The Bar Review

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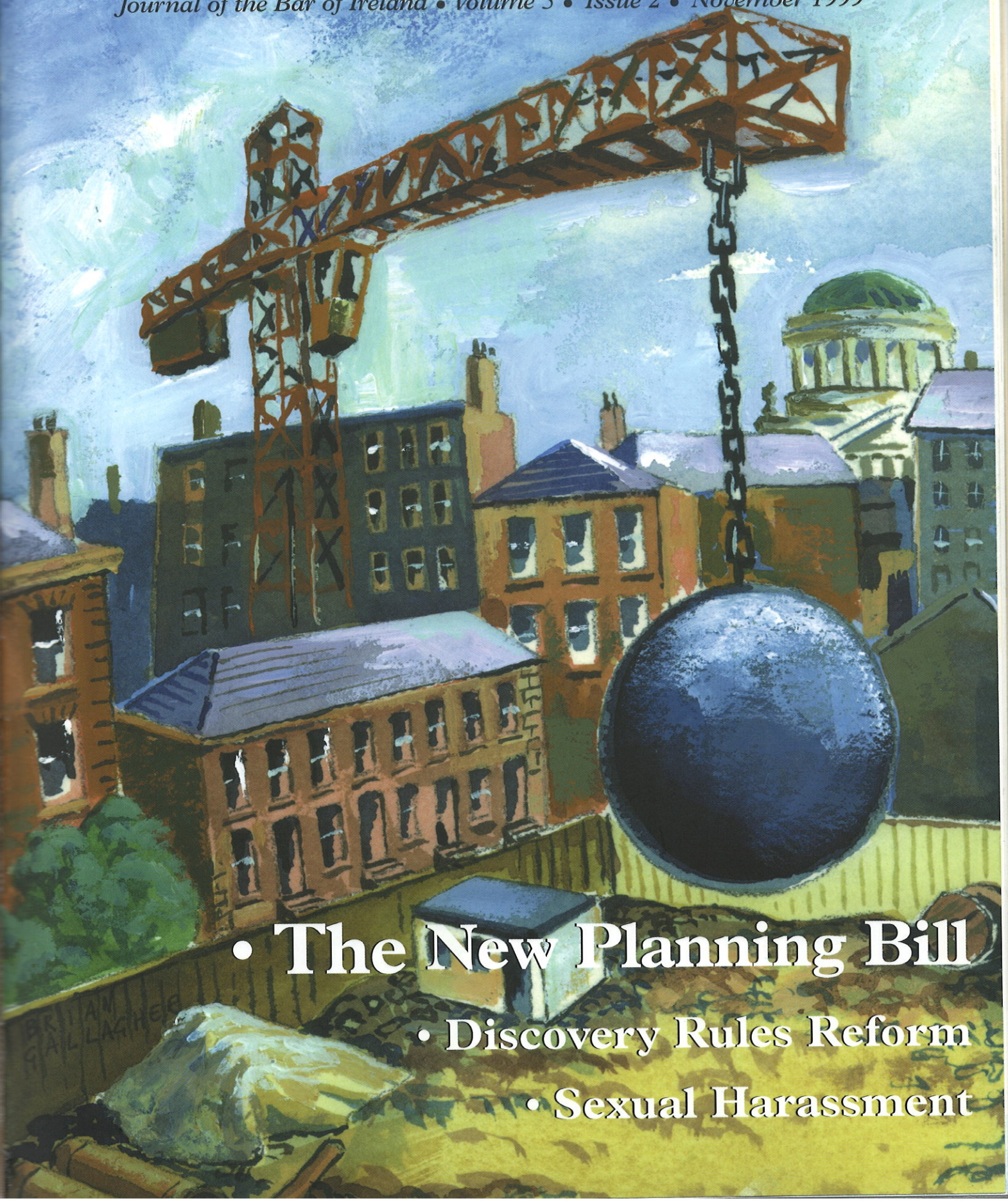

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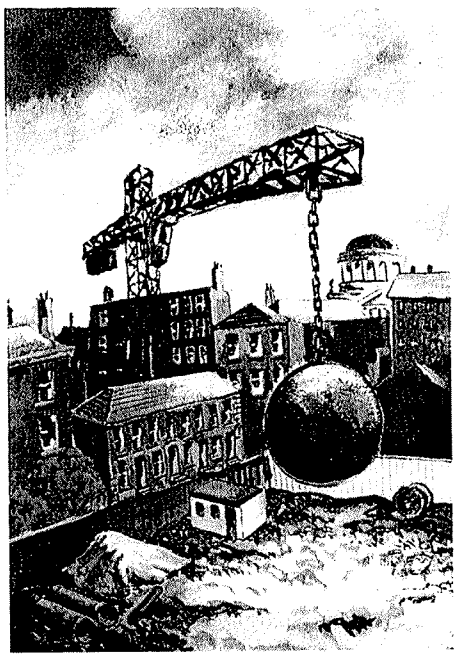

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KING'S INNS NEWS

DICK TUITE B.L., 1943-1999 AN APPRECIATION

Charles Dickens once said: "Whatever I have tried to do in life, I have tried with all my heart to do it well; whatever I have devoted myself to, I have devoted myself to completely." I think these words could well sum up how our friend and colleague, Dick Tuite, so suddenly and prematurely taken from us, approached everything he did in his life. Every task or project he took on, he carried out with commitment and enthusiasm. His philosophy of life could well be said to have been, If something is worth doing, it's worth doing it well.

I first made Dick's acquaintance through our mutual involvement in Rotary International. He was a member of the Dublin No.1 Club, and although he only joined Rotary in 1987, his resourcefulness and qualities of leadership were quickly recognised when he was elected to serve as President of his Club in 1994. He carried out this office with great distinction, and he was subsequently asked to participate in the work of Rotary at national level when he became District Officer for Probus, the branch of Rotary providing clubs for retired professionals and businessmen. In this capacity, despite his own very busy professional life, Dick made time to travel widely visiting the various clubs which were his responsibility. He also contributed actively in the formation of a number of new clubs. The goal of Rotary is to promote peace, understanding and goodwill through the medium of service, both in the local community and in the wider international context. Through his unselfish work in the community Dick was always an example in promoting this ideal, and he truly lived up to the Rotary motto of Service above Self.

Although Dick spent almost all of his working life in the commercial and industrial sector, he always had a great love of the law. In this he was not content simply with just a passing interest however, and after successfully undertaking the necessary studies in such little spare time as he had, he was called to the Bar in 1992. Dick was very proud of this achievement, and he always regarded it as a great honour to be numbered among the members of the Bar.

Although it was not initially his intention to leave commercial life for actual practice at the Bar, he continued to keep up his contact with the profession. During the course of his legal studies he developed a great affection for the King's Inns, and shortly after his call he was elected as a member of the non-practising panel of the Council of the King's Inns, a position he continued to hold during the succeeding years. He also loved to take dinner at the Inns, and I well recall the memorable evening in early 1995 during his year as President of the Dublin Rotary Club when he held his presidential dinner there.

Early in 1997 Dick decided to take a new direction when he abandoned his commercial career for a new beginning in the law. At that time he decided to commence practice at the Bar. I was both delighted and privileged to be asked by him if he could devil with me. When he entered the Library in October of that year, he set to work with a remarkable energy and enthusiasm. However his period in the Library was to be short-lived, as soon afterwards he was offered the position of Director of Education in King's Inns. While he really regretted having to pass up the opportunity of practising as a barrister, he was truly delighted to have been offered this post.

As with everything he undertook, Dick again brought a boundless energy and commitment to his new position. He quickly analysed and came to grips with the problems inevitably encountered in developing a course of education to equip the barristers of the future with the necessary knowledge and skills required to practise law in the rapidly developing and evolving social and commercial life of modern Ireland. In this he also drew on his wide experience of the commercial world. But in all this he never lost sight of the human touch. Dick was kind and considerate, and he always had time to listen, qualities which quickly won him the respect and affection of both staff and students.

Dick had a huge regard for the barristers' profession and was so pleased with having been given the opportunity to contribute in an active way towards the further building up and promoting of the Bar. He had so much to offer, but regrettably it was not to be. Yet he achieved much even in the short time given to him.

As was said in the tribute at the funeral Mass, "Dick was big in friendship and big in mind". He was a true friend, generous and open to everybody. He will be missed.

To his wife, Patricia, and his children, David, Niall and Helen, we offer our sincere sympathy. May he rest in peace.

John Whelan, S.C.

REFORM OF OUR RULES OF CIVIL PRACTICE & PROCEDURE

The new Superior Court Rules on Discovery are to be welcomed. As noted in an article analysing the new rules in this issue, the excessive use of the discovery process had generated a small industry with attendant costs that often bore little relation to the value of the issues at stake between litigating parties. It operated often to delay and complicate cases that were ultimately resolved with little or no help from the material discovered. The requirements, introduced by the new rules, that parties specify particular classes of documents to be discovered and justify, on affidavit, why they are seeking those documents, should ensure that the discovery procedure remains a slave to the main litigation and does not become its master. The new Discovery rules should lead to a reduction in the time and costs involved in litigation and as such they are to be welcomed by all members of the legal profession.

This reform of a key element of our civil litigation procedures inevitably raises the question of what further reforms are necessary. The vast majority of our existing court rules have been in operation for well over a century, and were established in a social and economic environment markedly different from that prevailing today. The priorities of many contemporary litigants in civil cases - a cost-effective, speedy solution to their problem, a full explanation of the issues and risks involved in the case, regular and clear information on the progress of their case - arguably do not sit well with the more cumbersome court procedures and the "winner-takes-all" structure of our litigation model. The new discovery rules should thus provide a prompt for a more fundamental re-appraisal of all aspects of our civil court procedures and the system of case management they embody.

The radical changes introduced in England and Wales last year in the Civil Procedure Rules 1998, following the recommendations of Lord Justice Woolf's major report on "Access to Justice", give an indication of the scope for change. The new English rules provide for the "fast-tracking" of urgent or important cases, allow for more extensive judicial intervention in the management of cases (through the case conference procedure, increased discretion on pre-trial procedures and increased powers to penalise recalcitrant litigants on costs) and provide for increased use of information technology in the management and conduct of litigation.

It is encouraging to note that there are moves afoot to reform ciivil litigation procedures in this jurisdiction. The Working Group on a Courts Commission, chaired by Mrs. Justice Susan Denham, which published its concluding report in November 1998, did sterling work in identifying issues that need to be addressed in our Courts system including the issues of reform of court procedures and case management. The establishment of the Court Services Board with a mandate to follow through on the Working Group's recommendations is indicative of the willingness of the government and the judiciary to embrace change. The project currently being undertaken by the Circuit Court Rules Committee to update and consolidate the Circuit Court Rules is a further indication of the progress being made. It is essential, however, that the momentum generated by these developments is maintained. The reform of the discovery rules is a welcome start. We urge active participation by all in the legal and political communities in precipitating the further reforms that must follow in its wake. •

THE NEW DISCOVERY RULES

Rory Brady, SC analyses the significant reform of the discovery procedure in High Court litigation introduced by SI 223 of 1999.

Introduction

It was one of the great mysteries of the Rules of the Superior Courts 1986 that a party could apply for discovery, inter partes, without the necessity of filing an Affidavit in support of the motion. Thus Order 31, Rule 12 of the Rules of the Superior Courts 1986 (which mirrored the provisions of the earlier rules) specifically stated that a party may apply for discovery, ".....without filing any affidavit.....". That same Order of the Rules made provision for the administration of interrogatories. However, in respect of any application to administer interrogatories it was necessary for a party moving a motion to have it grounded on an extensive affidavit. In the circumstances whereby most forms of complex litigation involve orders and cross orders for discovery, the absence of any requirement for an affidavit to justify discovery was remarkable given the amount of legal costs attributable to this process. It is even more remarkable when one takes account of the fact that by 1986 - when the latest code of rules was promulgated - the overwhelming contribution of the discovery process to the costs of litigation was well known. Nonetheless the rules remained unaltered.

The role that discovery of documents has come to play in litigation in the 1980's/1990's is all too familiar. The physical manifestation of this is to be seen, day in and day out, in the Law Library where the common areas can be cluttered with bankers boxes full of discovered documentation and indeed some counsel now equip themselves with trolleys for the purposes of transporting these boxes. In some cases the Courts are literally swamped with paper. However the dominant role assumed by 'paper' in modern litigation - particularly on the commercial side - has not gone without comment by the judiciary. The ease with which discovery was obtained combined with the costs consequences of the same must have inspired the following dicta from Lynch J. in *Brooks Thomas Limited v Impac Limited* [1999] 1 ILRM 171 (at page 178).

> "I wish to mention one final point. Order 31, Rule 12(1) of the Rules of the Superior Courts provides that 'Any party may without filing any affidavit, apply to the Court for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein'. In view of the trend in modern times to seek discovery in almost every case the Superior Court Rules Committee might consider changing Rule 12(1) so as to require an affidavit before discovery is ordered".

It seems plain that the above dicta was the genesis of the new discovery rules that have been introduced as and from the 3rd day of August 1999 (S.I. No. 233 of 1999, Rules of the Superior Courts (No. 2) (Discovery) 1999).

A Change in Culture

In the absence of any reported decision on the meaning to be ascribed to the new rules, it is necessary to look at current practice and the changes likely to be effected thereto. The classic approach to discovery is set out in *Bray on Discovery* (which principle is quoted with approval in the modern text *Matthews and Malek "Discovery"*). The relevant passage from *Bray* - which has for generations informed the approach of the Courts to discovery applications - reads as follows:

> "For the purpose of testing the materiality of the discovery to a particular issue .... it is the case of the parties seeking the discovery that must be assumed to be true, and not that of the party to whom the discovery is sought".

Armed with such a formidable proposition the case for seeking extensive discovery was a particularly potent one. Indeed, such was the influence of this approach that the test of relevance (which was the litmus test of the obligation to discovery) was very broad. The accepted judicial formulation of that test is set forth in the judgement of Brett L.J. in *Compagnie Financiere de Pacifique v Peruvian Guamo Company* (1882) 11 Q.B.B.55 (at page 63) where he observed:

> "It seems to me that every document relates to matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words either directly or indirectly because, as it seems to me, a document can properly be said

"In the circumstances whereby most forms of complex litigation involve orders and cross orders for discovery, the absence of any requirement for an affidavit to justify discovery was remarkable given the amount of legal costs attributable to this process".

to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary if it is a document which may fairly lead him to a train of enquiry, which may have either of these two consequences".

The above test was followed by Lynch J. in the *Brooks Thomas* case. Nonetheless in that case documents that were relevant - albeit only tenuously - were not ordered to be discovered by way of an order for further and better discovery and the appeal against a High Court Order to that effect was allowed. The seed

"The test of relevance will now be subordinated to the test of necessity"

of change - in the attitude of the Irish judiciary to discovery - was sown, in that case, on the fertile ground of Order 21, Rule 12(3) of the 1986 Rules which provided as follows:

"An order shall not be made under this Rule if and in so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs".

Notwithstanding that Lynch J commented that ".....one could see a tenuous relevance" to the documents then being sought by way of a motion for further and better discovery, an order for their discovery was refused because the Court was of the view that the documents were not necessary by reason of the nature of the issues that arose in that case. The Supreme Court engaged in an analysis of the nature of the *Brooks Thomas* case, as pleaded, and then decided that documents that were of tenuous relevance (and thus discoverable in accordance with the Brett L.J. criterion) should not be discovered. The Court refused to order discovery for the simple reason that it was not satisfied that the documents were necessary to dispose fairly of the action or for saving costs. Thus the Order of the High Court was reversed. It is the writer's contention that the significance of the new Rules is not so much in the content thereof but in the indication it gives of a shift in attitude by the judiciary to the process of discovery. A more rigorous and analytical approach to the grant of discovery will, in future, be a feature of this procedure. This is an eminently sensible development and one which will lead to a reduction in legal costs but not, I believe, to a diminution in the quality of justice. It is not unfair to say that in the vast majority of cases it is only a small number of documents actually adduced in evidence that turn out to be material to the issues that the Court has to decide. To focus discovery on those documents and thus limit the categories of discovery is a worthy objective.

It is interesting to note that the almost limitless process of discovery has given rise to a phenomenon - in other common law jurisdictions - of independent companies and firms that specialise in discovery. It has almost become a small industry in its own right with attendant costs that can be a multiple of the amount in dispute in the litigation. In civil law systems discovery is virtually non existent but the European Court of Human Rights has not sought to condemn this omission in procedures as inimical to the protection of human rights. We are clearly steering a new course between these two legal poles.

New Rules

Those provisions of the new Rules that are of critical importance are as follows:

"(1) Any party may apply to the Court by way of notice of motion for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his or her possession or power, relating to any matter in question therein. Every such notice of motion shall specify the precise categories of documents in respect of which discovery is sought and shall be grounded upon the affidavit of the party seeking such an order of discovery which shall:

(a) verify that the discovery of documents sought is necessary for disposing fairly of the cause or matter or for saving costs;

(b) furnish the reasons why each category of documents is required to be discovered

(2) on the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or by virtue of non-compliance with the provisions of subrule 4(1), or make such order on terms as to security for the costs of discovery or otherwise and either generally or limited to certain classes or documents as may be thought fit.

(3) An order shall not be made under this rule if and so far as the Court shall be of the opinion that it is not necessary either for disposing fairly of the cause of matter or for saving costs".

(0.31, r12)

Thus the principal changes to existing practices and procedures are as follows:

(a) A written application for voluntary discovery must specify the precise categories of documents required.

(b) In addition, the letter requesting voluntary discovery must furnish the reasons why each category of documents is required.

(c) The Notice of Motion for Discovery must specify the precise categories of documents.

(d) The grounding affidavit ".....of the party seeking such an Order" must verify discovery is necessary and furnish the reasons why each category of documents is required.

While it is at present unclear as to what will be required in a verifying affidavit some assistance can be gleaned from Order 84 of the Rules of the Superior Courts which requires - in certain judicial review cases - a verifying affidavit. It is usual to find such affidavits dealing extensively with matters of fact and indeed the issues in the case. It is likely, in my view, that a similar level of content and thus disclosure of ones case will be required by the judiciary implementing the new rules. However only time will tell.

Conclusion

The change in culture that is reflected in the new rules can best be summarised as an obligation to show why a document is required to do justice and not simply to show what documents might be relevant. The test of relevance will now be subordinated to the test of necessity. It is a welcome development that in time will reduce the tyranny of paper in modern litigation. It may also give the photocopiers in solicitors' offices a well earned rest! •

THE PLANNING DEVELOPMENT BILL, 1999

In the first of two articles, James Macken S.C., analyses the significant changes to our planning laws proposed in the Planning and Development Bill, 1999

Introduction

With 245 sections arranged in 18 Parts, and six schedules, all running to 210 pages of text, the new Planning Bill is a document of some substance. Add to that, radical proposals such as the proposed Social Housing land appropriation scheme, and the transfer of adjudication on compulsory purchase and local authority development schemes from the Minister for the Environment and Local Government to An Bord Pleanala, together with a general intent, as displayed throughout the Bill, to revise and update the planning code, and the result is a Bill that should continue to provoke wide debate and will result in significant change in the law.

The social housing proposal has, for obvious reasons, received wide publicity. What I want to do in this article is to point to a whole series of less controversial but highly significant proposals for change which have for the most part passed unnoticed in the press. The second article will deal with the proposals that have grabbed the headlines, including the proposed Social Housing land appropriation scheme.

The New Bill

The long title of the Bill proclaiming as it does an intent to

> "revise and consolidate the law relating to planning and development law ...to provide in the interests of the common good for proper planning and sustainable development including the provision of housing..."

clearly signals its reforming intentions. This is not just a consolidation act. Here the provision of housing is signalled as one of the primary purposes of the Act, as is the provision of *sustainable development,* an interesting and important concept of European origin, which is capable of many meanings, none of them precise.

The first change of note is that the Bill proposes to shed the "Local Government (Planning & Development)" title of the code and to entitle the new legislation "Planning and Development". This clearly signals an intention to place planning and development on a higher level than the local and this intention is reflected in Part II of the Bill, where the emphasis is on co-operation and co-ordination between planning authorities and the elaboration of regional planning guidelines and national directives.

Agriculture

The next major change occurs in the definitions section. The definition of agriculture contained in the 1963 Act has been changed. The "training of horses and the keeping of bloodstock" has been added to the definition; more significant, however, is what has been left out, namely

> "the use of land for turbary, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes."

When one looks at Section 4, which defines exempted development, one sees that this too has been altered to exclude

"The result is a Bill that should continue to provoke wide debate and will result in significant change in the law"

"forestry (including afforestation)". The intention therefore is that the use of land for the cutting of turf or the planting of woodlands or forests will no longer be exempt from planning control as forming part of agriculture in the normal sense.

This change, which will have a profound effect on agriculture, is no doubt inspired by concerns for the environment expressed at European level in relation to the effects of conifer plantations on rivers and turf extraction on bogland habitats. The recent case of *Commission v Ireland (21 September 1999, Case C-392/96),* in which Ireland was held to have failed properly to transpose the Environmental Impact Assement directive of 1985 by failing to require the assessment of the effects on the environment of afforestation projects under 70 hectares or of peat extraction projects in sensitive bogland areas is a case in point. No doubt regulations will follow the passage of the Act and provide for some small projects to be exempt, although in view of the concern expressed by the European Commission about the cumulative effect of a number of small projects, this will not be an easy issue to resolve. It should also be noted that the thinning, felling and replanting of forests or woodlands is exempted by Section 4 (1) (i) as long as it does not involve the replacement of "broadleaf high forest" by conifers.

Some interesting questions will no doubt arise when enforcement proceedings come to be taken in relation to turbary and afforestation where the use began in a certain area prior to the change of legislation. The extent of the area concerned and the intensity of the use, will be among the many factors to be considered in deciding whether the use commenced more than seven years prior to the taking of enforcement proceedings. I say this because it is also proposed in Part VIII, which deals with enforcement, to extend the limitation period for enforcement proceedings from five years at present to seven years. Some interesting questions will arise where the statute has run in respect of a particular use, and the new legislation further extends the limitation period. I will return to that later in the context of Enforcement.

Exempted Development

Other provisions in the Bill which will have a significant effect on exempted development are contained in Part IV, dealing with Architectural Heritage. These are largely a re-enactment of the provisions of the Planning Act, 1999 which is due to come into effect in January 2000 and deal with the protection of structures of special architectural, archaeological, historical, artistic, cultural, scientific, social or technical interest. A Record of Protected Structures is to be set up and incorporated into each development plan. No works can be carried out either to the interior or exterior of a protected structure unless these works

> "would not materially affect the character of (a) the structure, or (b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest."

Clearly it is not going to be easy to decide such a question. The solution proposed has been to provide a procedure whereby the owner or occupier of such a structure can request the planning authority to issue a declaration "as to the type of works which it considers would or would not affect the character of the structure." There is no provision for an appeal against such a declaration. Side by side with that procedure, the Bill provides a greatly expanded section 5. The current section 5 of the Local Government (Planning and Development) Act, 1963 is short and provides in subsection (1):

> "If any question arises as to what, in any particular case, is or is not development or exempted development, the question shall be referred to and decided by [An Bord Pleanala]."

The proposed new section provides for a new procedure involving an application to the relevant planning authority for a declaration on that question, which must be issued within 4 weeks or within 3 weeks of the receipt of additional information, if requested by the planning authority.

What appears to be envisaged is that any person, be they owner, occupier, a neighbour or a local conservation society, may refer a question to the planning authority, although the time limit would not appear to be long enough to allow for advertising or public notice. If no decision is made within the relevant time the person who made the request may refer the question for decision by the Board within 4 weeks of the date the decision was due. If a declaration is issued the person who referred the question and the owner and occupier of the land in question have one month to refer the declaration for review by the Board. Why two different time periods --"one month" and "4 weeks"-- are used in the same section is a mystery to me, particularly since the appeal period for planning applications has been reduced from one month to four weeks, and throughout the Bill weeks are preferred to more variable periods such as months.

