Much of this awareness emanates from a number of high profile court cases taken by the Health and Safety Authority which resulted in very significant media coverage for the Authority and its work. However, notwithstanding this public awareness, it is clear from the statistics provided in the Report that accidents at work continue to occur at alarmingly frequent intervals.

1997 was the second year of a three year work programme devised by the Health and Safety Authority. The emphasis of the 1997 work programme was on enabling good safety management. From an economic point of view, the management of health and safety at work not only improves the health of the workforce but also makes a significant contribution to reducing business costs. These costs include such areas as reducing production down time, employee sick leave levels and employer insurance costs. Such objectives are laudable and to be welcomed by each sector of society and it is heartening to note that the Health and Safety Authority have committed themselves to rigorously enforcing compliance by those employers who ignore or wilfully neglect the requisite safety standards.

The Labour Force Survey which is provided by the Central Statistics Office continues to be the most comprehensive source of information available to the Authority. The statistics from the 1997 Survey show that the number of fatal accidents has decreased for the second successive year. This welcome reduction in fatal accidents from 78 in 1995 to 48 in 1997 is particularly impressive having regard to the continued strong growth in employment and in the economy generally. It is also noteworthy that the number of visits carried out by the Authority in response to complaints made to it has increased dramatically over the past two years. This represents the first fruits of increased public awareness of safety in the work place and augers well for the future.

On the other hand, it is always dangerous to treat safety at work on a "solve it and then forget it" type basis. The real challenge for the Authority is to keep established risks of injury under control while at the same time identifying new ones as they come on stream.

The 1997 Report does however contain negative statistics which clearly show that much remains to be achieved in the area of safety at work. For example, the construction and agricultural businesses continue to provide unacceptably high levels of accidents and fatalities. Indeed, the number of fatalities in the agricultural and forestry industries for 1997 is higher than it was for 1996. This is so, notwithstanding, a decrease in the number of persons identified as working in this industry by the Labour Force Survey. The necessity for media attention and public awareness is highlighted by the fact that almost 40% of the 11,156 workplace visits took place within the construction sector. The increased demand for housing allied to the time pressures to complete contracts have made the construction industry particularly prone to accidents at work. The Health and Safety Authority are particularly alert to this problem and have resolved to continue to spend a large percentage of its resources on this sector.

Among the various industrial sectors dealt with by the Report, an interesting breakdown is provided by the Authority concerning a total of 108 inspections carried out by it on workplaces upon which asbestos is present. In the current climate of "asbestosis" type cases, it is interesting to note that 44% of the asbestos installations in place were considered by the Health and Safety Authority to be in poor condition thereby giving rise to the possibility of asbestos fibres becoming airborne and possibly inhaled by workers.

1997 saw a welcome increase in the number of prosecutions taken by the Health and Safety Authority. While the average fine per case has only increased marginally from the 1996 figure, it is to be noted that 33 prosecutions have been initiated but not yet heard and therefore cannot form part of the 1997 statistics. In the words of its chairperson, the Health and Safety Authority believe that 1997 has provided grounds for cautious optimism in the area of workplace safety. This optimism springs mainly from heightened public awareness and it is to be hoped that this contributes to a significant reduction in the unnecessarily high level of accidents occurring in the workplace. By way of a cautionary observation, it is instructive to note that notwithstanding the dramatic increase in the Labour Force, the Department of Enterprise, Trade and Employment has only seen fit to make minor increases to the number of staff employed by the Health and Safety Authority.

From the prospective of the practising barrister, the Report contains a very interesting breakdown of all of the cases taken by the Health and Safety Authority and also sets out a concise analysis of all new and amending legislation governing this area of the law. In general, the Report is interesting and stimulating and a copy is available in the Law Library for interested members' reference. ●

BANKING LAW IN THE REPUBLIC OF IRELAND
by John Breslin.
Gill & Macmillan, £150.00

Banking Law in the Republic of Ireland is a comprehensive and detailed account of a subject area which has previously been the preserve of English texts - for this reason alone it will be welcomed by all practitioners.

The author, John Breslin, is a colleague at the Bar and lectures in Banking Law and Financial Services Law at University College Dublin. He formerly practised as a solicitor and has extensive experience of regulatory matters, having worked for the Securities and Investment Board in London.

