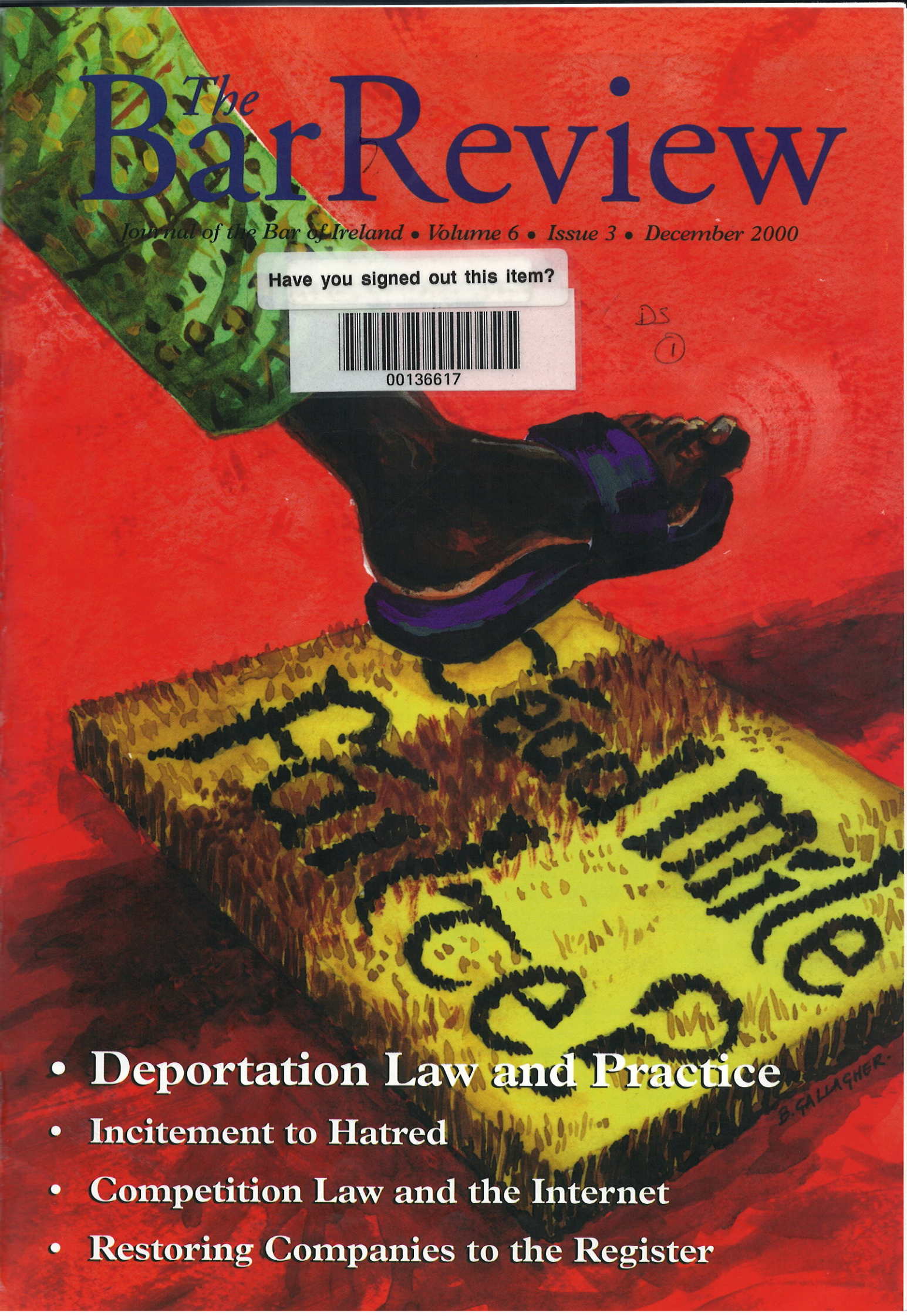
The Bar Review

Journal of the Bar of Ireland • Volume 6 • Issue 3 • December 2000



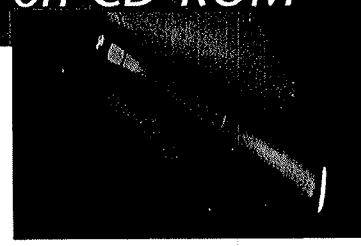
- Deportation Law and Practice
- Incitement to Hatred
- Competition Law and the Internet
- Restoring Companies to the Register

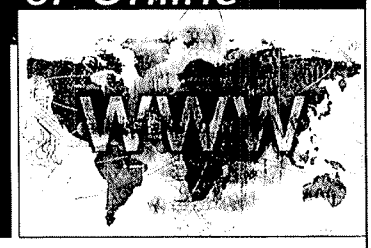
Launches November 2000 for only £495

Irish Property Law Service

The one stop legal workshop

on CD-ROM or Online





The Irish Property Law Service is the complete library for the Irish property lawyer, featuring commentary from leading professionals in the area, legislation, case law and precedents. Available online or on CD-ROM this Service covers the broad spectrum of property law.

Built on four key components:

Narrative: Leading commentary on land law, landlord and tenant law, the law on specific performance, conveyancing law and equity & trusts

Legislation: Full text of relevant legislation, complete with annotations

Precedents: Useful precedents, incorporating our leading service Irish Conveyancing Precedents

Case Law: The case judgments are reproduced in full and where relevant, statutory provisions are also reproduced to aid comprehension of case law

Butterworths' Irish Property Law Service in Electronic Format will:

- Save you valuable research time
- Prof. John Wylie's monthly bulletin keeps you right up-to-date with all developments in the law
- Eliminate manual updating
- Searchability and Portability – On the one laptop you have access to an entire reference source

Claim your free demonstration of Irish Property Law Direct and discover how this remarkable CD or Online service will help you make better use of your time and skills

Please contact your Area Managers direct on: Madeleine Roche Tel/Fax (01) 840 0638 Mobile: 087 2597659
Toni Ryder Tel/Fax: (01) 288 4005 Mobile: 087 2566793

Or fill out this order form and send it to the address below

To order

Please supply me with the following:

(Qty)	Title Product Code	Total
	Irish Property Law Service Single user online licence £495 Product Code: IPLD	
	Single user CD-ROM licence £495 Product Code: IPL	
	Total Amount due plus p&p	£

I would like to pay:

☐ Please invoice me

Or my Butterworths Tolley Account no. is .....

or by credit card as follows:

☐ Mastercard ☐ Amex ☐ Visa

My credit card no. is .....

and its expiry date is .....

or with the attached cheque for £.....

(made payable to **Butterworths Tolley**)

Signature .....

Date .....

Delivery details

Name .....

Job Title .....

Company .....

Address .....

.....

.....

.....

Postcode .....

Tel .....

By post

James Farmer, Butterworths,Dept AA 570,
PO Box 4214 FREEPOST, Dublin 2

Phone

Please phone Customer Services on: (01) 8731555

Fax

Please fax your order to: +44 (0)20 7400 2570

Visit our website at www.butterworthsireland.com

Butterworths

Butterworths (Ireland) Limited
Registered office Arthur Cox Building Earlsfort Terrace Dublin 2
Registered in Ireland number 60402

A member of the Reed Elsevier plc group

We like to keep our customers informed of other relevant books, journals and information services produced by Butterworths or by companies approved by Butterworths. If you do not wish to receive such information, please tick the box ☐

The Bar Review

Volume 6, Issue 3, December 2000, ISSN 1339 - 3426

Contents

Subscriptions: October 2000 to July 2001 - 9 issues. £90 (plus VAT) including index and binder.

Subscription and advertising queries should be directed to :

Noted Marketing and Design Limited,
The Mews,
26A Mount Eden Road,
Donnybrook, Dublin 4.

Telephone 01 283 0044
Fax 01 283 0955

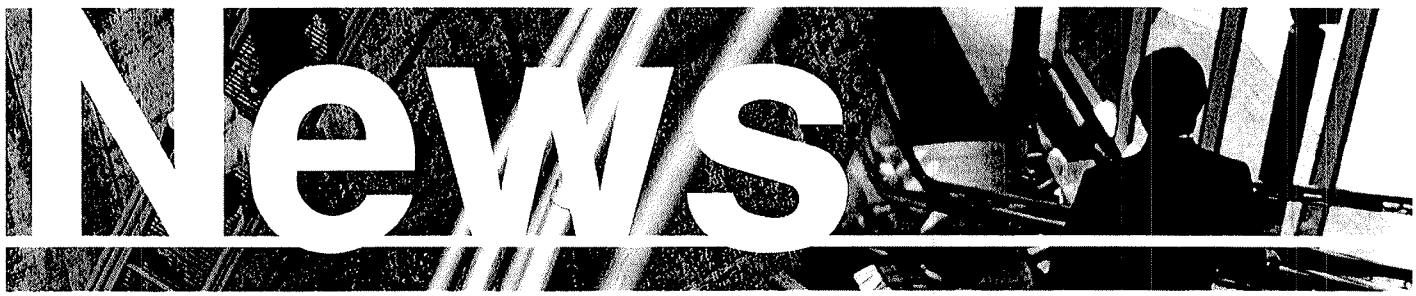
The Bar Review December 2000

Editorial Correspondence to:

The Editor,
Bar Review,
Law Library Building,
158 Church Street,
Dublin 7

Telephone: 353-1-817 5198
Fax: 353-1-817 5150
e-mail: pdm@lawlibrary.ie

Design: the Design Room tel: 6617080 Cover Illustration: Brian Gallagher: tel: 4973389



Equality for Women Project Funding

The Department of Justice, Equality and Law reform invites project proposals designed to promoted equality for women in the following areas:

- Access to employment, education and training with a particular emphasis on retraining and up-skilling women
- Encourage career development among women
- Encourage entrepreneurship among women
- Meet the needs of disadvantaged women and women over 50 years of age
- Promote gender balance in decision making

The funding is available to organisations interested n working for equality for women. Project promoters will include community and voluntary groups, trade unions, employers, state bodies, political parties, women's organisations as well as commercial organisations. Partnership arrangements between the different sectors are encouraged.

Project application forms and guidelines are available from the Equality Section, Department of Justice, Equality and Law reform, 43-49 Mespil Road, Dublin 4

Phone (01) 663.2686 or email equalityinfo@justice.ie
The completed form should be returned before 5.00pm on 5th January, 2001.

Dáil Courts

In order to commemorate and celebrate the pioneering work of the Dáil courts (1920-24), Dáithí Mac Cárthaigh BL proposes to collect and publish the likenesses of the judges and justices, registrars, clerks and other officials of the Supreme, Circuit and various Parish Courts. He would be grateful if anyone in possession of such likenesses could forward them to him along with a short biographical note including details of the individual's Dáil Court service.

Bar Council Statement on Former Chief Justice Liam Hamilton

The Bar Council wishes to extend its deepest sympathies to the family of Liam Hamilton, the former Chief Justice of Ireland. His career in law was one marked by brilliance as a student when he received the Brooke Scholarship, as a barrister practising at the Bar, and subsequently as a member and President of the High Court and Chief Justice of the Supreme Court.

He brought to bear to the office of a judge in this State an independence of mind and a great capacity in mastering the details of complex cases. A hallmark of Liam Hamilton's role as a judge was not only his courage and fairness but also his abundance of courtesy towards every citizen of the State who appeared in the courts over which he presided.

The untimely death of Liam Hamilton is a loss not only for his family and friends, but also for his many former colleagues at the Bar.

Cherie Booth QC talking to Rory Brady SC, Chairman of the Bar Council, at the Women in Law Conference.

Bar Council/Community Liaison Scholarships

Angela Brady and Ruth Doyle were the recipients of this year's bursaries for higher education. Angela is studying science in University College Dublin while Ruth will be studying journalism at DIT college, Kevin Street.

THE TREATY OF NICE - IRELAND AS ONE OF MANY

As this issue of the Bar Review goes to press, the Nice Summit of European Union leaders has approved a new Treaty which prepares the Union for enlargement and institutes a number of important legal and constitutional reforms. Assuming that the treaty is ratified, in Ireland by referendum, we will need to quickly adapt our thinking and conduct to a new set of relations within the EU which, more than ever, will mean that Ireland's influence and contribution to the Union, as well as the benefits it obtains from membership, will depend on our ability and skills at punching above our weight. Whereas the Irish government has emphasised the trading opportunities for Ireland in an expanded European Union, it may also be important that Ireland, although a small country, will have the benefit as one of many in the future of its past experience and knowledge as an EU member since 1973.

Under the new rules, a decision of the Council of Ministers may - but only may - be made for issues covered under qualified majority voting if the number of votes in favour passes a specified threshold, 71 per cent initially, rising to 73 per cent when all 12 candidates in negotiation for EU entry are allowed to join. This is similar to the existing system, although the new deal gives large countries proportionately more of the votes and, in a new rule designed to appease larger members for the loss of one of their two commissioners, enables decisions to be queried and allowed to go forward only if countries representing 62 per cent of the EU's population support it. In a second new rule, the prize for the smaller countries is a mechanism allowing a majority of countries to block a decision, regardless of the weighted vote.

Thus, Ireland as one of 15 member States will have a weighted vote of 7 out of 237 total votes in a qualified majority system which requires a blocking minority of 68 votes. As one of a possible 27 member States in the future, these 7 votes will be one of a total of 342 requiring a blocking minority of 88 votes. If it wishes to block a measure by another means, its single vote will require, in a European Union of 27 members, the support of 13 other countries; or, alternatively, its vote will require to be added to those of countries together representing a population of over 330 million out of the 545 million persons in an expanded European Union. A further measure of Ireland's relative position will be its 12 MEPs (reduced from 15) out of 626 MEPs in the present Union of 15 countries or out of 738 MEPs in an expanded Union of 27 member States.

The Treaty of Nice will remove the national veto in 29 articles of the 70 still subject to unanimity - some 10 per cent of all treaty articles. From a lawyer's perspective, perhaps the most important of these are those relating to the procedures before the Community courts which will be the subject of reforms designed to streamline and speed up its working; to decisions on trade in services, governed by Article 133 EC; and to certain common immigration and asylum decisions (following unanimous adoption of governing legislation). Following negotiations, many more proposals to introduce qualified voting were abandoned. These included certain tax measures designed to combat fraud, social security measures to ease cross-border movement of migrant workers, and decisions on the free movement of professionals. Little or no progress was made on cohesion, and indeed the endorsement of the notion of 'enhanced cooperation' whereby member States may implement a common position, as for example the Schengen agreement, raises the prospect of complicated multilateral policy alliances which could become more familiar in a future expanded European Union.

For all the institutional changes introduced by the Treaty of Nice, it is remarkable that the expansion of Europe does not entail any significant change or roll-back to the substance of European law. The acquis communitaire remains intact, and the rights and obligations of individuals, companies and governments will continue to be governed by the same rules and principles including those developed by domestic and Community courts. From this perspective, It is no coincidence that the adoption of an EU Charter of Fundamental Rights coincides with this opening to the East. Although Romano Prodi described the central objective of the summit as being "the reunification of Europe", it may be doubted whether a Europe of these dimensions has ever been united historically. Instead, the fears and doubts of the west, and the hopes of the east, probably require a greater identification with the rule of law including respect for fundamental rights at this point in time precisely in order to unite the divergent cultures of Europe around the European experiment. Together with other constitutional reforms, the question of incorporating the Charter into the Treaties has been left over to 2004, but in all likelihood it will soon be recognised as one of the Union's constitutive texts, and therefore also quickly become a useful additional source of law for practitioners.●

COMPETITION LAW THE INTERNET

Stephen Dodd BL provides an overview of the questions and challenges which the Internet poses for the application and development of Irish and European competition law.

Introduction

The United States' Supreme Court has described the Internet as a "unique and wholly new medium of worldwide human communication."[1] Two aspects of the Internet make regulation particularly difficult to grapple with: its rapid pace of change and its global nature. In addition to this regulatory concern, whereas there is general convergence in high technology with ever expanding services available on the Internet, the Internet itself tests the adaptability of all pre-existing laws including competition law. At the same time, as e-commerce develops, it is not inconceivable that the Internet may turn out to be competition law's most habitual sphere of application.

The purpose of this article, following a brief introductory description of the Internet, is to discuss a number of the competition questions which are likely to impact on the development of the Internet. These include: infrastructure issues including access to the local loop and access to software; jurisdiction and enforcement questions; defining the market; services issues embracing e-commerce and anti-competitive practices; and the domain name system.

Before turning to these questions, it should be noted that, following the lead of the European Commissioner for Competition, the application of competition law to the Internet may call for a distinction to be drawn between infrastructure issues and service issues.[2] Infrastructure issues concern access to the Internet, such as to the telecom network. This is where the Internet intersects with the telecommunications sector. Access issues also embrace access to software such as browser and other programmes. Service issues, on the other hand, concern the operation of e-commerce, i.e., the behaviour of firms while trading online. The domain name system, while something of a hybrid, will be classified as a service issue for the purposes of this article.

It is also important to bear in mind that the Internet's global nature means that the overarching preliminary task is to determine which competition law applies. This raises the territorial reach of competition law (and hence international law), and requires an examination, in every case, as to whether the appropriate law is Irish competition law, European competition law or that of another regime.

The Internet

The connection

The connection of the Internet involves a number of levels.[3] The individual user at a terminal, usually a PC (though it may be a television, WAP telephone or other alternative) will have an account with an Internet Service provider (ISP). This is typically by a dial-up account (using the normal telephone connection), though a business which wants a more permanent connection may lease a line. The individual user is linked to the ISP through the short distance network under the local loop, i.e., the copper wires of the public telephone network which, in Ireland, are still controlled by Eircom. ISPs may link with other networks under peering agreements. Beyond this is the worldwide long distance or backbone network, which is controlled by four firms (MCI, Worldcom, Sprint and GTE).

Cable TV networks have undergone liberalisation[4] to act as an alternative to the copper wires telecommunications network. A further alternative is the direct satellite connection and radio based FWPMA or wireless in the local loop,[5] although these remain at a nascent stage.

Physical Description

A more technical description of the Internet is that it is made up of web-pages each with a domain name address. When a user seeks to access a web-page, certain computers known as "switches" or "routers" activate. Their function is to receive and forward the data contained in the web-page which is stored in the "host". A standard Internet protocol allows data to be transmitted over the Internet. The switches link up to the host by means of the "pipes" such as the telecommunications network. At present in Ireland, these switches or routers are all owned by Eircom. The ownership by Eircom of both the switches and the network has given rise to the claim of bundling. It is claimed that ISPs should be allowed to provide their own switches or routers.

Content

As regards the content of the Internet, the web-pages themselves may be either commercial or non-commercial. The program through which the Internet is viewed is the browser, the most widely used being Microsoft's Internet Explorer and Netscape. To find a web-site, a search engine or directory may be used, though it is unnecessary if the exact domain name address is known. To view certain pages or for certain other

uses such as audio-visual pages, certain other software programmes may be needed.

Regulation, Self Regulation or Competition Law ?

Regulation, in the sense of direct regulation for the purpose of guiding the market, is traditionally juxtaposed to competition law. Regulation is *ex ante*, in a sense proactive, while competition law operates *ex post*, in the same sense reactive. In the area of access to the Internet, the approach to the recently liberalised telecommunications sector has been regulation via a National Regulatory Authority (NRA). In Ireland the Authority is the Office of the Director of Telecommunications Regulations, under Etain Doyle. A Regulator was deemed necessary in order to guide through the early stage of the liberalised market and to overcome structural bottlenecks which competition law would be unable to shift - otherwise the previously incumbent operator, which had a monopoly prior to liberalisation, might be in a position to unfairly maintain its dominance on the market.

"The regulatory system is inherently short-lived and will eventually give way to the sole operation of competition law. The European Commission has recently issued proposals for the relationship of competition law and regulators, envisaging greater reliance on the competition rules."

The relationship between NRAs and competition law has been addressed in the Commission Notice on the Application of Competition Rules.[6] The Commission notes that "competition rules are not sufficient to remedy all of the problems in the telecommunications sector."[7] NRAs however have a duty not to approve a practice which is contrary to competition law. In this connection, the regulator has used the concept of Significant Market Power (SMP), where a firm has a market share of over 25%, as the trigger mechanism for imposing particular regulatory obligations on companies. This is considerably easier to satisfy than the concept of dominance in competition law. Among the interventions made by the regulator have been the approval of prices under the interconnection fees[8] and the granting of licences.[9] In addition, the Open Network Provision (ONP) Directive[10] imposes on firms with SMP obligations of transparency and non-discrimination that go beyond that imposed on dominant firms under Article 82 of the competition law rules. However, the regulatory system is inherently short-lived and will eventually give way to the sole operation of competition law.

The European Commission has recently issued proposals for the relationship of competition law and regulators,[11] envisaging greater reliance on the competition rules. The Commission proposes the establishment of two separate thresholds of SMP and dominance, and the imposition of separate sets of *ex-ante* obligations on undertakings deemed to have either or both. Neither the Irish Telecommunications Regulator nor the Irish Competition Authority have responded favourably to this proposal. Etain Doyle[12] has argued that a dominance-based SMP test is not appropriate in a sector where competition is still emerging. Furthermore, a test that was explicit about the level of market share at which a firm was presumed to have SMP would better contribute to legal certainty. On the other hand, the Irish Competition Authority[13] has argued that the proposal on changing the test does not in fact involve greater involvement of competition law but simply adds another cumbersome layer of regulation. It has been argued that dominance embracing the notion of joint dominance is flexible enough to deal with the telecommunications sector and that the SMP test is unnecessary.[14]

The romantic notion of the Internet as being subject only to self regulation still survives strongly. In this vision cyberspace is seen as a libertarian paradise patrolled at most, if at all, by competition law. In this respect certain voluntary bodies have arisen to construct various standards of compliance. More importantly, perhaps, the development of new applications of the Interent such as WAP telephones has required operators to agree on common standards and protocols for it to function. This was through co-operation and without government intervention. A triumph for the advocates of minimum regulation was the European Commission declaration[15] that Internet telephony could not be classified as voice telephony and therefore was not subject to regulations such as for universal service.