What happens if the declaration is not issued within the prescribed time and the person does not appeal to the Board? Given the extra burden of work to be placed in the planning authorities by this and other innovations and the scarcity of planning staff at the moment, it is likely that many declarations will issue late. If late declarations are still to be valid what is the point in the time-limit?

The right of the planning authority to refer a question to the Board is unaffected by this new procedure. In such a case there is no appeal from the decision of the Board, which is a decision of first instance, since the appeal to High Court contained in the present section 5 (2) is proposed to be eliminated. This seems regrettable. Even though not used very often, the right of appeal to the High Court has proved an important legal right and has given rise to a number of important cases, such as *McMahon and others v Dublin Corporation and Trident Homes* [1997] ILRM 227.

Details of declarations made are to be entered on the planning register. The Board is to keep a record of its decisions under the section and forward it to each planning authority; before making a declaration the planning authority must consider the record of the Board's decisions.

Development Plans

Part II of the Bill deals with Plans and Guidelines in four chapters: Development Plans, Local Area Plans, Regional Planning Guidelines, and Guidelines and Directives.

So far as the development plans of each planning authority are concerned the principal changes are the emphasis on co-ordination with other planning authorities, the duty to make a new plan for the whole of the functional area every six years, the provision of specific timescales for the taking of each step in the plan-making process and the investing of management with a central role in the performance of this reserved function.
In addition the list of objectives to be included in the plan has been revised and greatly expanded and, for the first time, the term "zoning" receives statutory recognition.

At present each planning authority is required to review its development plan "at least once every five years" and make in it any variations considered proper, or make a new plan for the whole or part of its functional area. The new proposal is that the planning authority must make a new plan for the whole of its functional area every six years, followed two years later by a local area plan for each town with a population in excess of 1,500 at the last census. The power to make a variation will still remain but it can only be exercised for "stated reasons."

There is to be no longer any distinction between rural and urban areas as to the objectives which must be included (nine are set out in the proposed Section 10 covering land use zoning, the provision of infrastructure, conservation and environmental protection, the development of areas in need of regeneration, traveller accommodation, preservation of amenities and the provision of community services) and those that may be included (40 are set out in the First Schedule). The purpose of the plan is to "*set out an overall strategy for the proper planning and sustainable development of the area of the development plan.*" Boroughs and UDCs may by agreement with the adjoining county councils, or by direction of the Minister, make plans for "the area and environs," co-ordinating the plan's objectives with those of the adjoining planning authority,

unless it considers it inappropriate or not feasible. The Minister may require two or more planning authorities to co-ordinate their development plans, either generally or in respect of specified matters.

The time limits for the process of making a new plan are clearly set out. Not later than four years after the making of a development plan, notice of intention to review the plan must be given and a process of public consultation begun. Not later than six months after notice is given, the manager of the planning authority shall prepare a report on such submissions or observations as have been received in response to the notice and that report must "give the response of the manager to the issues raised," and "state the policies the manager intends to pursue in preparing the draft development plan." The elected members then consider this report and may issue recommendations, which "must take account of the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government." The manager is obliged to comply with the recommendations, provided, of course, that they are validly made.

The draft plan must be completed within one year of the original notice of intention to review the plan. Another process of public notification and consultation is then commenced and, not later than 16 weeks after this second notice, the manager must prepare a report giving his or her response to the issues raised. The council then has eight weeks to consider the draft plan and the second manager's report. Amendments proposed that would involve a material alteration of the draft must be advertised and reported on by the manager. A vote on the plan and/or the amendments is then taken. If the members fail to adopt a plan within two years of the notice of intention to review, "the manager shall make the plan, subject to the proviso that so much of the plan that has been agreed by the members ...shall be included as part of the plan as made by the manager."

Local area plans are dealt with in Chapter II of Part II of the Bill. Such plans may be prepared "in respect of any area which the planning authority considers suitable and in particular for those areas which require economic, physical and social renewal and for areas likely to be subject to large scale development within the lifetime of the plan." When made, or even when in draft form, such plans are relevant planning considerations to be considered by planning authorities and the Board in deciding on applications for permission.

County Councils must prepare local area plans for each town with a population in excess of 1,500 at the most recent census within 2 years of making the county plan. This replaces the obligation to indicate planning objectives for boroughs and scheduled towns contained in Section 19 of the 1963 Act. Specific provision is made for the employment of outside consultants in the preparation of local area plans. Perhaps such a provision should be considered in the context of the County Plan - it will be argued that if not stated specifically the power is not there.

Chapter III gives regional authorities the power to make regional planning guidelines, to "provide a long-term strategic planning framework for the development of " its region. The recent Strategic Planning Guidelines for the Greater Dublin Area published in March of this year are deemed to have effect as if made under the Act. The regional authority must consult with the planning authorities, which, in turn, must assist and co-operate in the preparation of the guidelines. Public consultation is provided for. No specific time limits are provided for either the making or review of such guidelines, but it is interesting to note that there is a "best before" date provided for: after six years planning authorities are not obliged to have regard to the guidelines, although they may. Under Chapter IV the Minister may issue guidelines and directives either generally or in relation to particular development plans.

Finally, on the subject of development plans and guidelines, each such document must contain "information on the likely significant effects on the environment of implementing the plan/guidelines"; and, as regards time limits, a person shall not question the validity of a plan/variation " by reason only that the procedures as set out ... were not completed within the time required."

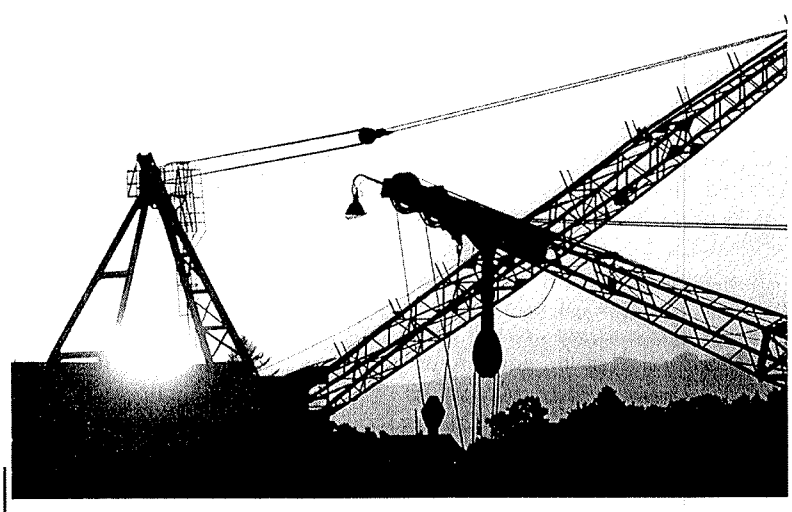
Outline Permission

Part III of the Bill deals with development control and provides for applications for permission, appeals, revocations and judicial review, replacing Part IV of the 1963 Act and some other statutory provisions. The time limit for the making of decisions is proposed to be altered from two months to eight weeks from the date of receipt of the application. If a notice requiring additional information or "evidence in respect of the application " is sought, the period for a decision is extended by a further four weeks only from the date of receipt of a reply. Interestingly enough, the period between 24 December and 1st January, both days inclusive, is to be disregarded when calculating "any appropriate period or other time period" referred to in the Act or regulations.

Prior to submitting an application a person may enter into consultations with the planning authority which may give advice regarding the proposed application, referring to the procedures involved and the relevant development plan objectives.

> "The carrying out of consultations shall not prejudice the performance by the planning authority of any other of its functions under the Act *and cannot be relied on in the formal planning process or in legal proceedings.*" [emphasis added]

It will be a crime for any official to seek to profit from any consultation or advice under this section.



A rather curious provision is set out in subsection (11) of the proposed new section 34. Where there has been a history of non-compliance with a previous permission by the applicant for permission, a partnership of which the applicant was a member, or a company controlled by the applicant, or if the applicant is a company, a related company or a company under the same control, the planning authority may apply to the High Court for permission to refuse planning permission for that reason. The time for consideration of the application is suspended pending the decision of the High Court. If the decision is to authorise the refusal of permission, there is no appeal to An Bord Pleanala.

Section 35 proposes to make provisions in respect of outline permissions which are, it would appear, designed to enhance the importance of outline planning permissions and reverse the findings of the High Court in *Irish Asphalt Ltd v An Bord Pleanala* unreported, High Court, July 1995 (Costello J.) and *The State (Tern Houses Brennanstown) v An Bord Pleanala* [1985] I.R. 725 (Barron J.) to the effect that if planning considerations at the time of making a decision on an application for approval require it, an outline permission may be modified or approval even refused. The new proposal is that the planning authority

> "shall not refuse to grant permission on the basis of any matter which had been decided in the grant of outline permission, provided that the authority is satisfied that the proposed development is within the terms of the outline permission."

The term "approval" is to be changed to "subsequent permission" and the subsequent permission prolongs the life of the outline permission. There is to be no appeal to An Bord Pleanala "in respect of any aspect of the proposed development which was decided in the grant of outline permission."

Appeals

The right to appeal to An Bord Pleanala against a decision on a planning application is to be restricted to the applicant and any person who made submissions or observations in writing to the planning authority in relation to the application "in accordance with the permission regulations and on payment of the appropriate fee." The time for making an appeal is four weeks beginning on the day of the decision of the planning authority, thus removing the present ambiguity about when a decision is "given" by a planning authority.

Other changes proposed in Part III of the Bill involve the restriction on the revocation or modification of planning permissions. This power will be restricted to circumstances where "the development to which the permission relates no longer conforms with the provisions of the development plan." As at present, the power is exercisable only when the development has not been commenced.

Development contributions are to be the subject of a scheme setting out the basis for such contributions. A public consultation process is required prior to the adoption of such a scheme, which must indicate the contribution to be paid in respect of the different classes of public infrastructure and facilities to be provided

Judicial Review

Section 48 is the last section of the proposed Part III of the Bill. It makes provision for the Board to refer to the High Court, any question of law arising on any appeal or referral and prohibits the questioning of the validity of a decision of a planning authority on an application for permission or a development by the planning authority itself not requiring an EIS, or of the validity of a decision of the Board on any appeal or referral, on any local authority development requiring an EIS, or on any decision in relation to a CPO or motorway scheme or road development proposal (the powers in relation to such matters under the Roads Acts 1993 and 1998 are to be transferred to the Board) otherwise than by way of an application for Judicial Review under Order 84 of the Rules of the Superior Courts.

"The right to appeal to An Bord Pleanala agains a decision on a planning application is to be restricted to the applicant and any person who made submissions or observations in writing to the planning authority in relation to the application".

It makes provision for the Board or any party to an appeal or referral to apply to the High Court to stay judicial review proceedings pending the making of the decision by the Board. The Court may "where it considers that the matter is within the jurisdiction of the Board," make an order on such terms as it thinks fit. This is an interesting new provision which is no doubt designed to enable the Board and developers to take positive steps in the High Court to assert that planning matters are the province of the Board and not the Courts.

The time for making an application for judicial review of a planning decision is to be eight weeks from the date of the decision or notice thereof and the High Court "shall not extend the period referred to... unless it considers that there is good and sufficient reason for doing so." At present the High Court has no power to extend time for judicial review of planning decisions. It has such power in relation to schemes and developments under the Roads Acts, 1993 and 1998. Clearly the thinking is that such a power to extend time should be given in relation to the extended range of the functions of the Board. In my view the certainty of the planning process has been greatly strengthened by the fact that after the expiry to the two month period a decision cannot be questioned. To re-introduce uncertainty would be a retrograde step.

Finally, the High Court, it is proposed, can only grant leave to apply for judicial review when it is (a) satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed, and (b) that the applicant has a substantial interest in the matter which is the subject of the application. It remains to be seen whether the courts will interpret this phrase, in the light of *Lancefort Ltd v An Bord Pleanala,*[1998] 2 ILRM 401 as meaning a substantial material interest or a substantial intellectual or environmental interest. •

EXUAL HARASSMENT

Adrian F. Twomey BL, in the first part of a two-part article, analyses the new law on sexual harassment in the workplace contained in the Employment Equality Act, 1998

Introduction[1]

Given the fact that sexual harassment has, in recent years, been the subject of so much media attention it is sometimes easy to forget that it only really appeared as an issue on the Irish legal landscape in 1985. Even in America, where the idea of seeking legal redress for workplace sexual harassment was first born,[2] one can really only trace legal analysis of the subject back to 1975. It was at that point in time when the now well-known feminist lawyer, Catharine MacKinnon, drafted and circulated a paper which suggested that sexual harassment had to be regarded as "sex discrimination" within the meaning of Title VII of the U.S. Civil Rights Act, 1964.[3]

Despite early setbacks, MacKinnon's argument was eventually accepted by the courts in America.[4] In 1984 MacKinnon-like reasoning was used by tribunals in Britain[5] and Northern Ireland[6] in a number of ground-breaking cases. The Irish Labour Court did not lag far behind. In 1985 the Court heard its first sexual harassment case: *A Worker v. A Garage Proprietor*.[7] Interpreting the Employment Equality Act, 1977 in MacKinnon-like fashion,[8] the Court determined that:

> "freedom from sexual harassment is a condition of work which an employee is entitled to expect. The Court will, accordingly, treat any denial of that freedom as discrimination within the meaning of the Employment Equality Act, 1977."

In the years which followed the Labour Court repeatedly applied that same logic as it dealt with a series of sexual harassment cases. Its consistent anti-harassment stance drew approval from a range of disparate sources and was largely responsible for efforts made to tackle the problem of sexual harassment in Irish workplaces. As was noted elsewhere, however:

> " it remains the case that express statutory prohibition of sexual harassment is preferable to [what have been, of necessity,] strained interpretations of legislation such as the Irish Employment Equality Act, 1977, or the British Sex Discrimination Act 1975."[9]

In 1998 the Oireachtas finally answered such calls, enacting the Employment Equality Act, 1998; section 23 of which expressly outlaws sexual harassment in the workplace.

The Employment Equality Act, 1998

The introduction of the 1998 Act is clearly the most significant development in the area of Irish employment equality law in more than twenty years.[10] It repeals and replaces the Anti-Discrimination (Pay) Act, 1974 and the Employment Equality Act, 1977. In the process of so doing, it significantly broadens the ambit of domestic employment equality law by outlawing previously permissible discrimination on a wide range of grounds.[11] Prior to the introduction of the new Act, employment-related discrimination was only prohibited where it was based on the sex or marital status of the victim. Section 6 of the 1998 Act, however, provides that it shall be discriminatory to treat a person "less favourably than another is, has been or would be treated" on the basis of their:

* gender;
* marital status;
* family status;
* sexual orientation;
* religious belief;
* age;
* disability;
* race, colour, nationality, ethnicity or national origins; or
* membership of the travelling community.

As has already been noted, the Act also expressly prohibits sexual harassment for the first time[12] as well as tackling a number of other forms of harassment or bullying.[13] The prohibition of sexual harassment is to be found in section 23 of the Act which would seem to be largely based on the corresponding section of the ill-fated Employment Equality Bill, 1996.[14] The section relating to sexual harassment in the 1998 Act, however, is of a superior vintage as a result of the inclusion of a number of alterations which would seem to constitute a useful response to some of the criticism levelled against the 1996 Bill.[15]

While the new Act was signed by the President during the summer of 1998, it will not come into effect until such time as the Minister for Justice, Equality and Law Reform makes a commencement order later this year. According to the Minister's Department, he was hoping to make such a commencement order on or before the 18th of October, 1999.[16]

Definition of Sexual Harassment

Conduct which may be classed as Harassment

Lord Wedderburn has suggested that a contract of employment is like an elephant in that it is an animal "too difficult to define but easy to recognise when you see it."[17] That same analogy might just as easily be used in relation to sexual harassment. As

former Minister for Equality and Law Reform, Mervyn Taylor, has pointed out; "[t]here is no universally accepted definition of sexual harassment and there are different views about where the boundaries lie."[18] In that context, the task facing Minister O'Donoghue's team and the parliamentary draftsman's office in defining sexual harassment for the purposes of the Act was, no doubt, extremely onerous. The fruits of their labours are to be found in subsection (3), which provides that:

> "For the purposes of this Act-
>
> (a) any act of physical intimacy by B towards A,
>
> (b) any express request by B for sexual favours from A, or
>
> (c) any other act or conduct of B (including, without prejudice to the generality, spoken words, gestures or the production, display or circulation of written words, pictures or other material),
>
> shall constitute sexual harassment of A by B if the act, request or conduct is unwelcome to A and could reasonably be regarded as sexually, or otherwise on the gender ground, offensive, humiliating, or intimidating to A."

The use of the labels "A" and "B" when referring to the 'victim' and the 'harasser' respectively, is a somewhat unusual device which ultimately causes some problems.[19] That having been said, the statutory definition of sexual harassment contained in subsection (3) is relatively comprehensive and certainly represents an improvement upon the definition contained in the 1996 Bill.[20]

Essentially, the definition is comprised of two elements. Firstly, in paragraphs (a), (b) and (c) the Act sets out the kinds of conduct which have the potential to be deemed to constitute sexual harassment. So, for example, the act of putting ones arms around a colleague or sending them explicit e-mails potentially constitutes sexual harassment. In that respect, there are relatively few surprises in subsection (3). It should, however, be noted that the subsection makes no reference to any need for the impugned act to be repeated before it will be deemed to be sexual harassment. It would, therefore, seem that one single comment or action can be a breach of the Act, whereas the old Labour Court position was that, with less serious incidents, liability would only be imposed where such incidents were repetitive in nature.

Subjective and Objective Tests

The second element of the definition contained in section 23(3) relates to the circumstances in which actions such as those specified in paragraphs (a), (b) and (c) will, in fact, be deemed to constitute sexual harassment. In that context, the Minister essentially had a number of options.

The first option available to the Minister was to use something akin to a "thin skull" rule in order to assess whether the potentially harassing conduct in fact constituted sexual harassment in any given case. In other words, the Act could have provided for a subjective test, as a result of which, impugned conduct would be regarded as constituting sexual harassment if, but only if, it was regarded as such by its recipient or victim. Such a test is appealing (in that it is victim-oriented) but is, arguably, overly harsh on employers in that they could find themselves being held liable on foot of a comment which would not be offensive to any employee other than the particularly sensitive worker to whom it was addressed.[21]

The second option open to the Minister was to use an objective test which determined the matter based on the opinion of a "reasonable person" or a "reasonable woman".[22] The main merits of such a test relate to its objectivity. On the other hand, the use of such a test in some U.S. states in the past was criticised on the basis that the test is potentially gender-biased and that it fails to protect particularly sensitive individuals.

In the UK, courts and tribunals would seem to have favoured the subjective test. As Bourne and Whitmore explain:

> "[t]he standard of behaviour which might constitute . . . sexual harassment is . . . to be viewed from the point of view of the victim. . . . Standards will vary as to what constitutes sexual harassment."[23]

So, in *Wileman v Milinec Engineering Ltd.*,[24] for example,

Popplewell J. considered the issue of different women reacting differently to identical treatment and held that if the alleged harasser:

> "made sexual remarks to a number of people, it has to be looked at in the context of each person. All the people to whom they are made may regard them as wholly inoffensive; everyone else may regard them as offensive. Each individual then has the right, if the remarks are regarded as offensive, to treat them as an offence under the Sex Discrimination Act 1975."[25]

Despite the inherently subjective nature of such a test it has also appealed to the Labour Court in this jurisdiction. So, for example, in *A Company v A Worker*,[26] the Court stated that:

> "Irrespective of the attitude of other workers to such matters, each employee has the right to work in an environment free from sexual harassment and therefore has the individual right to determine whether and from whom, if anybody, she will accept such conduct."

Significantly, however, the Labour Court qualified the subjective test, adding that in order to "exercise this right ... the worker must make known to the offender that his conduct is unwanted." This qualification of the subjective test would seem to indicate that the Court was aware of the potential unfairness of the unqualified test from the perspective of employers. The addition of a requirement that the victim challenge the offender, however, was arguably counter-productive in that it would surely have been very difficult (if not impossible) for a relatively shy junior employee to challenge a more senior harasser about his conduct.

It is submitted that the best test is that generated by the U.S. Supreme Court in the case of *Harris v Forklift Systems Inc.*[27] In that case, the Court held that actionable sexual conduct under Title VII included that which a *reasonable* person would find hostile or abusive.[28] Not only must a reasonable person find the conduct hostile or abusive, however, but the individual plaintiff must have done so as well.[29] Such a test arguably strikes the optimum balance between the positions of the radical wings of employer and feminist lobby groups. It certainly has the advantage of ensuring that employers are not punished for acts committed by their employees which are, in the eyes of the vast majority of workers (both male *and* female), merely part and parcel of normal, non-abusive working environments.

Section 23(3) of the 1998 Act would seem to echo the sentiments of the U.S. Supreme Court in that it incorporates both subjective and objective tests. For the purposes of section 23(3) an incident of alleged sexual harassment will only be regarded as being actionable if it is both subjectively "unwelcome" to the victim and can objectively be "reasonably ... regarded as ... offensive, humiliating or intimidating". Such a test will clearly not be easy to apply in practice. Had it not been incorporated into the Act, however, it is arguable that subsection (3) would have been unfairly weighted against employers.

Express Prohibition of Sexual Harassment

When is Harassing Conduct Actionable ?

Section 23(1) of the Act is effectively the long-awaited provision which will expressly outlaw sexual harassment. It states that:

> "If, at a place where A is employed (in this section referred to as "the workplace"), or otherwise in the course of A's employment,[30] B sexually harasses A and either-
>
> (a) A and B are both employed at that place or by the same employer,
>
> (b) B is A's employer, or
>
> (c) B is a client, customer or other business contact of A's employer and the circumstances of the harassment are such that A's employer ought reasonably to have taken steps to prevent it,
>
> then, for the purposes of this Act, the sexual harassment constitutes discrimination by A's employer, on the gender ground, in relation to A's conditions of employment."

The subsection in question would seem to cover most of the basic points. It has a number of obvious strengths in that it seeks to protect individuals against sexual harassment perpetrated not only by their employers and colleagues but also against harassment by their employers' clients, customers and business contacts. The Act goes on further in sub-section (4), providing that:

> "According to the nature of the business of A's employer, the reference in *subsection* (1) (c) to a client, customer or other business contact includes a reference to any other person with whom A's employer might reasonably expect A to come into contact in the workplace or otherwise in the course of A's employment."

Once again, this is a sensible provision which seeks to protect otherwise vulnerable employees. That having been said, subsections (1) and (4) are not without their failings. Perhaps the most significant problem with the subsections in question is their failure to deal with same-sex harassment.

Same-Sex Sexual Harassment

The issue of same-sex sexual harassment has caused courts in a number of jurisdictions some difficulties over the years.[31] It would, however, seem that at this point in time in most countries same-sex sexual harassment is regarded as actionable in largely the same way as cases involving harassers and victims of different genders. In 1984, for example, the Canadian Human Rights Tribunal held, in *Romman v Sea-West Holdings Ltd.*,[32] that a male employee had been unlawfully sexually harassed by his male supervisor. The approach taken by the Tribunal would seem to be in line with the stance adopted by the Canadian Supreme Court in the later case of *Janzen v Platy Enterprises Ltd.*[33] In *Janzen*[34] Chief Justice Dickson stated, obiter dictum, that:

> "Sexual harassment as a phenomenon of the workplace is not new. Nor is it confined to harassment of women by men, though this is by far the most prevalent and significant context. *It may be committed by women against men, by homosexuals against members of the same sex.*"[35]

The U.S. Supreme Court arguably went even further early last year, holding in *Oncale v Sundowner Offshore Services, Inc.*[36] that sexual harassment of a male employee perpetrated by his heterosexual male colleagues can constitute actionable sex discrimination under Title VII of the U.S. Civil Rights Act, 1964.[37] Oncale had been employed by the defendants as a roustabout on an eight-man oil platform crew. He claimed that he had been subjected to verbal harassment of a sexual nature, physically assaulted and threatened with rape by a number of his colleagues. Oncale eventually resigned, fearing that he would be raped by the other men if he continued to work on the platform. Handing down the decision of a unanimous Court, Scalia J. stated that:

> "We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principle concerns of our legislators by which we are governed. Title VII prohibits "discrimination ... because of ... sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements."[38]

In rejecting the claim by the defendants that a judgment in favour of the plaintiff would transform Title VII into a general

civility code for the American workplace, Scalia J. stated that, in applying the decision of the Supreme Court, lower courts could use common sense and an appropriate sensitivity to social context to differentiate between "simple teasing or roughhousing"[39] among employees of the same sex, and "conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."[40]

Same-sex sexual harassment has been the subject of some judicial scrutiny in England as well. In *Smith v Gardner Merchant Ltd.*,[41] for example, the Court of Appeal opined that:

> "It is not difficult to imagine circumstances in which sexual harassment by a man may be directed at a ... man; or a woman may sexually harass another woman .... In each case the detriment to the victim is likely to be the same: revulsion, humiliation or degr[a]dation leading to reluctance to continue in the employment and a desire to leave by reason of the harassment."[42]

While the statement in question was made *obiter dictum*, such circumstances have in fact fallen for consideration before the English Industrial Tribunal. In the case of *Gates v Security Express*,[43] for example, the Tribunal imposed liability on the defendant company after the male supervisor of the plaintiff (a male security guard) had grabbed him from behind and simulated intercourse.