The book, which runs to over nine hundred pages, is divided into nine parts and forty-one chapters and has a clear and well thought out structure. The author refers not only to Irish and English judgments but also makes use of Commonwealth case law where appropriate. For the practitioner interested in researching a particular topic in greater detail there are comprehensive footnotes which, inter alia, identify specialist texts and relevant journal articles. In addition the book deals with the European dimension to modern Irish banking law.

The author starts the book with an area which has been the cause of considerable public interest in recent times, that is, the regulatory framework within which banks operate in this jurisdiction. This part of the book examines, amongst other things, financial regulation, deposit protection and the topic of money laundering. The extent of the coverage of regulatory issues is a feature distinguishing this work from other offerings currently on the market.

An examination of the banker-customer relationship follows, with consideration of the duty of confidentiality which forms part of this relationship. The author also explores the powers of the Revenue Commissioners to obtain information from banks about their customers. One area not dealt with is s.808 of the Taxes Consolidation Act, 1997, which gives the Revenue power to obtain information from banks in connection with the transfer of assets abroad by customers. It would also have been useful if the references to relevant tax legislation had been updated to reflect the Consolidation Act. However these are minor complaints.

The book next deals with Bills of Exchange and cheques before going on to consider the law relating to the giving of credit and finance, and the impact of the Consumer Credit Act 1995.

The latter portion of the work is concerned with security (in rem and in personam), considerations relating to the grantor of security and the nature of the asset in which a security interest may be taken. The author also deals with enforcement of security. He highlights the distinction between security interests and quasi-security arrangements such as negative pledge clauses, set-off and flawed assets. The rights and obligations of sureties are discussed as are performance bonds and letters of credit. The final chapter contains a review of the law relating to Receivers.

This book will be indispensable to those who have an interest in banking law and also contains much of value for those who are concerned with company or land law. Undoubtedly the refrain "Breslin on Banking" will become a familiar one at the Issue Desk in coming months.

– Niall O'Hanlon, Barrister

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WASTING BY DEGREES
By Conor Bowman,
Ashfield Press

This book, on its face, is the story of a Dublin student, Dixton Larkin, who attends Cambridge University to study for a post graduate degree in law (LL.M.,). He behaves intolerably badly. The book is not, however, what it appears on its face. In reality, it is a totally subversive book. It pits anarchy (Larkin, Charmers, Pepper) against authority (Burton, Hagar and particularly, Praelector Winston). By skilful (and at times, humourous) writing, the reader is encouraged to be sympathetic to the cause of anarchy. It attacks the traditional values of hard work, sobriety and chastity upon which this country has grown great.

This work should not be regarded in isolation. There is now a significant body of anarchic artistic material world wide. 'Wasting by Degrees' is in the same genre as the pornographic films of Martinez and Fernandez, which did so much to undermine stable government on the South American continent. It can also be compared with the poetry of Helmut Klipert, who wrote in Munich between 1937 and 1942 (the year of his fatal accident).

The book consists of and contains matters calculated and tending to undermine the public order and the authority of the State. As such is is clearly a 'seditious document' within the meaning of Section 11 of the Offences Against the State Act, 1939. It is, therefore, surprising, that the authorities have not sought to suppress it.

Although the overall thrust of the book is without merit, a fair review must give credit where it is due. The book seems to glorify sloth, alcohol abuse and even premarital sex. Given that no member of the Irish bar could have personal experience of any of these matters, one must conclude that the author, Conor Bowman, is an imaginative genius.

– Anon

●

MEDICAL LAW
Edited By Ian Kennedy and Andrew Grubb
Oxford University Press, 1998 UK price £125

The study of Legal Medicine encompasses many subjects including ethics, medical law, clinical forensic medicine, thantology, forensic pathology, prescribing law and toxicology. Like many facets of law, a practising Lawyer needs ready access to an authoritative reference book on particular medical law

issues. Principles of Medical Law provides such source material. When using a text such as this there are undoubtedly jurisdictional and leglislative differences between the United Kingdom Legal systems and that of the Republic of Ireland. However the analysis and treatment of several medical law issues in this text will be of essential assistance in researching the important English and other Commonwealth decisions all in one text.