Infrastructure of the Internet

Access to the Local Loop

The local loop is the part of the short distance telecommunications network which connects an individual computer with an ISP's network. There are two main local loop access mechanisms - the traditional copper telecommunications network owned by a dominant telecommunications operator (in Ireland this being Eircom) and (TV) cable. A pressing issue has been separation or "unbundling"of the local loop. This entails the separate provision of access to the switch and access to the copper wire, thus allowing alternative operators to use the copper wire of the incumbent and to invest in their own switching equipment. Until now regulation has concerned the interconnection fees charged by the telecom operator in connecting to the network. Yet access to the local loop raises other anti-competitive concerns, including:

(a) *Tying:* Tying is of course the bundling of services, which in the present context did not come about through market practice but though the graduated liberalisation of a previous monopolised market. In such circumstances, the mechanism for untying is not competition law but interventionist regulation. Unbundling has been high on the agenda at European level. The Irish Telecommunications Regulator has set a deadline of April 2001 for unbundling to occur.

(b) Article 82(b) outlaws an abuse of a dominant position consisting of "limiting production, markets or technical development to the prejudice of consumers." Refusal of a dominant operator to unbundle the local loop prevents competitors from developing their own technical infrastructure.

(c) *Essential facilities or refusal to supply:* The Commission Access Notice[16] provides that a dominant firm's refusal

to grant access to a service may constitute an abuse. It refers to three situations where refusal to give access amounts to abuse.[17] Firstly, discriminatory access where access has been granted to one operator but refused to another. Terms should not be different between operators, though there may be an objective justification. Secondly, the unilateral termination of an access agreement from an existing customer. Thirdly, where access is essential for the operator to compete on the downstream market, though access has not been provided to any operator. This is the application of the essential facilities doctrine which was recently restated in the *Oscar Bonner*[18] case. In this case the Court of Justice declared that refusal to supply may be abusive where: (1) the product is indispensable for carrying on the business insofar as there is no actual or potential substitute; (2) there is no objective justification for the refusal and (3) such refusal is likely to eliminate all competition in the market on the part of the business requesting the product or service This may be the case where a company is seeking to offer new products or services.

The Access Notice also sets out a series of elements which the Commission may consider in determining whether access to an essential facility should be ordered. These include that access to the facility is essential in order for companies to compete on that related market. It is insufficient that access would be simply more advantageous - it must make the activity almost impossible. This will be the case where duplication of a facility is not possible or extremely difficult. In the *Oscar Bonner* case it was not enough that it would be difficult for the company to duplicate the facility. All potential entrants must be subject to the same difficulty and the cost alone must be sufficient to deter an operator from entering. The Commission will also consider whether there is sufficient capacity available on the facility to provide access; whether the facility owner fails to satisfy demand on an existing service or market, blocks the emergence of a potential new service or product or impedes competition on an existing or potential service or product market; whether the party seeking access will pay a reasonable non-discriminatory price; whether access is subject to non-discriminatory conditions; and whether there is an objective justification for refusing to provide access.

"Trading below costs or accepting losses on Internet operations because of purported increased profits elsewhere may be abusive. The solution is to ensure separation so that the Internet operation is a commercial activity in itself."

In its Access Notice, the Commission notes that it will be a long time before alternative infrastructures such as cable and utility networks are satisfactory in terms of coverage. At present, therefore, it appears that access to the local loop would be an essential facility, although with the development of cable network and radio this will cease to be the case.

Access to software

In relation to the Internet, relevant software includes the operating system, the browser, the search engine, the electronic platforms for transactions, security tools such as for encryption and authentication and middleware. Certain software, to which the principles of the Access Notice also apply, could arguably be classified as essential. The Commission has recently approved of Microsoft's licensing agreements with ISPs regarding its Internet explorer browser products.[19] This was after Microsoft agreed to withdraw two conditions. The offending conditions were that the ISPs' failure to attain minimum distribution volumes of Internet Explorer would result in termination of the licence, and, secondly, a prohibition of the ISP promoting and advertising any competing browser.

This contrasts with Microsoft litigation in the United States. The US District Court[20]found that Microsoft had engaged in a concerted series of actions designed to protect the barrier to entry from various threats including Netscape's browser and Sun's implementation of Java. The principal objection was the practice of tying to Microsoft's operating system.

Access and Leverage or Extension of Dominance

The Internet is closely connected with the telecommunications sector, with many firms active in several aspects of the sector or high technology information industry. The scale of investment needed in high technology means that there is a tendency towards concentrations. In this connection, one issue which may arise is the extension of dominance from one part of the industry into another under the concept of leverage. On this point, the former European Competition Commissioner, Van Miert, has stated that: "Dominant players cannot claim technological progress as a justification for extending their dominance. That would stifle innovation and not encourage it. So we will not allow gatekeepers to block entry into markets. This is true in the case of joint control of cable networks and telecoms infrastructure, of digital set top boxes and of Internet Web browsers."[21]

Leverage may arise at national level in the relationship between the parent telecommunications operator and its ISP subsidiary. There is a strong risk in such circumstances not only of more favourable treatment of its own operation but of cross-subsidisation of its Internet activity from its more profitable operations. This could amount to predation or predatory pricing. Trading below costs or accepting losses on Internet operations because of purported increased profits elsewhere may be abusive. The solution is to ensure separation so that the Internet operation is a commercial activity in itself, as for example in Ireland where Eircom's ISP, Indigo, is a separate company.

Apart from the network operator, leverage of market power may be by incumbents into down-stream markets. The obvious example of this is Microsoft which holds substantial market power in the market for computer operating systems. In the United States, there has been considerable difficulties associated with Microsoft's practice of bundling its Internet Explorer browser with its operating system by requiring manufacturers to install the software as a condition for the licensing of the operating system.

The European Commission has been wary of concentrations

which extend dominance to other areas of the Internet. It recently approved the merger *America Online Inc (AOL) and Time Warner Inc (TW)* [22] only after AOL offered to sever all structural links with German media group Bertelsmann AG. The Commission was concerned that AOL which had European joint ventures with Bertelsmann, when merged with Time Warner, which in turn had planned to merge its music recording and publishing activities with EMI, would have controlled the leading sources of music publishing rights in Europe. In Europe TW, EMI and Bertelsmann together hold approximately 50% of all music publishing rights. AOL could thus have emerged as the gatekeeper in the emerging market for Internet music delivery on-line. A vertically integrated company could have dominated the on-line music distribution market and music players. The above undertaking, and the failure of the EMI/TW deal to take place, meant that the Commission could approve the merger.

On the other hand, the Commission recently prohibited the merger between the two US communications companies *MCI WorldCom* and *Sprint*.[23] MCI WorldCom is the world's leading provider of Internet backbone connection, with Sprint one of its main competitors. The Commission found that regional and local providers were still dependent on the largest top-level providers to gain full and effective access to the Internet. It considered that the merged entity could dictate terms and conditions for access to its Internet networks in a manner that could have had significant anti-competitive effects and hinder innovation.

Leverage may also arise under Article 81 relating to limited horizontal alliances. As there may often be significant reliance on parent companies, such alliances would have to be scrutinised in each case to consider whether the undertakings are independent and fully functioning operations.

Jurisdiction and Enforceability

As already stated, the global nature of the Internet gives rise to a particular difficulty in determining when it is appropriate to apply European Competition or Irish competition law. As there may be simultaneous effects beyond the European Union, this may also be a matter for international law. The first issues involve determining when the European Union can claim jurisdiction of a competition law issue and, secondly, whether European competition law or Irish competition law applies.

Dealing with the first matter, the general trend has been for the Community to adopt a more expansionist interpretation of the jurisdictional scope of the competition rules. Traditionally, jurisdiction in international law is founded on either territoriality or nationality.[24] However the Community has gone beyond this and based its jurisdiction on a form of the "effects" doctrine.[25] In *Woodpulp,*[26] the Court of Justice considered that the competition rules can apply to undertakings situated outside the Community where the restrictive agreement is "implemented" within the Community and has the object or effect of restricting competition within the Common Market. The Court stated that the fact that there might be no territorial nexus was "immaterial".[27]

An effects based doctrine has also been adopted in the context of merger control. In *Gencor,*[28] the CFI held in a case where the proposed concentration was found to have an immediate, substantial and foreseeable effect in the Community that the application of the merger control regulation did not breach public international law.

The effects doctrine is difficult to apply in the context of the Internet. In the broadest sense, any web page posted anywhere in the world, because it can be accessed from anywhere in Europe, could be said to have an "effect" in the Community. On the other hand, infrastructure and access issues affecting the Internet mostly still arise at national level. Service issues or e-commerce questions are more difficult to narrow down. A web-site posted outside the Community in a non-European language could be said to prevent the site from having an effect in Europe. A commercial website may on its face exclude trade in the European Union. Aside from this, the nature of the product or service may be a determining factor and, in particular, it is possible that the Internet could have a radical effect on the definition of the product market (see next section). For the present it is at least clear that if an agreement or the conduct of a dominant firm either restricts access to the Internet or inhibits e-commerce trading in Europe, it will come within this form of the effects doctrine.

"Because of its global nature, the Internet will produce simultaneous effects in the Community and in some other competition regime such as in the United States. In this respect, the US adopts a fully fledged effects based jurisdictional rule so there is clear potential for institutional clashes. To avert this possibility, international cooperation is therefore necessary."

Because of its global nature, the Internet will produce simultaneous effects in the Community and in some other competition regime such as in the United States. In this respect, the US adopts a fully fledged effects based jurisdictional rule so there is clear potential for institutional clashes. To avert this possibility, international cooperation is therefore necessary. In addition to bilateral co-operation agreements, there are ongoing multilateral discussions through the World Trade Organisation. The European Union and the United States co-operated in relation to the *Novell-Microsoft* complaint.[29] A recent example of the Commission co-operating with the United States is in *WorldCom/MCI*, in which the Commission approved the concentration between two American parties after MCI agreed to divest itself of all its Internet operations.[30]

The second matter is determining whether Irish competition law or European Competition law applies. Where there is direct effect on European Community trade, then EC competition law applies. Articles 81 and 82 of the EC Treaty refer to agreements or practices between undertakings or abuse of a dominant position which "affect trade between *member states*"

and restrict competition within "*the common market*". The main tool in determining whether Irish competition law applies is market definition. Where the effect on trade in the Community is not appreciable then under the *de minimis* rule European Competition law will not apply. Irish competition law is one of the few national laws which does not apply a *de minimis* test to the application of its own competition law.

The Market

The principal importance of defining the market is twofold; to determine whether Irish competition law or European Competition law is applicable and as a preliminary step in determining dominance in a market. The global quality of the Internet means that any attempt to place limits on the geographic scope of the market is difficult. Identifying the product market is equally problematic in that it is uncertain whether sales on the Internet or e-commerce are to be regarded as a segment of the market or as a separate market. Assessment of dominance is also vexing. If a market is defined as a global market, market shares will generally be small. It is also uncertain whether market share should be measured in terms of capacity, traffic carried, traffic exchanged, revenue or numbers of connected ISPs. Many online services gain revenue not from users but through advertisements on the sites. In such cases, is market share to be assessed solely on the basis of use by consumers or is such revenue also relevant?

"Identifying the product market is problematic in that it is uncertain whether sales on the Internet or e-commerce are to be regarded as a segment of the market or as a separate market ... It is also uncertain whether market share should be measured in terms of capacity, traffic carried, traffic exchanged, revenue or numbers of connected ISPs."

The Geographic Market

The Commission in its *Notice on Market Definition*[31] defines the relevant geographic market as "the area in which the undertakings concerned are involved in the supply and demand of products or services in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas."[32] The geographic market will be defined on the basis of (1) past evidence of orders to other areas; (2) basic demand characteristics (national preferences, preferences for national brands, language, culture and life style, need for local presence);(3) views of consumers or competitors;(4) current geographic pattern of purchases (barriers and costs associated with switching to companies located in other areas). For example the exclusive use of the Irish language on a web-site would limit the market to that of Ireland. Equally the site could impose express geographic limits on the intended market. Apart from this, the four factors listed above are predicated on past practice, such that the swift pace of change of the Internet renders prediction somewhat unreliable.

Thus, a market which could at one point in time be defined as national can evolve into an international market. In *Bertelsmann/Havas/BOL*,[33] the Commission considered that the geographic scope of the market for books might be wider than national although it was pointed out that sales in France represented the vast majority of the parties' total sales via the Internet which indicated the existence of a national market. In *World Com/MCI*,[34] the Commission described the basic market for the Internet as hierarchical or pyramidical. It concluded that the relevant geographic market was global at the top level of backbone networks, in contrast to the position of smaller ISPs competing to provide Internet access services to final users ,where the market would be national or indeed sub-national.[35] In *Enel* [36] the Commission stated that the relevant geographic market in telecommunications is determined (1) by the extent and coverage of the network and the customers that can economically be reached and whose demand may be met; and (2) by the legal and regulatory system. The Commission defines markets nationally when the regulatory restrictions and technical standards still restrict entry to the geographic market. On the other hand, the completion of liberalisation in the telecommunications sector means the relevant market may extend throughout the EU.

The Product market

The product/services traded on the Internet may take the form of goods which are later physically delivered, or they may be digital goods/services such as videos, books and also financial services such as on-line auctions, public market tendering and authentication/ encryption services. The Commission in the above Notice defines the relevant product market as comprising "all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use."[37] Demand side substitutability (i.e. the ability of consumers to change to substitute products) is the principal criterion in determining the relevant product market in the Community. Supply side substitutability (i.e. the ability of suppliers to change production to produce the relevant products) is used less often. The Commission in its Notice states that the standard test to measure demand substitutability is the customer's response to a hypothetical price increase (between 5 to 10 %). If the consumer would change to other products, such alternative products or geographic areas must be included in the relevant market.

The Internet is not a market in itself but a communications system. Thus, the immediate effect of the Internet may be to remove certain intermediates in the market chain, such as travel agents or wholesalers. At the same time, the manner of sale on the Internet may be deemed sufficiently different from normal trading to constitute a separate market. The Commission's approach to the market has been to examine the manner in which revenue has been earned . In *@Home Benelux*,[38] the Commission decided that there were separate markets for dial up Internet access for residential and business customers, Internet advertising and paid-for content provision. Parties argued that the relevant geographical market for the products was national on the grounds that Internet access depended on national telecommunications and/or cable infrastructure. Advertising and paid-for content was directed towards the national markets. The Commission appeared to accept these views, although it did not resolve the issue. In *Telia/Telenor/Schibsted*,[39] the Commission held that web-site production may be sufficiently technical and specialised to justify a separate market definition. In *Bertelsmann/Mondaori*,[40] the

Commission considered that it might be possible to distinguish a market for distant selling including books via the Internet.

In its Access Notice, the Commission forewarned of the problems of change, stating that "given the pace of technological change in this sector, any attempt to define particular product markets in this Notice runs the risk of rapidly becoming inaccurate and irrelevant."[41]

E-Commerce: Anti-Competitive Practices

E-commerce comprises transactions business to business (B2B), business to consumer (B2C) and business to government or consumer to government.[42] E-commerce in Ireland, especially in the B2C category, is somewhat lagging behind most states in the European Union. The estimated value of the Irish consumer e-commerce market in the year 2000 is only IR£60 million, though this is expected to rise to approximately IR£850 million by 2003.[43] Approximately 10% of Irish adults have used the Internet for browsing products and pricing, while only 4% have actually purchased goods or services online.[44] Internet traffic in Ireland is however steadily increasing.[45] In the European Union, on-line consumer sales are expected to reach $3.2 billion by the year 2001.[46]

Nevertheless, a raft of recent Irish legislation may facilitate the growth of e-commerce in Ireland. These measures include the Electronic Commerce Act 2000, providing that transactions concluded electronically are subject to consumer law, and the extension of data protection under The Data Protection Act 2000. At European level, measures include the EU Distance Selling Directive,[47] the Draft Copyright Directive on harmonisation of copyright law,[48] a Directive on Personal Data and the protection of Privacy in the Telecommunications Sector,[49] the EU Directive on Electronic Signatures,[50] and the EU Electronic Commerce Directive 2000.[51]

"The Electronic Commerce Act 2000 allows the Minister to place the registration of ".ie" Internet domain names on a statutory basis and to regulate the registration system in the public interest."

Any of the practices prohibited by Articles 81 and 82 could potentially arise in the context of e-commerce under the Internet. These include fixing prices, discounting, discriminatory terms, collection charges for services, and market sharing. More specific types of anti-competitive practices in e-commerce which may arise include:

Sharing or Restricting Information

The *raison dêtre* of the Internet is information. The sharing of confidential information such as for tariffs, discounts or commercial targets between competitors is anti-competitive, and it follows that an Internet service which catered for this would breach the competition provisions.

The nature of the Internet is also such that exclusion of information may give rise to competition concerns. An example may be the exclusion of a competitor from a price comparison web-site or an important listings site. A further example would be an agreement with a search engine operator to exclude competitors of a firm from its search database. In a concrete example, the Commission carried out an investigation into the on-line joint venture between the publishers *Matra-Hachette, Pearson and Burda.*[52] Although approved in this case, the Commission focused on whether the publications would be available on fair conditions to other online service providers and, in addition, on whether content providers other than those in the joint venture would have access to the customer base on conditions similar to those of the partners.

Attempts to control information on web-sites through exclusive intellectual property rights could also arise. In this instance the *Magill* case[53], in which the refusal of three broadcasting companies to licence the Irish TV Guide Magill to print their weekly programme listings in advance was held to be anti-competitive, is of some relevance. The European Court of Justice there held that the refusal to provide basic information on copyright grounds prevented the appearance of a new product which the appellants did not offer and for which there was potential consumer demand. Similar restrictions concerning information on the Internet may therefore be anti-competitive.

Regulatory Bodies

Hitherto the Internet has been regulated mostly by self-regulating private bodies such as the Internet Society which allocates domain names though the Internet Information Centre (InterNIC). Other voluntary bodies set technical standards or protocols for the industry with which members agree to comply. The competition rules require membership to be based on objective non-discriminatory criteria. Members must also not engage in price fixing or market sharing. The specified standards in software could potentially give rise to a violation of Article 81 if the members are not allowed to deviate from these standards, although, in European law, the obligation could possibly be exempted under Article 81(3).

Territorial Restrictions

The global nature of the Internet poses complications for distribution or selling arrangements limiting certain areas or channels i.e., exclusive distribution agreements or selective distribution agreements. A web site advertising or promoting a product/service can be accessed by customers from outside the distributor's assigned area. While it is a canonical position of European competition law that absolute territorial protection is prohibited, limiting distributors to pursue only active sales in a particular area is generally permitted. Passive sales (where there is no direct advertising) cannot be proscribed. The recent *Block Exemption on Vertical Restraints*[54] describes the use of the Internet by an exclusive distributor as a passive sale insofar as the site is not primarily constructed to reach customers outside the territory. However, unsolicited e-mails sent to individual customers are considered to be active selling.

Essential facilities

An essential facility could relate to access to a system used in a particular industry or sector. An example of this is the *SWIFT* case,[55] in which the Commission classified the SWIFT global inter-banking payment system as being in a quasi-monopolistic

position on the market for international payment message transfer networks and held that the payment infrastructure was an essential facility. The Commission found that SWIFT had abused its dominant position by excluding La Poste from SWIFT's membership without justification. SWIFT gave an undertaking to provide access to the network to institutions who satisfy objective criteria proportionate to the need to avoid systematic risk.

Unfair Pricing

Article 82(a) prohibits a dominant firm directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. This covers all buyers on downstream markets including retail consumers. It would therefore provide a check on dominant firms on the Internet.

Domain Names

Domain names are website addresses.[56] In the context of the Internet, the possession of a certain domain name can be a huge advantage over an online competitor. This is because a search under a seach engine or directory will return "hits" relating to a product or service on the basis of the relevance of the domain name and description of the site. Having the generic name of the product or service, such as "shoes.com" for the footwear industry, could be of inestimable value in leading consumers to access that firm's site.

"In the context of the Internet, the possession of a certain domain name can be a huge advantage over an online competitor.... In addition to raising trademark concerns, regulation of domain name allocation, the mechanisms for allocating domain names and the resolution of disputes all raise important competition issues."

The US-based Network Solutions Inc. (linked to InterNic) has a monoply in the registration and allocation of domain names ending with suffixes "com"., "net." and "org.". These are called gTLD (generic top level domain) and are intended to be used where the organisation operates in a number of different countries. At national level, there are domain names for each individual state. These are called nTLDs and are intended to be used for organisations operating in one country. In Ireland the domain name has the suffix ".ie" with the registration provided by the IEDR, based in UCD. The Electronic Commerce Act 2000 allows the Minister to place the registration of ".ie" Internet domain names on a statutory basis and to regulate the registration system in the public interest.