In Ireland "the matter of harassment between members of the same sex" has, according to Meenan, been "unclear."[44] Perhaps the most significant Labour Court determination under the Employment Equality Act, 1977 (in the context of same-sex harassment) was that handed down in *A Worker v A Company*,[45] wherein the Court observed that:

> "inherent in any case of sexual harassment is a perceived dominant position of a person of one sex over a person of the opposite sex, whether that dominance be attributed to the historical roles of males and females or to a position of authority in the workplace. The court also considers that the detrimental effect of sexual harassment on the victim, whatever its measure, derives basically from the fact that the offender is of the opposite sex, and that inherent in the harassment is innuendo or threat to the victim of a sexual nature. In this case, while the offensive remarks made by the general manager were demeaning to the worker as a woman they do not come within the scope of the accepted meaning of sexual harassment - the unwanted real, implied, or perceived request for, or threat of extracting, sexual favours. Where two persons of the same sex are involved, it is the court's view that particular circumstances must be established to justify the claim that the conduct of one constitutes sexual harassment of the other."[46]

The Court did not elaborate on exactly what those "particular circumstances" might be. It did, however, seem to leave open the possibility of a determination, at some point in the future, that an incident of same-sex harassment constituted a breach of the 1977 Act.

In light of the stances adopted by the courts in America, Canada and England (and by the Labour Court in this jurisdiction) on the issue of same-sex sexual harassment one might expect to find that such conduct is prohibited by the 1998 Act. The Act does not, however, contain any such prohibition: largely because of the use in section 23 of the tags "A" and "B" when referring to the victim and the harasser. Section 23 is to be interpreted in line with section 18(1) which provides that:

> "A" and "B" represent 2 persons of opposite sex so that, where "A" is a woman, "B" is a man, and *vice versa*.

As a result, the 1998 Act would seem to prohibit sexual harassment only where the harasser is male and the victim female or vice versa: a legislative stance which leaves Ireland's law on sexual harassment at odds with that of most other common law jurisdictions. The same *lacuna* was evident in the 1996 Bill and was highlighted by both academic commentators[47] and in the course of the Dáil Debates on the 1996 Bill.[48] It was expressly drawn to the attention of the Minister for Justice, Equality and Law Reform (John O'Donoghue T.D.) in the course of the Committee Stage debate on the 1998 Act in the Seanad, when Senator O'Meara proposed the insertion of a new subsection (2) in section 23 which would have read:

> "It is immaterial for the purposes of this section whether A and B are of the same gender."

Minister O'Donoghue refused to accept Senator O'Meara's amendment, stating that:

> "[The a]mendment ... seeks to extend the definition of sexual harassment to same sex sexual harassment. Section [23] gives protection against other forms of harassment and I am not disposed towards including same sex harassment in this section.
>
> Part III of the Bill transposes into Irish law the equal pay and equal ... treatment directives. The foundation of these directives is the notion of a comparator of the opposite sex. I am not disposed to deviate from the policy in this regard in this Part. In any event, same sex sexual harassment is seldom simply a matter of discrimination on the grounds of sex. Same sex sexual harassment, which is based for example on age, sexual orientation or on family or marital status, is covered in section 32.
>
> I realise there are aspects of harassment and bullying that do not come within the scope of the nine grounds in the Bill. I am determined to focus on outlawing discrimination on these nine grounds rather than broadening the scope of the Bill to include new issues, however worthy they may be. Accordingly, I am declining to accept the Senator's amendment."

It is difficult to rationalise the thinking behind Minister O'Donoghue's refusal to accept Senator O'Meara's amendment. The Minister's suggestion that Part III of the Act is simply intended to give effect to the equal pay and equal treatment directives is hard to accept, given that the directives in question do not expressly deal with sexual harassment at all. The simple fact of the inclusion of section 23 in the Act (allied to the radical extension of Irish equal opportunities law in other parts of the Act) indicates that the Minister was quite prepared to legislate on matters not directly addressed by the Directives. His failure to do so in relation to same-sex sexual harassment means that while employees are protected under the Act against sexual harassment by colleagues of the opposite sex, they are not so protected when sexually harassed by colleagues or employers of the same sex. •

(The second part of this article will appear in the December issue).

1 B.C.L. (N.U.I.), M.Litt. (Dubl.), B.L. (King's Inns), Lecturer in Law, N.C.I. This article is based on a paper delivered by the author at a recent conference. See Adrian F. Twomey, "Sexual Harassment & the Employment Equality Act 1998", EIRI Associates/Round Hall Sweet & Maxwell, *Employment Law 2000*, Alexander Hotel, 15 September, 1999.

2 The term sexual harassment would appear to have first been used in the mid-1970s in, inter alia, the writings of the Working Women United Institute, the Alliance Against Sexual Coercion, and Carroll Brodsky. See Noel Harvey & Adrian F. Twomey, *Sexual Harassment in the Workplace: A Practical Guide for Employers and Employees,* (Dublin: Oak Tree Press, 1995), 22 et seq.

3 Some years later, MacKinnon published a more detailed version of her argument. See Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination,* (New Haven and London: Yale University Press, 1979).

4 See Harvey & Twomey, op. cit., at 27-28.

5 See, for example, *Porcelli v Strathclyde Regional Council,* [1984] I.R.L.R. 467.

6 See, for example, *Mortiboys v Crescent Garage Ltd.*, Industrial Tribunal, 34/83 SD (15 February, 1984). For a discussion of the decisions in *Porcelli, op. cit.,* and *Mortiboys, op. cit.,* see Deirdre Curtin, *Sexual Harassment in Employment: Developing a Standard of Employer Liability,* (1984) 6 *Dublin University Law Journal (ns)* 75.

7 EE 02/1985.

8 As Curtin pointed out in 1984, "the sophisticated jurisprudence which has been developed in the American courts ... deserve[d] the attention of any future Irish court or tribunal to consider the matter." Curtin, *loc. cit.*, at 76-77.

9 Harvey & Twomey, *op. cit.*, at 29.

10 For a discussion of the 1998 Act and its implications, see Adrian F. Twomey, *Equal Opportunities in Irish Workplaces*, in Patrick Gunnigle (ed.), *The Irish Employee Recruitment Handbook,* (Dublin: Oak Tree Press, 1999), at 623.

11 See Twomey, *Equal Opportunities in Irish Workplaces, loc. cit.*

12 Section 23. According to Bolger, "the express recognition that sexual harassment is unlawful discrimination on grounds of sex" is "[p]robably the most important development in the area of sex discrimination". Marguerite Bolger, "The Employment Equality Act, 1998, EIRI Associates/Round Hall Sweet & Maxwell, *Employment Law 2000*, Alexander Hotel, 15 September, 1999.

13 See section 32, Employment Equality Act, 1998.

14 The Employment Equality Bill, 1996, was found to be unconstitutional by the Supreme Court: *In the Matter of Article 26 of the Constitution of Ireland and In the Matter of the Employment Equality Bill 1996, (1997)* 8 E.L.R. 132. For a commentary on the 1996 Bill, see Eilis Barry, *The Employment Equality Bill 1996,* (1996) 7 E.L.R. xvii. According to Barry, "[t]he provisions of the Bill [were] very disappointing. It [was] a lengthy Bill and the language used [was] often unclear and vague. There [were] so many exclusions and savers that it [was] difficult to establish just what the Bill [was] seeking to prohibit. Indeed the Bill [reduced] existing protection particularly in the area of sexual harassment. The provisions on indirect discrimination [were] also unsatisfactory." Barry, *op. cit.,* at xxv. See also, Peter Flood, *Implications of Employment Equality Bill, '96,* (1996) 14 (July) IR *Data Bank* 5. For a detailed examination of section 23 of the 1996 Bill (which dealt with sexual harassment in the workplace) see Adrian F. Twomey, "Sexual Harassment and the Employment Equality Bill, 1996", (1996) (November) *Employment and Industrial Relations International* 16.

15 See, for example, Twomey, "Sexual Harassment and the Employment Equality Bill, 1996", *loc. cit.*; Barry, loc. cit., at xxii-xxiii; Paul Joyce, "Employment Equality Bill: Amendments Required", (1996) 7 (October-December) *FLAC* News 3.

16 The Act was commenced on that date by S.I. 320/1999.

17 Lord Wedderburn, *The Worker and the Law,* 3rd Ed., (London: Pelican, 1986), at 116.

18 Mervyn Taylor, TD, Minister for Equality and Law Reform, in his address to the I.N.O. at their seminar "Sexual Harassment is No Laughing Matter", Dublin, 5 May 1993.

19 See *infra.*, 4.2.

20 Subsection (3) draws heavily on the equivalent provision (subsection (2)) in the 1996 Bill. The original version of that Bill, however, was weakened by the inclusion of a subsection (4) which provided that:

> "Any act or conduct falling within any of *paragraphs* (a) to (c) of *subsection* (2) shall not constitute sexual harassment of A by B if it is proved that B had reason to believe that A would not find the act or conduct sexually offensive, humiliating or intimidating".

In essence, that subsection seemed to be an attempt to build into the Bill something along the lines of the defence recognised by the Labour Court in a 1992 case (*A Company v A Worker,* EEO4/1992) in which the Court stated that:

> [f]or it to be established that the conduct complained of ... amounted to sexual harassment, the worker must establish ... that the alleged conduct took place, that it was offensive to and unwanted by her, *and that the alleged perpetrators knew or could reasonably have been expected to know that it was offensive and unwanted* (emphasis added).

The now defunct subsection (4) improved upon that idea in that it transferred the burden of proof in relation to the defence to the employer. On the other hand, the proposed statutory test was not as clearly objective as that framed by the Court. Even then, it is worth noting that in a number of other jurisdictions the Courts need not even consider the intentions of the harasser (see, generally, Harvey & Twomey, op. cit., at 45-46). In *Strathclyde Regional Council v Porcelli* (*op. cit.*), for example, Lord Justice Emslie held that the British Sex Discrimination Act, 1975, is simply concerned with the "treatment" to which the victim is subjected and not with the motive or objective of the person responsible for that treatment. Given the weakness inherent in the subsection quoted above, its absence from the 1998 Act is to be welcomed. For a more detailed analysis of the potential impact of such a provision, see Twomey, "Sexual Harassment and the Employment Equality Bill, 1996", *loc. cit.*, at 19-20.

21 As one English journalist has noted, "one woman's sexual harassment is another woman's unremarkable office banter." Zoe Heller, "Let's banish the boring solemnity of the sex-pest debate", *The Independent on Sunday,* 20 October 1991.

22 For discussions of the "reasonable woman" test see Naomi R. Cahn, "The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice", (1992) 77 *Cornell L. Rev.* 1398; Nancy S. Ehrenreich, "Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law", (1990) 99 *Yale Law Journal* 1177; Jeremy A. Blumenthal, "The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment", (1998) 22 *Law and Human Behavior* 33; Anita Bernstein, "Treating Sexual Harassment with Respect", (1997) 111 *Harvard Law Review* 445; Kathryn Abrams, "The New Jurisprudence of Sexual Harassment", (1998) 83 *Cornell Law Review* 1169; Anita Bernstein, "An Old Jurisprudence: Respect in Retrospect", (1998) 83 Cornell Law Review 1231; and Kathryn Abrams, "Postscript, Spring 1998: A Response to Professors Bernstein and Franke", (1998) 83 *Cornell Law Review* 1257.

23 Colin Bourne & John Whitmore, *Race and Sex Discrimination,* 2nd ed., (London: Sweet and Maxwell, 1993), at 140.

24 [1988] I.R.L.R. 145.

25 *Ibid.*, at 147.

26 *A Company v A Worker,* EE 04/1992, 9 March 1992.

27 114 S. Ct. 367 (1993).

28 Ibid., at 370.

29 *Ibid.*, at 371.

30 For a discussion of the 'course of employment' concept, see Harvey & Twomey, *op. cit.*, at 60-63.

31 See, for example, the divergent opinions expressed by a variety of American Courts in cases such as *Goluszek v HP Smith,* 697 F. Sup. 1452 (ND Ill. 1988), *McWilliams v Fairfax County Board of Supervisors,* 72 F.3d 138 (CA4 1996), *Wrightson v Pizza Hut of America,* 99 F. 3d 138 (CA4 1996) and *Doe v City of Belleville,* 119 F. 3d 563 (7th Cir., 1997).

32 (1984) 5 C.H.R.R. D/2312 (Jones).

33 59 D.L.R. (4th) 352 (1989).

34 *Ibid.*

35 *Ibid.*, at 376. Quoting, with approval, from M.A. Hickling, "Employer's Liability for Sexual Harassment", (1988) 17 Man. L.J. 124. Emphasis added.

36 118 S. Ct. 998 (1998).

37 For a discussion of the Court's decision, see Christina S. Yager, *"Oncale v Sundowner Offshore Services, Inc.:* Judicial Recognition of Same-Sex Sexual Harassment", (1999) 26 *Northern Kentucky Law Review* 357. For useful analyses of the pre-*Oncale* position, see Susan Silberman Blasi, "The Adjudication of Same-Sex Sexual Harassment Claims under Title VII", (1996) 12 *Lab. L.J.* 291; and Katherine H. Flynn, "Same-Sex Sexual Harassment: Sex, Gender and the Definition of Sexual Harassment Under Title VII", (1997) 13 *Georgia State University Law* 1099.

38 118 S. Ct. 998, 1002 (1998).

39 *Ibid.*, at 1003.

40 *Ibid.*

41 [1998] 2 All E.R. 852.

42 *Ibid.*, per Beldam L.J.

43 Industrial Tribunal, 21 June 1993.

44 Frances Meenan, *Working Within the Law,* (Dublin: Oak Tree Press, 1994), 129.

45 (1992) 3 Employment Law Reports 40; EEO 3/1991.

46 *Ibid.*, at 44. Harvey and Twomey state that "[t]he determination in *A Worker v A Company* [is not particularly] ... satisfactory, in that its assertion that 'the detrimental effect of sexual harassment on the victim . . . derives . . . from the fact that the offender is of the opposite sex' ... was certainly not backed up by empirical or other evidence...." Harvey and Twomey, *op. cit.*, at 48.

47 See Twomey, "Sexual Harassment and the Employment Equality Bill, 1996", *loc. cit.* and Irene Lynch, "The Scope of the New Legislation", unpublished conference paper, European Foundation, 24 October, 1996.

48 In the course of his Second Stage speech on the 1996 Bill the current Taoiseach (Bertie Ahern T.D.) asked the then Minister for Equality and Law Reform (Mervyn Taylor T.D.) why the Bill "fail[s] to outlaw homosexual harassment in the same way that it outlaws heterosexual harassment...." Dáil Debates, 22 October, 1996.

DATA PROTECTION & PRIVACY ON THE INTERNET

Karen Murray BL analyses the protections for privacy on the Internet contained in the Data Protection Directive, which is shortly to be enacted here, and the likely impact of those protections on the e-commerce system.

Introduction

E-Commerce is seen as fueling Ireland's continuing economic growth and Ireland's public representatives and business leaders appear united in their determination to ensure that Ireland will become a significant center for e-commerce. A variety of surveys and public pronouncements support this view. Anderson Consulting recently carried out a survey of attitudes to e-commerce amongst business executives. This found that 82% of Irish respondents strongly believed that they would be more reliant on e-commerce in the future and 73% strongly believed that e-commerce would transform the business environment. In particular, e-commerce will have the effect of ending the disadvantages which Ireland faces on account of its geographical location on the periphery of Europe[1]. E-commerce will dramatically alter Irish lifestyles and this will create conflicts with the existing rights and duties of Irish citizens[2]. One right that will have to be reassessed in the e-commerce environment is that of privacy.

The Right to Privacy

Every Irish person has a strong right to privacy and although the Irish Constitution does not explicitly protect this right, the Supreme Court recognised its existence in the case of *Kennedy v Ireland*[3] where two journalists phones were tapped and monitored by the State. When this activity was found to be unconstitutional, the Interceptions of Postal Packets and Telecommunications Messages (Regulation) Act, 1993 was introduced. This allows the Minister for Justice to authorise the interception of telecommunications but only for the purposes of a criminal investigation or in the interests of State security. If communications are intercepted in other circumstances, Section 98(1) of the Telecommunications Services Act, 1983 provides that a person convicted of doing so may be sentenced to a term of imprisonment for a term of 5 years or a fine of £50,000 or both.

The European Convention on Human Rights provides even stronger protections for an individual's right to privacy. Article 8 of the Convention provides:

> "Everyone has the right to respect for his private and family life, his home and correspondence.[4]"

In the European Court of Human Rights case *Halford v UK*[5], the applicant was a former chief constable of Merseyside in England who had initiated a sexual discrimination suit against her employers. She alleged that as part of its strategy for defending this suit, her phones at work and at home had been intercepted by the police. She successfully argued that this was a breach of her right to privacy under the Convention. Privacy is similarly vulnerable on the Internet. In August 1999, hackers broke into the web sites which hosts Microsoft's free Hotmail e-mail service, a service used by an estimated 200,000 Irish people. The breach allowed users accounts to be accessed without the use of a password[6]. A similar attack occurred recently at the *Ireland.com* website which is administered by the Irish Times.

The Data Protection Directive

The one piece of privacy legislation that was specifically designed for computers is the Data Protection Act, 1988 which is shortly to be updated to implement the European Data Protection Directive[7]. The objective of data protection is to protect the privacy of an individual by controlling how data relating to that person is processed. How this law can be applied to Internet websites remains to be seen.

Any European website will have to comply with the basic principles of data protection such as the requirements that data be

* processed fairly and lawfully;
* collected for specified, explicit and legitimate purposes;
* adequate, relevant and not excessive;
* accurate and, where necessary, kept up to date;
* kept in a form which permits identification of data subjects for no longer than is necessary[8].

The Data Protection Act, 1988 and the Directive contain a variety of other provisions detailing how data must be processed. In particular, the limitations placed on those processing sensitive data such as racial origin, trade union membership, political and political opinions should be noted[9]. This article examines those provisions which particularly apply to web sites on the Internet.

Privacy Statements and Disclaimers on Web sites

The Internet is a complex international telecommunications system which is available all around the world. Any business which uses the Internet will need to carefully monitor all its customers. The collection and analysis of data about customer habits is vital to any business on-line but this may conflict with the European right to privacy and in particular with the Data Protection Directive. If Internet advertising is to be effective, data must be gathered on the attributes on those who visit the site. This is also subject to data protection rules. If information

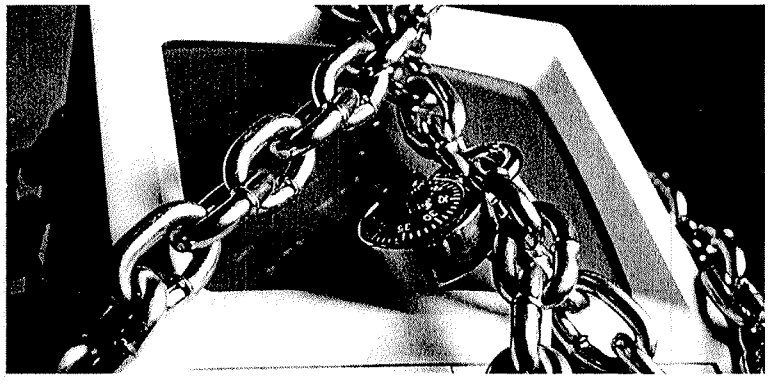
is to be gathered from an individual, there is certain information of which they must be informed. Article 10 of the Data Protection Directive sets out the information, which must be provided to the data subject[10] if data is to be collected from him. Member States must ensure that the controller[11] or his representative provide a data subject from whom data relating to himself are collected with at least the following information, except where he already has it[12]:

(a) the identity of the controller and of his representative, if any[13];

(b) the purposes of the processing for which the data are intended[14];

(c) any further information such as
-the recipients or categories of recipients of the data,
-whether replies to the question are obligatory or voluntary, as well as the possible consequences of failure to reply,
-the existence of the right of access to and the right to rectify the data concerning him

in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data.



A particular problem for Europe's data protection legislation is that the Internet does not respect borders. Data can be transferred from a European Website to a web site in America at the click of a button. This has serious implications for enforcement on the Internet and although European and American concepts of data protection are very different, some compromise will have to be found. In this context, it is interesting to note the US case of the *Federal Trade Commission v GeoCities*. GeoCities was accused by the FTC of unfairly gathering data. Ultimately the matter was settled and a consent order was made requiring GeoCities to place a privacy notice on its home page which would include the following:

"A. what information is being collected (e.g., "name", "home address", "e-mail address", "age", "interests");

B. its intended use(s);

C. the third parties to whom it will be disclosed (e.g., "advertisers of consumer products", "mailing list companies", "the general public").

D. the consumer's ability to obtain access to or directly access such information and the means by which (s)he may do so;

E. the consumer's ability to remove directly or have the information removed from respondent's databases and the means by which (s)he may do so; and

F. the procedures to delete persona identifying information from respondent's databases and any limitations related to such deletion.

Such notice shall appear on the home page of the respondent's Web site(s) and at each location on the site(s) at which such information is collected"[15].

It is interesting to note that these requirements are broadly similar to the information which must be given under Article 10 of the Data Protection Directive, although a European web site would have to give more detail such as the purposes for which data is collected. A recent study of consumer privacy on the Internet shows that almost two-thirds of all commercial web sites provide some form of warning if they collect personal data[16]. This is considerable increase on last year when the FTC showed only 14% of web sites warned consumers how their personal information was being collected[17].

Internet 'Cookies'

A new threat to an individuals privacy is posed by Internet 'cookies'. A 'cookie' is a short piece of data that a web site can store on your computer and which allows by web servers to identify web users. They may be used to track the habits of users of the world wide web. This information can be used to market particular advertisements directly to consumers whose habits indicate that they are interested in particular products. The cookie will determine what advertising banners appear on the users screen. If they look at music sites, advertisements will be for CD's or music web sites. If a cookie is merely being used to allow a user to be identified and to ensure that they have authorised access to a site, there is no problem. The difficulty arises where data gathered as a result of a cookie is analysed for sales or other purposes. If the user is not informed of this, this contravenes the data protection principle that data must be obtained and processed fairly[18]. This position may become more complex with the enactment of the Data Protection Directive. Article 7(a) of the Directive provides that personal data may only be processed where the data subject has unambiguously given his consent. This consent is defined by the Directive as meaning any "freely given, specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed." This might mean that the current situation where a data subject has to tick a box if he objects to his data being processed will have to be replaced with a box which will be marked if the subject consents to his data being processed. If 'cookies' or other technologies are to be used to gather information about individuals, those individuals will have to be informed that data is being gathered and the purposes to which it may be put.

Confidentiality and Security of Processing.

Any person acting under the authority of the controller or of the processor, including the processor himself, who has access to personal data must not process them except on instructions from the controller, unless he is required to do so by law. It is also essential to ensure that data is held securely. The danger of hackers and others gaining unauthorised access to data has been well documented. In September 1999, the websites of the New York stock exchange and the NASDAQ were successfully hacked[19]. Under the Directive, controllers must implement

appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing[20]. Controllers are obliged to choose a processor providing sufficient guarantees in respect of the technical security measures and organisational measures governing the processing to be carried out and must ensure compliance with those measures.