The general editors are renowned in this field of law and were responsible for the publication of 'Medical Law Text with Materials' in the early 1990's the second edition of which was published in 1994. This latest text is useful to the Practitioner because it considers in depth difficult issues such as consent to medical treatment, medical negligence as well as matters such as confidentiality in the medical law context and medically assisted reproduction. At first glance the layout is clear with separate parts, chapters and paragraphs for ease of access and reference. There is a wealth of footnotes and a comprehensive table of cases, statutes and an excellent index.

This text has a range of authoritative, leading academic and practitioner contributors and to ensure its continuing relevance it will be kept up to date with annual cumulative supplements compiled by the general editors. In fact the publishers have included a first supplement with the main text which covers medical law developments up to July 1998.

It is instructive to note that a number of leading Irish cases are contained in the table of cases and footnotes including *Daniels v Heskin* [1954] IR 73, *Dunne v National Maternity Hospital* [1989] IR 91 concerning in its chapter dealing with breach of duty and the concept of reasonableness. There is also reference to *Walsh v Family Planning Services Limited* [1992] IR 496 in the area of duty imposed on a doctor in terms communication with a patient prior to surgical procedure, (which in that case involved an elective procedure).

Liability for medical negligence is dealt with in a clear and concise manner and gives the reader a comprehensive overview of the law as it currently stands from an English Law perspective. The recent important decision of *Bolitho v City and Hackey Health Authority* [1997] 4 All ER 771 in this area is considered in a clear manner. It could be said however that the *National Maternity Hospital* decision in our jurisdiction had already significantly refined the *Bolom* test and also that stated in earlier Irish decisions including *Daniels v Heskin and O'Donovan v Cork County Council* for establishing negligence in diagnosis or treatment. This text is very welcome from both an Irish law practice and academic perspective. A busy practitioner who wishes to obtain a quick overview on a diverse range of topics from consent to treatment of the incompetent patient to actions arising from birth or on research and experimentation, will find fertile ground in which to till.

The test of any substantive law text such as this is whether it become a leading work in the subject. This seems assured for Principles of Medical Law.

– Jarlath Spellman, Barrister

IBA Forum for Advocates and Barristers

The International Bar Association is the major international organisation representing lawyers throughout the world. However, for many years, there was a dissatisfaction among professional bodies representing the independent Bars that the IBA did little of interest for those who practised as barristers. With that in mind, the IBA was persuaded to allow a separate unit to be established within its overall Constitution to represent the interest of independent referral barristers throughout the world. It is, in a sense, a World Bar Council.

The procedural ways of the IBA are labyrinthine and it has taken some time for the project to come to fruition. However, at the Biennial Conference of the IBA, held in Vancouver in September of this year, the first formal meeting of the Forum for Barristers and Advocates ('FBA') occurred, and elected Frank Clarke SC along with Chris Pullin, QC (of Australia) and Malcolm Wallis, SC (of South Africa) as Co-Chairman of the Forum.

The immediate working programme is threefold. The first task is to increase contact between individual barrister organisations in different countries, and to collect and increase information about how barristers practice in those countries. There is a perception that there has been a significant amount of reinvention of the wheel by barristers' organisations throughout the world and that considerable assistance can be obtained by looking at how experiments or different practices have worked in the various countries that have independent Bars.

The second task is to promote the position of barristers at an international level. A striking and extraordinary example of the need for that occurred at the Vancouver Conference itself. One of the principal all-day sessions of that Conference related to a comparison between the conduct of litigation in the Common Law and Civil Law countries respectively. Given that litigation in court is conducted in the majority of the Common Law countries by barristers, it was extraordinary that not one of the speakers invited to address the Conference was in fact a member of the Bar of any country.

The third immediate aim is to extend the membership of the FBA into other countries which have forms of practice resembling the way barristers practice in Ireland and other member countries. It is a striking feature of the last fifteen years that a number of countries which have formally merged the professions of solicitor and barrister now have vibrant and growing voluntary barrister sectors where individuals elect to practice in much the same way as barristers practice here, (that is, on referral from solicitors, and doing court and expert advisory work).

The first influence of the FBA is hoped to be felt at the next significant IBA conference which is due to take place in Boston next June. Further details will be available early in the new year. Anyone interested in further information, please contact Frank Clarke ●

DATES FOR YOUR DIARY

The Medico-Legal Society of Ireland

Programme of Events for Session 1998-1999
All lectures take place at 6.30 pm at the United Service Club,
St. Stephen's Green
Information on membership from Mary McMurrough, B.L.