In addition to raising trademark concerns, regulation of domain name allocation, the mechanisms for allocating domain names and the resolution of disputes all raise important competition issues. The US Government has entered into an agreement with NSI, referred to above, for a timetable to liberalise the domain name system. This involves NSI licensing other Registrars, which it has already done in the case of a number of test bed registrars. In Europe the appropriate intitution is the Reseaux IP Europeens, Network Coordination centre (RIPE NCC) which is linked to InterNic and the Internet Society in the United States. All the registrars are in turn answerable to the Internet Assigned Numbers Authority (IANA). [58]

The European Commission's main concerns in this process are that there be fair representation of interested parties in any revised domain name system and that membership of all relevant bodies is based on objective, transparent and non-discriminatory criteria. Apart from this, the Commission also wants to be satisfied that the system does not operate in an anti-competitive fashion. Placing limits on Registrars, such as giving one Registrar allocation rights in respect of a particular gTLD, or limiting the number of Registrars without adequate justification, would appear to breach Article 81. A further concern is the participation of telecommunications operators who continue to hold a dominant position on their domestic telecommunications market(s) in domain name registration. The Commission may wish to eliminate such participation on the basis that any significant influence by a dominant company over the policy of domain name allocation would infringe the principle that a dominant operator should not act as a regulator in its own market.

Conclusion

The speed of developments in the Internet makes even legal commentary on the subject somewhat ephemeral. The two themes of the mutable nature of the Internet and its universality have informed this article and are the main quandaries with which competition law must contend. The Internet represents a confluence of the goals of competition law including efficiency, the promotion of technology and the protection of consumers. From an efficiency perspective, the Internet may allow speedier trading and reduce transaction costs. It also provides more perfect information for consumers to choose from. In a certain sense the unifying nature of the Internet chimes with the pre-eminent goal of European Competition Law, namely integration,[59] although the integration in this case extends beyond the Community.

At present the infrastructure of the Internet is the main concern of competition law. While the shift from dealing with these access matters through a Regulator to a greater reliance on competition law has already begun, there has also been a slow accretion of case law concerning Internet service issues. In the future this may transpire to be the main area for the application of competition law to the Internet.●

1. *Reno v ACLU* 117, S. Ct., 2329, 2334 (1997)
2. Mario Monti in a speech at the conference, *Barriers in Cyberspace*, Kangeroo Group Swissotel, Brussels, 18 September 2000.
3. For a history of the Internet see Ruttley, EC *Competition Law in Cyberspace: An Overview of Recent Developments* (1998) 19 ECLR 186
4. See Commission Directive 95/51/EC (1995) OJ L256/49
5. The Irish ODTR issued two such licences on 16 June 2000, see media release on such date.
6. 98/C265/02
7. Ibid. at para. 14
8. See Directive 97/33/EC (the Interconnection Directive).
9. See Directive 97/13/EC (the Licensing Directive).
10. Council Directive 90/387
11. *Towards a new framework for Electronic Communication infrastructure and associated services* (Com(1999) 539).
12. Speech by Etain Doyle, Director of Telecommunications Regulation to the Irish Nortel Networks Users Association, 18 October 2000
13. See Initial Response of the Irish Competition Authority to the European Commission document, *Towards a new framework for Electronic Communication infrastructure and associated services.*
14. See Tarrant, *Significant Market Power and Dominance in the Regulation of Telecommunications Markets,* (2000) ECLR 320
15. See Status of Voice Communication on Internet under Community Law, in particular under Directive 90/388/EEC, OJ No C 6, 10.1.1998, p. 4.
16. Commission Notice 98/C 265/02 on the application of the competition rules to access agreements in the telecommunications sector-framework, relevant markets and principles.
17. Ibid. at 2.1
18. C-7/97, *Oscar Bonner GmbH & Co. K.G v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG et al* (1999) 4 CMLR 112
19. See Commission Press Release IP/99/413; Notification of a Licensing system-Case No. IV/C-3/36.945 - Microsoft Internet Explorer Licensing Agreements (1998) OJ C175/4
20. District Judge Thomas Penfield Jackson, delivered on 5 November 1999.
21. In a speech, *The deadline of 1st January 1998: What does it mean for consumers of telecommunications services?* to BEUC, Brussels, 21/11/1997. Available at http://europa.eu.int/comm/dg04/speech/seven/en/sp9706 3.htm
22. 11 October 2000; See Ip/00/1145
23. 28 June 2000; See IP/00/668
24. See Brownlie, *Principles of Public International Law* (1979) 3rd ed. at 300-303.
25. Though see Dieter Lange and John Sandage, *The Wood Pulp Decision and its Implications for the Scope of EC Competition Law* (1989) CML Rev.137 at 157, where it is claimed that the Court did not adopt a pure effects based test.
26. *Wood Pulp* OJ 27, (1984) L27/85; *A. Aahlstrom Osakeyhio v Commission* (1988) ECR
27. 4 CMLR vol. 18 at 611,612. It further stated that "If the applicability of the prohibitions laid down under competition law were made to depend on the place where the agreement...was formed, the result would obviously be to give undertakings an easy means of evading those obligations."
28. Case T-102/96 *Gencor v Commission* (1999) 4 CMLR 971
29. See Commisiion Press Release IP/94/653 of July 17 1994
30. Case IV/M.1069, (1999) O.J. L116/1; (1999) 5 CMLR 876
31. Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law OJ 1997 C 372/5
32. *Ibid.* para. 8
33. Case IV/M 149, 6/5/1999.
34. (1999) OJ L116/1
35. The Commission in its 1991 Competition Guidelines relating to the telecommunications sector
36. Case IV/JV.2, Enel/FT/DT/Wind, June 22 1998
37. *Ibid.* para. 7
38. Case IV/JV.11 15/9/1998
39. Case 27/5/1998
40. 22/4/1999
41. *Ibid.* para. 47
42. See Bernardo Urrutia Garro, *Internet and its effects on competition,* speech at Barcelona, 10 July 2000, at http://europa.eu.int/comm/competition/speeches/index_t heme_29.html
43. See ODTR, The *Irish Telecommunications Market Quarterly Review,* September 2000, at point 3.3.
44. Nielsen//NetRatings Global Internet Trends, Q2 2000. See September Quarterly Review op. cit.
45. In terms of the traffic being carried on the fixed networks, Internet traffic represents approximately 22% of total fixed minutes, see recent figures in the September Quarterly Review, op.cit., at point 3.1
46. See Ruttley, *EC Competition Law in Cyberspace: An Overview of Recent Developments* (1998) ECLR 186 at 190
47. 97/7/EC
48. The Draft Directive was published by the Commission on 21 May 1999
49. Directive 97/66/EC
50. This entered into force in January 2000 and is to be implemented by Member States by July 2001
51. Approved on 4 May 2000. Ireland will be under an obligation to implement the Directive within 18 months of its formal adoption.
52. See Commission Press Release IP/95/1354, 6 December 1995.
53. *Magill TV Guide/ITP, BBC &RTE* (1989) OJ L78/43; (1995) 4 CMLR 718
54. Commission Regulation (EC) No 2790/1999 of 22 December 1999
55. OJ 1997 C335/3
56. See generally Nordemann, Czychowski & Gruter, *The Internet, the Name Server and Antitrust Law, Volume 19, Issue* 2, February 1998, at 99
57. Part 4, section 31
58. This is located at the University of Southern California's School of Engineering.
59. See Rodger, *Market Integration and the development of European Competition Policy to meet new demands* (1994) 2 Legal Issues of European Integration 1 at 8

CONSTITUTIONAL ASPECTS OF NON-JURY COURTS

Peter Charleton SC and Paul Anthony McDermott BL conclude their comparative review of the Diplock Courts and of the Special Criminal Court north and south of the border.

Parallels between the Diplock Courts and the Special Criminal Court (continued)

No preliminary investigation

Section 2 of the Emergency Powers Act 1991 restricts recourse to preliminary investigation in cases scheduled for the Diplock Courts. The idea of a preliminary investigation has its origin in the belief that no citizen should be put on trial for a serious criminal charge without the State having the obligation to first prove that there is a stateable case against him. In Ireland this procedure takes place pursuant to the Criminal Procedure Act 1967 in the District Court and, in Northern Ireland, it takes place in the Magistrate's Court. The objection to the Emergency Powers legislation is that the examination can take place solely on the basis of documents and that therefore valuable opportunities for the defence may be lost. However, these arguments do not take account of the fact that the idea of preliminary examination in the common law world is a simple inquiry as to whether there is enough evidence to put an accused on trial. It is not the trial of the issue itself. It is an issue that can be tried by a review of documents. The parallel with the Republic is that under the recently enacted Criminal Justice Act 1999 the right of preliminary examination is, in effect, abolished in its entirety. Virtually no one in the Republic makes use of it, makes submissions to say that there is no case to answer or calls for a witness to give evidence on deposition. Even if a witness is called, the examining party is limited to an examination in chief, which achieves virtually nothing. Preliminary examination has been regarded as a waste of time and the idea is to replace it with the ability to bring a motion before the court of trial prior to the commencement of the trial whereby an argument can be made that there is no *prima facie* case.

"Under the recently enacted Criminal Justice Act 1999 the right of preliminary examination is, in effect, abolished in its entirety. ... Preliminary examination has been regarded as a waste of time and the idea is to replace it with the ability to bring a motion before the court of trial prior to the commencement of the trial whereby an argument can be made that there is no *prima facie* case."

Scheduling

An argument is made that the scheduling in and the scheduling out provisions, central to the Northern Ireland Criminal Justice system of Diplock Courts, and scheduled under Part I of the Emergency Powers Act 1991, should be phased out. The argument is that cases which have no political motivation should not be scheduled and should, in fact, be de-scheduled. A 1981 survey by Dermot Walsh is to the effect that approximately forty percent of cases processed by the Diplock system were ordinary criminal cases. Regrettably, no such survey has been done on our side of the border. The prospects of judicially reviewing a decision by the Director of Public Prosecutions to list a case before the Special Criminal Court are slim. [1] It is undesirable to deprive people of jury trials where it is their ordinary constitutional entitlement. However, in cases of armed gangs, be they subversive or not, who are determined not just to commit crime, but to set up structures to subvert the State and destroy the administration of justice as it applies to them, it seems to us that it is expecting too much to expect citizens to sit on juries and face the prospect of intimidation or trickery. Some flavour of the reality

"While there is no entitlement on either side of the border to the presence of an attorney during an interrogation, audio and visual recording will at least move us in the right direction where there might be a reasoned public debate as to whether this is desirable as a further step."

of the kind of crime with which the Republic now has to deal with is given by the judgment of Carney J. in *DPP v Special Criminal Court:*[2]

> "The evidence of assistant commissioner Anthony Hickey given before the Special Criminal Court, evidence accepted by that court, establishes that An Garda Síochána as well as having to deal with crime in its traditional form now has in addition to deal with organised crime. Those engaged in such crime require a wall of silence to surround their activities and believe that its maintenance is necessary for their protection. They have at their disposal the resources including money and firearms to maintain this wall of silence and will resort to any necessary means including murder to further this objective...Those prepared to furnish confidential information to the police in relation to organised crime know they could face a death sentence if this co-operation became known."

Organised crime

Ultimately, as it seems to us to be necessary to stress, a legal system is not simply a matter of rules, it is also a matter of honesty and faith in the personnel administering it. It is important to keep a very close watch on the proportion of subversive to ordinary crime being tried in both the Diplock Courts and the Special Criminal Court. The reality of it is, however, that organised crime intended to subvert the Constitution of Ireland, and organised crime for the purpose of criminal greed and status, are here with us to stay. The extent which they can grow and dominate society, the arrogance of those involved with their gangs and their determination not to abide by any rules of decency and standards makes, for us at least, a reasonable case for the measured use of multi-judge non-jury courts on an emergency basis. Nor should one forget that the European system of criminal trial does not employ a jury. The model in Holland, for example, involves a trial by three judges, a right of rehearing on appeal by three High Court judges and finally an appeal on a point of law to the Dutch Supreme Court. Why is that system any less fair than the common law system of jury trial?

Recording interviews

The Criminal Justice Act 1984 introduced a requirement that there should be electronic recording of Garda interviews. Notwithstanding the fact that fifteen years have passed since the signing into law of this Act only three stations in Dublin and one in Cork have audio-visual recording of police interviews. The measures are described as "a trial basis introduction." This sounds less than convincing. One notes from the report of the Special Rapporteur for the criminal justice system in Northern Ireland[3] that at least there is a proposal to introduce silent video recordings to back up monitoring by closed circuit television. The Special Rapporteur urges speedy implementation of legislation in that regard. It cannot be said that in Ireland we are any different to Northern Ireland. In both jurisdictions, clearly, audio and visual recordings cannot do anything other than help to discover the truth.

Presence of lawyers

There is no right in Ireland to have a solicitor present during Garda interrogations.[4] The Special Rapporteur thought that it was desirable to have an attorney present during police interrogation in Northern Ireland. What he says about Northern Ireland can equally be applied to Ireland. In the United States the *Escobedo-Miranda* doctrine indicates that defendants have a right to be warned of their right to silence and of their right to counsel at public expense.[5] Long interrogation can be treated as evidence of the accused not having waived these rights even if the police testify that he has. Warren C.J., commented in the *Miranda* case:

> "...the current practice of incommunicado interrogation is at odds with one of our nation's most cherished principles - that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."

While there is no entitlement on either side of the border to the presence of an attorney during an interrogation, audio and visual recording will at least move us in the right direction where there might be a reasoned public debate as to whether this is desirable as a further step.

Non-Parallels

In addition to the foregoing (and probably to a degree unwelcome) comments, it is also correct to point out some of the aspects of the operation of the Diplock Courts that do not find a parallel south and west of the border. For the sake of completeness we set them out in sequence, as above:

Several judges

We have previously commented on the difference in make-up of personnel between the Diplock and the Special Criminal Courts. The case for having a body of three or more judges is, to our minds, a compelling one.

Right to silence

In our view national governments are fighting a losing battle, in the European context, in their efforts to restrict or abolish the right to silence. If you have the right to remain silent then it diminishes that right if a negative inference is drawn from the exercise of that right even in particular and specified circumstances. European law upholds the right to remain silent but is prepared to countenance the fact that guilt may in part be based on the exercise of that right. The right to silence exists because there are two categories of persons who may exploit it. The first are obviously members of organised crime gangs. The second, and these are the people who need protection, are that under-class of society, ill-educated and inarticulate who, if forced into the witness box, will place themselves in the position of immediately raising suspicions as to their guilt, not because of what they have done, but because of how they express themselves. This opinion is not far-fetched. Perhaps some readers have seen the Chamberlain baby film *A Cry In The Dark*. The film portrays the reason behind the couple's conviction for the murder of their baby in the Australian outback near Ayres Rock as the woeful performance by Mr. Chamberlain, a Minister of Religion, in the witness box. Of course, he was not forced into the position of giving evidence, but his kind of case operates as a warning. The criminal justice system is there to protect that small percentage of people who come before it who either are or who may be regarded by reasonable people as possibly being innocent.

The Criminal Evidence (Northern Ireland) Order 1988 permits a judge to draw adverse inferences from a detainee's silence in three circumstances:

(a) When the defendant bases his or her defence on a fact that he or she could reasonably have been expected to raise during police questioning, but did not;

(b) When an accused fails to give the police an explanation for the presence of a nearby substance, object or mark that could reasonably be believed to have a connection with a crime; and

(c) When a defendant fails to account for his or here whereabouts at the time a crime was committed.

"In our view national governments are fighting a losing battle, in the European context, in their efforts to restrict or abolish the right to silence... The criminal justice system is there to protect that small percentage of people who come before it who either are or who may be regarded by reasonable people as possibly being innocent."

Negative inference

As to (a), the prosecution in Ireland is not entitled to question an accused as to why an explanation given in evidence has not previously been given, principally in Garda interviews.[6] Something similar to (b) is contained in the Criminal Justice Act 1984, but has been virtually never used. Under section 52 of the Offences Against the State Act 1939 a person is obliged to give an account of his movements when under arrest and given a statutory request, in that regard, by a member of An Garda Síochána. In a recent case involving bank officials the Supreme Court finally bit the bullet of the right to silence. In effect, what they said in *Re National Irish Bank*[7] was that it is alright to require information for administrative or police investigative purposes, but that a compelled statement, whether under duress, by way of an inducement, or by way of a statutory requirement, can never be admissible against an accused at his trial. These are the comments of Barrington J. for the Supreme Court:

"The judgment in this case follows the decision in *Heaney -v- Ireland* [1996] 1 IR 580 insofar as that case decided that there may be circumstances in which the right of the citizen to remain silent may have to yield to the right of the State authorities to obtain information. It is not inconsistent with the decision in *Rock -v- Ireland* [1998] 2 ILRM 37 that there may be circumstances in which a court is entitled to draw fair inferences from an accused having remained silent when he could have spoken. It follows *The People (AG) -v- Cummins* [1972] IR 312 insofar as that case decided that for a confession to be admissible in a criminal trial it must be voluntary. In the course of the submissions the question arose as to what would be the position of evidence discovered by the inspectors as a result of information uncovered by them following the exercise by them of their powers under section 10. It is proper therefore to make clear that what is objectionable under Article 38 of the Constitution is compelling a person to confess and then convicting him on the basis of his compelled confession. The courts have always accepted that evidence obtained on foot of a legal search warrant is admissible. So also is objective evidence obtained by legal compulsion under, for example, the drink driving laws. The inspectors have the power to demand answers under section 10. These answers are in no way tainted and further information which the inspectors may discover as a result of these answers is not tainted either. The case of *The People (AG) -v- O'Brien* [1965] IR 142 which deals with evidence obtained in breach of the accused's constitutional rights has no bearing on the present case. In the final analysis, it would be for the trial judge to decide whether, in all the circumstances of the case, it would be just or fair to admit any particular piece of evidence, including any evidence obtained as a result or in consequence of the compelled confession." [8]

Using compelled information

On the question of the use that can be made of information unlawfully compelled in breach of the right to silence, the United States Supreme Court set a standard in *Kastigar v U.S.*[9]

> "We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore it is sufficient to compel testimony over a claim of privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offence to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to...criminal acts" [*Ullmann -v- United States,* 350, U.S., at 438-439, quoting *Boyd -v- United States,* 116 U.S. at 634. See *Knapp -v- Schweitzer,* 357 U.S. 371, 380 (1958)]. Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."

"If silence is an absolute right it does not seem ever to be correct to draw a negative inference from the fact that an accused has exercised it. However, European law does distinguish between using compelled information from an accused to convict him (which is unlawful) and using silence in particular circumstances as part of the proof of guilt (which can under certain circumstances pass scrutiny)."

We do not know whether the idea of presumptions arising from particular facts would pass European scrutiny.[10] Certainly, those presumptions are ever present in Irish law, such as the presumption that someone with a large amount of a drug has it for drug pushing (Misuse of Drugs Act, 1977, section 15(2)) or the presumption that a gift to a public official is for the purpose of corruption (Prevention of Corruption Act, 1884, as amended). A logical inference cannot ever offend constitutional justice as it is simply the exercise of ordinary good sense. A presumption reverses a burden of proof onto the defence and can be justified in cases where an accused can be expected to have particular knowledge of facts which could establish an innocent explanation. If silence is an absolute right it does not seem ever to be correct to draw a negative inference from the fact that an accused has exercised it. However, European law does distinguish between using compelled information from an accused to convict him (which is unlawful) and using silence in particular circumstances as part of the proof of guilt (which can under certain circumstances pass scrutiny).

On several occasions the European Court of Human Rights has considered the compatibility of shifting the evidential burden onto the accused in a criminal case. In the leading case of *Murray v UK*[11] the Court held that where a *prima facie* case was established and the burden of proof remained on the prosecution, adverse inferences could be drawn from a failure to testify. In the earlier case of *Salabiaku v France*[12] the Court held that presumptions against the accused must be confined within reasonable limits which take into account the importance of what is at stake and which respect the rights of the defence. The issue was recently revisited in *Averill v United Kingdom*[13] where the European Court of Human Rights rejected the applicant's claim that the drawing of an adverse inference against him rendered his trial unfair. However the Court did hold that the complete denial of any access to a solicitor for the first 24 hours of interrogation had breached the applicant's right to legal representation under Article 6 of the Convention. This was because the potential of an adverse inference being drawn placed the applicant in a dilemma as to whether he should answer questions and possibly incriminate himself or remain silent and risk an adverse inference. In such circumstances the concept of fairness enshrined in Article 6 requires that the accused have the benefit of a lawyer at the initial stages of interrogation.

The applicant in *Averill* had been arrested in connection with a double murder in Northern Ireland. He was detained pursuant to s 14(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1989. Access to a solicitor was deferred for 24 hours pursuant to section 45 of the Northern Ireland (Emergency Provisions) Act 1991. Thereafter, up until he was charged, he was seen daily by a solicitor. Before each interview the applicant was cautioned that if he failed to mention any fact which he later relied on in his defence in court this 'may be treated as supporting any relevant evidence against you.'[14] A similar caution was delivered in respect of certain fibres found on his person which the police wished the accused to account for. The applicant made no reply to questions about his movements during 37 interviews over seven days. He was denied access to legal advice during these interviews. The applicant was convicted of the murders and a number of related offences in a Diplock Court. At his trial the applicant forwarded an alibi for the day of the murder. The trial judge drew what he described as a "very strong adverse inference" against the applicant from his failure to mention his alibi and to give an explanation for the fibres while in custody. The applicant alleged that this inference deprived him of his right to a fair trial contrary to Article 6 of the Convention.

The European Court observed that whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation. In the present case the applicant's failure to answer questions put to him while in custody did not expose him to the threat of penal sanction. The fact that he was warned that an adverse inference could be drawn disclosed a level of indirect compulsion. The applicant was denied access to his solicitor for 24 hours, but was able to consult with him on a daily basis after that.