Enforcement under the Data Protection Act, 1988.

Until domestic legislation is introduced in Ireland to implement the Data Protection Directive, it is impossible to suggest how the Directive might be enforced. Under the 1988 Act, a variety of enforcement mechanisms were provided.

* A data controller in breach of the principles may be served with a Notice by the Data Protection Commissioner requiring the controller or processor to take specific steps within a specified time to ensure compliance with the Act[21]

* In addition to this, a data subject can force a data controller to comply with the Act. He may assert his right of access and rectification[22] or he may sue the data controller for negligence in court and seek compensation[23].

* Any data processor, his employees or agents who disclose personal data which he is processing without the prior consent of the data controller will commit a criminal offence[24].

Conclusion

The Internet poses a huge challenge for data protection. A major motivation for the development of data protection law was the fear of a 'big brother' state. So the genesis of data protection predates the development of the PC and the explosion of popular use of the Internet. Many data protection concepts are based around the idea of large mainframes owned and run by major corporations and these concepts may be ill suited to a world where a lap top computer can dispose of more computing power than a 1970's mainframe and where data can be transferred around the globe in moments. A particular problem is that the Internet does not acknowledge international borders. Another problem is that the Directive prohibits transfers of personal data to third countries, which do not have data protection rules similar to Europe's. The USA has indicated its dislike of Europe's rigid data protection rules and negotiations are in train to arrive at some compromise between US and European Law. This has lead to the development of 'safe harbour principles' which are still under negotiation. These principles are

* Notice. The web site must inform individuals about the purposes for which it collects information about them, how to contact the organisation about any complaints or inquiries and the types of third parties to whom the data may be disclosed.
* Choice. The web site must offer individuals the opportunity to choose whether and how personal information they provide is used or disclosed to third parties.
* Onward transfer. The web site can only transfer data to third countries consistent with the principles of notice and choice.
* Security. The web site must take reasonable measures to assure the information is reliable and to protect from loss, misuse etc.
* Data Integrity. The web site may only process information which is relevant for the purposes for which it was gathered and the accuracy of data must be maintained.
* Access. Individuals must be given [reasonable] access to personal information about them.
* Enforcement procedures must be provided[25].

Although these negotiations can be portrayed as a pragmatic attempt to ensure the development of the Internet internationally it is difficult to see how a Directive as complex as the Data Protection Directive can be summarised into seven 'safe harbour' principles without diluting the protections offered by the Directive. This apparent watering down of data protection so soon after the Directives implementation date, may give rise to fears that the Directive will not be fully applied in the future. ●

1. *The Sunday Business Post,* 12th September 1999, p. 20.
2. See Kelleher & Murray, *IT Law in the European Union,* (London: Sweet & Maxwell), 1999.
3. [1987] IR 587.
4. The term private life has been held to protect the "physical and moral integrity" of the person: *X & Y v The Netherlands* [1985] 8 EHRR 235.
5. [1997] 24 EHRR 523.
6. Irish Times, 1st September 1999.
7. Its full title is "Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data."
8. Article 6.
9. See generally, Kelleher & Murray, *Information Technology Law in Ireland,* (Dublin: Butterworths), 1997, chapters 19-23. http://www.ncirl.ie/itlaw
10. The data subject is an identified or identifiable natural person who is the subject of personal data.
11. The controller of personal data is the person who determines the purposes and means of the processing of personal data.
12. Article 38 provides: "....if the processing of data is to be fair, the data subject must be in a position to learn of the existence of a processing operation and, where data are collected from him, must be given accurate and full information, bearing in mind the circumstances of the collection12".
13. Article 10 (a)
14. Article 10(b)
15. http://www.ftc.gov/opa/1998/9808/geocitie.html
16. Art 2 defines personal data as being any information relating to an identified or identifiable natural person.
17. New York Times, May 13th 1999. Study carried out by Culnan, Georgetown University at the request of the FTC.
18. S2(1)(a).
19. Irish Independent, 16th September 1999.
20. Article 17.
21. Section 10 and 12.
22. Section 6.
23. Section 7.
24. Section 21.
25. International Safe Harbor Privacy Principles, April 19th, 1999.

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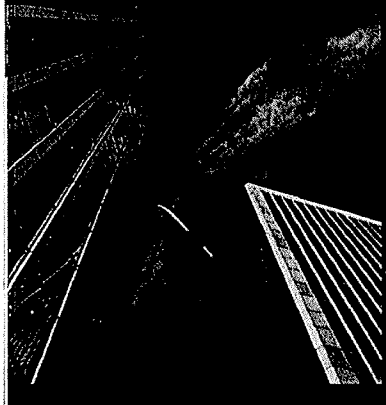

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Administrative

D.P.P. v. Judge Hamill
High Court: **McGuinness J.**
23/07/1999

Judicial review; criminal; *certiorari;* delay; offences contrary to s. 7, Offences Against the State Act, 1939, as amended by s. 2(3), Criminal Law Act, 1976; second respondent returned for trial before Circuit Criminal Court; applicant seeks order of *certiorari* quashing return for trial and an order remitting matter to first respondent; second respondent not served with notice of motion within period originally stipulated by High Court; *ex parte* application for leave to issue judicial review proceedings not made within six months; whether s. 7 offence fell to be tried in the Central Criminal Court; whether High Court judge had power to extend period within which notice of motion for judicial review was to be served, the original return date having expired; whether open to the Court under O. 84, r. 21(1), Rules of the Superior Courts, to extend the six month time limit within which an application should have been made for leave to issue judicial review proceedings seeking an order of *certiorari;* whether grounding affidavits had "verified" the facts relied upon in the applicant's statement, as required by O. 84, r. 20(2)(b), Rules of the Superior Courts; whether District and Circuit Court judges had deliberately and consciously offended against second respondent's fundamental legal and constitutional rights by accepting that Circuit Criminal Court had jurisdiction to try the s. 7 offence; S. 8(1), Criminal Procedure Act, 1967; S. 25, Courts (Supplemental Provisions) Act, 1961.
Held: Reliefs granted.

Arnold v. Judge Windle
Supreme Court: **Murphy J.**, Lynch J., Barron J.
04/03/1999

Judicial review; leave to apply; applicant had been convicted of road traffic offences, appeal from decision of High Court to refuse leave to apply for judicial review seeking certiorari of orders by respondent; High Court judge had exercised discretion to refuse *certiorari* because of availability of another remedy; whether availability of an appeal to the Circuit Court is an adequate remedy; whether due administration of justice requires that leave to apply be granted.
Held: Appeal upheld; the availability of an appeal to the Circuit Court would not provide an adequate remedy if it were established that the respondent had acted unconstitutionally in imposing the penalties.

De Roiste v. The Minister for Defence
High Court: **McCracken J.**
28/06/1999

Judicial review; preliminary issue as to delay in commencing proceedings for judicial review; applicant compulsorily retired from the Defence Forces in 1969; leave to apply for judicial review granted in 1998; whether the delay was inordinate; whether the delay was inexcusable; whether applicant discharged onus of showing Court that there is a good reason for extending the period within which application should be made; whether the balance of justice is in favour of or against allowing the case to continue, taking into account the applicant's blameworthiness; O.84, r.21, Rules of the Superior Courts.
Held: Order granted to dismiss the applicant's claim.

Harty v. Limerick County Council
High Court: **Smyth J.** *(ex tempore)*
23/03/1999

Judicial review; *certiorari; mandamus;* applicants encamped on road; applicants had applied to respondent for housing; applicants had refused respondent's offer of accommodation; whether the respondent acted in breach of its statutory duty to the applicant under the Housing Acts 1966-1998 by invoking its powers as a road authority to extinguish the public right of way over the road; whether the respondent acted perversely in failing to have regard to the special housing needs of the applicants; whether there is an error on the face of the record of the respondent's order for the extinguishment of the public right of way.
Held: Respondent tried reasonably and carefully to balance its obligations towards the applicants under the Housing Acts with its other obligations; application dismissed.

Adoption

Eastern Health Board v. E.
High Court: **Laffoy J.**
16/08/1999

Enquiry under Art.40.4.2^0 of the Constitution; private adoption; consent to transfer of custody of baby; level of consent required; welfare of baby; mother contacted agency through advertisement; agency referred mother to respondents; first named respondent effectively proprietor of the agency; first named respondent suggested he and his wife (the second named respondent) could adopt mother's baby; baby born prematurely and mother in distressed state; baby given to agency's representative four days after birth; applicant sought enquiry under Art.40.4.2^0; High Court had ordered production of baby before the Court; High Court had ordered respondents to relinquish custody of baby to applicant; whether respondents had had lawful custody of the baby prior to the second order; whether giving of baby to respondents and receipt of baby by them was for the purpose of adoption; whether mother's decision was good in law;

whether mother's consent was informed and free and a real consent; whether respondent had shown that the decision of the mother was a free decision unimpaired by her circumstances or by any influence on his part; whether welfare of baby had been compromised by the decision; s.34, Adoption Act, 1952, as amended by s.7 Adoption Act, 1998; s.3 Child Care Act, 1991.
Held: Giving and receiving of baby had been for purpose of adoption and contravened s.34 of Act of 1952; mother's consent was not valid; onus on respondent to show decision consensual; decision to give baby to respondents compromised baby's welfare under s.3; custody prior to second order was unlawful.

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Competition

Article

Competition, co-ordination or harmonisation? What is the EU's tax policy
Branton, Graham
12 (1999) ITR 169

Contract

Keller v. Crowe
High Court: **Kelly J.**
06/08/1999

Contract; agreement for the sale of premises; specific performance; subject to contract; whether a binding agreement for the sale of premises exists; whether a previous stipulation that negotiations were 'subject to contract' was retained in later negotiations; whether a sufficient note or memorandum exists for the purposes of the Statute of Frauds (Ireland), 1695; whether defendant vendor's auctioneer has authority to bind his principal by letter created and signed by him; whether if this letter did not exist a sufficient note or memorandum would exist in the subsequent exchange of correspondence between the plaintiff and the auctioneer; whether contract is specifically performable.
Held: Order of specific performance granted.

Jodifern Limited v. Fitzgerald
High Court: **McCracken J.**
28/07/1999

Contract; subject to contract; motion to strike out plaintiff's proceedings for specific performance of contract for sale of land; whether plaintiff's claim for specific performance can succeed; whether there is a completed agreement between the parties; whether completed agreement is evidenced in writing for purposes of the Statute of Frauds, 1695; whether there is part performance.
Held: Proceedings struck out.

Meridian Communications Ltd v. Eircell Ltd
High Court: **Carroll J.** *(ex tempore)*
20/07/1999

Contract; interlocutory injunction; plaintiff seeks an interlocutory injunction to require the defendant to observe its agreement with the plaintiff and an interlocutory injunction to require the defendant to continue to supply air time at a volume discount after its current agreement runs out; whether there is a serious issue to be tried; whether damages would be an adequate remedy for the plaintiff; whether the balance of convenience favours the granting of the interlocutory injunction.
Held: First interlocutory injunction refused as defendant gave undertaking to observe the current agreement with the plaintiff; balance of convenience favours refusal of second interlocutory injunction as Court cannot oblige defendant to breach the conditions of its statutory licence.

Article

Contracts for the international sale of goods
O'Neill, Maria
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District Court (Child Trafficking and Pornography Act 1998) Rules, 1999.
S.I. 216/1999

Damages

Duff v. Minister for Agriculture and Food
High Court: **Laffoy J.**
11/08/1999

Assessment of damages; milk quotas; first-named defendant had committed an error of law in allocation of quotas under superlevy regime; error of law had meant that less quota was available to eighth-named plaintiff from commencement of superlevy regime; eighth-named plaintiff sold lands inherited by his wife in order to acquire lands with quota attached; whether eighth-named plaintiff entitled to damages in respect of financial loss from additional production which he had forgone by reason of non-availability of additional quota in each year since introduction of superlevy regime; whether eighth-named plaintiff entitled to damages in respect of interest on monies disbursed by him to service his indebtedness; whether eighth-named plaintiff entitled to damages in respect of future loss; whether eighth-named plaintiff entitled to damages in respect of capital loss claimed to have been caused by sale of lands; whether eighth-named plaintiff entitled to general damages.
Held: Damages awarded in respect of loss attributable to lost additional production and interest paid on indebtedness; general damages awarded; damages in respect of capital loss denied on ground of causation.

Duff v. Minister for Agriculture and Food
High Court: **Laffoy J.**
24/08/1999

Assessment of damages; milk quotas; first-named defendant had committed an error of law in allocation of quotas under superlevy regime; error of law had meant that less quota was available to ninth-named plaintiff from commencement of superlevy regime; ninth-named plaintiff faced extreme financial hardship; ninth-named plaintiff ultimately sold farm together with quota and retired from farming; house with three acres of land also sold; whether ninth-named plaintiff entitled to damages in respect of financial loss attributable to lost production by reason of non-availability of additional quota in each year since introduction of superlevy regime; whether ninth-named plaintiff entitled to damages in respect of financial loss resulting from inability to fulfil plan under Farm Modernisation Scheme to purchase "followers" (additional dairy units), attributed by ninth-named plaintiff to lack of finance by reason of non-availability of additional income form additional production which additional quota would have allowed; whether ninth-named plaintiff entitled to damages in respect of interest on monies disbursed to service his indebtedness; whether ninth-named plaintiff entitled to damages in respect of capital loss in connection with sale of farm, stock and machinery; whether ninth-named plaintiff entitled to damages in respect of loss of income by reason of farm not being available to generate income since its sale and continuing into future for a year or two; whether ninth-named plaintiff entitled to damages in respect of loss in connection with shares in a Co-operative which had been forgone; whether ninth-named plaintiff entitled to damages in respect of capital loss arising from his liability to Co-operative in respect of a superlevy penalty and interest which had accrued thereupon; whether ninth-named plaintiff entitled to award of general damages.
Held: Damages granted in respect of loss attributable to lost additional production, interest paid on indebtedness, capital losses in respect of sale of farm, stock and machinery (though not in respect of sale of dwelling house, nor in respect of sale of a one acre parcel of land, since ninth named plaintiff was not the beneficial owner and substitute house had appreciated in the interim), capital loss in connection with shares in Co-operative and capital loss arising from ninth named plaintiff's liability to Co-operative in respect of superlevy penalty; general damages awarded; damages in respect of lack of finance with which to purchase followers denied on the ground of causation, since lack of finance stemmed from level of debt incurred by ninth-named plaintiff before commencement of superlevy regime; damages refused in respect of non-availability of farm as a means of generating future income.
Universal City Studios Inc. v. Mulligan
High Court: **Laffoy J.**
18/05/1999

Assessment of damages; additional damages; intellectual property; copyright; infringement of plaintiffs' copyrights in motion pictures by sale from market stalls by defendant of counterfeit video cassettes; High Court had granted perpetual injuction restraining infringement; defendant not represented at inquiry as to damages; no evidence as to volume of sales of pirated copies; no evidence from which it could be deduced that activities of defendant had affected commercial success of any of plaintiffs' titles; High Court had indicated that case was appropriate for an award of additional penal damages under s.22(4) Copyright Act, 1963; quantum of damages.
Held: Plaintiffs awarded damages of £75,000 including £50,000 damages under s.22(4).

Defence Forces

Hallissey v. Minister for Defence
High Court: **O'Donovan J.**
15/06/1999

Army deafness; assessment of damages; Green Book; tinnitus; loss of hearing; plaintiff exposed to excessive noise of gunfire without hearing protection while serving in army; plaintiff suffered high frequency loss of hearing; hearing loss meant plaintiff no longer able to engage in activities normally associated with those of a soldier and was restricted to administrative duties; restriction to administrative duties detrimentally affected his quality of life; application of low fence threshold of 20 decibels in Green Book would have significantly distorted extent of plaintiff's high frequency loss of hearing; whether hearing loss should be measured according to formula in Green Book; whether there were good reasons for departing from Green Book formula; whether effect of hearing loss on duties plaintiff could perform could be taken into account in assessing damages; whether claim in respect of future loss of earnings had been established; Civil Liability (Assessment of Hearing Injury) Act, 1998.
Held: Damages awarded for loss of hearing; effect of hearing loss on duties plaintiff could perform could be taken into account in assessing damages; good reasons existed for departing from formula in Green Book.

Education

Statutory Instrument

County Dublin Vocational Education Committee (Membership) Regulations, 1999
S.I. 207/1999

Employment

Donohue v. Bus Éireann
High Court: **Macken J.**
30/07/1999

Employment; interlocutory relief; injunctions; plaintiff bus driver was employed by subcontractor; subcontractor provided transport services to defendant; defendant received a complaint that the plaintiff, while operating a bus, had struck two children; defendant conducted a subsequent enquiry and obliged the subcontractor to cease utilising the services of the plaintiff; whether there was undue delay on the part of plaintiff in commencing proceedings for injunctive relief; whether plaintiff has established a fair issue to be tried with regard to the protection of her constitutional rights to a fair hearing; whether plaintiff has established a fair issue to be tried with regard to an induced breach of contract; whether plaintiff has established a fair issue to be tried with regard to defamation; whether damages would be an adequate remedy for plaintiff.
Held: Interlocutory relief granted; declaratory relief refused.

Library Acquisitions

Barry, Eilis
Notes on remedies and enforcement under the employment equality act, 1998
CLE Lecture
Dublin Bar Council 1999
N191.2.C5

Maguire, Cathy
Trade union membership and the law
Dublin Sweet and Maxwell 1999
N185.C5

Statutory Instrument

Maternity Protection (Maximum Compensation) Regulations, 1999
S.I. 134/1999

Environmental Law

Article

A decade of waste management in Ireland
Fitzsimons, Jarlath
1999 IPELJ 63

European Communities

Article

Competition, co-ordination or harmonisation? What is the EU's tax policy
Branton, Graham
12 (1999) ITR 169

Library Acquisitions

Cranston, Ross
European banking law the banker-customer relationship
2nd ed
London Lloyds of London Press 1999
W107

Gormley, Laurence William
Gordian knots in European public procurement law
Koln Bundesanzeiger 1997
W109.6

Heusel, Wolfgang
Irish Centre for European Law
Agricultural law for the European Union current problems and future prospects papers and precedents from two joint conferences on the EU common agricultural policy
Dublin Irish Centre for European Law 1999
W113

Mouton, Jean-Denis
Towards a new constitution for the European Union the Intergovernmental conference 1996
Koln Bundesanzeiger 1997
W109.6

Statutory Instruments

European Communities (Official Control of Foodstuffs) (Amendment) Regulations, 1999.

S.I. 210/1999

European Communities (Value-Added Tax) Regulations, 1999
S.I. 196/1999

Evidence

Desmond v. Riordan
High Court: **Morris P.**
14/07/1999

Privilege; determination of preliminary issue; whether statements made by a coroner while conducting an inquest enjoy absolute privilege irrespective of his state of mind; whether privilege ceases once a coroner is aware that he is exceeding his jurisdiction and continues to act; s.30, Coroners Act, 1962.
Held: Statements made by coroner in carrying out his duties under s.30 enjoy absolute privilege; once a coroner strays outside the functions which he is required to perform under the Act and once he knows he is no longer performing one of these functions he ceases to enjoy privilege.

Murphy v. Justice Flood
High Court: **McCracken J.**
01/07/1999

Tribunal of Inquiry; discovery; privilege; judicial review; respondent had made an order commanding applicant to produce and furnish to Tribunal of Inquiry copies of documents in his possession; applicant claimed privilege in respect of documents; respondent had decided Tribunal had jurisdiction to determine privilege and that documents were not privileged; applicant seeks judicial review; whether fact that both applicant and respondent are carrying out investigations in the public interest constitutes a breach of the maxim *nemo judex in causa sua;* whether the respondent has jurisdiction to determine whether documents are privileged; whether Tribunal can rule on matters of evidence; whether decision of the Tribunal was made without hearing the full argument of the applicant.
Held: Tribunal has jurisdiction to determine privilege; decision of Tribunal that documents are not privileged set aside; matter remitted to Tribunal to determine privilege.

Family

F. v. O'M.
High Court: **O'Higgins J.**
26/03/1999

Nullity; informed consent; petitioner's wife engaged in affair with third party before and after marriage; petitioner would not have consented to marriage had he known; whether consent of petitioner not informed; whether non-disclosure of inappropriate behaviour prior to or during courtship not a ground for nullity.
Held: Petition refused.

Fisheries

Statutory Instruments

Fishery Harbour Centre (Rossaveel) Bye-Laws, 1999
S.I. 250/1999

Hake (Restriction on Fishing) (No.3) Order, 1999
S.I. 195/1999

Gaming & Betting

Statutory Instrument

Horseracing (On-Course Betting Office) (Amendment) Regulations, 1998
S.I. 572/1998

Injunctions

Library Acquisition

Hoyle, Mark
The mareva injunction and related orders
3rd ed
London Lloyds of London Press 1997
N232

Insurance Law

Article

Insurance Ombudsman's report 1998: commentary and review
O'Regan Cazabon, Attracta
1999 3(2) IILR 30

Library Acquisition

Hodgin, Ray
Professional liability: law and insurance
London Lloyds of London Press 1996
N290.Z45

International Law

Article

International trade law: US and EC - banana split at the world trade organisations - implications for the future of dispute settlement at the WTO
Gardiner, Caterina
1999 ILTR 199

Legal Aid

Statutory Instrument

Civil Legal Aid (Refugee Legal Service) (No.2) Order, 1999
S.I. 262/1999

Legal Profession

Article

First impressions last
McCann, Deiric
1999 (July) GILSI 16

Library Acquisition

General Council of the Bar
Code of conduct for the bar of England and Wales
6th ed
London General Council of the Bar 1998

Licencing

Statutory Instrument

Retail Price (Beverages in Licensed Premises) Display Order,1999
S.I. 263/1999

Local Government

Statutory Instruments

Athlone Appointed Stands (Street Service Vehicles) Bye-Laws, 1999
S.I. 241/1999

Waterford Appointed Stands (Street Service Vehicles) Bye-Laws,1999
S.I. 240/1999

Medical Law

Blehein v. Kennedy
High Court: **Geoghegan J.**
02/07/1999

Mental health; certification; applicant seeks leave to institute proceedings under s.260, Mental Treatment Act, 1945; applicant claimed that two doctors, in conspiracy with his wife, fraudulently certified him and arranged for his being taken to and detained in hospital; whether applicant had made out substantial grounds for contending that persons against whom proceedings were to be brought had acted in bad faith or without reasonable care.
Held: Leave refused.

O'Halloran v. Minister for Justice
High Court: **Geoghegan J.**
30/07/1999

Mental health; judicial review; mandamus; powers of executive; detention of person found guilty but insane in Central Mental Hospital; the applicant sought an order compelling the respondent to direct his transfer from the Central Mental Hospital; whether respondent could direct a public hospital under the control of a health board to take in a person found guilty but insane and detain and treat such person subject to overriding directions from the Minister; s.2, Trial of Lunatics Act, 1883; s.38, Health Act, 1970.
Held: No such directions could be made without express statutory authority, which did not exist.

Library Acquisition

Harper, Richard S
Medical treatment and the law the protection of adults and minors in the family division
Bristol Jordans 1999
N185.122

Negligence

Gilna v. Maguire
High Court: **Johnson J.**
19/05/1999

Negligence; personal injury; plaintiff injured during the course of employment; whether first named defendant, the employer, was negligent in failing to provide plaintiff with safe equipment in the course of employment; whether second named defendant was negligent in providing equipment to first named defendant in such a condition that it gave off electrostatic shocks when, if properly equipped, it would not have done so; whether the 'eggshell skull' principle should apply.
Held: Defendants were negligent; damages of £664,203 awarded.