Wednesday, 25th November, 1998
Gerard Hogan, SC
'Judicial Review of Decisions of Medical Bodies'

Wednesday, 27th January, 1999
Mr. Raymond Downey, Solr, former Registrar of Marriages for Dublin City
'Marriage and Divorce'

Wednesday, 24th February, 1999
Drs Roberto and Maurizio Viel, Specialists in Maxillo-Facial Surgery, London
'The Ethics of Cosmetic Surgery'

Wednesday, 2th March, 1999
Eugene P. Trager, M.D., Clinical Associate Professor of Psychiatry, University of Illinois
'Tinkering with the Insanity Defence – the American Experience'

●

Expert Witnesses Conference

Wednesday 25th November 1998,
at The Museum of Modern Art, Kilmainham, Dublin.
Cost: £235.00 per delegate.
Please contact Ms. Frances O'Connor:
Tel: 01-6623 404.

Addressing key issues in this field, Conference will hear addresses from the Honorable Justice Hugh O' Flaherty (Supreme Court), The Honorable Justice Robert Barr (High Court), Mr. Garrett Cooney, S.C., Mr. Paul Behan, Behan and Company, Legal Costs Accountant, Mr. Roderick Bourke, Partner, McCann Fitzgerald, Solicitors

A forward looking conference, critical issues of the changing nature of Report Writing in insurance cases and medical cases will also be examined with debate from speakers such as Dr. John Varian, Orthopaedic Surgeon, Blackrock Clinic and Mr. Mark Solon, Director, Bond Solon, examining what are the implications of The Statuory Instrument on the compulsory exchange of reports in personal injury cases?

Professionals from various fields, such as Consultant Doctors, Nurses, Scientists and Psychologists, Engineers, Architects and Accountants will be advised on the specialised service they can provide as "Experts", as the whole area of "Experts and Fees", the "Expert and Taxation", "Cross-examination of Experts" will be addressed during the conference.

At an evening reception at the conference the State Pathologist, Mr. John Harbison, will launch the new book, "The Role of the Expert Witness" from Inns Quay Publications

●

Conference on Product Liability and Safety

Organised by the Irish Centre for European Law
Tuesday, November 24, 1998
18.15 to 21.15 pm
in the Westbury Hotel, Dublin
contact: 01 608 1081

FINIS

THE ROLE OF THE EXPERT WITNESS

Edited by Bart D. Daly, BCL, BL

With a foreword by

The Hon. Mrs. Justice Susan Denham

The Supreme Court of Ireland

The Role of the Expert Witness is divided into two sections.

Part 1 contains contributions from Adrian Hardiman, SC; and Robert Pierse, Solicitor, on how they view the role of the expert witness in our legal system.

Caroline Conroy, Solicitor, of La Touche Bond Solon writes from her area of expertise on the training of expert witnesses, also a review on the rules of court for expert witnesses by Benedict O Floinn, BL.

Part II are contributions from experts covering the following areas of expertise:

Anaesthetist/Chronic Pain Specialist
Arbitrator
Banking Specialist
Chartered Accountant
Chartered Physiotherapist
Chartered Quantity Surveyor
Consulting Engineer
Divorce and Pensions
Forensic Accountant
Forensic Scientist
Genealogist
General Surgeon
Health and Safety Consultant
Language Specialist
Neurologist
Occupational Physician
Occupational Therapist and Ergonomics Consultant
Occupational Therapist and Independent Assessor
Radiologist
Recruitment Consultant
Respiratory Physician
Social Worker
Vascular Consultant and General Surgeon

Part II features a special article from State Pathologist, Professor John Harbison.

The Role of the Expert Witness is the first publication of its kind and a valuable aid to aspiring experts. It is user-friendly, and will become an important reference point in legal offices as the role of the expert witness becomes a more significant and respected one in the legal field.

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web site: www.firstlaw.ie

Publication Date: 25 November 1998 **Price: £24.00**

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01 6763663, OR 6762135
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FOR AN IMMEDIATE QUOTE

PADRAIC HANNON
MANAGER

EBS
BUILDING SOCIETY