The Court stated that the extent to which adverse inferences can be drawn from silence must be necessarily limited. Whilst in most cases one would expect innocent persons to co-operate with the police, there may be reasons why in a specific case an innocent person would not be prepared to do so. In particular an innocent person may not wish to make any statement before he has had the opportunity to consult with a lawyer. Nor was the need for caution removed simply because an accused is eventually allowed to see his lawyer but continues to refuse to answer questions. An accused's continued silence in such circumstances could be based on *bona fide* advice received from his lawyer. The Court held that due regard had to be paid to all these considerations by the trial judge.

"The reason for the existence of the traditional common law rule requiring confession evidence to be voluntary is that a confession is enough to convict a person beyond reasonable doubt. It follows that if there is any reasonable doubt as to its voluntary nature it cannot be allowed to stand."

On the facts of the case the Court held that there had been no breach of Article 6. The trial judge was not obliged to draw an inference from the applicant's silence. He did so in the exercise of his discretion and provided detailed reasons for his decision, reasons which had been upheld on appeal. The applicant had not been convicted solely on the basis of his silence. There had also been forensic evidence, and the witnesses called by the applicant to support his alibi had been held to be without credibility by the trial judge. In concluding that there had been no breach of Article 6, the Court stated:

> "... the decision to draw adverse inferences must be seen as only one of the elements upon which the trial judge found that the charges against the applicant had been proved beyond reasonable doubt. Furthermore, in drawing adverse inferences, it cannot be said that the trial judge exceeded the limits of fairness since he could properly conclude that, when taxed in custody by questions as to his whereabouts at the material time or the presence of fibres on his hair and clothing the applicant could have been expected to provide the police with explanations. It is to be noted that the applicant had been stopped by the police not far from the scene of the crime and had volunteered an explanation of his movements. However, he held his silence after being taken into custody. For the Court, the presence of incriminating fibres in the applicant's hair and clothing called for an explanation from him. His failure to provide an explanation when questioned by the police ...could, as a matter of common sense, allow the drawing of an adverse inference that he had no explanation and was guilty, all the more so since he did have daily access to his lawyer following the first 24 hours of his interrogation when he was again questioned about these matters under caution. Moreover, the applicant did not contend at his trial that he remained silent on the strength of legal advice. His only explanation was that he did not co-operate with the Royal Ulster Constabulary for reasons of policy ... [I]t must also be noted that the applicant was fully apprised of the implications of remaining silent and was therefore aware of the risks which a policy-based defence could entail for him at his trial."

In *Magee v The United Kingdom*[15] the applicant had been arrested in connection with an attempted bomb attack on military personnel. On his arrival at Castlereagh Police Office he immediately requested a solicitor but access was delayed pursuant to s 15 of the Northern Ireland (Emergency Provisions) Act 1987. The applicant was interviewed five times that day. During a sixth interview he made admissions and during a seventh interview he signed a statement. Only then was he finally permitted to see his solicitor. After a voir dire at his trial the admissions and the statement were admitted into evidence. The accused was convicted on the basis of his statement and was sentenced to 20 years imprisonment. The European Court of Human Rights noted that the applicant had undergone 48 hours of detention before being given access to a solicitor. It also noted the findings of the European Commission for the Prevention of Torture into conditions at Castlereagh. The Court held that the denial of access to legal advice at the start of the detention was a breach of Article 6:

> "The austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he may have manifested at the beginning of his detention to remain silent. Having regard to these considerations, the Court is of the opinion that the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confide in his interrogators. Irrespective of the fact that the domestic court drew no adverse inferences ... it cannot be denied that the [adverse inference] caution administered to the applicant was an element which heightened his vulnerability to the relentless rounds of interrogation on the first days of his detention."

Confessions[16]

In Northern Ireland confession evidence is admissible in cases which are scheduled under the Emergency Provisions Act, in effect cases which come before the Diplock Courts, unless the accused are subjected to torture, to inhuman or degrading treatment, or to any violence or threat of violence (whether or not amounting to torture) in order to induce the accused to make a statement. There would seem to be little excuse for the continuance of this provision. However, one cannot honestly say that there has been no historical cause for concern on the

other side of the border. In this connection, the cases of *The People (DPP) -v- Breathnach*[18] and *The People (DPP) -v- Pringle*[19] are worth contrasting. Breathnach had been almost constantly interrogated for forty hours following his arrest; he had been denied access to legal advisers and to friends and his confession was made after he had been awakened from a few hours of much needed sleep and brought down at 4.00 a.m. for further interrogation into the passage way of the Bridewell Garda Station in Dublin. The Court of Criminal Appeal[20] reversed the ruling of the Special Criminal Court and excluded the confession. In the case of *Pringle*[21] the accused was questioned a number of times over a three day period. In admitting the confession, particular emphasis was laid by the Court of Criminal Appeal on the nature of the accused's work and what the court of trial had found to be the toughness of his character. Under the definition of oppression as previously defined, the test of its occurrence is subjective. It depends not only on the degree of burdensome conduct by the questioners, but also on the character of the person under interrogation and his specific reaction to what was done to him:

> "In this case the accused was a man of forty two years of age, in good health, who had for some time prior to his arrest had been a fisherman in the Galway area. He was apparently an experienced man of the world not unused to conditions of physical hardship. It was clearly open to the Court of trial to hold that the will of such a man would not have been undermined by the interviews he had experienced and by lack of sleep and that he spoke the inculpatory words when otherwise he would have remained silent."

Recent developments on confessions

It must be stated that any potential for error by the use of anything less than a standard of requiring the prosecution to prove the absence of oppression beyond reasonable doubt has been clarified by a series of recent decisions. These include the decision of the Special Criminal Court in *The People (DPP) v Paul Ward* where what the Court had characterised as dubious interrogation methods by An Garda Síochána were subjected to scorching criticism and the ruling out of a series of confession statements. The reason for the existence of the traditional common law rule requiring confession evidence to be voluntary is that a confession is enough to convict a person beyond reasonable doubt. It follows that if there is any reasonable doubt as to its voluntary nature it cannot be allowed to stand. The Northern Ireland standard is a departure from that and, it seems to us, undermines the very basis upon which the common law is built.

"It seems to us to be beyond argument that both jurisdictions should have some means, other than the recollection of the accused and interviewing police officers, of discovering what precisely happens during interrogation. There cannot be any excuse in either jurisdiction for deferring audio-visual recordings of interrogations any further."

Access to counsel

Another partial non-parallel is the idea that people can be deprived of access to counsel. Under section 47 of the Emergency Powers Act a detainee has the right to see a solicitor, but if a senior police officer reasonably believes that such access will interfere with the investigation or alert other suspects, or hinder the prevention of an act of terrorism, access may be denied for up to 48 hours. The figures between 1987 and 1991 indicate that deferral occurred in 58% of Prevention of Terrorism Act detentions on average, but have been dropping rapidly over the last five years, down to 0.5% in 1995 and 3% in 1996.[23] What can happen in the Republic is that where a danger similar to that identified in the Northern Ireland legislation has been reasonably suspected to exist, the accused is deprived of his right to a solicitor of his choice by that solicitor being barred from visiting him, but is instead given access to another solicitor named by him. The reason can be a reasonable suspicion of conflict of interest or corruption within the legal profession, which is not immune, after all, to the suspicion of the possibility of wrongdoing.

Further Features of Diplock Courts

The legislative background to the Diplock courts

In their detailed study of the legislative history of the Diplock Courts, Greer and White reach two conclusions:[24]

(i) Although regarded by many as self-evident truths, the reasons for the establishment of the Diplock courts, namely pro-loyalist jury bias and the risk of jury intimidation, have never been justified with empirical evidence.

(ii) Whilst there may have been potential problems in the way the jury system operated in Northern Ireland, sufficient consideration was never given to alternatives to abolishing trial by jury.

In response to the first of these criticisms Lord Diplock replied in an unintentionally droll speech delivered in the House of Lords: "[w]hen I see a fire starting, and indeed we saw a fire starting then, I send for the fire brigade not a statistician." In reply, one might suggest that when one seeks to calculate how high the risk of fire is in particular circumstances, one normally sends for a statistician and not the fire brigade. The parliamentary debates on the Northern Ireland (Emergency Powers) Bill 1973 are littered with anecdotal evidence and vague speculation about jury intimidation and perverse verdicts. When asked whether he could provide firm evidence that juries were returning perverse verdicts, the Secretary of State for Northern Ireland Mr Whitelaw replied that he could go no further than saying "that some of the verdicts given had been rather hard to understand."[26] In the words of Greer and White, "...the evidence which was presented to justify the introduction of jury-less Diplock courts in Northern Ireland in 1973 was seriously deficient. At most it indicated that eligibility for jury service should have been democratised, the selection of juries randomised and the identity of jurors concealed."[27]

"The parallels between the two systems are obvious. They have arisen out of the necessity to fight organised crime. Some aspects of the criminal justice system in the Republic, particularly multi-judge courts and the ordinary application of admissibility standards to confessions, surely must commend themselves as basic steps forward. We believe those steps should be taken one at a time before the wider reforms that may be necessary in both jurisdictions come into play."

Case hardening

One of the biggest complaints about Diplock courts is that they lead to case hardening among the judges who sit in them. This concept was explained by Sir George Baker in the following terms :"I understand it to mean that the judge has heard it all before; therefore he does not believe the accused; therefore he is or becomes prosecution-minded or more prosecution-minded. I accept at once that it is possible."[28]

Do Diplock courts change the character of the criminal trial?

Jackson and Doran have suggested that by careful scrutiny of the Diplock courts "one may detect certain traits which betray a fundamental shift from the traditional character of the criminal trial."[28] Essentially the introduction of Diplock Courts was not accompanied by any significant overhaul of ordinary criminal procedures. Thus, in theory at least, the rules and procedures of an ordinary criminal trial remain intact in a trial without a jury. However Jackson and Doran suggest that the reality may be different:

> "Do [the judges] strive to maintain a stringent division between their traditional role as tribunal of law and their "jury role" as tribunal of fact? Or do they accept that a judge alone could never hope to simulate the decision-making process of twelve lay persons and do they therefore adopt a somewhat different approach to matters of fact? Do they, for example, consider that their position allows them to take a more active responsibility on matters of fact during the trial than the jury is able to take? Do they take a more active role in questioning the witnesses than in a jury trial? Do they allow counsel greater freedom in questioning witnesses or do they adhere to stricter standards of relevance than they might be prepared to in a jury trial? Are judges able or willing to indicate in a way that juries are not whether they consider particular lines of enquiry to be more fruitful than others?"[30]

Subsequently Jackson and Doran conducted a comparative study of jury and non-jury trials, and proposed the following answer to their own question:

> "We found that judges have scope in both jury and non-jury trials to deviate from the umpireal role associated with the latter. There was, however, no clear evidence from our survey that judges necessarily acted in a more inquistorial manner when sitting in the absence of the jury....Since justice itself is considered to be epitomised by jury trial, it is not surprising that judges should try to adhere to the umpireal role associated with those proceedings. This is especially likely when, as in Northern Ireland, jury trial continues to be a prominent feature of the criminal justice system."

Judges in Diplock courts, it is claimed, appear to take a more inquiring approach towards defence witnesses. The absence of the jury seems to free judges from the careful detachment which they felt had to be preserved in jury trials and at the same time prompted them as triers of fact to play a more intrusive role. As for the alleged phenomenon of case-hardening, Jackson and Doran draw an interesting conclusion from their study:

> "...judges did adopt an approach towards the evidence which could be described as 'case-hardened', not in the commonly understood sense of being prosecution-minded, but in the sense of confining their consideration to the issue of legal guilt on the offences charged. This did not necessarily disadvantage accused persons. Indeed we saw that judges were scrupulous in applying a strict legal standard of proof to the evidence and there were certain kinds of cases and certain kinds of evidence which counsel admitted they would prefer to be tried by professionals. The fact remained, however, that the scope of the contest was more restricted and there could be no consideration of the merits of conviction other than on the basis of the legal standards to be applied to the defendant. In jury trials, by contrast, counsel were given greater freedom within more relaxed standards of relevance to build up a rounded picture of a defendant or a witness which then enabled them to appeal to the merits of the case."[34]

Part of the reason why Diplock courts do not automatically lead to a more interventionist approach by the trial judge may be because when judges and practitioners appear in both jury and non-jury trials "the influences of jury trial are reinforced in their day-to-day practice."[35] A lot may also hinge on the relative experience and dominance of personality of the counsel and judge in any particular case.

Alternatives to the Diplock courts

When a State is faced with the threat of terrorism such that the jury system is perceived to be flawed, are there any less extreme measures which may be taken instead of banishing the jury system? In the context of Northern Ireland, Greer and White have proposed the following steps:[36]

(i) Scheduled offences should be tried by a jury except in individual cases where there is clear proof of intimidation.

(ii) The randomness of jury selection should be increased by reducing the number of pre-emptory challenges to three per side.

(iii) The anonymity of jurors should be further protected so that only a skeleton staff of court officials would be aware of their identities

However, experience has shown that once the authorities in any country become used to operating within the framework of emergency legislation they are often unwilling to give up these powers when the emergency has ended. In this context, Ewing and Gearty have noted that "... in the years from 1980 to 1986 an average of 630 defendants per year were proceeded against on serious charges without a jury. It is noteworthy how quickly even this dramatic break with our ancient traditions has been assimilated."[37]

Conclusion

All in all, it seems to us, it ill-behoves citizens of Ireland to preach about the inadequacies of the Diplock Court system in Northern Ireland. The parallels between the two systems are obvious. They have arisen out of the necessity to fight organised crime. Some aspects of the criminal justice system in the Republic, particularly multi-judge courts and the ordinary application of admissibility standards to confessions, surely must commend themselves as basic steps forward. We believe those steps should be taken one at a time before the wider reforms that may be necessary in both jurisdictions come into play. Ultimately, the criminal justice system is supposed to be a search for the truth. In that regard it seems to us to be beyond argument that both jurisdictions should have some means, other than the recollection of the accused and interviewing police officers, of discovering what precisely happens during interrogation. There cannot be any excuse in either jurisdiction for deferring audio-visual recordings of interrogations any further.

Finally, an article such as this cannot end without a brief mention being made of the Human Rights aspects of the Good Friday Agreement. In particular, the agreement provided for the establishment of a Human Rights Commission. The way in which this will change the legal landscape in Northern Ireland remains to be seen. Bryce Dickson, writing in the *Bar Review*, has said of the future:

> "The future then looks rosy. Let us all hope that the politicians in both parts of Ireland can ensure that the right political environment exists in the years to come to allow the human rights and equality provisions of the 1998 Agreement to be fully realised in practice in both jurisdictions."[38] ●

1. *Foley v Director of Public Prosecutions,* Irish Times Law Reports, 25 September 1989.
2. High Court, Unreported, 13 March 1998
3. E/CN.4/1998/39/Add4.
4. See *Lavery v The Member in Charge,* unreported, Supreme Court, 23 February 1999.
5. *Miranda v Arizona* (1966) 384 US 436
6. *The People (DPP) v Finnerty* [2000]1 ILRM 191
7. [1999] 1 ILRM 321
8. [1999] 1 ILRM 321 at pp 360-361
9. (1972) 406 US 441
10. See generally *Murray v The United Kingdom* [1996] 22 EHRR 29
11. (1996) 22 ECHR 29
12. (1988) 13 EHRR 379
13. Unreported, E.Ct.H.R., 6 June 2000
14. In accordance with the *Criminal Evidence* (Northern Ireland) Order 1988
15. Unreported, E.Ct.H.R., 6 June 2000
16. See generally, Charleton, McDermott & Bolger, *Criminal Law* (1999), chapter 2.
17. Northern Ireland (Emergency Provisions) Act, 1996, section 12(2)(b)
18. (1981) 2 Frewen 57
19. (1981) 2 Frewen 43
20. (1981) 2 Frewen 43.
21. (1981) 2 Frewen 57.
22. Per O'Higgins C.J. at 82. For the subsequent history of the case see *The People (DPP) v Pringle* [No. 2] [1997] 2 IR 225
23. Northern Ireland (Emergency Provisions) Acts: Statistics, Northern Ireland Office, cited in the Special Rapporteur's Report, above.
24. Greer and White - *Abolishing the Diplock Courts*
25. HL Debs, Vol 855, col 380
26. HC Debs, Vol 855, col 282
27. 'A Return to Trial by Jury' in Jennings, *Justice Under Fire* (Pluto Press, 1988) 68
28. Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978, Cmnd 9222 (HMSO, 1984) para 122
29. Jackson and Doran, *The Diplock Court: Time for Re-examination* (1989) NLJ 464 at 465
30. Jackson and Doran, *The Diplock Court: Time for Re-examination* (1989) NLJ 464 at 465
31. Jackson and Doran , *Judge Without Jury* (Clarendon Press, 1995) 289
32. Jackson and Doran, *Judge Without Jury* 290
33. Jackson and Doran, *Judge Without Jury* 290
34. Jackson and Doran, *Judge Without Jury* 291
35. Jackson and Doran, *Judge Without Jury* 293
36. .Greer and White, *Abolishing the Diplock Courts*, chapter 7
37. *Freedom Under Thatcher* (Calrendon Press, 1990) 229
38. *The Northern Ireland Act; Issues of Equality and Human Rights* (1999) 4 Bar Review 212 at 213

ARTNERSHIP LAW

By Michael Twomey
(Butterworths, 2000)

Reviewed by Paul Gallagher SC

Michael Twomey's *Partnership Law* not only fills a huge gap in Irish textbook writing, it also represents a quite remarkable contribution to the study of partnership law in general. It is no exaggeration to say that in terms of legal scholarship this book is in the same class as *Lindley & Banks on Partnership*. It has in addition some significant advantages over that authoritative text. First, it has a clarity of structure and thought that makes the book very accessible to lawyers. Secondly, it deals in a comprehensive way with issues frequently arising in partnership disputes but just as frequently inadequately dealt with in existing textbooks. Of particular interest in this regard is the chapter on the Goodwill of a Partnership which explains this very important issue in a clear and concise fashion.

The analysis of the frequently encountered issue of whether or not a partnership exists is particularly good. It approaches the issue in a logical fashion designed to provide maximum assistance to lawyers looking for an answer to a particular problem. It also provides a very useful analysis on the various types of partnerships which can exist at law.

One of the most difficult areas in partnership law concerns the relations between partners and third parties. The complexities of this area have been skilfully swept away and one is left wondering why it was ever thought to be a difficult area of partnership law.

In addition to all of the above, *Partnership Law* provides a unique insight into the very significant number of important Irish authorities on partnership law which hitherto have been largely ignored. This alone would have made the book very worthwhile.

This very complete work which covers all areas of partnership law is unlikely to be bettered. We are very fortunate that Michael Twomey should have expended so much effort and care to produce a book that will benefit not just lawyers but any person who ever has to consider a partnership problem.●

The Hon Mr Justice Fergus Flood, the Hon Mr Justice Hugh Geoghegan, the Attorney General Mr Michael Mc Dowell SC and Mr Michael Twomey pictured at the publication by Butterworths of *Partnership Law*

2 FIRSTS FROM BUTTERWORTHS!

Partnership Law

The first Irish textbook on partnership law

BY MICHAEL TWOMEY

Part of the Butterworths Irish Law Library Series

This is the **FIRST** *Irish textbook to deal with this important area of commercial and business law. A knowledge of partnership law is essential because:*

- Most professionals practice through partnerships e.g. accountants, solicitors, doctors, dentists, vets etc
- Partnerships are the default form of business under Irish law so any time people carry on business together (eg farming, shopkeeping etc) without incorporating they will be in partnership
- Partnerships and limited partnerships have become the investment vehicle of choice because of their tax, accounting and disclosure advantages over companies eg film-financing, holiday home schemes, car park investments etc.

4 REASONS WHY THIS BOOK IS INDISPENSABLE:

First Irish textbook on Partnership Law

Practical analysis of the essential clauses of a partnership agreement which is clearly and easily cross-referenced — ideal for the busy practitioner

First critical analysis of hundreds of essential reported and unreported Irish and Northern Irish cases as well as decisions from Scotland, England & Wales, Australia, New Zealand, Canada, America and South Africa

Includes the text of the Partnership Act 1890 and Limited Partnerships Act 1907, fully up to date

Publication Date: **May 2000** Format: **Hard Cover** ISBN: **1 85475 885 3** Product Code: **TPL** Price: **£95**

The Law on Solicitors in Ireland

The FIRST Irish textbook on the law relating to solicitors

BY PATRICK O'CALLAGHAN

AN ASSESSMENT OF THE LAW RELATING TO SOLICITORS IN IRELAND

- **Essential for all solicitors, their advisors and clients**
- **Provides a comprehensive coverage of the legal regime relating to solicitors**
- **Alerts the reader to problems and issues that can arise in practice**

Covers all the main areas of concern to solicitors in practice, whether in a sole practice or in a larger firm. The areas covered range from issues of topical concern such as negligence and the solicitors' compensation fund to practical matters such as costs and accounts with detailed analysis of relevant case law.

PRIORITY ORDER FORM:

To order any of these publications, cut this coupon out and send it to: **James Farmer, Butterworths, Dept. AA 579, PO Box 4214, FREEPOST, Dublin 2.**

OR Contact **Customer Services:** (01) 8731555
e-mail: order.line@butterworths.co.uk

OR an Area Manager:
Madeleine Roche:
Tel/fax: (01) 840 0638 Mob: 087 2597659
Toni Ryder:
Tel/fax: (01) 288 4005 Mob: 087 2566793
Gerry McCallion (N Ire)
Tel: (01) 232 771 254 Mobile: 080 2768215

OR you can fax this order form on
00 44 20 7400 2570

☐ Partnership Law
ISBN: 1 85475885 3 Product Code: TPL Price: £95

☐ The Law on Solicitors in Ireland
ISBN: 1 85475 846 2 Product Code: LSI Price: £95

I would like to pay:

☐ using my Butterworths account,
Number:

☐ please invoice me
Name:

Firm:

Address:

Postcode: Amount: £

Orders are subject to a charge of £2.50 p&p in the UK and Ireland and £3.50 p&p for overseas customers. Certain groups of customers are exempt from this charge. For more information please call Customer Services.