Library Acquisition

Buckley, R A
The modern law of negligence
3rd ed
London Butterworths 1999
N33.3

Planning

Hughes v. An Bord Pleanala
High Court: **Geoghegan J.**
30/07/1999

Judicial review; locus standi; certiorari; third-named respondent granted planning permission to second-named notice party; third-named respondent decided to revoke planning permission; statutory notice of revocation served three times; second-named respondent and second-named notice party appealed against the three notices; applicant had not been served with notice of revocation; applicant seeks an order of prohibition against first-named respondent from determining the appeals; applicant seeks certiorari of each notice of revocation and of the decision of the first-named respondent to accept the appeals; whether County Manager was acting within an implied power in deciding to serve a third notice; whether applicant has locus standi in relation to complaints as to multiplicity of notices and inadequacy of first notice; whether notices are invalid; s.30(1), Local Government (Planning and Development) Act, 1963.
Held: First and second notices invalid; order of certiorari granted quashing first two notices; third notice valid; first-named respondent can only consider appeals from third notice.

Practice & Procedure

Cahalane v. Revenue Commissioners
High Court: **McCracken J.**
14/05/1999

Discovery; privilege; defendant refused to continue to authorise plaintiff's use of duty-free spirits in the course of its business; plaintiff claims that his business has been effectively closed down by withdrawal of authorisation and that defendant wrongfully removed some of plaintiff's stock and has failed to return it; defendant pleads privilege with regard to a number of documents disclosed on discovery; whether public interest in administration of justice, where the plaintiff claims damage to the right to earn a livelihood, is greater than need for confidentiality in Customs investigations; whether plaintiff can obtain discovery of documents in possession of defendant; whether some of the documents are privileged as they contain legal advice.
Held: Certain documents privileged; order of inspection granted in respect of non-privileged documents.

Jobling-Purser v. Jackman
High Court: **Carroll J.** (ex tempore)
27/07/1999

Practice and procedure; validity of certain orders; order made ex parte permitting named persons to enter defendant's premises to carry out a search and to take custody of and remove certain items; whether order expired when an attempt was made to execute it; whether order is so old that it would be unjust to allow persons named in it to enter and search defendant's premises.
Held: Order vacated insofar as it permits named persons to enter and search defendant's premises and take custody of or remove anything; remainder of order concerning the plaintiff's undertaking as to

costs stands.

Minister For Finance v. Goodman
High Court: **Laffoy J.**
19/05/1999
Taxation of costs; applicant seeks orders to review the taxation of costs of the respondent of appearing before a Tribunal of Inquiry; whether O. 99, r. 38(4), Rules of the Superior Courts mandates that the reception of further evidence is intended to be the exception to the normal rule, justifiable by exceptional circumstances; whether the court has jurisdiction to receive oral evidence under r. 38(4).
Held: No exceptional circumstances in the instant case; nevertheless, applicant allowed to adduce oral evidence by virtue of the predominant practice of the court on the hearing of taxation reviews in the recent past.

National Irish Bank, In re
High Court: **Kelly J.**
19/03/1999

Commercial; banking; inspectors; duplication of process; applicant is subject to investigation by inspectors appointed pursuant to Part 2, Companies Act, 1990 and by the Comptroller and Auditor General; applicant seeks order limiting inspectors in their investigation of compliance by the bank with its obligations concerning Deposit Interest Retention Tax and an order compelling inspectors to furnish to the applicant documents relating to interviews carried out by inspectors with staff and customers of applicant; whether there is duplication of process by the two enquiries; whether principle of double jeopardy extends to fact finding investigations; whether, if there is duplication, the doctrine of res judicata applies; whether s.7(4), Companies Act, 1990 is offended by the operation of the two enquiries; whether the subject matter of the first application is res judicata; if matter not res judicata whether applicants are entitled to supply of inspector's transcripts; whether applicants are entitled to invoke the rights established in Re Haughey at the information-gathering stage of the inspector's work.
Held: Application refused.

Article

Recent developments in relation to discovery
Delany, Hilary
1999 ILTR 203

Library Acquisitions

Briggs, Adrian
Civil jurisdiction and judgments
2nd ed
London Lloyds of London Press 1997
N353

Hoyle, Mark
The mareva injunction and related orders
3rd ed
London Lloyds of London Press 1997
N232

Statutory Instrument

Rules of the Superior Courts (No.2) (Discovery), 1999
S.I. 233/1999

Property

Gill v. Egan
High Court: **O'Sullivan, J.**
16/02/1999

Land law; planning; personal injury; purely factual issues to be resolved; clash of evidence *inter partes;* whether plaintiff gave permission to defendant permanently to deposit rocks on land; whether such deposit had caused certain damage; whether such deposit had caused personal injury to plaintiff; whether necessary for plaintiff to remove rocks in order to comply with condition attaching to award of planning permission.
Held: Factual issues resolved in favour of defendant; £3,500 awarded to plaintiff in respect of certain "relatively minor operational transgressions" by defendant in depositing rocks.

Rhatigan v. Gill
High Court: **O'Sullivan J.**
16/02/1999

Land law; issue estoppel; *ius tertii;* whether defendant entitled to possession of a strip of land; whether earlier litigation had resolved issue of possession; whether plaintiff entitled as a trespasser to set up against defendant's claim to possession the right of another.
Held: Plaintiff not issue estopped; Defendant's counterclaim refused; in order for the doctrine of issue estoppel to apply, the issue must be identical with the issue already determined in earlier litigation and the determination, when it is an issue of fact, must be a formal determination of that issue in the same manner as it would have arisen in the second set of proceedings and not by reason, only, of the application of a principle of law which would not apply in the second set of proceedings; although doctrine of *ius tertii* fails in the mouth of a trespasser if it is a mere ius tertii, it may be invoked where the trespasser himself claims to hold a title in respect of the land, or where (as here) he shows that he acted on the authority of another title holder.

Road Traffic

Statutory Instruments

Athlone Appointed Stands (Street Service Vehicles) Bye-Laws, 1999
S.I. 241/1999

Waterford Appointed Stands (Street Service Vehicles) Bye-Laws,1999
S.I. 240/1999

Sale of Goods

Article

Contracts for the international sale of goods
O'Neill, Maria
1999 IBL 82

Shipping

Library Acquisition

Brodie, Peter R
Dictionary of shipping terms
3rd ed
London Lloyds of London Press 1997
N332.0023

Social Welfare

Library Acquisition

Department of Social, Community and Family Affairs

Guide to social welfare services
Dublin Department of Social, Community and Family Affairs 1998
N181.C5

Sports

Library Acquisition

Verow, Richard
Sport, business and the law
Bristol Jordans 1999
Precedents on disk at Information desk, Distillery Library
N186.6

Taxation

Articles

Anti-avoidance provisions
Fitzgerald, Ann
12 (1999) ITR 178

Capital gains tax: what the revenue have to say
Kelly, Jed
12 (1999) ITR 165

Competition, co-ordination or harmonisation? What is the EU's tax policy
Branton, Graham
12 (1999) ITR 169

VAT and electronic commerce
Cremins, Denis
12 (1999) ITR 187

Voluntary disclosure and prosecutions
Corcoran, Noel
12 (1999) ITR 149

Library Acquisitions

Frecknall, Alison
Tax acts 1999-2000 income tax, corporation tax, capital gains tax
Dublin Butterworth Ireland Ltd 1999
M335.C5.Z14

Statutory Instruments

European Communities (Value-Added Tax) Regulations, 1999
S.I. 196/1999

Finance Act, 1996 (Commencement of Section 75(1)) Order, 1999.
S.I. 223/1999

Telecommunications

Statutory Instruments

Wireless Telegraphy Act, 1926 (Section 3) (Exemption of Inmarsat-D Terminals For Land Mobile Applications) Order, 1999
S.I. 100/1999

Wireless Telegraphy Act, 1926 (Section 3) (Exemption Of Inmarsat-M Terminals For Land Mobile Applications) Order,1999.
S.I. 102/1999

Wireless Telegraphy Act, 1926 (Section 3) (For The Exemption of Arcanet Suitcase Terminals) Order, 1999
S.I. 104/1999

Wireless Telegraphy Act, 1926 (Section 3) (Exemption of EMS-Prodat Terminals for Land Mobile Applications) Order,1999
S.I. 105/1999

Wireless Telegraphy Act, 1926 (Section 3) (Exemption of EMS-MSSAT Terminals for Land Mobile Applications) Order, 1999
S.I. 106/1999

Wireless Telegraphy Act, 1926 (Section 3) (Exemption of DCS 1800 Mobile Terminals) Order, 1999
S.I. 107/1999

Transport

Statutory Instrument

Road Transport Act, 1999 (Commencement) Order,1999
S.I. 264/1999
Other than Sections 4 To 8, 11, 16 and 23

Tribunals

Library Acquisition

Bar Council conference on Inquiries: the rights of individuals, privacy and confidentiality. Dublin, July 17th, 1999
Dublin Bar Council of Ireland 1999
N398.1.C5

Wills

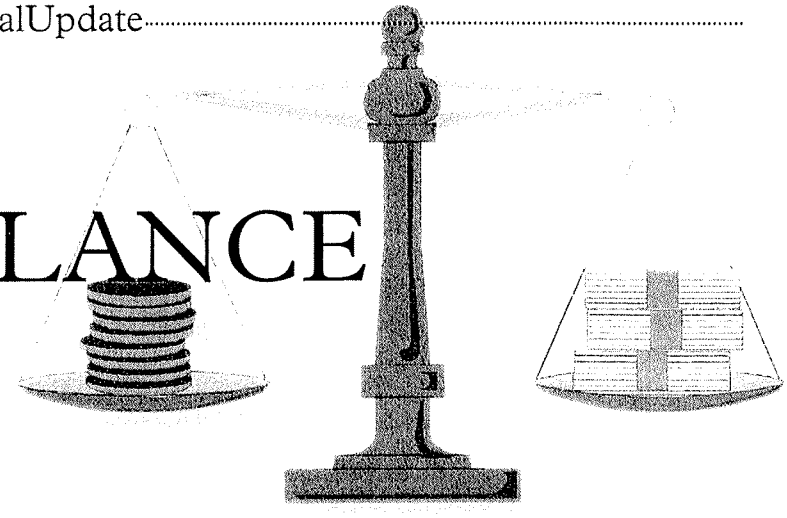
Flood v. Flood
High Court: **Macken J.**
14/05/1999

Wills; administration of estate; removal of executor; defendant executor received sum of money from deceased; allegation that sum paid to defendant by way of loan; defendant claimed sum paid as gift and refused to repay sum to estate; plaintiff seeking order removing defendant as executor of estate; court unable to resolve conflict of evidence; whether stance of defendant in conflict with role as executor; whether Court could remove executor from position; whether plaintiff had established sufficient facts to suggest that there was a serious matter to be considered; ss.26 and 27 Succession Act, 1965.
Held: A serious matter arose in relation to the administration of the estate that could only be resolved by the removal of the defendant as executor.

O'Donnell v. O'Donnell
High Court: **Kelly J.**
24/03/1999

Probate; deceased was a paranoid schizophrenic; deceased suffered breakdowns in 1949, 1966 and 1991; will executed on 3rd March, 1982; plaintiff seeks admission to probate of the will of the deceased in solemn form of law; defendant counterclaims; whether the will of the deceased was executed in accordance with law; whether at time of the making of the will the deceased knew and approved of its contents; whether at time of execution of the will the deceased was of sound disposing mind and testamentary capacity; Succession Act, 1965.
Held: Will admitted to probate in solemn form of law; counterclaim dismissed.

AT A GLANCE



Rules of Court

Rules of the Superior Courts (No.2) (Discovery), 1999
S.I. 233/1999

European Directives implemented into Irish Law up to 20th October 1999

Information compiled by Damien Grenham, Law Library, Four Courts.

European Communities (Minimum Requirements for Vessels Carrying Dangerous or Polluting Goods) (Amendment) Regulations, 1999
S.I. 96/1999
(DIR 98/55, 98/74)

European Communities (Marine Equipment) (Amendment) Regulations, 1999
S.I. 112/1999
(DIR 98/85EC (which amends DIR96/98EC))

European Communities (Authorisation, Placing on the Market, Use And Control of Plant Protection Products) (Amendment) Regulations, 1999
S.I. 198/1999
(DIR 91/414, 97/73, 1999/1)

European Communities (Seed of Fodder Plants) (Amendment) Regulations, 1999
S.I. 199/1999
(DIR 66/401)

European Communities (Export Credit Insurance) Regulations, 1999
S.I. 203/1999
(DIR 98/29)

European Caselaw received in the Law Library up to 20th October 1999

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

C-227/92 P Hoechst AG v Commission of the European Communities
Judgment delivered: 8/7/1999
Appeal - Rules of Procedure of the Court of First Instance - Reopening of the oral procedure - Commission's Rules of Procedure - Procedure for the adoption of a decision by the College of Members of the Commission

C-234/92 P Shell International Chemical Company Ltd., v Commission of the European Communities
Judgment delivered: 8/7/1999
Appeal - Rules of Procedure of the Court of First Instance - Reopening of the oral procedure - Commission's Rules of Procedure - Procedure for the adoption of a decision by the College of Members of the Commission

C-245/92 P Chemie Linz GmbH v Commission of the European Communities
Judgment delivered: 8/7/1999
Appeal - Rules of procedure of the Court of First Instance - Reopening of the oral procedure - Commission's Rules of Procedure - Procedure for the adoption of a decision by the College of Members of the Commission

C-189/97 European Parliament v Council of the European Union
Judgment delivered: 8/7/1999
EC/Mauritania fisheries agreement - Agreements with important budgetary implications for the Community

C-254/97 Societe Baxter v Premier Ministre
Judgment delivered: 8/7/1999
Internal taxation - Tax deduction - Expenditure on research - Proprietary medicinal products

C-412/97 ED Srl v Italo Fenocchio
Judgment delivered: 22/6/1999
Free movement of goods - Freedom to provide services - Free movement of capital - National provision prohibiting the issue of a summary payment order to be served outside national territory - Compatibility

C-186/98 Portugal v Nunes & de Matos
Judgment delivered: 8/7/1999
Financial assistance granted from the European Social Fund - Improper use of funds - Penalties under Community law and national law

C-215/98 Commission of the European Communities v Hellenic Republic
Judgment delivered: 8/7/1999
Failure by a Member State to fulfil its obligations - Directive 91/157/EEC on batteries and accumulators containing certain dangerous substances - Failure by a Member State to adopt the programmes provided for in Article 6 of the Directive

C-354/98 Commission of the European Communities v French Republic
Judgment delivered: 8/7/1999
Failure by a Member State to fulfil its obligations - Failure to implement Directive 96/97/EC

T-231/97 New Europe Consulting Ltd., v Commission of the European

Communities
Judgment delivered: 9/7/1999
PHARE - Action for damages - Conditions - Principle of sound administration - Assessment of damage

T-163/98 The Procter and Gamble Company v Office for Harmonisation in the Internal Market (Trade Marks and Designs)
Judgment delivered: 8/7/1999
Community mark - Term 'Baby-Dry' - Absolute ground for refusal - Extent of review by the Boards of Appeal - Extent of review by the Court of First Instance

Library Acquisitions

Information compiled by Deidre Lambe, Law Library, Four Courts.

Bar Council conference on Inquiries: the rights of individuals, privacy and confidentiality. Dublin, July 17th, 1999
Dublin Bar Council of Ireland 1999
N398.1.C5

Barry, Eilis
Notes on remedies and enforcement under the employment equality act, 1998
CLE Lecture
Dublin Bar Council 1999
N191.2.C5

Briggs, Adrian
Civil jurisdiction and judgments
2nd ed
London Lloyds of London Press 1997
N353

Brodie, Peter R
Dictionary of shipping terms
3rd ed
London Lloyds of London Press 1997
N332.0023

Buckley, R A
The modern law of negligence
3rd ed
London Butterworths 1999
N33.3

Cranston, Ross
European banking law the banker-customer relationship
2nd ed
London Lloyds of London Press 1999
W107

Department of Social, Community and Family Affairs
Guide to social welfare services
Dublin Department of Social, Community and Family Affairs 1998
N181.C5

Enonchong Dr, Nelson
Illegal transactions
London Lloyds of London Press 1998
N15.1

Frecknall, Alison
Tax acts 1999-2000 income tax, corporation tax, capital gains tax
Dublin Butterworth Ireland Ltd 1999
M335.C5.Z14

Fuller, Geoffrey
Corporate borrowing law and practice
2nd ed
Bristol Jordans 1999
N263

General Council of the Bar
Code of conduct for the bar of England and Wales
6th ed
London General Council of the Bar 1998

Gormley, Laurence William
Gordian knots in European public procurement law
Koln Bundesanzeiger 1997
W109.6

Harper, Richard S
Medical treatment and the law the protection of adults and minors in the family division
Bristol Jordans 1999
N185.122

Hedley, William
Bills of exchange and bankers' documentary credits
3rd ed
London Lloyds of London Press 1997
N306.2

Heusel, Wolfgang
Irish Centre for European Law
Agricultural law for the European Union current problems and future prospects papers and precedents from two joint conferences on the EU common agricultural policy
Dublin Irish Centre for European Law 1999
W113

Hodgin, Ray
Professional liability: law and insurance
London Lloyds of London Press 1996
N290.Z45

Hoyle, Mark
The mareva injunction and related orders
3rd ed
London Lloyds of London Press 1997
N232

Maguire, Cathy
Trade union membership and the law
Dublin Sweet and Maxwell 1999
N185.C5

Mouton, Jean-Denis
Towards a new constitution for the European Union the Intergovernmental conference 1996
Koln Bundesanzeiger 1997
W109.6

Thomas, David
Sentencing referencer 1999
London Sweet and Maxwell 1999
M587

Verow, Richard
Sport, business and the law
Bristol Jordans 1999
Precedents on disk at Information desk, Distillery Library
N186.6

Worsdall, Anthea
Anti-counterfeiting: a practical guide
Bristol Jordans 1998
M564.1

Bills in progress at 20th October 1999

Information compiled by Damien Grenham, Law Library, Four Courts.

Activity Centres (Young Persons' Water Safety) Bill, 1998
2nd Stage - Dail [P.M.B.]

Broadcasting Bill, 1999
2nd Stage - Dail

Broadcasting (Major Events Television Coverage) Bill, 1999
Report - Dail

(Note: title Changed From "Major Events Television Coverage Bill, 1999")

Cement (Repeal Of Enactments) Bill, 1999
2nd Stage - Seanad

Censorship Of Publications (Amendment) Bill, 1998
2nd Stage - Dail [P.M.B.]

Children Bill, 1999
2nd Stage - Dail

Children Bill, 1996
Committee - Dail [Re-Introduced At This Stage]

Companies (Amendment) Bill, 1999
2nd Stage - Dail [P.M.B.]

Companies (Amendment) (No.2) Bill, 1999
Report - Dail

Companies (Amendment) (No.4) Bill, 1999
1st Stage - Dail [P.M.B.]

Control Of Wildlife Hunting & Shooting (Non-Residents
Firearm Certificates) Bill, 1998
2nd Stage - Dail [P.M.B]

Copyright & Related Rights Bill, 1999
Committee - Seanad

Criminal Justice (United Nations Convention Against Torture) Bill, 1998
2nd Stage - Seanad

Criminal Justice (Safety Of United Nations Workers) Bill, 1999
2nd Stage - Seanad

Criminal Law (Rape)(Sexual Experience Of Complainant) Bill, 1998
2nd Stage - Dail [P.M.B.]

Education (Welfare) Bill, 1999
2nd Stage - Seanad

Eighteenth Amendment Of The Constitution Bill, 1997
Committee Stage - Dail [P.M.B.]

Employment Rights Protection Bill, 1997
2nd Stage - Dail [P.M.B.]

Energy Conservation Bill, 1998
2nd Stage - Dail [P.M.B.]

Equal Status Bill, 1998
2nd Stage - Dail [P.M.B]

Equal Status Bill, 1999
Committee - Dail

Family Law Bill, 1998
2nd Stage - Seanad

Home Purchasers (Anti-Gazumping) Bill, 1999
1st Stage - Seanad

Human Rights Bill, 1998
2nd Stage - Dail [P.M.B.]

Human Rights Commission Bill, 1999
2nd Stage - Dail

Illegal Immigrants (Trafficking) Bill, 1999
2nd Stage - Dail

Intoxicating Liquor Bill, 1999
2nd Stage - Dail

Licensed Premises (Opening Hours) Bill, 1999
2nd Stage - Dail [P.M.B.]

Local Government (Planning And Development)(Amendment) Bill, 1999
Committee - Dail

National Beef Assurance Scheme Bill,1999
Report - Seanad

Planning And Development Bill, 1999
2nd Stage - Seanad

Partnership For Peace (Consultative Plebiscite) Bill, 1999
2nd Stage - Dail [P.M.B.]

Prevention Of Corruption (Amendment) Bill, 1999
2nd Stage - Dail

Private Security Services Bill, 1999
2nd Stage- Dail [P.M.B.]

Prohibition Of Ticket Touts Bill, 1998
Committee - Dail [P.M.B.]

Protection Of Patients And Doctors In Training Bill, 1999
2nd Stage - Dail [P.M.B.]

Protection Of Children (Hague Convention) Bill, 1998
Committee - Dail

Protection Of Patients And Doctors In Training Bill, 1999
1st Stage - Dail

Protection Of Workers (Shops)(No.2) Bill, 1997
2nd Stage - Seanad

Radiological Protection (Amendment) Bill, 1998
Committee- Seanad

Refugee (Amendment) Bill, 1998
2nd Stage - Dail [P.M.B.]

Registration Of Lobbyists (No.2) Bill 1999
2nd Stage - Dail

Registration Of Lobbyists Bill, 1999
1st Stage - Seanad

Regulation Of Assisted Human Reproduction Bill, 1999
1st Stage - Seanad [P.M.B.]

Road Traffic Reduction Bill, 1998
2nd Stage - Dail [P.M.B.]

Safety Health And Welfare At Work (Amendment) Bill, 1998
2nd Stage - Dail [P.M.B.]

Safety Of United Nations Personnel & Punishment Of Offenders Bill, 1999
2nd Stage - Dail [P.M.B.]

Seanad Electoral (Higher Education) Bill, 1997
2nd Stage - Seanad

Sea Pollution (Amendment) Bill, 1998
Committee - Dail

Shannon River Council Bill, 1998
2nd Stage - Seanad

Solicitors (Amendment) Bill, 1998

Committee - Dail [P.M.B.]

Statute Of Limitations (Amendment) Bill, 1998
2nd Stage - Dail [P.M.B.]

Telecommunications (Infrastructure) Bill, 1999
2nd Stage - Seanad

Trade Union Recognition Bill, 1999
1st Stage - Seanad

Tribunals Of Inquiry (Evidence)(Amendment)(No.2) Bill, 1998
2nd Stage - Dail [P.M.B.]

Twentieth Amendment Of The Constitution Bill, 1999
2nd Stage - Dail [P.M.B.]

Twenty- First Amendment Of The Constitution Bill, 1999
2nd Stage - Dail [P.M.B.]

Twenty-First Amendment Of The Constitution (No.2) Bill, 1999
2nd Stage - Dail [P.M.B.]

Udaras Na Gaeltachta (Amendment)(No.2) Bill, 1999
1st Stage - Dail

Udaras Na Gaeltachta (Amendment)(No.3) Bill, 1999
Committee - Dail

Acts Of The Oireachtas 1999

Information compiled by Damien Grenham, Law Library, Four Courts.