Butterworths
Butterworths, 35 Chancery Lane, London WC2A 1EL
Butterworths is a division of Reed Elsevier (UK) Ltd
Registered office: 25 Victoria Street, London SW1H 0EX
Registered in England number 2746621
VAT Registered No. GB 730 8595 20

NEW YORK BAR COURSE PROGRAMME 2001

Become an American Attorney in 6 months!

If you are a solicitor or barrister or law graduate you may wish to consider qualifying at an American Bar and adding the title "Attorney-at-Law" to your credentials. Opportunities both in international organisations or in the increasing number of US firms who have a presence in Europe are far more available to those with a US qualification. Post-graduate law students will undoubtedly make themselves more marketable in a competitive legal market place with an international qualification included in their curriculum vitae.

With the convenience of a common language, and a legal system based on Common Law, a US qualification is far easier to achieve than you might have first thought. Delivered by Oliver J Connolly, an Irish Lawyer and New York Attorney, in collaboration with Central Law Training, the largest organisation providing Post Qualification training to lawyers in the UK and BAR/BRI, America's premier Bar provider.

Success in an American Bar examination will:

- ENHANCE YOUR MARKETABILITY
- RAISE YOUR PROFESSIONAL PROFILE
- EXTEND YOUR EXPERTISE

For full details of the course programme, please contact the Course Director at the numbers shown below.

- NEW YORK BAR AND CALIFORNIA BAR EXAM PREPARATION
- VENUE - UNIVERSITY COLLEGE DUBLIN, FACULTY OF LAW, ROEBUCK CASTLE, DUBLIN 4
- GENUINE AMERICAN COURSE LECTURES AND MATERIALS
- WEEKEND LECTURE COURSES: INTENSIVE FOUR-MONTH PROGRAMME
- HOME STUDY PROGRAMME ALSO AVAILABLE FOR NEW YORK AND CALIFORNIA STATE BARS
- MARCH 2001 START FOR END OF JULY 2001 EXAM

CENTRAL LAW TRAINING

Telephone the Course Director
Mr. Oliver J Connolly MA, LLB, Attorney-at-Law
on (01) 8174424 email: oconnolly@lawlibrary.ie

barbri BAR REVIEW

Legal Update

The BarReview
Journal of the Bar of Ireland. Volume 6, Issue 1

A directory of legislation, articles and written judgments received in the Law Library from the 16th October 2000 to the 10th November 2000.
Judgment information compiled by the Legal Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Senior Judicial Researcher: David L. Scannell, LL.B, LL.M (Cantab.).
Judicial Researchers: Aine Clancy, LL.B (Ling. Germ), Claire Hamilton, LL.B (Ling. Franc.) B.L
Anthony Moore, LL.B (Ling. Germ) LL.M (Cantab.), Jolle O'Loughlin, B.C.L, LL.M (N.U.I)
Jason Stewart, LL.B, B.C.L (Oxon.)

Administrative Law

Broadnet Ireland Ltd v. Office of the Director of Telecommunications Regulation
High Court: **Laffoy J.**
13/04/2000

Judicial review; security for costs; undertaking as to damages; applicant participated unsuccessfully in tender process for the award of certain licences; respondent decided to refuse to grant applicant a licence; High Court granted leave to applicant to apply for judicial review of respondentís decision; respondents and notice parties seeking security for costs against applicant; applicant not in a position to meet orders for costs; whether any special circumstance in existence that would allow Court to exercise its discretion against awarding security; whether fact that Director defending the proceedings meant other parties should not be granted security for costs; respondents and notice parties seeking undertaking as to damages; whether respondents and notice parties will incur loss and damage caused by delay in the issuing of the licences; applicant did not seek injunction or stay; whether jurisdiction to require undertaking as to damages confined to situation in which interim injunction or stay granted; analogy between conditioning grant or continuance of leave to apply for judicial review and the Courtís discretionary power to grant interlocutory injunction in private litigation; test for whether or not to exercise discretion to require undertaking as to damages; whether existence of this judicial review application has, in substance, the same effect as an interlocutory injunction; whether balance of justice in favour of requiring undertaking; whether any factors militate against requiring undertaking; whether fortified undertaking should be required; s.390, Companies Act, 1963; O.29, r.1 and O.84, r.20, Rules of the Superior Courts.
Held: Security for costs awarded against applicant in respect of each respondent and notice party; in deciding whether to require undertaking as to damages test is whether it is necessary in interests of justice or whether necessary to mitigate injustice to parties directly affected by existence of the pending application; continuance of leave conditional on applicant giving fortified undertaking as to damages to each party directly affected by the proceedings.

Herron v. Ireland
Supreme Court: **Hamilton C.J.,** Barrington J., Lynch J.
03/12/1999

Administrative; judicial review; application for order of *mandamus* in 1993 requiring respondents to provide secure residential placement for psychological assessment and treatment of applicantís son; child's father had taken him to London in breach of the Hague Convention on International Child Abduction; English Court of Appeal dismissed proceedings instituted by applicant in England under the Convention; Supreme Court order made which stated that if child was returned to the State he should be brought by the Garda Siochana before the High Court as soon as possible; at time of the making of the Supreme Court order the proceedings in the UK had not been finally determined; situation envisaged by Supreme Court that child would be returned to this jurisdiction did not materialise at any stage; in November 1998 the child, now aged 18, had called to Garda Station; matter had been discussed with Chief State Solicitor; directions sought from High Court; High Court order had been made to have proceedings re-entered; whether the trial judge having regard to the terms of the Supreme Court order erred in law in failing to direct that the child be brought by the Garda Siochana before the High Court; whether the trial judge erred in law in dismissing motion brought by applicant that certain named individuals be attached and committed to prison for alleged contempt of court; whether the trial judge erred in law in holding that the case could be regarded as an application pursuant to the provisions of s.11, Guardianship of Infants Act, 1964; whether the applicant is entitled to the relief sought in respect of her son, he now having reached the age of majority.
Held: Appeal of respondents against order re-entering proceedings allowed; trial judge erred in holding that the case could be regarded as an application pursuant to s. 11, Guardianship of Infants Act, 1964, as they were judicial review proceedings; appellant not entitled to relief by way of *mandamus* or damages; order of the Supreme Court never became enforceable.

D.P.P. v. Judge Haugh
High Court; **Carney J., O'Donovan J., Laffoy J.**
12/05/2000

Administrative; judicial review; delay; prejudice; respondent had refused adjournment on the ground that there was not a real or serious risk that due to the impact of publicity, the first named notice party would not receive a fair trial; respondent had proposed to send out to potential jurors a letter and questionnaire; whether the respondent had jurisdiction to frame and send to potential jurors the letter and questionnaire; s.15(3), Juries Act, 1976.
Held: Order of *certiorari* granted quashing order of respondent; declaration made that Juries Act 1976 and the common law do not permit the questioning of potential jurors in the manner contemplated.

Articles

Report of the all-party Oireachtas committee on the Constitution. Fourth report: the courts and the judiciary
Hogan, Gerard W
2000 (3) P & P 2

The "visible hand" in the mobile telephony market
Bradley, Conleth
6(1) 2000 BR 4

Library Acquisition

Canny, James K
The law of local government
Dublin Round Hall Sweet & Maxwell 2000
M361.C5

Statutory Instruments

National milk agency (conduct of elections)(amendment) regulations, 2000
SI 271/2000

National milk agency (election day), regulations 2000
SI 272/2000
Seanad electoral (panel members) (prescribed forms) (amendment) regulations, 2000
SI 291/2000

Seanad electoral (university members) (prescribed matters) (amendment) regulations, 2000
SI 290/2000

Adoption

Article
Unveiling our heritage: a comparative examination of access by adopted persons and their families to identifying and non-identifying information
Blair, D Marianne
2000 (3) IFLJ 10

Agriculture

Statutory Instruments
Control of bulls for breeding (permits)(amendment) regulations, 2000
SI 284/2000

Diseases of animals act, 1966 (section 54(2)) (exemption) order, 2000
SI 270/2000

Livestock marts regulations, 1968 (amendment) regulations, 2000
SI 279/2000

Animals

Statutory Instrument

Wildlife (wild birds) (open seasons) (amendment) order, 2000
SI 280/2000

Banking

Library Acquisition

Wadsley, Joan
The law relating to domestic banking
Penn, Graham
2nd ed
London Sweet & Maxwell 2000
N303

Statutory Instrument

Central bank act, 1971 (approval of scheme of ansbacher bankers limited and anglo irish bank corporation public limited company)
SI 298/2000

Bankruptcy

Article

Recent developments in insolvency law
O'Hanlon, Niall
2000 (2) P & P 13

Children

Article

Breaking out of jail: generating non-custodial penalties for juveniles
Vaughan, Barry
2000 (3) ICLJ 14

Library Acquisition

Consultation paper on the law of limitation of actions arising from non-sexual abuse of children Law Reform Commission
Law Reform Commission
Dublin Law Reform Commission
2000
L160.C5

Commercial Law

Re Money Markets International Stockbrokers Ltd (in liq.)
High Court: **Laffoy J.**
12/05/2000

Investor Compensation Act, 1998; application by administrator for directions; administrator also liquidator of company being wound up; administrator seeking directions; administrator not in a position to furnish to the Investor Compensation Company Ltd a definitive statement of names of eligible investors under the Act of 1998, and the 'net loss' and 'compensatable loss' of each such investor; questions regarding precise liability of the company to each client the subject of applications for directions in the winding-up; computation of 'net loss'; whether Act of 1998 gives power to administrator to deliver an interim statement; ss.12, 30, 31, 33(3) and (4), 34, and 35(5), Investor Compensation Act, 1998; Art. 9, Directive 97/9/EC.
Held: Administrator may deliver interim statement.

Articles
A comparative analysis of securities regulations in Europe and USA - part1
Goldberg, David
Abrahamson, Maurice
2000 CLP 194

Incorporation - is it worthwhile?
O'Hara, Jim
13 (2000) ITR 431

Recent developments in insolvency law
O'Hanlon, Niall
2000 (2) P & P 13

Company Law

Articles

Accidental tourists
Grogan, Richard
2000 (October) GLSI 22

Examinerships and the companies (amendment) (no. 2) act 1999
Compton, Gary
2000 (3) P & P 6

Library Acquisitions

Bruce, Martha
Rights and duties of directors
3rd ed
London Tolley 2000
Company law: Directors
N264

Walmsley, Keith
Butterworths company law handbook
14th ed
London Butterworths 2000
N261

Competition

Article

The "visible hand" in the mobile telephony market
Bradley, Conleth
6(1) 2000 BR 4

Constitutional Law

O'Donoghue v. Ireland
High Court: **Kearns J.**
24/11/1999

Constitutional; challenge to constitutionality of legislation; separation of powers; application to High Court for declaration that s.21(1)-(3), Bankruptcy Act, 1988, are invalid and repugnant to the Constitution; function of court during bankruptcy proceedings; whether this function constitutes the administration of justice pursuant to the Constitution; whether this function is incidental and ancillary to the administration of justice; whether s.21(1)-(3) of the 1988 Act are invalid having regard to the Constitution.
Held: Application dismissed.

Contract

Article

Negotiating liabilities without benefit: the pre-contractual liability trap
Friel, Raymond J
2000 CLP 188

Library Acquisition

Friel, Raymond J
The law of contract
2nd ed
Dublin Round Hall Sweet & Maxwell 2000
N10.C5

Copyright, Patents & Designs

Article

Biotechnology and the ethical and moral concerns of European patent law
Mills, Oliver
6(1) 2000 BR 46

Criminal Law

D.P.P. v. Melia
Court of Criminal Appeal: **Keane J.,** O'Donovan J., O'Higgins J.
29/11/1999

Criminal; sentencing; applicant applied to review sentences imposed by the High Court pursuant to s.2, Criminal Justice Act, 1993; respondent had been sentenced to nine years' imprisonment in respect of aggravated sexual assault, three years' imprisonment in respect of false imprisonment, robbery, assault, possession in a public place of an article intended to unlawfully cause injury, incapacitate or intimidate, and unlawfully exercising control of a mechanically propelled vehicle by force or threat thereof, all sentences to be concurrent, with the final year of each to be suspended; whether sentences imposed unduly lenient, having regard to the gravity of the separate offences of sexual assault and false imprisonment and the previous conviction for rape.
Held:Appeal allowed.

D.P.P v. J.E.M.
Court of Criminal Appeal: Denham J., Geoghegan J., McGuinness J.
01/02/2000

Criminal; sexual assault; corroboration; applicant had been convicted of sexual assault; applicant seeking leave to appeal against conviction and sentence on grounds, inter alia, that the trial judge had failed to warn the jury that it was dangerous to convict in the absence of corroboration; whether the trial judge erred in principle or failed to balance fairly the conflicting rights in the case in refusing to recall the prosecutrix for cross-examination; whether there was any basis on which the court could interfere with the exercise of the trial judge's discretion in refusing to discharge the jury during the evidence of a prosecution witness; whether there was any basis on which the court could interfere with the trial judge's exercise of discretion in refusing in his summing up to give the jury a warning that it was dangerous for them to convict the applicant in the absence of corroboration; s.7, Criminal Law (Rape) (Amendment) Act, 1990.
Held: Leave to appeal against conviction refused; application for leave to appeal against sentence may proceed.

Articles

A study in innocence
Farnan, Keith
2000 (August/September) GLSI 10

Breaking out of jail: generating non-custodial penalties for juveniles
Vaughan, Barry
2000 (3) ICLJ 14

Money laundering - an overview
Ashe, Michael
Reid, Paula
2000 CLP 183

Victims, victimology and victim impact statements
Carey, Gearoid
2000 (3) ICLJ 8

Voir dire: disrupting the jury
Goldberg, David
2000 (2) P & P 10

Library Acquisition

Consultation paper on the law of limitation of actions arising from non-sexual abuse of children Law Reform Commission
Law Reform Commission
Dublin Law Reform Commission
2000
L160.C5

Defamation

Hunter v. Duckworth
High Court: **Kelly J.**
10/12/1999

Defamation; libel; jurisdiction of Irish courts; plaintiffs allege that have been libeled by material in a booklet written by second-named defendant and published by first-named defendant; the two plaintiffs had, along with four other men, become known as 'The Birmingham Six'; first-named defendant claims that England was the site of all events connected with the alleged defamation; first-named defendant seeks, *inter alia*, a declaration that the court has no jurisdiction over the subject-matter of the proceedings; whether defamation issue should be looked at by reference to the common law or by reference to the Brussels Convention; whether Convention seeks to depart from the notion that the original publisher of defamatory material will be liable for republications which are the natural and probable causes of such publication; whether publication in Ireland of the booklet was a natural and probable consequence of the booklet's first publication.
Held: Application dismissed; plaintiffs' proceedings properly brought under Article 5(3) of the Brussels Convention.

Employment

Articles

Accidental tourists
Grogan, Richard
2000 (October) GLSI 22

Employers' liability in the electronic workplace
Power, Ann
6(1) 2000 BR 14

Statutory Instruments

Employment regulation order (provender milling joint labour committee) (no. 2), 2000
SI 259/2000

Employment regulation order (women's clothing and millinery joint labour committee), 2000
SI 274/2000

Employment regulation order (shirtmaking joint labour committee), 2000
SI 275/2000

Employment regulation order (tailoring joint labour committee), 2000
SI 276/2000

Employment regulation order (catering joint labour committee), 2000 (for areas other than the areas know, until 1st January, 1994, as the county borough of Dublin and the borough of Dun Laoghaire)
SI 285/2000

European Law

Library Acquisition

Plender, Richard
European court practice and precedents general editor Richard Plender
London Sweet & Maxwell 1997
W94

Evidence

Library Acquisitions

Keane, Adrian
The modern law of evidence
5th ed
London Butterworths 2000
M600

Murphy on evidence
Murphy, Peter
7th ed
London Blackstone Press 2000
M600

Family Law

McG. v. F. (Falsely Called McG.)
High Court: **Budd J.**
28/01/2000

Family; nullity; powers and duties of medical inspector appointed in respect of nullity petition; respondent's diary removed surreptitiously by petitioner and without former's consent; whether inspector could view diary of respondent; whether inspector entitled to interview third-party informants who may have information which would assist the inspector in undertaking a psychiatric examination.
Held: Medical inspector should prepare report without recourse to diary in the absence of a future discovery motion; inspector's report to be confined to an assessment on the basis of interviews with the parties to proceedings; if both parties were to consent to the medical inspector interviewing third-party informants, then the Court might sanction such an interview in particular circumstances.
M. v. D.
Supreme Court; **Denham J.**, Lynch J., Barron J.
08/12/1999

Family; child abduction; Hague Convention; appeal against decision of High Court refusing to return children to place of habitual residence; children removed from England to Ireland by respondent grandmother; plaintiff mother suffered alcoholism and depression; whether trial judge erred in law and fact in refusing to return children to country of habitual residence, where this was deemed to mean a return to plaintiffis custody; whether appropriate for trial judge to rely upon events which take place in the courtroom when considering whether or not to return child to plaintiff; whether appropriate to rely, with counsel's consent, upon social welfare reports exhibited with affidavits; whether the interviewing by the trial judge of child and reliance on same to ground refusal to return was an error in law and fact; whether use by trial judge of test of welfare of child incorrect in law; Child Abduction and Enforcement of Custody Orders Act, 1991; Art. 13, Hague Convention.
Held: Appeal dismissed.

McG. v. W.
Supreme Court: Denham J., Murphy J., Barron J., Murray J., Hardiman J.
31/03/2000

Joinder to proceedings; recognition of foreign divorce; judgment in rem; jurisdiction of court once final order made; High Court granted recognition to foreign divorce of petitioner; application by Attorney General to be joined to proceedings; appeal; Attorney General seeking to be joined to proceedings after judgment given by High Court, in order to appeal against the judgment; whether proceedings in High Court may continue without Attorney General; whether Attorney General must be served with copy of proceedings; whether Attorney General may choose not to participate in proceedings; whether Court has inherent jurisdiction to join Attorney General; whether discretion to notify Attorney General of the proceedings ought to have been exercised in favour of notification; whether proceedings binding on the parties; whether there was a proper *legitimus contradictor*;

whether order made by High Court a final order; whether proceedings in being; whether order, if final, may be amended; s.29, Family Law Act, 1995.
Held: Court does not have jurisdiction to reopen proceedings; appeal dismissed.

E.H. v. J.M.
High Court: **Kinlen J.**
04/04/2000

Family law; separation; financial orders; applicant and respondent had produced two children and had separated by mutual agreement; what arrangements should be put in place with regard to the children.
Held: Order retaining joint custody granted; order retaining childrens' allowance granted; order that the respondent is to be responsible for health insurance cover, dental fees, school fees and extra-curricular expenditure granted; order that the respondent pay arrears of maintenance granted; order that the respondent pay for holidays for the children granted; order that the respondent pay an amount per month for suitable alternative accommodation granted; order reversing decision of Circuit Court that respondent may not have any dealings with a site in respect of which he has planning permission granted provided that the respondent undertakes to build on the said site within 3 years.

Articles

Sexuality, ideology and the legal construction of 'family': Fitzpatrick v. Sterling Housing Association
Ryan, Fergus
2000 (3) IFLJ 2
Tax pitfalls of divorce
Walpole, Hilary E
13 (2000) ITR 449

Fisheries

Statutory Instruments

Cod (restriction on fishing) (no.7) order, 2000
SI 269/2000

Hake (restriction on fishing) (no.5) order, 2000
SI 267/2000

Celtic sea (prohibition on herring fishing)(revocation) order, 2000
SI 306/2000
Cod (restriction on fishing0 (no. 8) order, 2000
SI 302/2000

Common sole (restriction of fishing in the Irish sea)
SI 305/2000

Hake (restriction on fishing) (no. 6) order, 2000
SI 303/2000

Monkfish (restriction on fishing)(no.8) order, 2000
SI 268/2000

Monkfish (restriction on fishing) (no. 9) order, 2000
SI 304/2000

Plaice (control of fishing in ICES Divisions VIIF and VIIG) (No.2)Order, 2000
SI 316/2000

Food

Article

Food for thought
O'Sullivan, Richard
2000 (August/September) GLSI 22

Health

Article

Food for thought
O'Sullivan, Richard
2000 (August/September) GLSI 22

Housing

Articles
Social and affordable?
Macken, James
6(1) 2000 BR 41

The planning and development bill 1999 and access to the courts
Connolly, James
2000 IPELJ 62

Immigration

Article

Ireland and the European asylum debate
Lindenbauer, Michael
Fraser, Ursula
2000 (2) P & P 2
Library Acquisitions

Almirall, Laura
Asylum in Ireland a report on the fairness and sustainability of asylum determinations at first instance
Lawton, Ned
Irish Refugee Council
Dublin Irish Refugee Council 2000
project funded by the Joseph Rowntree Charitable Trust
C206.C5

Fanning, Bryan
Asylum seekers and the right to work in Ireland
Loyal, Steven
Staunton, Ciaran
Irish Refugee Council
Dublin Irish Refugee Council 2000
research on behalf of the Irish Refugee Council, funded by the Combat Poverty Agency
C206.C5

Harvey, Colin
Seeking asylum in the UK problems and prospects
London Butterworths 2000
C206

Information Technology

Articles

Employers' liability in the electronic workplace
Power, Ann
6(1) 2000 BR 14

Sign of the times
Newman, Jonathan
2000 (August/September) GLSI 14

Statutory Instruments

Electronic commerce act, 2000 (commencement) order, 2000
SI 293/2000

Taxes (electronic transmission of certain revenue returns) (specified pro
visions and appointed day) order, 2000
SI 289/2000

International Law

Articles

A comparative analysis of securities regulations in Europe and USA - part1
Goldberg, David
Abrahamson, Maurice
2000 CLP 194

The United States supreme court: the October 1999 term in review
Heffernan, Liz
6(1) 2000 BR 9

Legal Profession

Articles
A word to the wise
Hall, Dr Eamonn
2000 (October) GLSI 26

Report of the all-party Oireachtas committee on the Constitution. Fourth report: the courts and the judiciary
Hogan, Gerard W
2000 (3) P & P 2

Licensing

In re Hannigan Holdings Limited
Supreme Court: Denham J., **Murphy J.**, McGuinness J.
13/04/2000

Licensing; consultative case stated; applicant seeking a certificate entitling them to receive a new seven day publican's licence in respect of existing licensed premises and a new extension adjoining them pursuant to s.6, Licensing (Ireland) Act, 1902 as amended by s.4, Intoxicating Liquor Act, 1960; s.6 permits a new licence to be granted to premises ìattached to or adjoiningî premises formerly licensed provided that such new licenses are granted only in order to render the said premises more suitable for the business carried on therein.
Held: The words 'attached to or adjoining' should be read disjunctively; the words 'attached to or adjoining' should be construed in the context of the proviso and given a special meaning and construction; a licence granted pursuant to s.6 must relate to premises capable of being licensed as one unit.