1/1999 The British - Irish Agreement Act, 1999

2/1999 Finance Act, 1999

3/1999 Social Welfare Act, 1999
Signed 1/3/99

4/1999 Bretton Woods Agreements (Amendment) Act, 1999
Signed 7/4/99

5/1999 Postal & Telecommunications Services (Amendment) Act, 1999
Signed 7/4/99

6/1999 Irish Sports Council Act, 1999

7/1999 Local Elections (Disclosure Of Donations And Expenditure) Act, 1999

8/1999 Companies Amendment Act, 1999

9/1999 Criminal Justice (Location Of Victims' Remains) Act, 1999
Signed By The President 19/05/1999

10/1999 Criminal Justice Act, 1999
Signed 26/05/1999
(S.I. 302/1999 Commences Parts Iv & V On 01/10/1999)

11/1999 Udaras Na Gaeltachta (Amendment) Act, 1999
Signed 26/05/1999

12/1999 Declaration Under Article 29.7 Of The Constitution (Extension Of Time) Bill, 1999

13/1999 Health (Eastern Regional Health Authority) Act, 1999
Signed 02/06/1999

14/1999 National Disability Authority Act, 1999

15/1999 Road Transport Act, 1999
Signed 23/06/1999

16/1999 British-Irish Agreement (Amendment) Act, 1999
Signed 25/06/1999

17/1999 Local Government (Planning And Development) Act, 1999
Signed 30/06/1999

18/1999 Sea Pollution (Amendment) Act, 1999
Signed 30/06/1999

19/1999 Architectural Heritage (National Inventory) & Historic Monuments (Miscellaneous Provisions) Act, 1999
Signed 06/07/1999

20/1999 Regional Technical Colleges (Amendment) Act, 1999
Signed 06/07/1999

21/1999 Minerals Development Act, 1999
Signed 07/07/1999

22/1999 Immigration Act, 1999
Signed 07/07/1999

23/1999 Electricity Regulation Act, 1999
Signed 11/07/1999
(Commenced On 14/07/1999 By S.I. 214/1999)

24/1999 Horse & Greyhound Racing (Betting Charges & Levies) Act, 1999
Signed 11/07/1999

25/1999 Courts (Supplemental Provisions)(Amendment) Act, 1999
Signed 13/07/1999

26/1999 Qualifications (Education & Training) Act, 1999
Signed 13/07/1999

Amendments Of The Constitution

Twentieth Amendment Of The Constitution Act, 1999
Signed 23/06/1999

Abbreviations

BR = Bar Review
CIILP = Contemporary Issues in Irish Law & Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
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
IILR = Irish Insurance Law Review
IIPR = Irish Intellectual Property Review
IJEL = Irish Journal of European Law
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = Irish Tax Review
JISLL = Journal Irish Society Labour Law
LSG = Law Society Gazette
MLJI = Medico Legal Journal of Ireland
P & P = Practice & Procedure

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UNSCRAMBLING THE "OUTSOURCING" EGG

Carrie Jane Canniffe BL outlines the legal pitfalls involved in the use of "outsourcing" agreements whereby businesses transfer the responsibility for servicing their IT needs to specialist third parties.

Introduction

The requirements of the modern marketplace demand that business organisations have effective and up-to-the-minute technological systems. In many instances the operation and maintenance of these systems will require considerable manpower, physical space and resources. The information technology (IT) department in an organisation can become as big if not bigger then the organisation's core operation. In addition while being a modern requirement IT may be otherwise unrelated to the operation itself, which could be anything from a manufacturing company to a financial institution[1].

A business practice has accordingly developed whereby an organisation will choose to "outsource" those functions which are not central to its operations. "Outsourcing" can be defined as the transfer of an in-house service department to a third party ("the provider") which party then provides the required services back to the original party ("the user") using the assets and employees of the transferred department.While there are various functions which an organisation might choose to outsource, the most common and the subject of this essay is the outsourcing of information technology.

Why Outsource?

One would wonder why an organisation with the requisite equipment and employees to provide its own IT service would turn to a third party thereby necessitating a complex contractual relationship and distancing themselves from a service which is often crucial to its operation.

The user often believes that there will be a cost saving. The provider as an expert may be able to make a profit making use of the economies of scale while still costing the organisation less for the service then it would cost them to run themselves. This perception however may not always be the reality and care should be taken to make accurate costing comparisons. Also regard should be had to the VAT situation when an organisation is assessing whether outsourcing is the best and most cost-effective option. Unlike an in-house operation, the outsourcing contract will be a contract for the supply of services, the fees for which will be liable to VAT. If the user company can recover the VAT then this may not pose a problem, however if this is not the case the amount of VAT payable will have to be deducted from any estimated savings deriving from the outsourcing.

In addition to the potential savings, the user may be anxious to focus on its core operation and may prefer to purchase its IT services rather then have them form part of its internal operation[1]. Further, it may be considered that an IT provider would find it easier to recruit the necessary staff and would be in a better position to update the service. This latter point is particularly important given the significant and continual advances being made in the IT area.

Types of Outsourcing Contracts

A provider is often selected by an invitation to tender, where those who submit a tender are asked to comment on the proposed contracts and its terms. Hence even before the negotiation stage there is a framework for the agreement. The form that an outsourcing contract will take depends to a large extent on the structure of the relationship.

Multiple Users

It will often be the case that the provider will be servicing a parent and its subsidiary companies. Having separate contracts with each of the users can be confusing and repetitive especially where there are a considerable number of companies in the group. Having an agreement with the parent alone could cause privity problems. Such problems may be overcome by appointing the parent user company as the agent for the other companies.

Multiple Providers

As well as the possibility that there will be a number of user companies there may be a number of providers depending on the nature of the service. In some cases one provider alone may

"One would wonder why an organisation with the requisite equipment and employees to provide its own IT service would turn to a third party thereby necessitating a complex contractual relationship and distancing themselves from a service which is often crucial to its operation."

not be capable of facilitating the organisation's specific needs. Where there are multiple providers the contractual vehicles for bringing their services to the user through outsourcing may

take a number of forms most of which have varying problems:

1. The contractor/ subcontractor situation could be established where the user has a contract with the main provider who in turn has contracts with the other service providers. Obviously in this situation the user will find it difficult to fully manage and control the service as a whole. As against that difficulty, this type of agreement allows the user to contract with one party which simplifies any liability issues.

2. A Joint Venture Agreement between the providers is an option, although it is not the most popular. It may not be commercially feasible to have all of the providers, who may be otherwise unconnected, acting in unison under the joint venture umbrella. In addition the possibilities for savings using the economies of scale are lessened as the venture keeps the operation in question away from the provider's other operations. Again, as with subcontracting, the user is removed from the providers, something which is not recommended for an outsourcing agreement.

"Above all the fact that this is not a typical service contract must be borne in mind. The parties are bound by assets, including employees and third party holdings, and the need for the service. The parties therefore are agreeing to a complex relationship where the potential for breakdown is great".

3. The most efficient method is to have the user contract with each provider separately. Given that generally there are a limited number of multiple providers, this is the most reasonable option to choose allowing the user full control and ease of apportionment should liability issues arise.

Standard Agreement v Joint Venture Agreement

The contract governing the typical user and provider relationship will be standard, though complex, with provisions for the transfer of assets, the service requirements, the monitoring of the service, confidentiality, termination and liability. If however the user is an organisation that cannot reclaim VAT then a joint venture arrangement between the user and provider may be used in order to keep the services within the organisation. This would remove from the user the requirement to pay VAT as technically they are providing the service themselves. In this type of situation the assets will be retained by the user, something which the user is often seeking to avoid by entering into an outsourcing agreement in the first place. While a joint venture agreement allows for more straightforward termination of the agreement as the provider can transfer its shares in the assets to the new provider, the drawbacks (in addition to the necessity to retain assets) are similar to those for the multiple providers joint venture structure, discussed above. While there may be a number of reasons to opt for the joint venture arrangement practitioners have found that the standard contractual relationship is generally the preferred.

Termination Difficulties

As with any contractual relationship, difficulties will inevitably arise where there is a breakdown of the relationship or where there is a dissatisfaction with the service provided. In an outsourcing situation however, the nature of the transaction which ties the parties in ways never previously envisaged in a supply agreement can give rise to significant termination difficulties and liabilities.

The nature of an outsourcing agreement is central to understanding the potential pitfalls. When a department is outsourced the user transfers all of the assets attaching to that department to the provider:

1. **The equipment:** This includes the Hardware[2] (the Mainframe[3] the PCs, the Peripherals[4], and cabling) and the Software[5]. If this is owned by the user then the transfer may prove straightforward enough. If however as is often the case the hardware is leased and the software is licensed from various third parties the transfer becomes more complicated. On occasion, the user could hold the rights to the software and on the transfer will generally license those rights to the provider for the duration of the agreement.
2. **The employees:** Transferring people is always going to pose potential problems especially in light of E.U legislation protecting employee's positions. Who goes, who stays and what is done on the breakdown of the user/provider relationship are all questions to be addressed in any outsourcing agreement.
3. **Property:** The data centre which is often located in the user organisation's premises would be the usual property to be transferred. Again the difficulties in relation to leasing may present themselves.
4. **Network - Voice or Data:** The information carried by the service and therefore the basis of the service.

In addition the user will transfer the functions of the department to the provider who will in turn provide those services.

While these contracts have been likened to the asset sale of a business the overwhelming difference is that whereas with an asset sale the relationship can come to an end following the sale, with an outsourcing agreement the relationship must continue to the mutual satisfaction of both parties.

Termination of an outsourcing agreement, as with any standard contract, can occur on the happening of two events: the natural end of the agreement on the expiry of the term without renewal or on the breach of the agreement where one or other of the parties fails in its duties. Given the intertwining of the relationship it is natural that outsourcing agreements will attempt to anticipate every eventuality, which will be a difficult task in light of the complexity of the relationship.

Above all the fact that this is not a typical service contract must be borne in mind. The parties are bound by assets, including employees and third party holdings, and the need for the service. The parties therefore are agreeing to a complex relationship where the potential for breakdown is great. The outsourcing contract itself is central to this relationship,

therefore reducing the potential for a breakdown and minimising the complications which would follow a breakdown should be foremost in the drafters mind.

Effect of Breakdown

One of the most striking aspects of allowing a breakdown to occur without the same having been provided for in the contract is the huge impact this could have on the user organisation itself. A business that relies on IT as part of its structure generally relies on it heavily and any stoppage of this service could cause chaos resulting in extensive losses. It is therefore in the user's interests that the scrambled egg is unscrambled and that the original transfer is fully and effectively reversed with the least amount of disruption to the organisation and its core functions.

It will often be the case that the transfer on termination will be not to the user but to another provider since the user presumably will not want to run the IT department itself. The extent of the provider's liability will depend on the disruption to the user's business; therefore, it is in the provider's as well as the user's interests to ensure that any breakdown of the relationship results in a smooth transition of the department to the next provider or in the rarer case back to the user.

An agreement for referring any problems to alternative dispute resolution in the form of arbitration or mediation would be helpful as disputes may be resolved more rapidly and without the expense and publicity of the court room[6].

Reasons For Termination

Service

While there are a number of reasons for an outsourcing agreement to break down, the most obvious breakdown would follow from the user being in some way dissatisfied with the service provided. The very basis of the outsourcing relationship is that the user is assured that it is getting the most up to date and efficient IT service possible. Obviously therefore any drop in standards or failure to change with the ever moving times will be of little benefit to the user, defeating the principal motive behind the agreement itself. In order to monitor the standards therefore it would be advisable to have a term in the agreement providing for detailed and frequent consultation with the user in relation to the service being provided in addition to a term clearly defining the service.

Given that a provider is providing a service and would be acting in the course of business, the Sale of Goods and Supply of Services Act, 1980 would apply to an outsourcing agreement. The user is therefore entitled to expect :-

a) that the provider has the necessary skill to render the service;
b) that it will provide the service with due care skill and diligence;
c) that where materials are used they will be sound and reasonably fit for the purpose for which they are required (which it is submitted would include the updating of equipment)
d) that where goods are supplied under the contract they will be of merchantable quality within the meaning of section 14(3) of the Act[7].

In the case of *Irish Telephone Rentals v Irish Civil Service Building Society*[8] the telephone system which was installed and maintained by the plaintiff for the defendant was not capable of dealing with an increase in the volume of calls which followed from an expansion of the defendant's business. The plaintiff had contracted to install a system that would cope with a business expansion. Costello J. held that the plaintiff was liable to the defendant for a breach of the terms implied by the Sale of Goods and Supply of Services Act, 1980 and in particular the

term that the goods provided would be of a merchantable quality[9]. An outsourcing agreement is effectively a service agreement and where these terms are not expressed in the contract it is submitted that they could be implied as occurred in the *Irish Telephone Rentals* case.

Equipment

The user will seek to transfer the best equipment it can to the provider otherwise it will suffer the consequences of the provider servicing them with inadequate hardware and software. Therefore it is envisaged that there will rarely be a difficulty with liability from this end of the contract. However, provision should be made in the event that the equipment transferred is in some way defective or substandard perhaps without the users knowledge.

The provider must keep its service up to date and must therefore maintain the equipment and renew the software to move with the user's expanding business or with developments in IT. Though the provider will not have to concern himself with this responsibility at the outset, as it will be using the equipment transferred by the user, given the rapid advances in technology this period will be short-lived. Therefore a provision will generally be inserted in relation to inadequate maintenance and development which is an integral part of the provision of a technological service. These areas would also be covered by the Sale of Goods and Supply of Services Act, 1980.

Where a provider chooses inadequate hardware for servicing the user's needs he may face liability as in the case of *Stephenson Blake (Holdings) Ltd. v Streets Heaver Ltd.*[10]. In this case a computer consultant was held liable for choosing equipment which failed to meet the needs of the plaintiff company. The court held that the consultant knew or ought to have known that it would be inadequate. Though the agreement in this case was not an outsourcing agreement it is submitted that the basic principle would apply to a provider who when updating equipment fails to meet the user's needs.

A provider therefore leaves himself open to being sued for a breach of the express or the implied terms of the agreement, if he fails to meet the users needs and to update as required. Though we have dealt with system capacity and equipment quality obviously any default in the service could result in liability.

Other: In addition to a servicing breakdown or equipment problem, termination may be triggered by a breach of a material obligation by either of the parties. The financial position of either of the parties is of course crucial to their continuing relationship as is the nature of the organisations.

Termination: Specific Issues

While we have had some regard to the general difficulties involved in the termination of an outsourcing agreement, to fully understand the extent of the same, it is necessary to have regard to some specific areas of the contract.

Employees

Employees working for the user in its IT service department on the asset transferral will now find themselves working for the provider. The staff if they are employees may be protected by the European Directive on the Transfer of Undertakings and Acquired Rights (Directive 77/187) which was implemented into Irish law by S.I. 306/1980. This legislation applies to "the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger". In effect this entitles the employees to expect to continue to work under the same terms and conditions of employment as they previously held at least for the short term. This may cause difficulties for the provider and should be considered before embarking on any outsourcing arrangement.

An outsourcing agreement could fall within the scope of this legislation given that substantial assets are transferred and the service often continues in much the same way as it did prior to the transfer. In the case of *Bannon v Employment Appeals Tribunal*[11] a company who supervised and maintained a shopping centre and its car park decided to have the security aspect of the business contracted out to a security business. Five security guards previously employed in the security side of the business were dismissed. On appeal to the High Court Blayney J. held that there had been a transfer of an undertaking, business or part of the business and in so holding overturned the decision of the EAT. He was of the opinion that there had been a change in the person responsible for the business and the business had retained its identity. Therefore, applying the Directive the security guards were held to have been unfairly dismissed. It is submitted that in the main an outsourcing agreement would go even further then this in that assets are transferred to the provider as well as the functions of the business. Whether this legislation applies is something which should be carefully considered prior to each outsourcing agreement.

"Therefore the best and most acceptable type of exclusion clause for use in these types of agreements seen as the clause which instead of excluding all liability simply agrees to limit liability in relation tc certain specified heads of loss".

An assessment should also be made as to whether the Directive applies to the individual staff members in the department to be transferred. There are some staff who will not be protected by this legislation and the user should ascertain the status of each member of staff prior to the transfer. Those staff with contracts for services can be dealt with separately as the Directive only applies to employees. In addition if an employee spends time working between the user organisation's departments and is not wholly or mainly involved in the provision of the service being transferred they may not fall within the legislation.

According to this Directive the transferor's (the user's) obligations arising from a contract of employment or employment relationship existing on the date of transfer shall by reason of the transfer be transferred to the transferee (the provider)[12]. In addition the transfer shall not of itself constitute

a good ground for dismissal[13]. Therefore a employee who is dismissed as a result of the transfer of the department could have a good claim against the parties. In addition on any transfer the employee is entitled to consultation and information regarding the transfer[14].

Staff issues could be considerable particularly if there is a termination of the relationship and a second provider is brought into the picture. Again the legislation may be applicable and if proper provisions are not made in relation to informing the employees of the changes and so on, the parties may be exposing themselves to claims.

Confidentiality

It is highly advisable that there be an agreement between the parties requiring the provider to retain the confidentiality of any information obtained by it during its term as service provider. The information to be kept confidential should be clearly specified. Where the relationship ends badly there is a genuine worry that highly sensitive information to which the provider often has full access could be used to harm the user organisation or to further its competitors. Any clause dealing with this area should be broad in its scope and if possible liability in relation to a breach of same should not be fettered.

Equipment

On termination the software and hardware may need to be transferred to the new provider. In certain cases the software may have been licensed and the hardware leased from third parties. Consent may have originally been obtained for the transfer to the provider, however a new consent may be required for a subsequent transfer. This may not be forthcoming and could result in considerable disruption to the user's business, particularly with software that is unique or specific in nature. Before the original transaction therefore, it is advisable to obtain the consent of the third parties to transfer to a subsequent provider in the event of a termination. If the software is the user's own then this will be licensed to the provider for the relevant period and can be easily licensed to a new provider. If the hardware is newly purchased, in line with the updating requirements, provision should be made for the user to purchase this for use by the next provider.

Exclusion Clauses

Most outsourcing agreements will attempt to limit or exclude liability in some form or other. The potential for a loss of profits to the user organisation if there is some breakdown in the service provided is great and it is unlikely that any user would accept an agreement which attempted to exempt the provider from liability in relation to the loss of profits sustained by the user in the event of a provider-fault break in the service. Therefore the best and most acceptable type of exclusion clause for use in these types of agreements is seen as the clause which instead of excluding all liability simply agrees to limit liability in relation to certain specified heads of loss. Even if the user were amenable to a full exclusion clause the courts are not well disposed to clauses which allow a service provider to deny liability for incorrectly performing the very service of its expertise and in order to be upheld any such clauses must be clearly expressed[15].

It is permissible to exclude the terms of the Sale of Goods and Supply of Services Act, 1980 in relation to services[16] where the recipient of the service is not a consumer[17]. Given that the parties to an outsourcing agreement deal with each other in the course of business, the terms set out in the 1980 Act could be excluded if the parties so agreed, though this would not be recommended for the user.

Termination Information

The rights of the parties on termination should be dealt with in the agreement. These rights will often depend on whether the breach was the fault of the user or of the provider. Particular emphasis should be placed on specifying when a termination can occur and how the same can be effected. As time progresses the service provided will change and so too will the assets, which includes not only the equipment but the staff. The user will therefore need information in relation to the running of the service since the initial transfer, so that it may transfer smoothly to another provider.

Conclusion

In light of the complexities involved with outsourcing, some of which we have just explored, it is a wonder that these agreements exist at all. That said, outsourcing can be of enormous benefit to the parties and has proved itself capable of working well for many businesses. The pitfalls while numerous are standard and can be dealt with through the use of comprehensive and well drafted agreements. With co-operation and foresight the outsourcing egg can be unscrambled. •

1. Among others, IBM, Ford and Pearl Assurance have all outsourced IT departments.
2. The hardware is the physical equipment used to run the computer programs.
3. The mainframe is a large powerful computer used for processing large quantities of data. This equipment is generally stored in a cool environment with controlled surroundings, for instance a data centre.
4. Peripherals are the devices which are attached to the computer allowing it to communicate, for example a printer.
5. Software comprises the computer programs which are run on the hardware.
6. It should be noted that while arbitration is reputed to be the cheaper alternative to litigation, it can often prove to be at least as expensive.
7. Section 39 of the 1980 Act.
8. [1991] ILRM 880.
9. Section 39.
10. Judgment of Hicks J., Queens Bench 2 March, 1994. Masons Computer Law Reports, pg. 17.
11. 1993 1 I.R. 500.
12. Directive 77/187 Article 3
13. Directive 77/187 Article 4
14. Directive 77/187 Article 6
15. *Canada Steamship Lines v The King* [1952] AC 192 where it was held that unless an exclusion clause expressly excludes liability for negligence the court may take another interpretation using the contra preferentem rule; and *White v Warrick* [1953] 1.WLR 1285.
16. Section 39; Exclusion allowed by Section 40.
17. "Consumer" is defined by Section 3.

DISCOVERY IN AID EXECUTION

Stephen Glanville BL outlines the process of discovery in aid of execution which can be a useful tactic when seeking to enforce a judgment.

Introduction

Discovery in aid of execution is a process allowing a judgment creditor (or other interested parties, depending on the type of judgment) subsequent to judgment to make application to the court for an order directing the judgment debtor, amongst others, to attend at the court for the purpose of giving information on the debtor's assets and means. Parties prosecuting in the High Court and Circuit Court under the Debtors Act (Ireland) 1872 may also avail of the procedure.

The procedure is useful in setting tactics in the enforcement process and is provided for in the Rules of the Superior Courts (RSC) O.42 rr.36-37 and in the Circuit Court Rules (RCC) O.33 r.7. It is used in a variety of situations, but principally where it is sought to appoint a receiver by way of equitable execution, as suggested in *Morgan v Hart* [1914] 2 K.B. 183. It is also used where judgment mortgage and garnishee proceedings are being pursued.

It has been held at first instance that the procedure is not available under RCC O.59 r.14 in the Circuit Court in respect of a judgment for the payment of money, a decision which does not appear to have been appealed to the High Court: *Aerospan Board Centre (Dublin) Ltd v Dean Furniture Ltd* [1989] 7 I.L.T. 79. Practitioners considering such an application in the Circuit Court should consult section 20 of the Courts of Justice Act,1924, and section 22(6) and (7) of the Courts (Supplmental Provisions) Act, 1961, which provide ample jurisdiction to the court and do not seem to have been referred to in *Aerospan.*

Criteria

Where the judgment is for the recovery or payment of money - in debt or damages - the party entitled to enforce that judgment may apply to the court under RSC O.42 r.36 for an order against the debtor. Where there has been a stay or suspension of execution, it appears that the party obtaining judgment is one "entitled to enforce" for the purpose of this rule: see *Brown v Stafford* [1944] K.B. 193. It is arguable that an interlocutory judgment for damages to be assessed falls within the procedure.

The terms of the order may provide for the attendance and oral examination of the debtor and for the production of any books and documents. Where the judgment is against a corporation, the order may be addressed to any officer of the corporation, and this appears to include former officers. In addition, RSC O.42 r.36 provides that such order may be addressed to "any other person", a broad provision that gives the application some variety. For example, in *J.Lennon Sparkes v. Maher* [1953-54] Ir.Jur.R. 2, the wife of the judgment debtor was ordered by the court to attend for examination to allow the receiver to ascertain which portion of the joint deposit account that she held with her debtor husband was the actual property of the latter. A garnishee against whom an order absolute has been made may be ordered to appear: see *Cowan v Carlill* (1885) 33 W.R. 583.

The procedure can be initiated before the return of an order of *fieri facias.* Attendance before the chief clerk of the court was ordered in a mortgage suit in which an order for sale had been made but where there was difficulty in identifying the property: *Butterly v Cumming* [1898] 1 I.R. 196. The Court ordered the production of title deeds, books, maps, rentals, counterparts of tenants' leases or agreements and, in general, documents relating to the lands and premises. It appears that r.36 was relied upon. An order of discovery was made where there had been default in obeying an order in an administration suit to lodge money in court: *M'Dowell v M'Dowell* (1896) 30 I.L.T.R. 93.

In respect of insolvent companies against which judgment has been awarded, it is possible that a liquidator or receiver will be deemed subject to this process, although the proposition has yet to be tested. It has also been suggested that discovery in aid of execution would be useful in the pursuit of an insurance company that is unidentified or in repudiation of the policy in question. Having obtained judgment against the insured, the creditor is then in a position to enforce the award against the insurer and in that case it may be possible for the creditor to discover the identity of the insurer and/or its reasons for repudiation. Examination on these issues may be ordered of the insured, and possibly also of the insurer (if identified).

Judgments other than for the recovery or payment of money

Where the judgment is other than for the recovery or payment of money, RSC O.42 r.37 and RCC O.33 r.7 provide for a similar application and order, though there are significant differences from the procedure applying in the case of a money judment. The rules provide that, if any difficulty arises in or about the execution or enforcement of any judgment or order, other than a judgment for the recovery or payment of money, any party interested may apply to the court, and the judge may make such order thereon for the attendance and examination of any party or otherwise as he may think just. It is not clear what is meant by a difficulty arising. However the object of RSC O.42 r.37 is to make orders under the preceding rule more efficacious.

It appears that an application may be brought under these rules only after a step has been taken in the enforcement process, i.e. service of the order or judgment on the debtor with the endorsement required under RSC O.41 r.8. Furthermore, some difficulty in that process must have arisen before the court will entertain the application. However, the application may be made by any party interested, and not just the party entitled to enforcement. The court has no power to order the production of books and documents. Finally, such order may be made against "any party or otherwise as may be just", which allows the court a wide discretion.

Practice

By virtue of RSC O.52 r.2, the existing practice applies, but all reported applications have been by motion *ex parte* before a judge and not the Master. Accordingly, the application will come on in the common law motions list. In the Circuit Court, the county registrar has power to summon to attend before him, and may examine on oath, any party to any proceeding, or any witness whose attendance in connection with any of the duties or powers conferred on him by statute or otherwise, he may deem necessary: RCC O.15 r.5. In practice, applications for discovery in aid of execution come on in the court list and the examination is carried out before a judge.

"The procedure is useful in setting tactics in the enforcement process"

A draft of the order is made out and filed in court along with the grounding affidavit. The latter is sworn by the applicant's solicitor and sets out the following:

1. Circumstances under which judgment was given
2. The date and number of the judgment - an attested copy of the court order should be exhibited
3. The sum in which it was awarded, with a calculation of the sum outstanding, including interest
4. The failure of the debtor to satisfy the judgment
5. The reasons of the applicant for seeking discovery.

There seems no reason why several judgments obtained in separate actions between the same parties should not be included on a single application.

The order should be sought in the following terms:

1. Order under RSC O.42 r.36/37 (or RCC O.33 r.7) for discovery in aid of execution to be made by named parties
2. order for the attendance and oral examination of the same
3. order for the production of books and documents (unless under RSC O.42 r.37 or RCC O.33 r.7)
4. such further or other order as the court deems meet
5. order for costs.

The court will grant the order on certain terms and it should then be served personally on those named therein. Substituted service or service out of the jurisdiction may be necessary. It appears that personal service will not be dispensed with merely on the ground that the debtor knows of the existence of the order, even when he was present at the making of the order: see *Re Tuck* [1906] 1 Ch. 692 on substituted service generally. Service should include the appropriate penal endorsement, otherwise a defaulting respondent will not be immediately open to committal proceedings. It is not clear what time constraints apply: there should be allowed at least two clear days before the hearing, although a judge would undoubtedly insist on a longer period.

The Examination

The examination shall be "as to whether any and what debts are owing to the debtor, and whether the debtor has any and what property or means of satisfying the judgment or order". It is clear from the case law that the examination itself is permitted to be rigorous and the court will allow the applicant to conduct a cross examination of sorts. However the questions must be pertinent and proper and must be put in a fair manner. A refusal to answer such questions will put the respondent in contempt of court and leave him open to commital. A further examination may be ordered in special circumstances: *Sturges v Countess of Warwick* (1914) 30 T.L.R. 112.

On the matter of production of documents, no reference is made to power, possession or procurement, as in pre-judgment discovery procedure. It would be unlikely for a judge to order such production without an indication in the application of the respondent's ability to comply. Nor is there any reference to claims of privilege, though it may be assumed that they will be entertained. It is questionable whether the documents of a limited company are necessarily in the custody or power of a director: see *Re Maville Hose Ltd.* [1939] Ch. 32.

Costs

Costs are generally in the discretion of the judge: RSC O.42 r.38. Where the exercise proves futile they may not be allowed, but this will not be apparent unless the information given on examination could not conceivably be of assistance in enforcing the judgment. The applicant is liable for the travelling expenses at least of those attending and it is best advised to provide for these in the form of a viaticum upon service of the order: see *Equitable Loan Investment Society v Bolger* (1909) 43 I.L.T.R. 267. It is not clear whether this extends to witness expenses properly so called, or confined to conduct money. A failure to provide evidence of a tender of conduct money will prevent the issue of an order of attachment for the witness' non-compliance.

Where a creditor had succeeded in realising the amount of his judgment by means of information procured by examination, but failed to include the costs of the examination procedure in the subsequent judgment summons, he was entitled to recover those costs by subsequent motion on notice together with the costs of that motion: *Dicker v. Aylmer* (1896) 30 I.L.T.R. 46. Where the plaintiff had obtained a declaration that there was a charge on the defendant's property and an order of attachment was made in respect of the disobedience of the defendant in attending for examination, the costs of the application for attachment were added to the charge: *Tottenham U.D.C. v Nielson & Co.* [1915] W.N. 275. Where the order was in respect of a judgment in an administration suit, costs were payable out of the personal estate of the deceased: *McDowell v McDowell* (1896) 30 I.L.T.R. 93. •

Stephen Glanville BL is the author of the "Enforcement of Judgments" *(October 1999). Published by Round Hall Sweet and Maxwell.*

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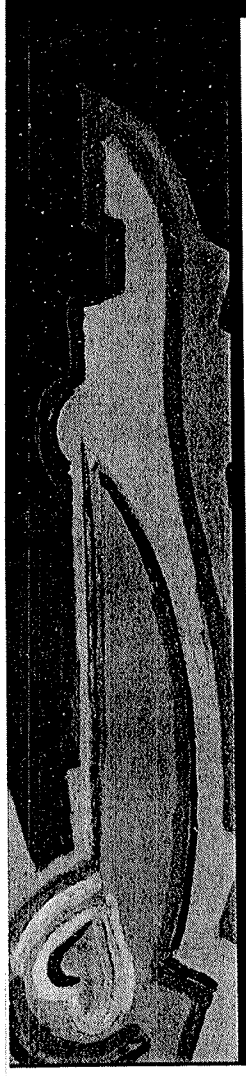

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TAXATION FEES

Master James Flynn, Taxing Master and Tony Halpin BL consider the principles applied by the Courts and the Taxing Masters on taxation of fees

Introduction

A barrister's work is multi-faceted. It comprises of a number of elements that aim to effectively and efficiently steer a case through to its ultimate conclusion. The barrister's work is, in the main, divided, into advocacy and paper work. The Brief Fee is the main source of remuneration for the Barrister. Other fees chargeable by Counsel are in respect of pleadings, opinions, consultations and refresher fees. The purpose of the article is to take a fleeting glance at Counsels' fees and the principles that are applied by the Taxing Masters and the Courts in assessing whether the fee sought by counsel is appropriate.

Pleadings

Usually the barrister first receives a 'Case for Counsel' and is requested to draft the necessary proceedings. The drafting of pleadings is usually undertaken by junior counsel. The nature of the case, the issues to be tried, the difficulties involved and the circumstances of the case, are all factors that will contribute to the assessment of the fee allowable in drafting a pleading. There are no set fees in respect of pleadings but certain fees would be considered standard in relation to certain types of pleadings of a general character. In deciding the fee allowable on a document of pleading the Taxing Master must be satisfied that the particular pleading was necessary in the first instance unless a specific order of the court directs otherwise. In most cases the pleading is axiomatically necessary and it is not necessary to carry out this exercise. In allowing a fee in respect of drafting or of settling legal documents, the Taxing Master must have regard to what is the reasonable expectation of the counsel involved and what amount a solicitor would reasonably expect to pay for such services. Counsel, in striking a fee for pleadings, should have regard to the amount of time it has taken him or her to draft the respective documents and the number of areas of law or fact that are involved.

Consultations

Order 99 Rule 37 (30) of The Rules of the Superior Courts, provides that:

> "No costs of consultation or conference shall be allowed as between party and party without a direction by the senior or only counsel that such consultation or conference be held."[1]

Consultations immediately prior to trial are an allowable expense on a party and party taxation. *Smith v Earl of Effingham*[2] held that the purpose of a consultation was to communicate suggestions and views and to plan the way in which a case is to proceed. It is accepted that consultations are necessary to accomplish a coherent, intelligible and harmonious approach to the gathering and collection of evidence in complicated cases. A consultation prior to hearing for the purposes of preparing for the case is also an allowable expense but the solicitor in all cases involving consultations with counsel must take and maintain attendance notes of such consultations for the purposes of justifying the need for holding them should they be challenged at taxation.[3] The allowance of consultations are generally within the discretion of the Taxing Master.[4] Counsel, in charging for consultations, should charge a fee that properly and fairly remunerates him or her for the amount of time and the number of issues dealt with at the consultation.

"In allowing a fee in respect of drafting or of settling legal documents the Taxing Master must have regard to what is the reasonable expectation of the counsel involved and what amount a solicitor would reasonably expect to pay for such services."

The Brief Fee

In considering the brief fee the barrister should look at the number of different fields and areas of work and law that he or she has undertaken. In relation to Counsels' fees generally, the brief fee is the one item that comes in for the greatest amount of debate at Taxations. The brief is delivered to the barrister prior to the hearing and it will normally consist of:-

1. Any existing legal pleadings or documents in the case.
2. Any other documents which are central to the issues therein.
3. Statements from the Client, Attendances, etc.
4. Statements or Reports from expert witnesses.
5. Relevant maps, plans, designs, folios or other material documentation.
6. Statements from witnesses.
7. Existing correspondences.
8. Summary of the main points in the case.
9. Instructions to the Barrister.
10. Counsels' Advices on Proofs.

The principles set out by Hamilton J. in *Kelly v Breen*[5] in relation to the assessment of Counsel's fees are as follows:-

1. A successful party should, so far as is reasonable, be indemnified from the expense he is put to in an action to attain justice or to enforce or defend his rights. He is not however entitled to be indemnified against such costs or expenses which have been incurred or increased through over-caution, negligence or mistake, or by payment of special fees to Counsel or special charges or expenses to witnesses or other persons or by any other unusual expenses.

2. It is the function of the practising solicitor:-

   (a) to select Counsel competent in the field of work to which the Brief relates, and

   (b) to determine the proper and reasonable fee which such Counsel namely a Counsel competent in the field of work to which the Brief relates (and not a particular Counsel whom the solicitor may wish to Brief), would be content to take.

3. In the determination of such fee the practising solicitor should act reasonably carefully and reasonably prudently and should have regard to his day to day and year to year experiences in the course of his practice.

4. These experiences include, inter alia, fees charged and paid in respect of cases of a similar nature, the practice of barristers as to marking fees insofar as accepted by solicitors in practice, fees paid to the opposing Counsel in the same matter, subject to whatever factors might be special to the case, and the depreciation in the value of money.

5. The fees payable to Counsel by a solicitor who has retained him in an action are disbursements made by him in the course of his practice.

6. The Taxing Master is obliged by virtue of Order 99 Rule 37 (18) RSC to allow all such costs, charges and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for enforcing or defending the rights of any party but, save as against the party who incurred the same, no costs shall be allowed which appear to the Taxing Master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to Counsel or special charges or expenses to witnesses or other persons or by any other unusual expense.

7. The discretion vested in the Taxing Master is not an unfettered one but is of a judicial nature and accordingly should be exercised by him without any element of predetermination or rule of thumb or indeed any arbitrary or capricious determination.

8. In the exercise of this discretion to allow or disallow all or part of a solicitor's disbursements, the Taxing Master is not entitled to prescribe the standards which he requires solicitors to adopt but is required to adopt the standard of the practising solicitor who is reasonably careful and reasonably prudent and for this purpose should keep himself informed up to date of the standards of solicitors in practice in relation to the fees properly charged by and payable to Counsel.

9. The Taxing Master in the exercise of his discretion is only entitled to disallow any or any part of a solicitor's disbursements, including Counsel's fees if he is satisfied that no solicitor acting reasonably carefully and reasonably prudently based on his experiences in the course of his practice would have determined such fees or would have made such disbursements in the course of his practice. It is desirable that on taxation of Bills of Costs the solicitor submitting and opposing same should be in a position to give such information of the nature set forth at 4 above to the Taxing Master as shall enable him to properly exercise this discretion.

The Taxing Master in assessing the fees paid to Counsel can take into account the seniority and specialised expertise of the respective Counsel who were briefed in the case or the level of seniority and expertise of Counsel acting for the other party which may increase the workload or effort required and accordingly increase the size of the brief fee. The special expertise of Counsel which a case demands or requires must be fairly remunerated.[6] In *Smyth and Anor. v Tunney and Ors*[7] Murphy J. stated that:-

> "Manifestly it would be unnecessary to inform the Taxing Master of fees payable to other Counsel or to the other Party in the same case unless the Taxing Master was to make some use of this information in some way."

In *The Attorney General v Alan Simpson*[8] the High Court recognised that the extent of the case directly affects the brief and it was held that the:-

> "...magnitude of the case depends upon its being regarded from the viewpoint of both parties. If looked at from one side only a distorted and untrue picture may be presented. The Taxing Master therefore erred in principle in having regard only to the importance of the case from the point of view of the defendant."

It is not imperative that the brief fee should be agreed at the outset but the High Court has indicated that the Solicitor should have regard to the fees paid to opposing Counsel. In *Crotty v An Taoiseach & Others*[9] the High Court held that:-

1. It is desirable, but not essential, that brief fees should be agreed between counsel and solicitor before the hearing of an action. Having regard to the nature and volume of work and the time constraints involved, it is not surprising that no thought appears to have been given to the question of fees until after the entire matter had concluded. This did not inhibit the solicitor for the costs from examining such fees and deciding whether each was fair and reasonable in all of the circumstances. The Taxing Master was not entitled to stand in the shoes of the solicitor for the costs and make his own assessment of what a solicitor in practice acting reasonably and prudently would offer counsel by way of brief fees.

2. One of the factors which a practising solicitor acting carefully and prudently should take into account in assessing the reasonableness of counsel's costs is the amount of fees paid to the opposing counsel in the same matter. Whilst in criminal matters payments to prosecution and defence counsel are equivalent where defence counsel are briefed under the State legal aid scheme, this does not follow in civil matters, where it is a long established practice that counsel regularly briefed by parties receive lower fees than those to which counsel for a successful plaintiff are entitled. Accordingly the disparity between the fees paid to counsel for the plaintiff and the defendants was correctly measured by the Taxing Master.

> In determining what the fee should be the Taxing Master takes the approach of the reasonable solicitor acting reasonably carefully and reasonably prudently in agreeing what the fee should be and that fee being acceptable to the particular counsel in question. A fee that market forces dictate as reasonable in the circumstances or what is known as the 'Going Rate' is to be considered reasonable and fees that fall beyond the market parameters would be considered unreasonable. However, a fee that appears heavier than the market rate needs to be justified and supported by reasonable explanations.

In *Loveday v Renton and Another (No.2)*[10] Hobhouse J. defined the brief fee as one that encompasses a number of duties from the initial stage of receiving the brief to the close of day one of the proceedings. Barron J. in *Commissioners of Irish Lights v Maxwell Weldon and Darley,*[11] sums up the essential criteria to be applied in assessing the brief fee, namely:-

(1) the nature of the case, its complexities and its importance to the client;

(2) the care and prudence of the solicitor; and

(3) experience of fees marked in other cases.

In *Edginton v Fitzmaurice*[12], the important principle was laid down that if the Taxing Master allows reasonable brief fees and refreshers as a whole he will be upheld, even if refreshers are not properly chargeable at all. If, therefore, he considers the Brief fee too small he may allow a refresher by way of addition to the Brief fee. In *Smith v Wells,*[13] the Court held that if the Taxing Master considered the Brief fee sufficient to cover all the work he might disallow the refreshers. Therefore, the Brief fees and the refresher fees must be considered as a whole and taxed accordingly. Laffoy J. in *Minister for Finance v Goodman & Ors*[14] held that

"The Court and Court Officers Act, 1995 gives the Taxing Master the power to examine the nature and extent of the work and allow what sum he considers reasonable"

> "As to the correct overall approach to the review of Counsels' fees in the context of the unusual process which the [Beef] Tribunal was, it seems to me that non-refresher items, that is to say, the brief fee, the fees for non-sitting days and the fee for the written final submissions should be considered together first, the refreshers should then be considered and finally all the elements should be considered together."

In *Simpson's Motor Sales (London) v Hendon Borough Council*[15] Pennycuick J. advanced the following guidelines for assessing Counsels' Fee:

> "...one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation. Then one must estimate what fee this hypothetical character would be content to take on the brief...There is, in the nature of things, no precise standard of measurement. The Taxing Master, employing his knowledge and experience determines what he considers the right figure...it is not a sound principle of taxation to treat the fee paid by the other party as the appropriate yardstick."

The Court and Court Officers Act, 1995 gives the Taxing Master the power to examine the nature and extent of the work and allow what sum he considers reasonable.

Section 27 (1) provides:-

> "On a Taxation of costs as between party and party by a Taxing Master of the High Court...the Taxing Master...shall have power on such taxation to examine the nature and extent of any work done or services rendered or provided by Counsel (whether Senior or Junior) or by a Solicitor,...and may tax, assess and determine the value of such work done or service rendered or provided in connection with the measurement, allowance or disallowance of any costs, charges, fees or expenses included in a Bill of Costs."

Section 27 (2) provides:-

> "On a taxation of costs as between party and party by a Taxing Master of the High Court...the Taxing Master...shall have power on such taxation to allow in whole or in part any costs, charges, fees or expenses included in a Bill of Costs in respect of Counsel (whether Senior or Junior)...as the Taxing Master considers in his or her discretion to be fair and reasonable in the circumstances of the case, and the Taxing Master shall have power in the exercise of that discretion to disallow any such costs, charges, fees or expenses in whole or in part."

Normally Counsel when furnishing a Fee Note merely furnishes a statement indicating the amount and the relevant item or items. It is not customary to furnish a detailed statement indicating the level and extent of work involved in a case. In the normal standard case this is acceptable but for cases involving difficulties and complexities a brief narrative identifying the effort demanded and rendered should accompany the fee note. This may assist the Solicitor in the achievement of an agreement as to allowable costs and avoiding the taxation process, enabling the speedy recovery of all costs of the matter.

Refresher Fees

In assessing the refresher fee, as already indicated, regard must be had to the Brief Fee, the nature of the case, the difficulties and complexities therein, and the duration of the trial. *King on High Court Costs* noted that:-

> "The use of the word 'refresher' has, however, been popularly extended to the additional daily fees paid to counsel in respect of a prolonged hearing. These daily refreshers originated at Common Law and arose from the fact that although the instructing solicitor would estimate the proper brief fee for supporting his own client's case he had no means of estimating the work which would be necessary to meet his opponent's evidence. The witnesses on the other side might be exceedingly numerous, and the fee marked on his counsel's brief quite inadequate, not only to the fee marked on his opponent's, but to the labour of cross-examination. The brief fee is normally supposed to cover one day's conduct of the case in Court and all speeches of counsel, but where the examination of witness occupied more than one day additional fees were very reasonably demanded and paid. Refreshers were not, however, usual in Chancery where

the evidence was all on paper before the brief was delivered and its extent known to both parties when fixing the brief fees. Nor were they allowed in the Court of Appeal for similar reasons. But when oral evidence began to be admissible in Chancery the reason for allowing refreshers at Common Law applied in Chancery also and a practice gradually arose of allowing additional fees to counsel in appeal cases where from circumstances which could not reasonably be foreseen the hearing occupied more than one day."[16]

Order 99 Rule 37 (28) RSC provides that:-

"It shall be in the discretion of the Taxing Master to allow reasonable refreshers to Counsel in proper cases."

Jessel M.R. in *Brown v Sewell*[17] indicated that 'When the trial of an action commences on one day and is concluded on the next day, refreshers to counsel will not be allowed unless the trial occupied in the whole more than one day's sittings, i.e., six hours.'[18] However, in *Irish Independent Newspapers Ltd. v Irish Press Ltd.*[19] Gavan Duffy J. articulated the principles applicable in Ireland in relation to the fees for refreshers:-

"The prescription of the appropriate refreshment for counsel in a long trial (five days in this case) is a delicate task, peculiarly fit for review by an officer appointed *ad hoc,* who, from his own practical experience, first as a solicitor and then as Taxing Master, and from the meticulous investigation which he must make on taxation into the case under review, is in the best position to gauge the fees that will do justice. I cannot lightly interfere with the discretion as to counsel's fees carefully exercised by a qualified specialist, thoroughly competent to give to the parties the benefit of his experience and skill on technical and discretionary remuneration, and my sympathy with counsel cannot blind me to the fact that there was no error of principle to justify interference here. The discretion of the Taxing Master is not to be curtailed by any presumption in favour of the particular fees allotted to counsel by their solicitors; in my opinion, *dicta,* in support of some presumption, to be found in the Reports of the early seventies, are not law today, if they ever were. There is no warrant in the Rules of Court for subordinating the Taxing Master's judgment to the solicitors' opinion and, if there were, it would embarrass the best solicitors and give an advantage to the inefficient and inexperienced."[20]

Parke J. in *Irish Trust Bank Limited v Central Bank of Ireland*[21] stated:-

"I think I am entitled to say that the practice in relation to marking refreshers is one which is at least as well known to Judges as to Taxing Masters. During their practice at the Bar, Judges had every opportunity of considering and applying what appeared to be the proper principles themselves and also reinforce their own experience with frequent consultations with their colleagues. A refresher which was one half of the brief fee was considered customary and reasonable in cases where the brief fee was not unusually high and the case was only expected to last for-a comparatively short time. Where however the brief fee was high and the case expected to run for a very considerable number of days it was almost invariable that the refresher fee would be fixed at a lower figure."

Accordingly, the Refresher Fee must reflect the effort required and continually contributed to a case and it is axiomatic, that long and protracted trials require a sum sufficient to remunerate the Counsel involved and ensure the care, attention and concentration which the case requires. •

1. *South Meath Election Petition,* 32 L.R.I. 407; *Hodson v Armstrong,* 26 I.L.T.R. 22; *White v Whelan,* noted at 26 I.L.T.R. 22; *Belfast Harbour Commissioners v Lawther,* 17 I. Ch. R. 147.
2. (1847) 10 Beav. at p. 389.
3. *In re Cosedge* (1885) 29 S.J. 306.
4. *Smith v Baker* (1873) 28 L.T. 669.
5. [1978] ILRM 63.
6. *In The State (Gallagher Shatter & Co.) v de Valera (No.2)* [1987] ILRM 555; [1987] IR 55, Finlay C.J. dealing with a specific point adverted to by the Taxing Master, viz. that there was a great disparity between what Counsel for the prosecutors had marked on their brief and what the State had agreed as a fee with its Counsel, pointed out (and it had been accepted by the Respondent) that there was, historically, a great difference between the fees charged by Counsel for the State and those for the other side.
7. *Philip Smyth and Genport Limited v Hugh Tunney, Crofter Properties Limited, G.b. Coulter and Caroline Devine (No. 2),* High Court, 8 August 1991, [1993] 1 I.R. 451.
8. [1958] I.R. 329.
9. [1990] ILRM 617.
10. [1992] 3 All ER 184. *See Minister for Finance v Goodman & Ors,* unreported, High Court, Laffoy J., 8 October 1999, wherein it is stated that the Loveday case is of limited assistance!
11. Unreported, High Ct., 15 May 1996.
12. [1885] WN 170.
13. 34 W.R. 30.
14. Unreported, High Ct., 8th October 1999.
15. [1964] 3 All ER 833.
16. *Costs on the High Court Scale,* Stevens and Sons, 1910, at page 114.
17. 14 Ch.D. 51.
18. "...when a case occupied more than one day, which meant more than the time of one day, for it might occupy parts of two days, making less than one whole day, then the Taxing Master had a discretion to allow refreshers. But when the case occupied less than the time of one day, the Taxing Master could not allow refreshers; he had no discretion. In the present case the Taxing Master acted under a mistake as to the facts. He thought that the case had occupied more time than one whole day, and I think therefore that the appeal on this point also should be allowed."
19. [1939] I.R. 371.
20. Ibid., at page 376 and 377.
21. [1976-7] I.L.R.M. 50.
22. (1872) VI. I.L.T. & S.J., 559.