Local Government

Library Acquisition

Canny, James K
The law of local government
Dublin Round Hall Sweet & Maxwell 2000
M361.C5

Medical Law

Articles

A little knowledge
Healy, John
2000 (October) GLSI 16

Biotechnology and the ethical and moral concerns of European patent law
Mills, Oliver
6(1) 2000 BR 46

Collins v. Mid-Western Health Board and O'Connor: GPs, hospital doctors and their duty of care
Sheikh, Asim A
Cusack, Denis A
6 (2000) MLJI 4

Comments from an adult psychiatric service on the mental health bill 1999
Various Authors
6 (2000) MLJI 14

Consent to treatment by patients - disclosure revisited
Craven, Ciaran
6(1) 2000 BR 56

Guarded welcome for mental health bill 1999
Keys, Mary
6 (2000) MLJI 28

The anonymous sources of embryos: an ethical appraisal
Iglesias, Teresa
6 (2000) MLJI 36

The new mental health bill - failing to progress
De Vries, Ubaldus
6 (2000) MLJI 19

Theatre of the absurd
Johnson, Keenan
2000 (August/September) GLSI 18

Library Acquisition

Hale The Hon Mrs Justice, Brenda
Mental health law
4th ed
London Sweet & Maxwell 1996
N155.3

Negligence

Crawford v. Keane
High Court: **Barr J.**
07/04/2000

Negligence; exemplary damages; assessment of damages; plaintiff and defendant involved in road traffic accident; parties gave very different accounts of the event; defendant's account a deliberate falsehood; collusion between defendant and witness for defence; whether plaintiff entitled to exemplary damages.
Held: Exemplary damages awarded in the amount of £7,000; general damages assessed at £30,000.

Kelly v. Bus Átha Cliath
Supreme Court: Keane C.J., **Murphy J.*, Hardiman J.**
(*dissenting)
16/03/2000

Negligence; personal injuries; role of Supreme Court on appeal from High Court; defendant's bus struck plaintiff at junction; conflict of evidence as to whether or not plaintiff had been standing wholly on pavement at time of impact; whether finding by High Court that plaintiff had been on the pavement supported by credible evidence.
Held: Appeal allowed; case remitted for rehearing to High Court.

McSweeney v. J.S. McCarthy Ltd.
Supreme Court: Hamilton C.J., Barron J., **Murray J.**
28/01/2000

Tort; employment; breach of statutory duty; contributory negligence; accident in course of appellant's employment as painter; whether respondent by leaving the appellant to carry out work according to his own devices failed to provide him with a reasonably safe system of work in breach of common law duty of care; whether respondent in breach of s.37(1), Factories Act, 1955 (as amended by s.12, Safety in Industry Act, 1980) and of s.73(3), Construction (Safety, Health and Welfare) Regulations, 1975; whether appellant in breach of common law and statutory duty to take reasonable care for his own safety.
Held: Appeal allowed; contributory negligence of appellant contributed substantially to his injury; 40% of fault apportioned to appellant; matter remitted to High Court for assessment of damages.

Article

A little knowledge
Healy, John
2000 (October) GLSI 16

Planning

Duffy v. Waterford Corporation
High Court: **McGuinness J.**
21/07/1999

Planning; judicial review; applicant seeks an order of certiorari quashing respondent corporation's decision to build 70 houses in the vicinity of applicant's home; respondent had notified proposed development in local newspaper and had taken written and oral submissions from

the public; city engineer had recommended proceeding with development subject to amendments which incorporated many of the objections; respondent had decided to proceed on basis of city engineer's recommendations; whether respondent was obliged to re-advertise amended scheme and again allow for objections of public; whether decision represented a material contravention of the development plan; Part X, Local Government (Planning and Development) Regulations, 1994; section 39(2), Local Government (Planning and Development) Act, 1963.
Held: Relief refused.

Carty v. Fingal County Council
Supreme Court: **Keane J.**, Murphy J., Lynch J.
05/02/1999

Planning; statutory powers of sanitary authorities; appellant's earlier applications to respondent authority's statutory predecessor, Dublin County Council ('the Council'), for planning permission had failed on the ground, *inter alia*, of insufficient capacity in the sewer serving the proposed site; planning permission granted on appeal to an Bórd Pleanála; sewers were overloaded at this time; condition requiring financial contribution to Council's expenditure on provision of public water supply and piped sewerage facilities; appellant had paid contribution; later, appellant's application for building bye-law approval from sanitary authority (also the Council) was refused by Notice of Disapproval on ground, *inter alia*, of insufficient foul drainage; subsequent application to the Council had been granted, but appellant now claims that Council acted wrongfully and in abuse of statutory powers in initially refusing application; whether grant of planning permission precluded Council *qua* sanitary authority from refusing building bye-law approval at all or for a reason provided for in a condition attached to the planning permission; whether owner/occupier's right to cause his drains to empty into the sewer of a sanitary authority (provided he gives notice and complies with conditions) could be exercised where sewers were overloaded and sanitary authority had issued a Notice of Disapproval; whether internal correspondence evidenced a formal acceptance by Dublin Corporation of inclusion of the Council sewer in the drainage area and its connection to Corporation sewer; Local Government (Sanitary Services) Acts, 1878 to 1964; Local Government (Planning and Development) Acts, 1963 to 1993.
Held: Appeal dismissed; Planning and Development and Sanitary Services codes are distinct; obligation to obtain building bye-law approval remains even after grant of planning permission in order for planning permission to be implemented.
Note: Section 25(3), Local Government (Planning and Development) Act, 1990, removed the right of the owner/occupier under s. 23, Public Health (Ireland) Act, 1878, to connect his drains to any sewer of the Sanitary Authority. From this time, the consent of the Authority to do so has been required. This provision had come into force by the time of this judgment but was not in force at the time when An Bórd Pleanála granted planning permission for the development.

Article

The planning and development bill 1999 and access to the courts
Connolly, James
2000 IPELJ 62

Pollution

Statutory Instrument

Air pollution act, 1987 (marketing, sale and distribution of fuels) (amendment) regulations, 2000
SI 278/2000

Practice & Procedure

Cooper Flynn v. Radio Telefís Éireann
High Court: Kelly J.
19/05/2000

Discovery; libel action; defendants made allegations that plaintiff, while working for a bank, advised or encouraged investors to participate in an investment scheme for the purpose of evading tax liabilities in the State; defendants pleading justification; non-party discovery ordered against the bank revealed the existence and contents of 65 clients' files in the possession of the bank relevant to the issues to be tried; High Court ordered that the names and addresses of the clients be expunged from the files prior to discovery; defendants seeking order requiring bank to make available in unredacted form the files previously disclosed; whether making of order necessary for the fair disposal of the action; whether making of order would confer litigious advantage on defendants; steps to mitigate loss of confidentiality; whether defendants entitled to seek support for plea of justification from documents revealed in course of discovery; whether revelation of names of potential witnesses a reason for refusing the order; whether order oppressive or unfair having regard to plaintiff's rights; whether necessary for the fair disposal of the action or for the saving of costs that additional discovery be ordered; O.31, r.8, Rules of the Superior Courts.
Held: Order granted directing bank to permit specified persons to inspect the files in unredacted form; application for additional discovery refused.

Superwood Holdings plc v. Scully
Supreme Court: O'Flaherty J., **Murphy J.**, Lynch J.
04/11/1998

Practice and procedure; dismissal for want of prosecution; ten years had elapsed since accrual of alleged cause of action; delay was inordinate; High Court had dismissed claim for want of prosecution; appellants appeal against High Court order; whether delay was inexcusable; whether balance of justice favoured case being permitted to proceed.
Held: Appeal allowed on terms.

Rye Valley Foods Ltd v. Fisher Frozen Foods Ltd
High Court: **O'Sullivan J.**
10/05/2000

Service out of the jurisdiction; Brussels Convention; defendant English company agreed to deliver goods to an address in England for collection by plaintiff Irish company; plaintiff alleging that goods defective; defendant seeking to have service of plenary summons set aside on ground that High Court does not have jurisdiction to hear and determine the claims; claims in contract and in tort; parties had had continuous dealings with each other since 1996; contractual claim; nature of relevant obligation under Art. 5(1) Brussels Convention; whether relevant obligation to be performed in Ireland or in England; whether contract modified by umbrella agreement arising out of continuing relationship between the parties; tort claim; whether concept of ìtort, delict or quasi-delictî in Art. 5(3) autonomous and independent of national law; whether claim related to the contract; Arts. 2, and 5(1) and

(3) Brussels Convention.
Held: Judgment for defendant.

Bula Ltd. v. Tara Mines Ltd.
High Court: **Morris P.**
12/05/2000

Practice and procedure; discovery; applicants seeking Order setting aside previous Order and directing the re-hearing of the appeal which was the subject of that order; applicants further seeking Order directing defendants to make discovery of specific documents and further information; whether defendants should produce further documents.
Held: Application refused; reasons for ruling will be addressed in a later judgment.

Dunne v. Electricity Supply Board
High Court: **Laffoy J.**
19/10/1999

Practice and procedure; defendant seeks orders dismissing plaintiff's claim for want of prosecution and as an abuse of the process of the court; defendant had constructed a power station at first pier; in consideration of relinquishment of berthing rights by plaintiff's predecessors in title defendant had allegedly undertaken in 1963 to provide and maintain alternative facilities at second pier; pursuant to that agreement extension had been constructed to allow defendant's predecessors berthing access at all times; precipitating cause of proceedings had been an indication by defendant in mid-sixties of an intention to relinquish responsibility for maintaining the extended pier; defendant had denied existence of agreement in 1977; had asserted that extension to pier had been constructed to facilitate New Ross Harbour Commissioners and their servants and agents in the pilotage of the boat on the river; proceedings had been instituted in 1989 as to the existence of the asserted property rights; defendant had pleaded the Statute of Limitations and/or doctrine of laches; plaintiff had given reasons for delay; former solicitor had been suspended which had resulted in difficulties for new solicitor in getting papers; whether delay was inordinate and inexcusable; whether balance of justice was in favour of or against proceeding with the case; whether plaintiff's claim should be struck out as being frivolous, vexatious and an abuse of process of the court on grounds of being statute barred.
Held: Application refused.

Money Markets International Stock Brokers Limited v. Fanning
High Court: **O'Sullivan J.**
11/02/2000

Practice and procedure; interrogatories; fraud; plaintiff company in liquidation; plaintiff seeking to compel first and fourth named defendants to reply to interrogatories and to deliver further interrogatories against all defendants; whether the defendants can be compelled to make enquiries for the purpose of answering interrogatories where they have deposed to lack of personal knowledge; whether plaintiff must show that it is necessary that interrogatories be answered both for promoting the fair and efficient conduct of the action or for saving costs; whether sufficient necessity established in the present case; whether unjust in principle to require the defendants to reply; whether appropriate test for determining the subject matter of interrogatories is a distinction between interrogatories which relate to facts in dispute and those which relate to evidence of facts in dispute; whether present interrogatories satisfy the test.
Held: First defendant must answer all but one of interrogatories; fourth defendant must answer all interrogatories; unjust to require defendants to answer two of three questions in supplementary interrogatories.

Moran v. Oakley Park Developments Ltd.
High Court: **O'Donovan J.**
31/03/2000

Practice and procedure; notice of motion; inherent jurisdiction; plaintiff seeking judgment in default of defence and specific performance of contract to purchase land and build premises; defendant seeking Order vacating a lis pendens and dismissing plaintiff's claim pursuant to O.19, r.28, Rules of the Superior Courts; whether plaintiff had an arguable case which is neither frivolous or vexatious.
Held: Applications dismissed.

Wildgust v. Bank of Ireland
Supreme Court: Denham J., Murphy J., **McGuinness J.**
13/04/2000

Practice and procedure; amendment of pleadings; loan to plaintiffs had been secured by assignment of life policy; one payment missed for which the first named defendant was allegedly responsible; plaintiff's claim dismissed in High Court but liberty granted to amend statement of claim to include a claim for negligent misstatement; whether the plaintiff's claim in negligent misstatement was pleaded with sufficient clarity in original statement of claim; whether defendants made sufficiently aware of the nature of claim and of its factual background by the course of the proceedings viewed as a whole; whether defendants were materially prejudiced in their defence; whether they would have continued to be materially prejudiced had the trial continued in the High Court; whether the trial should have continued, with or without amendment of pleadings.
Held: Appeal allowed.

Articles

Recent developments in security for costs
Lowe, Nicola
2000 (2) P & P 6

The early disposal of unwinnable claims
McGrath, Michael P
2000 CPLJ 67

Library Acquisitions

Consultation paper on the law of limitation of actions arising from non-sexual abuse of children
Law Reform Commission
Dublin Law Reform Commission
2000
L160.C5

Cook, Michael J
Cook on costs 2000 a guide to legal remuneration in civil contentious and non-contentious business
London Butterworths 2000
L89

Property

Article

Stamp duty clawback - residential property
Cahill, Patrick S
13 (2000) ITR 439

Library Acquisitions

Burn, E H
Cheshire and Burn's modern law of real property
16th ed
London Butterworths 2000
N60

Lyall, Andrew
Land law in Ireland
2nd ed
Dublin Roundhall Sweet & Maxwell 2000
N60.C5

Pearce, Robert A
Land law
Mee, John
2nd ed
Dublin Round Hall Sweet & Maxwell Ltd 2000
N60.C5

Records & Statistics

Statutory Instrument

Statistics (tourism) order, 2000
SI 239/2000

Refugees

Article

Ireland and the European asylum debate
Lindenbauer, Michael
Fraser, Ursula
2000 (2) P & P 2

Library Acquisitions

Almirall, Laura
Asylum in Ireland a report on the fairness and sustainability of asylum determinations at first instance
Lawton, Ned
Irish Refugee Council
Dublin Irish Refugee Council 2000
project funded by the Joseph Rowntree Charitable Trust
C206.C5

Fanning, Bryan
Asylum seekers and the right to work in Ireland
Loyal, Steven
Staunton, Ciaran
Irish Refugee Council
Dublin Irish Refugee Council 2000
research on behalf of the Irish Refugee Council, funded by the Combat Poverty Agency
C206.C5

Harvey, Colin
Seeking asylum in the UK problems and prospects
London Butterworths 2000
C206

Statutory Instruments

Refugee act 1996 (establishment day) order, 2000
SI 309/2000

Refugee act 1996 (sections 14 and 15 and second schedule) (commencement) (no.2) order, 2000
SI 308/2000

Road Traffic

Article

Theatre of the absurd
Johnson, Keenan
2000 (August/September) GLSI 18

Shipping

Gourdomichalis Maritime S.A. v. The Owners and All Persons Claiming an Interest in the M.V. Tirgu Frumos, "The M.V. Tirgu Frumos"
High Court: **Morris P.**
12/05/2000

Arrest of vessel; application to set aside arrest; maritime claim; sister ship arrest; parties entered into joint venture agreement whereby defendant agreed *inter alia* to deliver a ship, the M.V. Costesti; whether claim based on loss and damage alleged to have been suffered by plaintiff caused by breach of this agreement a ìmaritime claimî within meaning of Art. 1 of the International Convention Relating to the Arrest of Seagoing Ships, 1952; whether defendant was owner of the M.V. Costesti at time the maritime claim arose; time that maritime claim arose; onus of proof; Jurisdiction of Courts (Maritime Conventions) Act, 1989.
Held: Order of arrest discharged.
Library Acquisition

Symmons, Clive R
Ireland and the law of the sea
2nd ed
Dublin Round Hall Sweet & Maxwell 2000
N330.C5

Sports

Article

A game of two halves
MacNeill, Eoin
Furlong, Kenan
Crowley, Diarmuid
2000 (October) GLSI 12

Taxation

Hibernian Insurance Company Limited v. Mac Uimis
Supreme Court: Hamilton C.J., **Murphy J., Barron J.**
20/01/2000

Taxation; corporation tax; management expenses; whether certain expenses incurred by the appellant in evaluating potential investment opportunities were expenses of management; whether it is significant that such costs were incurred before the decision to purchase; whether the relationship between the expenses incurred and the potential purchases was such as to deprive that expenditure of the character of expenses of management; whether the legislation directed the deduction of sums dispersed as 'expenses of management' without reference to any other quality or characteristic of the disbursement; meaning of 'management' in legislation; s.15(1), Corporation Tax Act, 1976; s.33, Income Tax Act, 1918.
Held: Appeal dismissed.

Articles

CAT and double taxation relief
Williams, Ann
13 (2000) ITR 435

Constitutional implications of individualisation
13 (2000) ITR 459

Crilly v T. & J. Farrington Limited
Ramsay, Ciaran
13 (2000) ITR 443

Engagement letters
O Cuinneagain, Mel
13 (2000) ITR 427
Stamp duty clawback - residential property
Cahill, Patrick S
13 (2000) ITR 439

Tax pitfalls of divorce
Walpole, Hilary E
13 (2000) ITR 449

Library Acquisition

Connolly, Margaret
Capital tax acts 2000-2001 stamp duties, capital acquisitions tax, residential property tax, probate tax
London Butterworths 2000
M335.C5.Z14

Statutory Instruments

Finance act, 1993 (section 60) regulations, 2000
SI 319/2000

Taxes consolidation act, 1997 (designation of urban renewal areas) order, 2000
SI 260/2000

Taxes (electronic transmission of certain revenue returns) (specified pro
visions and appointed day) order, 2000
SI 289/2000

Value-added tax (estimation of tax payable and assessment of tax payable
or refundable) regulations, 2000
SI 295/2000

Telecommunications

Article

The "visible hand" in the mobile telephony market
Bradley, Conleth
6(1) 2000 BR 4

Statutory Instruments

Wireless telegraphy (fixed satellite earth stations) regulations, 2000
SI 261/2000

Wireless telegraphy act, 1926 (section 3) (exemption of certain fixed satellite receiving earth stations) order, 2000
SI 273/2000

Torts

Articles

A little knowledge
Healy, John
2000 (October) GLSI 16

Collins v. Mid-Western Health Board and O'Connor: GP's, hospital doctors and their duty of care
Sheikh, Asim A
Cusack, Denis A
6 (2000) MLJI 4

Transport

Statutory Instrument

Air navigation and transport (amendment) act, 1998 (aggregate borrowings limit variations) order, 2000
SI 287/2000

Tribunals of Inquiry

Bailey v. Mr. Justice Flood
Supreme Court: **Denham J.,** Murphy J., Barron J.
14/04/2000

Judicial review; applicants challenging decision of respondent to hear evidence of their financial affairs in public; whether decision of respondent reasonable.
Held: Appeal dismissed.

Murphy v. Mr. Justice Flood
Supreme Court: **Hamilton C.J.,** Denham J., Barrington J., Keane J., Barron J.
26/01/2000

Tribunal of inquiry; judicial review; leave to apply for judicial review; tribunal admitted a certain affidavit made by a deceased person into evidence; tribunal refused to hear the contents of the affidavit otherwise than in public; High Court refused leave; whether rulings in breach of applicant's constitutional rights; whether rulings unreasonable or irrational or flew in the face of fundamental reason and common sense; s.2(a), Tribunals of Inquiry (Evidence) Act, 1921.
Held: Appeal dismissed.

European Directives implemented into Irish Law up to 10/11/00

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

European communities (assembly centres) regulations, 2000
SI 257/2000
[DIR 97/12/EC AND DIR 98/99/EC]

European communities (agricultural or forestry tractors type approval) (no. 2) regulations, 2000
SI 286/2000
[DIR 2000/19/EC AND DIR 2000/22/EC AND DIR 2000/25/EC]

European communities (prohibition on the sale, supply and export to Burma/Myanmar of equipment which might be used for internal repression or terrorism) regulations, 2000
SI 299/2000
[REG 1081/2000]

European communities (veterinary checks on products imported from third countries) regulations, 2000
SI 292/2000
[DIR 97/78/EC]

European communities (consumer credit) regulations, 2000
SI 294/2000
[DIR 1998/7/EC]

European communities (foodstuffs treated with ionising radiations) regulations, 2000
SI 297/2000
[DIR 1999/2/EC]
[DIR 1999/3/EC]

European communities (fees on imports of products of animal origin from third countries) regulations, 2000
SI 301/2000
[DIR 96/43/EC]

European Communities (unfair terms in consumer contracts) (amendment) regulations, 2000
SI 307/2000
[DIR 93/13/EEC]

European communities (control of exports of dual-use items) regulations, 2000
SI 317/2000
[REG 1334/2000]

European Caselaw received in the Law Library up to 10/11/00.

Information compiled by Lorraine Brien, Law Library, Four Courts.

C-46/97 Hellenic Republic v Commission of the European Communities
Court of Justice of the European Communities
Judgement delivered 13/7/2000
(Clearance of EAGGF accounts-1992)

C-107/97 Rombi & Ors v Organisation Generale des consommateurs (Orgeco) Union Departementale 06

Court of Justice of the European Communities
Judgement delivered 18/5/2000
(Food supplements-Directive 89/398/EEC-Transposition-Conditions-Rentention of previous national legislation-Additive-L-carnite)

C-262/97 Pensioenen v Engelbrecht
Court of Justice of the European Communities
Judgement delivered 26/9/2000
(Social security-Freedom of movement for workers-Retirement pension-Increase in respect of dependent spouse-Articles 12 and 46a of Regulation (EEC)No 1408/71-Overlapping of pensions awarded under the legislation of different Member States)

C-287/98 State of the Grand Duchy of Luxembourt v Linster & Ors
Court of Justice of the European Communities
Judgement delivered 19/9/2000
(Environment-Directive 85/337/EEC-Assessment of the effects of certain public and private projects-Specific act of national legislation-Effect of the directive)

C-289/97 Eridania SpA v Azienda Agricola San Luca di Rumagnoli Viannj
Court of Justice of the European Communities
Judgement delivered 6/7/2000
(Sugar-Price regime-Marketing year 1996/1997-Regionalisation-Deficit zones-Classification of Italy-Validity of Regulations No 1580/96 and 1785/81)

C-371/97 Gozza & Ors v Universita degli Studi di Padova & Ors
Court of Justice of the European Communities
Judgement delivered 3/10/2000
(Right of establishment -Freedom to provide services-Doctors-Medical specialties-Training periods-Remuneration-Direct effect)

C-58/98 Corsten v Germany
Court of Justice of the European Communities
Judgement delivered 3/10/2000
(Freedom to provide services-Directive 64/427/EEC-Skilled services in the building trade-National rules requiring foreign skilled trade undertakings to be entered on the trades register-Proportionality)

C-156/98 Federal Republic of Germany v Commission of the European Communities
Court of Justice of the European Communities
Judgement delivered 19/9/2000
(Aid granted to undertakings in the new German Lander-Tax provision favouring investment)

C-205/98 Commission of the European Communities v Republic of Austria
Court of Justice of the European Communities
Judgement delivered 26/9/2000
(Failure of a Member State to fulfil obligations-Directive 93/89/EEC-Tolls-Brenner motorway-Prohibition of discrimination-Obligation to set toll rates by reference to the costs of the infrastructure network concerned)

C-225/98 Commission of the European Communities v French Republic
Court of Justice of the European Communities
Judgement delivered 26/9/2000
(Failure of a Member State to fulfil its obligations-Public works contracts-Directives 71/305/EEC as amended by Directive 89/440/EEC, and 93/37/EEC-Constructing and maintenance of school buildings by the Nord-Pas-de-Calais Region and the Department du Nord)

C-303/98 Sindicato de Medicos de Asistencia Publica (Simap) v Conselleria de Sanid ad y Consumo de la Generalidad Valenciana
Court of Justice of the European Communities
Judgement delivered 3/10/2000
(Social policy-Protection of the safety and health of workers-Directives
89/39/EEC and 93/104/EC-Scope-Doctors in primary health care teams-Average period of work-Inclusion of time on call-Night workers and shift workers)

C-322/98 Kachelmann v Bankhaus Hermann Lampe KG
Court of Justice of the European Communities
Judgement delivered 26/9/2000
(Social policy-Male and female workers-Access to employment and working conditions-Equal treatment-Conditions governing dismissal)

C-458/98 P Industrie des Pondres Spheriques v Council of the European Union
Court of Justice of the European Communities
Judgement delivered 3/10/2000
(Appeal-Anti-dumping-Regulation (EEC) No 2423/88-Calcium metal-Admissilility-Re-opening of an anti-dumping procedure after annulment of the regulation adopting an anti-dumping duty-Right to a fair hearing)

C-462/98 P Mediocurso-Estabelecimento de Ensino Particular Ld' v Commission of the
European Communities
Court of Justice of the European Communities
Judgement delivered 21/9/2000
(Appeal-European Social Fund-Training programmes-Reduction of financial assistance-Rights of defence -Right to be heard)

C-303/98 Sindicato de Medicos de Asistencia Publica (Simap) v Conselleria de Sanid ad y Consumo de la Generalidad Valenciana
Court of Justice of the European Communities
Judgement delivered 3/10/2000
(Social policy-Protection of the safety and health of workers-Directives
89/39/EEC and 93/104/EC-Scope-Doctors in primary health care teams-Average period of work-Inclusion of time on call-Night workers and shift workers)

C-16/99 Ministre de la Sante v Erpelding
Court of Justice of the European Communities
Judgement delivered 14/9/2000
(Council Directive 93/16/EEC-Interpretation of Articles 10 and 19-Use of
the title of specialist doctor in the host Member State by a doctor who has obtained in another Member State a qualification not included as regards that State on the list in Article 7 of the directive)

C-19/99 Modelo Vontinente SGPS SA v Fazenda Publica
Court of Justice of the European Communities
Judgement delivered 21/9/2000
(Directive69/335/EEC-Indirect taxes on the raising of capital-Charge for drawing up a notarially attested act recording an increase in the share capital of a capital company and an amendment to its statutes)

C-22/99 Bertinetto v Biraghi SpA
Court of Justice of the European Communities
Judgement delivered 26/9/2000
(Agriculture-Common organisation of the markets-Milk and milk products-Milk-price-Article 3 of Regulation (EEC) No 804/68)

C-23/99 Commission of the European Communities v French Republic
Court of Justice of the European Communities
Judgement delivered 26/9/2000
(Failure by a Member State to fulfil its obligations-Free movement of goods-Procedures for detention under customs control-Goods in transit-Industrial property right-Spare parts for the repair of motor vehicles)

C-87/99 Zurstrassen v Administration des Contributions Directes
Court of Justice of the European Communities
Judgement delivered 16/5/2000
(Article 48 of the EC Treaty (now, after amendment, Article 39 EC)-Equal treatment-Income Tax-Separate residence of spouses-Joint assessment to tax for married couples)

C-109/99 Association Basco-Bearnaise des Opticiens Independants v Prefet des Pyrenees-Atlantiques & Ors
Court of Justice of the European Communities
Judgement delivered 21/9/2000
(Directives 73/239/EEC and 92/49/EEC-Objects of insurance undertakings limited to the business of insurance and operation arising directly therefrom, to the exclusion of all other commercial business)

C-117/99 Union Nationale Interprofessionnelle des Legumes Transformes(Unilet) Gilles Le Bars v Association Comite Economique Regional Agricole Fruits et Legumes de Bretague (Cerafel)
Court of Justice of the European Communities
Judgement delivered 13/7/2000
(Agriculture-Common organisation of the markets-Fruit and vegetables Producers' organisations-Imposition of fees on non-member producers of freshproducts-Exemption for non-member producers of products intended for processing-Lawfulness of the exemption)

C-124/99 Borawitz v Landesversicherungsanstalt Westfalen & Anor
Court of Justice of the European Communities
Judgement delivered 21/9/2000
(Social security for migrant workers-Equal treatment-National legislation
fixing in connection with the transfer abroad of retroactive pension payments, a higher minimum amount than that paid within the country)

C-134/99 IGI-Investimentos Imobilarios SA v Fazenda Publica
Court of Justice of the European Communities
Judgement delivered 26/9/2000
(Directive 69/335/EEC-Indirect taxes on the raising of capital-Charges for entries in a national register of legal persons-Duties paid by way of fees or dues)

C-175/99 Mayeur v Association Promotion de l'Information Messine (APIM)
Court of Justice of the European Communities
Judgement delivered 26/9/2000
(Maintenance of workers' rights in the event of transfer of an undertaking-Transfer to a municipality of an activity previously carried out, in the interests of that municipality, by a legal person established under private law)

C-177/99 & C-181/99 Ampafrance SA & Anor v Sanofi Synthelabo & Anor
Court of Justice of the European Communities
Judgement delivered 19/9/2000
(VAT-Deduction of tax-Exclusion of the right of deduction-Entertainment costs-Proportionality)

Library Acquisitions

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

Almirall, Laura
Asylum in Ireland a report on the fairness and sustainability of asylum determinations at first instance
Lawton, Ned
Irish Refugee Council
Dublin Irish Refugee Council 2000
project funded by the Joseph Rowntree Charitable Trust
C206.C5

Bruce, Martha
Rights and duties of directors
3rd ed
London Tolley 2000
Company law: Directors
N264

Burn, E H
Cheshire and Burn's modern law of real property
16th ed
London Butterworths 2000
N60

Canny, James K
The law of local government
Dublin Round Hall Sweet & Maxwell 2000
M361.C5

Connolly, Margaret
Capital tax acts 2000-2001 stamp duties, capital acquisitions tax, residential property tax, probate tax
London Butterworths 2000
M335.C5.Z14

Consultation paper on the law of limitation of actions arising from non-sexual abuse of children Law Reform Commission
Law Reform Commission
Dublin Law Reform Commission 2000
L160.C5

Cook, Michael J
Cook on costs 2000 a guide to legal remuneration in civil contentious and non-contentious business
London Butterworths 2000
L89

Fanning, Bryan
Asylum seekers and the right to work in Ireland
Loyal, Steven
Staunton, Ciaran
Irish Refugee Council
Dublin Irish Refugee Council 2000
research on behalf of the Irish Refugee Council, funded by the Combat Poverty Agency
C206.C5

Friel, Raymond J
The law of contract
2nd ed
Dublin Round Hall Sweet & Maxwell 2000
N10.C5

Hale The Hon Mrs Justice, Brenda
Mental health law
4th ed
London Sweet & Maxwell 1996
N155.3

Harvey, Colin
Seeking asylum in the UK problems and prospects
London Butterworths 2000
C206

Keane, Adrian
The modern law of evidence
5th ed
London Butterworths 2000
M600

Lyall, Andrew
Land law in Ireland
2nd ed
Dublin Roundhall Sweet & Maxwell 2000
N60.C5

Murphy on evidence
Murphy, Peter
7th ed
London Blackstone Press 2000
M600

Pearce, Robert A
Land law
Mee, John
2nd ed
Dublin Round Hall Sweet & Maxwell Ltd 2000
N60.C5

Plender, Richard
European court practice and precedents general editor Richard Plender
London Sweet & Maxwell 1997
W94

Symmons, Clive R
Ireland and the law of the sea
2nd ed
Dublin Round Hall Sweet & Maxwell 2000
N330.C5

Wadsley, Joan
The law relating to domestic banking
Penn, Graham
2nd ed
London Sweet & Maxwell 2000
N303

Walmsley, Keith
Butterworths company law handbook
14th ed
London Butterworths 2000
N261

Acts of the Oireachtas 2000
(Acts of 08/11/2000)

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

1/2000 Comhairle Act, 2000
Signed 02/03/2000

2/2000 National Beef Assurance Scheme Act, 2000
Signed 15/03/2000
SI 130/2000 = (Commencement)

3/2000 Finance Act, 2000
Signed 23/03/2000

4/2000 Social Welfare Act, 2000
Signed 29/03/2000

5/2000 National Minimum Wage Act, 2000
Signed *31/03/2000*
1.SI 95/2000 / SI 201/2000 = (Rate Of Pay)
2.SI 96/2000 = (Commencement)
3.SI 99/2000 = (Courses/Training)

6/2000 Local Government (Financial Provisions) Act, 2000
Signed 20/04/2000

7/2000 Commission To Inquire Into Child Abuse Act, 2000
Signed 26/04/2000
SI 149/2000 = (Establishment Day)

8/2000 Equal Status Act, 2000
Signed 26/04/2000
SI 168/2000 (Section 47 Commencement)
2. SI 351/2000 (Brings Into Operation Whole Of The Act)

9/2000 Human Rights Commission Act, 2000
Signed 31/05/2000

10/2000 Multilateral Investment Guarantee Agency (Amendment) Act, 2000
Signed 07/06/2000

11/2000 Criminal Justice (United Nations Convention Against Torture) Act, 2000
Signed 14/06/2000

12/2000 International Development Association (Amendment) Act, 2000
Signed 20/06/2000

13/2000 Statute of Limitations (Amendment) Act,2000
Signed 21/06/2000

14/2000 Merchant Shipping (Investigation of Marine Casualities) Act, 2000
Signed 27/06/2000

15/2000 Courts (Supplemental Provisions) (Amendment) Act, 2000
Signed 28/06/2000

16/2000 Criminal Justice (Safety of United Nations Workers) Act, 2000
Signed 28/06/2000

17/2000 Intoxicating Liquor Act, 2000
Signed 30/06/2000
SI 207/2000 (Commencement Other Than S's 15, 17 & 27 (S27 = 02/10/'00))

18/2000 Town Renewal Act, 2000
Signed 04/07/2000
SI 226/2000 (Commencment)

19/2000 Finance (No.2) Act, 2000
Signed 05/07/2000

20/2000 Firearms (Firearm Certificates For Non-Residents) Act, 2000
Signed 05/07/2000

21/2000 Harbours (Amendment) Act, 2000
Signed 05/07/2000

22/2000 Education (Welfare) Act, 2000
Signed 05/07/2000

23/2000 Hospitals' Trust (1940) Limited (Payments To Former Employees) Act, 2000
Signed 08/07/2000

24/2000 Medical Practitioners (Amendment) Act, 2000
Signed 08/07/2000

25/2000 Local Government Act, 2000
Signed 08/07/2000

26/2000 Gas (Amendment) Act, 2000
Signed 10/07/2000

27/2000 Electronic Commerce Act, 2000
Signed 10/07/2000

28/2000 Copyright And Related Rights Act, 2000
Signed 10/07/2000

29/2000 Illegal Immigrants (Trafficking) Act, 2000
Signed 28/08/2000
SI 266/2000 (Commencement)

30/2000 Planning And Development Act, 2000
Signed 28/08/2000

Bills of the Oireachtas
09/11/2000

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

Activity centres (young persons' water safety) bill, 1998
2nd stage - Dail **[p.m.b.]**

Aer Lingus bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Aviation regulation bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Broadcasting bill, 1999
Committee - Dail

Cement (repeal of enactments) bill, 1999
Committee - Dail

Censorship of publications (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Children bill, 1999
Committee - Dail

Children bill, 1996
Committee - Dail [re-introduced at this stage]

Companies (amendment) bill, 1999
2nd stage - Dail **[p.m.b.]**
Companies (amendment) (no.4) bill, 1999
2nd stage - Dail **[p.m.b.]**

Company law enforcement bill, 2000
Committee - Dail

Containment of nuclear weapons bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Control of wildlife hunting & shooting (non-residents firearm certificates) bill, 1998
2nd stage - Dail **[p.m.b]**

Courts bill, 2000
2nd stage - Dail

Criminal justice (illicit traffic by sea) bill, 2000
1st stage - Dail

Criminal justice (theft and fraud offences) bill, 2000
1st stage -Dail

Criminal law (rape)(sexual experience of complainant) bill, 1998
2nd stage - Dail **[p.m.b.]**

Customs & excise (mutual assistance) bill, 2000
1st stage - Dail

Dumping at sea (amendment) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Eighteenth amendment of the Constitution bill, 1997
2nd stage - Dail **[p.m.b.]**

Electoral (amendment) (donations to parties and candidates) bill, 2000
2nd stage - Dail [p.m.b.] *(resumed)*

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]**

Family law bill, 1998
2nd stage - Seanad

Fisheries (amendment) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Fisheries (amendment) (no.2) bill, 2000
Committee - Seanad

Harbours (amendment) bill, 2000
Committee - Seanad

Health (miscellaneous provisions) bill, 2000
1st stage - Dail

Health (miscellaneous provisions) (no.2) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Health insurance (amendment) bill, 2000
2nd stage - Dail

Home purchasers (anti-gazumping) bill, 1999
1st stage - Seanad

Housing (gaeltacht) (amendment) bill, 2000
1st stage - Dail

Human rights bill, 1998
2nd stage - Dail **[p.m.b.]**

ICC bank bill, 2000
1st stage - Dail

Industrial designs bill, 2000
1st stage - Dail

Industrial relations (amendment) bill,2000
2nd stage - Dail *(Initiated in Seanad)*

Insurance bill, 1999
Report - Seanad *(Initiated in Dail)*

Interpretation bill, 2000
1st stage - Dail

Irish film board (amendment) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Irish nationality and citizenship bill, 1999
Committee - Dail *(Initiated in Seanad)*

Landlord and tenant (ground rent abolition) bill, 2000
2nd stage - Dail **[p.m.b.]**

Licensed premises (opening hours) bill, 1999
2nd stage - Dail **[p.m.b.]**

Local government (no.2) bill, 2000
2nd stage - Seanad *(Initiated in Dail)*

Local Government (planning and development) (amendment) bill, 1999
Committee - Dail

Local Government (planning and development) (amendment) (No.2) bill, 1999
2nd stage - Seanad
Local government (Sligo) bill, 2000
2nd stage -Dail
Mental health bill, 1999
Committee - Dail

National pensions reserve fund bill, 2000
Committee - Dail

National stud (amendment) bill, 2000
1st stage - Dail

National treasury management agency (amendment) bill, 2000
2nd stage - Dail

Nitrigin eireann teoranta bill, 2000
2nd stage - Dail

Official secrets reform bill, 2000
2nd stage - Dail **[p.m.b.]**

Organic food and farming targets bill, 2000
Committee - Dail **[p.m.b]**

Partnership for peace (consultative plebiscite) bill, 1999
2nd stage - Dail **[p.m.b.]**

Patents (amendment) bill, 1999
2nd stage - Dail

Prevention of corruption (amendment) bill, 1999
1st stage - Dail [p.m.b.]

Prevention of corruption (amendment) bill, 2000
2nd stage - Dail

Prevention of corruption bill, 2000
2nd stage - Dail **[p.m.b.]**

Private security services bill, 1999
2nd stage- Dail [p.m.b.]

Proceeds of crime (amendment) bill, 1999
Committee - Dail

Prohibition of ticket touts bill, 1998
Committee - Dail **[p.m.b.]**

Protection of children (Hague convention) bill, 1998
2nd stage - Seanad *(Initiated in Dail)*

Protection of patients and doctors in training bill, 1999
2nd stage - Dail **[p.m.b.]**

Protection of workers (shops)(no.2) bill, 1997
2nd stage - Seanad

Public representatives (provision of tax clearance certificates) bill, 2000
2nd stage - Dail [p.m.b.]

Radiological protection (amendment) bill, 1998
Committee- Dail *(Initiated in Seanad)*

Refugee (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Registration of lobbyists bill, 1999
1st stage - Seanad

Registration of lobbyists (no.2) bill 1999
2nd stage - Dail **[p.m.b.]**

Regulation of assisted human reproduction bill, 1999
1st stage - Seanad **[p.m.b.]**

Road traffic (Joyriding) bill, 2000
2nd stage - Dail **[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
1st stage - Dail **[p.m.b.]**

Seanad electoral (higher education) bill, 1998
1st stage - Seanad **[p.m.b.]**

Sea pollution (amendment) bill, 1998
Committee - Dail

Sea pollution (hazardous and noxious substances) (civil liability and compensation)
bill, 2000
1st stage - Dail

Sex offenders bill, 2000
Committee - Dail

Shannon river council bill, 1998
Committee - Seanad

Solicitors (amendment) bill, 1998
Committee - Dail **[p.m.b.]**
(Initiated in Seanad)

Standards in public office bill, 2000
1st stage - Dail

Statute law (restatement) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Statute of limitations (amendment) bill, 1999
2nd stage - Dail **[p.m.b.]**
Succession bill, 2000
2nd stage - Dail **[p.m.b.]**

Teaching council bill, 2000
2nd stage -Dail

Telecommunications (infrastructure) bill, 1999
1st stage - Seanad

Tobacco (health promotion and protection) (amendment) bill, 1999
Committee - Dail [p.m.b.]

Trade union recognition bill, 1999
1st stage - Seanad

Tribunals of inquiry (evidence)(amendment)(no.2) bill, 1998
2nd stage - Dail **[p.m.b.]**

Trinity college, Dublin (charters and letters patent amendment) bill, 1997
changed from "the Trinity College,

Dublin and the University of Dublin (charters and letters patent amendment) bill, 1997"
Report - 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.]**

Twenty- first amendment of the constitution (no.3) bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.4) bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.5) bill, 1999
2nd stage - Dail **[p.m.b]**

Udaras na gaeltachta (amendment)(no.3) bill, 1999
Report - Dail

UNESCO national commission bill, 1999
2nd stage - Dail **[p.m.b.]**

Valuation bill, 2000
1st stage - Dail

Whistleblowers protection bill, 1999
Committee - Dail

Wildlife (amendment) bill, 1999
2nd stage - Seanad *(Initiated in Dail)*

Youth work bill, 2000
1st stage - Dail

(P.S) Copies of the acts/bills can be obtained free from the internet & up to date information can be downloaded from website : www.irlgov.ie

(NB) Must have "adobe" software which can be downloaded free of charge from internet

ABBREVIATIONS

BR=	Bar Review
CIILP=	Contemporary Issues in Irish Politics
CLP=	Commercial Law Practitioner
DULJ=	Dublin University Law Journal
GLSI=	Gazette Law Society of Ireland
IBL=	Irish Business Law
ICLJ=	Irish Criminal Law Journal
ICLR=	Irish Competition Law Reports
ICPLJ=	Irish Conveyancing & Property Law Journal
IFLR=	Irish Family Law Reports
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
MLJI=	Medico Legal Journal of Ireland
P & P=	Practice & Procedure

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

BAR OF IRELAND
RETIREMENT TRUST SCHEME

Contribution Deadline - Reminder to Scheme members

Another year has passed and once again the final deadline is fast approaching for making pension contributions upon which tax relief may be claimed for the year ended 5th April 2000. The deadline for receipt of such contributions by the Scheme Trustee is Wednesday 31st January 2001.