LAND REGISTRATION: A NEW MODEL

Proinnsias O'Cillín BL, Chief Examiner of Title in the Land Registry, outlines his proposal for a new system for land registration that would avail of the technologies of the Information Age

Responding to the Times

In 1933 W.E. Glover commented that the Irish system of "local registration of title" was "still looked on with favour by those who have not yet realised that the transport of the country has ceased to be conducted by pack horse" (Glover, Ch. 2[1]). His report gave rise to a reorganisation of the system, principally involving the centralisation of the service.

The transportation change he referred to (from packhorse to motorised traffic) is as nothing compared to the technology-led revolution in communications taking place at the present time, a revolution that is radically changing the way business is done worldwide. "Organisations that do not make this transition will fail. They will become irrelevant or cease to exist" (Tapscott & Caston, preface[2]).

Land Registration cannot be aloof from these changes. The new paradigm demands a radical transformation of Land Registration and, indeed, of the whole public information system.

Information Age Registration

A system of Registration of Title for this, the Information Age, ought to be conducted via the telecommunications network.

A person who wishes to find out who is the owner of a parcel of land should be able, at the same time, to access information about the rateable valuation of the parcel, the occupier, the land-use, zoning, soil type, distance from shops and other services, bus routes, planning permissions, *lites pendentes,* market value, and so on. If Patrick Murphy is the owner of the site, the enquirer will, also, want to know if this Paddy Murphy is alive or dead, and, if dead, who his representatives are. This sounds complex, perhaps, but in reality it is quite simple. If all the public agencies, who already store this information, made it available in computerised databases connected to the telecommunications network, then it would be not at all difficult, or unduly complicated, for someone to write a program that would combine searches on several databases into one comprehensive report. The matter would be further simplified by adopting standards for the formats in which the information is stored in order to facilitate the inter-linking of information from the various sources. An enterprise, separate from the participating agencies, (Land Registry, Valuation Office, Probate Office, Courts Services, General Registrar, Companies Office, etc.), could, moreover, operate a Data Warehouse, which could copy information from all of the separate agencies and re-format it for rapid searching by the public.

Common Keys to Multiple Databases

Four important keys to enable information in multiple, disparate databases to be combined would be Person-Number, Corporate-Body-Number, Land-Parcel-Number and Geographic Co-ordinates. By adopting a common Parcel-Number, for example, information about a parcel of land stored in relational tables at several sites (e.g., Valuation Office, Planning Office, Land Registry) could be readily combined. A search to these multiple sites could collect all the information stored by reference to that Parcel-Identifier, (with or without other information stored by reference to the geographic coordinates of the parcel), and combine it into a single report.

Complexity of the Ownership Concept

Probably the most complex area of public information in such a network would be that of land ownership. While we can say of a PARCEL of land that it has (related to it) an OCCUPIER, a RATEABLE VALUATION, a particular LAND-USE, etc., we can't say, simply, that it has an OWNER. Such an assertion begs the question, "an owner of what interest: Freehold, Leasehold (of what term, and as head-lease or sublease),

"A system of Registration of Title for this, the Information Age, ought to be conducted via the telecommunications network".

Mining Right, or what?" Then we have to deal with tenants in common, joint tenants, trustees, beneficiaries, corporate owners, full owners and limited owners. In addition, an INTEREST may be attached to another INTEREST as an appurtenance, rather than held by an OWNER in *alieno solo.* INTERESTS can be encumbered. And there may be defects in an OWNER'S title.

Thesis on Model for Land Registration

In my thesis (for MSc), "*A Model for Land Registration in the Information Age,*" I set out to solve these problems, and offer my model of land ownership as a candidate for a universal system of Land Registration, capable of being implemented in any country of the world. Inevitably, my model for Land Registration had to impact on the rest of the *Societal Information System,* since Land Registration should not be seen as operating in isolation from the other elements of Societal Information.

Differences between Approaches

The differences between the model I proffer and previous approaches to the computerisation of Land Registration are summarised in Table 1:

	Previous Approaches	My Approach
Objective	Automate existing process (to some extent).	Transform the registration system into something totally different: an Information Age service.
Scope	The Land Registry and/or the Registry of Deeds	The entire Public Information System, and, perhaps, elements of privately-held information.
Focus	The organisation being computerised; (how can we do things better?)	The Services: What services should be provided in the Information Age, and How?
Vision	Static: i.e., moving from a static paper-based system to a static computerised system	Dynamic: We are in a period of constant technological change. A system for the Information Age must be capable of benefiting from technological improvements as they occur.
Implementation	A single, long-term project. (Unfortunately, a system that takes several years to implement is out of date before it starts)	The dynamic environment predicates a policy of continuous development. Implement immediately such aspects as bring immediate pay-back, and more later. Adopt new technology as it comes on stream.
Analysis	Bottom-up; investigates what people in the organisation are doing, and how this can be computerised.	Top-down; starts with conceptual analysis of the services that should be made available, and then examines the organisational structures and systems needed to provide them
Application	The Project applies to one organisation	My model has Universal application
Complexity	Tends to be complex	I present a simple, easy-to-implement model
Publication	Confidential, between the developer of the model and the organisation that commissioned it.	Public: My model is made public in the Academic tradition, (preserving, of course, the copyright of the author), inviting criticism and discussion and capable of bringing about worldwide improvement and cooperation.

Table 1

It will be seen that my approach is in line with the most recent thinking on how businesses can best implement the new technologies. For example,

* Tapscott and Caston (1993)[3], reviewing research costing more than $7m., funded by more than 300 companies across the world, report that "the Strategic I.T. Plan is dead," (i.e., the traditional "strategic" plan which implemented computerisation projects over a period of several years), and is replaced, in successful companies, by continuous development.
* Hammer and Champy[4] (p. 31) assert that "Reengineering a company means tossing aside old systems and starting over."

Modularlity

While Land Registration would be part of the Societal Information System, the principle of Modularity would enable the Land Registry to proceed with the transformation of its services without waiting, for example, for the Births, Marriages and Deaths modules to be computerised. Anticipating, however, that all public information would eventually be linked through the telecommunications network, it would, nevertheless, from the start, anticipate the external linkages. Pending the introduction of a Person-number common to all users of Societal Information, the Land Registration Authority would simply adopt a local Person-number, which would be replaced in due course, (and, probably, in the course of transactions), with the common Person-number. (This would be achieved by allowing the system to record whether a Person-Number entered is a common or a local number).

As the managers of various data-sets adopt a compatible structure, they would go on line and "plug in" to the overall system.

Modularity, therefore, means that progress can be made independently by multiple organisations and at a pace that suits their own business. It, also, means that, within organisations, change can be incremental, recouping continuous expenditure by constantly improving effectiveness and efficiency.

The adoption of standards for data formats to facilitate this dynamically growing and expanding system would be assisted by setting up a structure for consultation between the various participating bodies, with the consultative body issuing recommendations to the participating bodies and prospective participants.

Benefits of Simplicity

To our bamboozled administrators, baffled by the complexity of modern technology, our old friend William of Okham comes to the rescue with his famous principle, known as Ockham's Razor. This is often expressed in the familiar form "A simple model is, *ceteris paribus,* preferable to a complex one," but, more precisely, and of especial assistance to those of us engaged in data-modeling, as "*entia non sunt multiplicanda praeter necessitatem* (entities should not be multiplied beyond necessity)" (Flew[5], p.236). It is of interest to list some of the advantages of simplicity over complexity (see Table 2).

It is, of course, often asserted that when people say they want simple systems, what they usually mean is that they want technologically complex systems that are easy to use. The computer and communication platforms that we will be using will, undoubtedly, be technologically complex. We do not need, however, to be aware of their complexity. When we make a phone-call, all we need to know is how to dial a number and

Complex Model	Simple Model
Baffles the administrators and business owners who want to implement new systems.	Is understood by administrators and business owners, so they know what they are doing.
Hard to Validate	Easily validated
Because Owners and Administrators don't understand the system model, control of the business is given over to the technical experts, who often don't understand the business objectives. The technology increasingly determines what people do.	Since the owners and administrators can understand the model, control moves back to the administrators and business-heads from the technical people. Technology serves the business objectives.
Expensive	Low cost
Long implementation	Implementation can be faster. Coupled with modularity, phased implementation is possible. Business, heads can choose which modules to implement and when.
Teething troubles	Teething trouble is a lot less likely than with complex models.
Inflexibility, because changes in one place will have many repercussions in other places.	Ease of adding new modules means that the system is more flexible.
Possibility of failure is high. (Many organisations have gone out of business attempting to implement complex systems).	Failure is unlikely: the model can be bench tested and validated at an early stage. Continuous, modular implementation means that benefits accrue as development takes place, rather than large present expenditure awaiting future recoupment.

Table 2

speak into the mouthpiece, not the details of the technological process by which the message is transmitted. Similarly, when we want to design a system to make data available to our clients and customers, all we need to know is how to format the data into information tables. The computer industry, in addition to providing us with machines and cables to carry the system, will, also, provide the Database Management Systems (DBMS) and communications packages to implement the tables and enable our customers to interface to them over the Internet.

Benefits of Publicity

The benefits of placing access to the model in the public domain include

* The improvement of the model through criticism and discussion;
* Facilitation of the development of universal (or world-wide) inter-connectivity; and
* The potential for hardware and software companies to provide competitive, standard systems to the organisations providing societal information, cutting down the technological costs and the need for the organisations to engage in in-house systems development.

Organisation Structure

When we go on to discuss the Organisational Structure necessary to implement a comprehensive Societal Information System, we take cognisance of the facts

* that Competition spurs efficiency,
* that Civil Service Departments are weak at innovation and unlikely to embrace constant change, and
* that effectiveness predicates the capture of information at source (Tapscott & Caston, Ch. 1).

These simple truths drive us to the conclusion that the services we see as desirable can best be delivered by independent and competitive organisations (which we call Registration Authorities) acting under franchise or mandate from a Government department responsible for Public Information. In turn, these Registration Authorities would licence agents, (such as solicitor, surveyor, priest or other marriage registrar, hospital personnel), to enter data, (such as owners, boundaries, marriages, deaths), directly into their respective databases.

Partitions and Amalgamations

To achieve efficiency, the Department of Public Information might partition a data-set between competing bodies. The partition could be on either a geographic basis or a functional basis. For example, an independent company might contract to provide the services of Registration of Title in relation to a particular county or group of counties, or one agency might run the Database comprising the textual records of ownership, while another provides the Mapping service.

On the other hand, a Registration Authority carrying out one registration service might well tender for the franchise to run an additional service. Such a tender could be very competitive, since the investment in technology and personnel to run the first service might reduce the extent of technological investment for the subsequent one. For example, an organisation which has already invested in a geographic information system (GIS), for one purpose should be able to tender competitively for another Land Information service which has not yet moved to a GIS format. Moreover, an organisation providing effective societal information services for one European country should not be restrained from tendering for similar services in another. •

The author's research at Trinity College Dublin into "Universal land registration" is described on the Web at:
http://www.cs.tcd.ie/research_groups/aisg/LandRegistration/
The author may be contacted at his E/Mail address:
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1 Glover, W. E. (1933). *Registration of Ownership of Land in Ireland.* Dublin.

2 Tapscott, Don and Art Caston *Paradigm Shift: The New Promise of Information Technology.* New York: Oxford Uni Press. (1993).

3 supra

4 Hammer M., and J. Champy *Reengineering the Corporation: A Manifesto for Business Revolution.* London: Brealey. (1995).

5 Flew, Anthony *A Dictionary of Philosophy.* London: Pan Books. (1979).

CRIMINAL LAW

by Peter Charleton SC, Paul A. McDermott BL and Marguerite Bolger BL. (Butterworths, 1999)

Reviewed by Mary Rose Gearty BL

The mammoth task of committing "the Criminal Law" to paper in one (handsomely bound) volume cannot be overestimated. As the authors point out, our criminal law is "floundering among a mass of statutes and decisions when [it] should be clear and readily accessible in a single document". Their trenchant criticism of the legislature in this regard is very welcome.

In terms of style, the text is clear, coherent and often conversational in tone. Purists may object to the use of phrases such as "bashed-in" or references to one's right "to be let alone", but arguably this more casual style makes the work more accessible and comprehensible, even to the lawyer. It certainly does not detract from the academic worth of the material. The tone is never chatty but often engaging and can be a pleasure to read particularly where insightful and entertaining hypothetical examples are given to illustrate a point. Passages from other texts, notably Charleton's *Offences against the Person,* are reproduced here (e.g. paragraph 1.73 dealing with the law in relation to intention) and sensibly so - if one of the authors has already explored a particular topic thoroughly and articulately there is no need to adjust it in order to create a completely "new" text.

A wealth of case law, statute law and code options from other jurisdictions is referred to and often reproduced in the text. From the point of view of both the academic and the practitioner this is both informative and useful. It is further proof of the industry of the authors, already evident in their abundant use of Irish jurisprudence. All the old stalwarts are here, together with any recent judgment of note, reported or otherwise.

It was an interesting decision to include a chapter on the law of evidence, a topic which probably justifies a second volume. However, as the authors point out, criminal law is "inextricably bound up with the law of evidence" hence this is an eminently practical addition to this volume. It cannot be a detailed exploration of the area but it is as informed and pertinent as the rest of this work. For instance, the Criminal Evidence Act, 1992 is examined and much of it is set out in full. As with many other chapters, this must be of immense value to the circuit practitioner in particular, whose library should ideally be limited for reasons of transportation, let alone cost and convenience. A useful guide to the custody regulations is provided. The authors note that any detailed study is outside the scope of the book, but the essentials are here and a good working knowledge of the regulations can quickly be gleaned from these pages.

Another innovative idea is "The Charging Manual", already familiar to readers of Charleton's *Criminal Law Cases and Materials* as "Sample Offences", but much extended here. The basic rules in relation to drafting of indictments are set out together with over 300 sample charges encompassing the most serious and the most commonly prosecuted offences. In each case the reader is referred to the paragraphs in the text which deal with that particular offence in detail. The sample charge is followed by a reproduction of the relevant legislative provision under which the charge is laid, if the provision has not already been set out elsewhere in the text.

Offences involving controlled drugs, firearms, explosives and the use of chemical substances in animals for human consumption are all dealt with in a chapter entitled "Possession". Homicide, sexual offences, non-fatal offences, property offences and corporate crime are all listed under the heading "Specific Offences". The chapter on corporate crime is

"A wealth of case law, statute law and code options fron other jurisdictions is referred to and often reproduced in the text. From the point of view of both the academi and the practitioner this is both informative and useful It is further proof of the industry of the authors, alread evident in their abundant use of Irish jurisprudence".

particularly interesting as a full and excellent discussion of a much neglected area.

In the chapter on homicide the High and Supreme Court decisions in *Re a Ward of Court*[1] are considered. It is disappointing to see no discussion of the distinction between act and omission which allowed the court in the similar case of *Bland*[2] to make the declarations sought. Although the judgments in the *Ward* case did not address the issue (concentrating instead on the right to life and the best interests of the patient) the Law Lords in *Bland* explored the area in some detail. The latter case is mentioned at paragraph 7.155. From the point of view of the criminal lawyer, the key issue in both cases was the distinction drawn between an act (e.g. administering a lethal injection) and an omission (e.g. withdrawing ventilation systems) which enabled the courts to declare that the applicants would not commit murder if certain medical treatment was discontinued. The attitude of the courts toward omissions which cause death is outlined in paragraphs 7.138 - 7.140 though neither of the two cases is discussed here. As the authors point out, it remains murder to take any active step to end life but, as in the Irish superior courts' judgments, the theoretical reasons for the distinction have not been explored in the context of the patient in a persistent vegetative state.

All of the defences are considered in depth, though consent appears in the chapters on assaults and sexual offences rather than under the general heading on defenes. The authors have quite rightly preceded their discussion of the Non-fatal Offences Against the Person Act, 1997 with a full analysis of the pre-1997 position (which includes extensive quotation from the 1861 Offences Against the Person Act). This is relevant both in relation to offences which pre-date the legislation and in interpreting this relatively new enactment. However, in so doing, the defence of consent is outlined as it was understood at common law, that is that a "victim cannot consent to an act which ...will have the effect of probably causing to him or her bodily harm"(at paragraph 9.16). Two authorities are cited in support of this proposition and a discussion of Brown[3] and similar cases (involving the infliction of actual bodily harm with the consent of the victim) follow. It is not noted anywhere in this section that the new definition of "assault" under the 1997 Act seems to preclude a conviction under Section 2 (assault) or Section 3 (assault causing harm) where the victim has consented.

The Section 2 provision actually defines assault in such a way that lack of consent becomes an element of the offence for the prosecution to prove. Section 3, by merely repeating the word "assault" cannot refer to anything but the offence as defined in Section 2. This interpretation is reinforced by the absence of the word "assault" in the Section 4 offence of causing serious harm. Consent is no defence to the latter, but, by definition, is a full defence under Sections 2 and 3. There is a lack of clarity in the treatment of this issue, a dramatic change in policy on the part of the legislature which has gone relatively unnoticed since the Act came into force.

The authors seem to agree with the above interpretation of the relevant sections but their conclusions are spread out over several separate paragraphs and are difficult to pin down. The point is considered again in paragraph 9.87 (dealing with Section 2 assault) where it is noted that it is "unclear whether or not ... one cannot consent to the infliction of serious harm" and "it is strongly arguable that a person may consent to assaults up to a level where those physically or psychically harm him" and by paragraph 9.94 (on the Section 4 offence) it is "beyond argument" that the common law provisions continue to apply in prohibiting the use of consent as a defence to a charge of causing serious harm.

This may be an editorial problem in that many headings throughout the different chapters deal with issues and cases which could be dealt with elsewhere - for instance the paragraph on constructive possession (at 5.07) could easily encompass "Proof by Circumstances" which appears as a separate heading at 5.14. One must read both to understand the complete picture.

The very few criticisms outlined above do not detract from the achievement of the authors. The emphasis to be placed on a particular interpretation or argument is more a matter of academic debate than one of accuracy. The book cannot be faulted in regard to reliability or accuracy. In relation to the use of headings, this is simply a question of editing and arrangement - everything is here, but may be difficult to find if one is not familiar with the lay-out of the book.

Lawful use of force is examined along with the other defences rather than under the section on the 1997 Non-Fatal Offences Against the Person Act which included new provisions in relation to that defence. The authors join with other commentators in asking whether or not the new provisions apply only in relation to non-fatal offences as suggested by the very title of the Act. Section 22 of the 1997 Act (set out at paragraph 13.06), which abolishes the common law rules in relation to self-defence, is in very sweeping terms. As they have done throughout the work, the authors identify and discuss a potential problem area. There is a full discussion of self defence as it applies to homicide and the chapter ends with a discussion of the judgments in Dwyer[4] in an attempt to predict the judicial reaction to this ill-drafted provision.

"This may be an editorial problem in that many headings throughout the different chapters deal with issues and cases which could be dealt with elsewhere

This is a detailed and extremely useful book - a highly comprehensive and authoritative guide to the criminal law. ●

Correction

Please note that John Mee's *"The Property Rights of Co-Habitees"* reviewed in the October 1999 issue, is published by Hart Publishing. The reviewer was Cormac Corrigan S.C.

THE HIGH COURT, A USER'S GUIDE

By Kieron Wood (Four Courts Press, 1999)

Reviewed by Donal Egan, BL, Chairman Victim Support

In 1995 as a result of a push from Victim Support and a substantial shove from the Bar Council an information desk was opened by the Department of Justice, Equality and Law Reform just off the rotunda in the Four Courts. It was belated recognition of the geographical complexity of our Courts, a user's reference point if you like (which includes the odd practitioner), for the surrounding terrain. A modest initiative that has, I believe, been of some help to the disoriented litigant.

The High Court, A User's Guide is a much more ambitious project. A guide to the Rules of Practice and Procedure for the Himalayan heights of the High Court in one slim volume is a daring, or as some might see it perhaps, a foolhardy venture.

None the less I believe that the book is an invaluable aid to the litigious minded lay person, not least because it will warn him or her of the complexities and dangerous salients on the climb. It is useful also for the practitioner, bearing in mind that in order to survive the climb, a copy of the Rules of the Superior Courts must be included in the survival kit. Indeed this condition is explicit in the text, as all directions and advices are carefully underpinned by the relevant Order and Rule and current case law where appropriate. For the student it is required reading as he or she begins exploring the foothills.

The first seven chapters deal with such mundane matters as Summonses, Court Lists and Service. While these may be considered basic matters for many practitioners, getting the basics right is an essential requirement in Rules and Procedure in the High Court. In this regard the book is very informative, detailed, practical and helpful.

The remaining seven chapters are concerned with the more technical areas; including Judicial Review, Judgement Mortgages, Bankruptcy and Appeals to the Supreme Court. Here the author skilfully outlines the contours and allows for further reconnaissance.

The author's journalistic skills are evident throughout the book. It is written in the easy effortless style of the good craftsman, the text at all times carefully woven to give a clear view of the subject matter to the reader.

I highly recommend this very readable book for anybody involved in High Court litigation. •

CREDIT UNIONS IN IRELAND (SECOND EDITION)

by Anthony P. Quinn BL (Oak Tree Press, 1999)

Reviewed by Ercus Stewart SC

Anthony P. Quinn, Barrister-at-Law has produced a revised second edition of his text *"Credit Unions in Ireland"*. The new edition deals with the very important changes in Irish Law brought about by the Credit Union Act 1997, and is most welcome.

Anthony Quinn is the recognised expert in Credit Unions and Credit Union Law in Ireland. He is a practising Barrister and member of the Law Library. In addition, and most importantly to his expertise, he was Assistant Principal in the Registry of Friendly Societies, which Office registers and supervises Credit Unions in Ireland. He has written extensively on Credit Unions. Not only does he have the legal expertise, as a Barrister, and the credit union expertise, as senior administrator with the Registrar of Friendly Societies (including Credit Unions), he has been, and continues to be, active at the "coal face". Barristers will know Anthony Quinn as a founder member, a continuing very active member, and Supervisory Committee Chairman, of the Law Library Credit Union. Apart from this being the first Credit Union for members of the Bar, it had the distinction of being the first Credit Union in Ireland to be registered under the Credit Union Act, 1997. Therefore readers know that this text is written by an acknowledged expert.

The Book includes topics such as the basics of Credit Union Membership, including forming and joining a Credit Union, the "Common Bond" enshrined in law, Rules, Insurance, Savings and Loans, all the main benefits of membership.There is a Chapter on the Rules, the Registrar's Role, Standard Rules: (called "the Bible of a Credit Union") and the legal effects of Rules. Meetings and Voting are fully dealt with, including Organisation,Annual General (AGM) and Special General (SGM) Meetings.

There is an important Chapter on Governance, the Board of Directors, Supervisory and other Committees, Officers and Management. Disqualification of persons from Board or other functions, plus a number of practical issues.

The Chapter on Financial Transactions, Members' Savings, Loans and Insurance, includes remedies for debts from members, Savings Protection, Transfer of Member's Financial interest upon Death and additional services of members.

Contracts, Investments, Special Funds and Borrowing contracts, including the acquisition, holding and disposal of land and investments, and borrowing by Credit Unions, are all comprehensively covered..

The important role, functions and duties of the Registrar of Friendly Societies, including Supervision, Control Complaints and Disputes, is fully dealt with. Accounts, Auditors and "Watchdogs" Administrators and Examiners. Termination including Winding Up, Dissolution, Amalgamation, Transfer of Engagements and Cancellation are all explained.

On the structural side, The Irish League of Credit Unions and the Credit Union Advisory Committee, both very important, are explained.

The author also includes the co-operative and historical background, and the Irish Credit Union Movement, its origins and development, and the co-operative context, in Ireland.

This is a very worthwhile and expert volume. It will be of use to Barristers, in their practice at the bar. It will be useful to all lawyers, in advising on matters of Credit Union Law. It will also be a very welcome addition to all those people around the country who give their services voluntarily to their community through their local or work-based Credit Union.

I wholeheartedly recommend this Book. •

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