Full tax relief, at your marginal income tax rate may be claimed on your "net relevant earnings" up to the limits set out below.

Under 30 years of age : 15 % of net relevant earnings.

30 to 39 years of age : 20 % of net relevant earnings.

40 to 49 years of age : 25 % of net relevant earnings.

50 to 74 years of age : 30 % of net relevant earnings.

Note: A cap (ceiling) of£200,000 applies to the amount of net relevant earnings upon which relief may be claimed.

For your convenience arrangements will be in place with Rita Simons at Bank of Ireland Financial Services, The Four Courts to deliver members' cheques etc. directly to Bank of Ireland Trust Services, on a daily basis. Pre-printed documentation to assist Scheme members in making contributions will be sent to all in the first week of January. A supply will also be available from Rita.

The Scheme offers members a choice of four Funds in which contributions may be invested:

The Managed Fund; The International Fund; The Cash Fund; The Pension Protector Fund

All contributions received must specify clearly the member's chosen Fund. Unspecified contributions will as usual be invested in The Managed Fund.

Joining the Scheme

The Bar of Ireland Retirement Trust Scheme is exclusive to members of the Law Library and offers flexibility and a low cost structure. At this time of year many new members join the Scheme. If you are considering doing so . . . .

Please contact Brian King at Bank of Ireland Trust Services (tel. 6043627) for a copy of the Scheme Explanatory Booklet.

COURTS SERVICE
An tSeirbhís Chúirteanna

Have you accessed the Courts Service website yet?

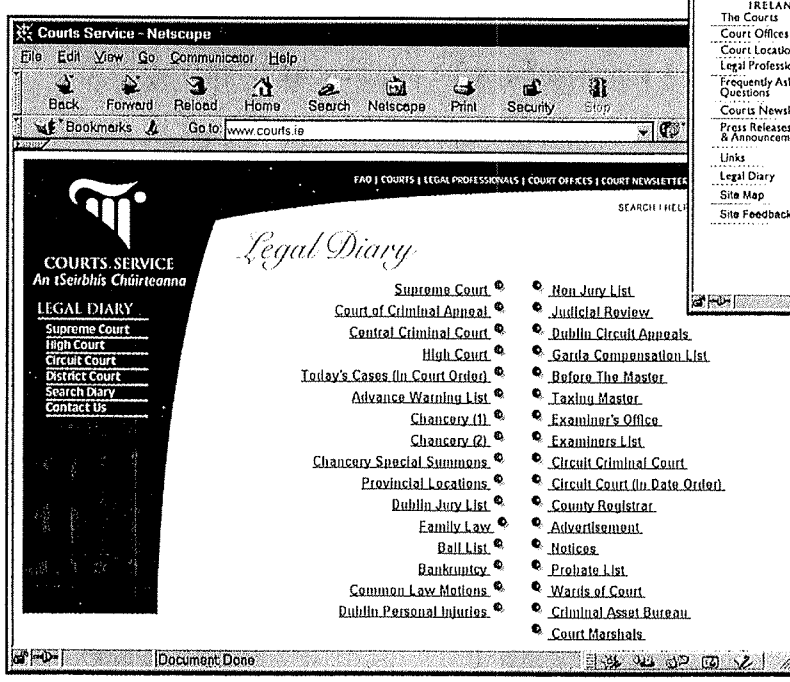
http://www.courts.ie

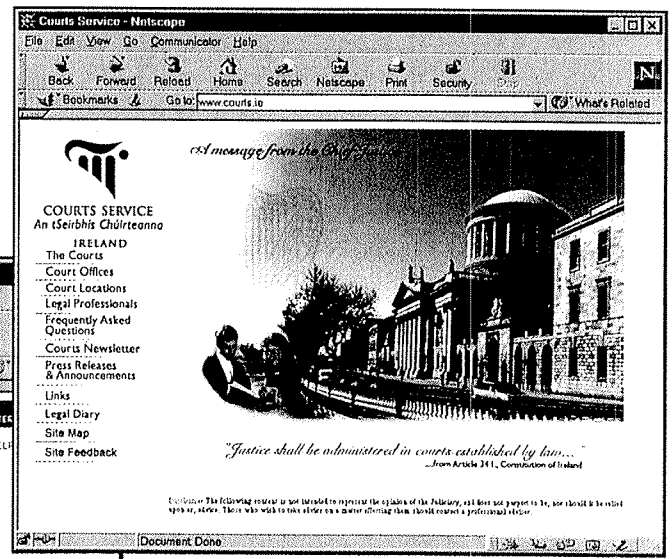
The Content of the Website includes:

- Home Page incorporating our new Corporate Identity
- A message from the Chief Justice
- Courts Service News Magazine
- Legal Diary
- Description of jurisdiction of each Court
- Narrative on various Administrative Offices
- Geographic 'drill down' map showing Courts nationwide
- Interactive Map of Four Courts
- Staff Directory
- Links to other related Sites
- User Feedback Section
- Search Facility
- Help Guides

Other sections planned or under construction:

- School/Education Section
- Historical Section
- Further information on provincial Court offices
- Judgments - Court judgments commencing with Supreme Court judgments Pilot Project.





HE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

Kathy Skelly BL and *Mary Feeney BL* *consider changes in deportation law and practice in the light of the decision of the Supreme Court upholding the constitutionality of sections 5 and 10 of the Illegal Immigrants (Trafficking) Act 2000.*

The decision of the Supreme Court in *In Re Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill 1999*[1] was greeted with a degree of disappointment by many practitioners and human rights organisations working with asylum seekers in this country. But while the provisions of sections 5 and 10 of the Illegal Immigrants (Trafficking) Act 2000 (the "2000 Act") will almost certainly create difficulties for asylum seekers and, in particular, those the subject of a deportation order, it appears that certain aspects of the judgment of the Supreme Court will offer some comfort to asylum seekers and their legal representatives.

The Constitutional Rights of Non-Nationals

It has long been established that non-nationals do not enjoy the same range of personal rights under the Constitution as citizens. It is an inherent characteristic of a State's sovereignty that it should have "... very wide powers in the interest of the common good to control aliens, their entry into the State, their departure and their activities within the State."[2] This fundamental right of the State, and its consequences for the limitation of the rights of non-nationals, has been acknowledged by the courts on several occasions, most recently by the Supreme Court in *Laurentiu v Minister for Justice*.[3]

> Nonetheless, while the State's right to exercise a large degree of control over the activities of non- nationals by definition diminishes the scope of their personal rights, such persons are not without rights while they are within the jurisdiction of the State. For example, in its recent judgment in the Article 26 reference on the 2000 Act, the Supreme Court has identified a number of such rights:
>
> (a) The right of non-citizens to apply for release from custody pursuant to Article 40.4.2 (habeas corpus) on the grounds that the person concerned is not being detained in accordance with the law;
>
> (b) A right of access to the courts to enforce his or her legal and constitutional rights;
>
> (c) In dealing with applications for refugee status or asylum, a right to fair procedures and to the application of natural and constitutional justice;
>
> (d) A right to require that any measures taken against a non-national by the State, in the exercise of its rights and powers, are exercised in a constitutionally valid manner and in accordance with laws that are not repugnant to the Constitution.

The Supreme Court limited itself to a consideration of those rights directly connected with the operation of section 5. This list should not therefore be considered as exhaustive, but rather

"While the State's right to exercise a large degree of control over the activities of non-nationals by definition diminishes the scope of their personal rights, such persons are not without rights while they are within the jurisdiction of the State."

as a useful first step towards establishing the extent and scope of a non-national's personal rights while within the State. Furthermore, it could be seen to be particularly useful for practitioners working with asylum seekers, as it is an explicit confirmation of the existence of rights that, until now, practitioners could only assume were enjoyed also by non-nationals.

Section 5

Under section 5(1) of the 2000 Act any person seeking to challenge the validity of specified decisions or orders made under the Immigration Act 1999, the Refugee Act 1996 and the Aliens (Amendment) No. 2. Order 1999 must now do so by way of judicial review under Order 84 of the Rules of the Superior Courts.[4] An application under section 5 of the Act, however, differs in a number of respects from an application for judicial review under Order 84:

(i) Under section 5(2)(a), an application for leave to apply for judicial review must be made within a period of 14 days commencing on the date on which a person is notified of the decision or order in question, unless the High Court considers there is "good and sufficient reason" for extending the period in which an application is to be made.

(ii) In addition, applications for leave cannot be made ex parte, but must be made on notice to the Minister for Justice, Equality and Law Reform and any other person specified for that purpose by order of the High Court. Section 5(2)(b) also provides that leave shall not be granted unless the High Court is satisfied that there are "substantial grounds" for contending that the decision or order is invalid or ought to be quashed.

(iii) Under section 5(3)(a), the decision of the High Court, whether on an application for leave to apply for judicial review or on application for judicial review itself, is to be final. An applicant cannot appeal a decision of the High Court to the Supreme Court unless the High Court grants leave to appeal. Such leave will only be granted in cases where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

(iv) Finally, the High Court is required by section 5(4) to give such priority as it reasonably can, having regard to all the circumstances, to the disposal of proceedings under the section.

"It must be assumed ... that an extension of time will always be granted in cases where not to do so would be to deny that person access to the courts unreasonably.... It is clear that the Supreme Court expects that the High Court will be generous in the way it exercises this power to extend the limitation period."

The Minister for Justice, John O'Donoghue, gave the following explanation for the inclusion of section 5 in the legislation during the passage of the Bill through the Oireachtas:

> "To put it succinctly, the purpose here is to provide for the first time in primary legislation a statutory code for judicial review of steps taken and decisions made in the asylum and immigration process which will facilitate the expeditious determination by the High Court of the procedural validity or otherwise of those decisions."

The Fourteen Day Limitation Period

For most practitioners representing non-nationals seeking to challenge one of the specified decisions or orders, it was the provisions of section 5(2)(a) that were viewed as creating the most difficulties and were therefore the most objectionable. During the course of the Supreme Court hearing, Counsel for the Attorney General argued that the measures set out in section 5, including the short limitation period imposed, were necessary to ensure that those wishing to challenge deportation orders did so as quickly as possible. There were good public policy reasons for having deportation orders executed without undue delay, it was submitted, as otherwise such persons might tend to become further enmeshed in Irish society and seek to have such orders then revoked on humanitarian grounds. Finally, it was said that it was vital for the effective running of the asylum process that genuine refugees be distinguished from economic migrants as soon as possible.

Counsel for the Attorney General argued that the fourteen day limitation period was not unfair or arbitrary given the generous powers granted to the High Court to grant extensions to the limitation period under section 5(2)(a) of the Act where there is good and sufficient reason for doing so. Counsel assigned by the Court to challenge the constitutionality of the Bill argued that for a host of very practical reasons a limitation period of fourteen days would be almost impossible to meet and the net effect of the provision would be to deny those wishing to challenge a deportation order access to the courts. Counsel assigned by the Court did acknowledge that a person's right of access to the courts was not an absolute one and could be regulated. It was argued, however, that a regulation that curtails a person's access to the court will not be constitutional if the effect of such interference would be to leave a person without sufficient opportunity to assess whether he or she has a right of action and then, if appropriate, to institute proceedings.

Eight factors were identified by Counsel assigned by the Court as clearly demonstrating that the effect of a fourteen day limitation period would be to render a person's access to the courts so "excessively difficult as to be arbitrary, unreasonable and therefore unconstitutional." These were:

(1) the nature and variety of the types of decisions and orders to which section 5 applies

(2). the category of persons subject to such decisions

(3). the common problem of a language barrier which is a feature of the immigration process

(4). the policy of the State in dispersing applicants for refugee status around the country

(5). The provisions of Section 10(c) in regard to the service of notices

(6). The extent to which legal advice is available

(7). The adequacy of existing procedures to enable the applicant to readily access all information and materials which were before the person who made the decision in question, and

(8). The complexity of such cases and the reality, or lack thereof, in expecting the applicant to readily identify all the valid grounds of challenge and to instruct a solicitor etc., within the fourteen day period.

Counsel assigned by the Court acknowledged that the High Court did have the power under the section to extend the fourteen day limitation period. They argued, however, that given all of the above, it seemed inevitable that a large number of applications would have to be brought outside the fourteen day period. Such a short limitation period, which would inevitably trigger the invocation of a judicial power of discretion, had to be in its nature flawed and fundamentally unjust. It was further submitted that many asylum seekers might find themselves deported before any application could be made on their behalf to the court for an extension of time, especially where there is no minimum period laid down by law before a deportation can take place.[7]

East Donegal Co-op[8] and the cost of saving a provision from condemnation.

The Supreme Court stated that any consideration of section 5 (or indeed section 10) must involve the application of the principles on statutory interpretation as laid down in *East Donegal Co-Operative Livestock Mart Ltd. v Attorney General.* These principles have more recently been enunciated by Finlay C.J. in *In Re Adoption (No 2) Bill*[9] in a passage that was quoted by Keane C.J. in the present judgment, as follows:[10]

(1) It must be presumed that all proceedings, procedures, discretions and adjudications permitted or prescribed by the Bill are intended to be conducted in accordance with the principles of constitutional justice; and

(2) As between two or more reasonable constructions of the terms of the Bill the construction that is in accordance with the provisions of the Constitution would prevail over any construction that is not in accordance with such provisions.

Consequently, section 5 (2) could not be considered a denial of a non-national's right of access to the court despite the short limitation period, given the power of the High Court to extend time. It must be assumed under the principles as laid down by *East Donegal* that an extension of time will always be granted in cases where not to do so would be to deny that person access to the courts unreasonably. Therefore, it is this power to extend the limitation period given to the High Court which in effect saves the provision. It distinguishes section 5(2) of the Act from a similar provision in section 82 (3A) of the Local Government (Planning and Development) Act 1963. In *Brady v Donegal County Council,*[12] this section, which provided a two month limitation period in which to seek leave to challenge a decision of the Planning Authority, was struck down as unconstitutional precisely because it did not give the High Court the power to grant an extension of time.

It is clear that the Supreme Court expects that the High Court will be generous in the way it exercises this power to extend the limitation period:

> "The court is satisfied that the discretion of the High Court to extend the fourteen day period is sufficiently wide to enable persons who, having regard to all the circumstances of the case including language difficulties, communication difficulties, difficulties with regard to legal advice or otherwise, have shown reasonable diligence, to have sufficient access to the Courts for the purpose of seeking judicial review in accordance with their constitutional rights."[13]

The Supreme Court noted that Counsel assigned by the Court might be correct in their assertion that the provisions of section 5(2) could lead to a situation where a large number of applications may be made successfully for an extension of the limitation period, but took the view that this could not in any way effect the constitutional validity of the provision.

"The Supreme Court noted [the possibility] that the provisions of section 5(2) could lead to a situation where a large number of applications may be made successfully for an extension of the limitation period, but took the view that this could not in any way effect the constitutional validity of the provision."

> "Whether a large number or even a majority of persons seeking leave to apply for judicial review will find it necessary also to apply for an extension of time is a matter for speculation. In any event, such a mathematical approach is not a basis on which to assess the validity or efficacy of such a provision."[14]

The aforementioned passages seem to constitute a clear signal from the Supreme Court that the fourteen day limitation period should not be allowed to frustrate those seeking to challenge genuinely a deportation order but who, as a result of a factor or factors outside his or her control, cannot meet the 14 day deadline.

The Supreme Court acknowledged that there will be occasions where the impossibility of meeting the limitation period will be apparent to the applicant from the offset and that in such cases

"A main aim of section 5 is to ensure that administrative decisions in relation to asylum seekers are capable of implementation with certainty at as early a date as possible. Nonetheless, the effect of the provision may be to lengthen rather than expedite the judicial review process in quite a few cases."

an application for an extension of time might be made before the limitation period expired. On the other hand, undoubtedly, it would be extremely foolish of any applicant to ignore the fourteen day limitation period. At all events, there is quite a wide scope for the granting of time extensions to those who act with diligence but who for some reasonable excusing factor are unable to make their applications in time. Certainly, the list of factors cited by Counsel assigned by the Court that would make compliance with the limitation period impossible is not exhaustive and will, undoubtedly, be added to in time. Whether a particular case should be afforded an extension of the limitation period or not will on occasions itself be the subject of a lengthy hearing before a judge. This is particularly likely when one considers that applications for leave are not made *ex parte* but on notice to the Minister.

The decision of the Supreme Court in relation to section 5(2) may be seen as a victory for the Minister for Justice. The provision was, however, saved at a price. By the employment of what is often referred to as the double construction approach to statutory interpretation, the Court has removed the teeth of section 5(2). A main aim of section 5 is to ensure that administrative decisions in relation to asylum seekers are capable of implementation with certainty at as early a date as possible. Nonetheless, the effect of the provision may be to lengthen rather than expedite the judicial review process in quite a few cases.

The Test of Proportionality

It was submitted by Counsel assigned by the Court that the principle of proportionality, as set out by Costello J. in *Heaney v Ireland*,[15] should be applied to section 5. This meant that the right of access to the courts should only be limited to the extent necessary to achieve the public policy objective in question. The Supreme Court took the view that there was a public interest in the certainty of the administrative decisions concerned, on the one hand, and the proper and effective management of applications for asylum, on the other. Therefore, there were "objective reasons" that could justify the "stringent limitation of the period within which judicial review of such decisions" could be sought, "provided constitutional rights were respected." The test was not whether a longer period of time would allow the same policy objectives to be achieved. Procedures of court could be regulated by law and the Supreme Court held that as long as a substantive constitutional right, such as that of access to the courts, was not undermined, it was "a matter of policy and discretion for the legislature to choose the appropriate limitation period."[16]

Substantial Grounds

Counsel assigned by the Court also challenged the requirement in section 5 that an applicant seeking leave to apply for judicial review must show "substantial grounds". This, it was argued, represented an additional hurdle for the applicant which, taken with the fourteen day limitation, amounted to an unreasonable restriction of access to the courts. It was further argued that this hurdle had to be considered arbitrary and discriminatory in the absence of an objective justification in terms of a compelling State interest.

The Supreme Court, in rejecting this argument, noted that the requirement to show "substantial grounds" to obtain leave to apply for judicial review would not be unique to this Act but already was a requirement in other legislation including the Planning Acts. It affirmed the definition of "substantial" of Carroll J. in *McNamara v An Bord Pleanala (no1)*[17] as meaning "reasonable", "arguable" and "weighty" and that such grounds must not be "trivial or tenuous". As the requirement was not in the Court's view so onerous as to infringe the constitutional right of access to the courts or the right to fair procedures, the imposition of the requirement was one that fell "within the discretion of the legislature."[18]

The Supreme Court is clearly acknowledging that the application of the principle of proportionality has its limits. Provided a provision can rationally be connected to a public policy objective and does not result in the elimination of a substantial right guaranteed under the Constitution, the test will be met. To seek to employ the test any more rigorously would result, in the Court's eyes, in an interference with the powers of the legislature.

Section 5(3)(a): Limited Right of Appeal to the Supreme Court

Counsel assigned by the Court sought to challenge the provisions of section 5(3)(a) on the grounds that any attempt to limit a right of appeal to the Supreme Court must also "be objectively justified and reflect some significant or compelling State interest." Given the express powers given to the Oireachtas in Article 34.4.3 of the Constitution,[20] the argument that the principle of proportionality should be applied to this provision was, in the Court's opinion, misconceived:

> "Since the legislature has an express power, to be exercised for policy reasons within its own area of discretion, the principle of proportionality has no application." [21]

Section 10

Section 10 of the Act deals with three matters of considerable practical importance for illegal immigrants and their legal advisors. These matters are the power to detain a person who is the subject of a deportation order, the power to impose requirements in the statutory notification of a decision to deport, and the service of notices.

"[It appears from the decision] that the application of the principle of proportionality has its limits. Provided a provision can rationally be connected to a public policy objective and does not result in the elimination of a substantial right guaranteed under the Constitution, the test will be met. To seek to employ the test any more rigorously would result, in the Court's eyes, in an interference with the powers of the legislature."

The section consists of a number of amendments to sections 3,5 and 6 respectively of the Immigration Act 1999 ("the 1999 Act"). The proposed amendments to the 1999 Act were opposed by Counsel assigned by the Court on the basis that they violated the constitutional right to personal liberty and the doctrine of the separation of powers, infringed the right of access to the courts and involved an impermissible importation of the laws of other countries.

The Power to Detain

The position under the 1999 Act

Section 3 forms the core of the 1999 Act in that it prescribes in detail the deportation process. Firstly, it provides that the Minister may make deportation orders in respect of non-nationals coming within certain enumerated categories, including those whose applications for asylum have been refused. It goes on to deal with the matters to be considered by the Minister in deciding whether to make such an order and the procedures to be followed in relation to the notification of both the proposal to deport and the final decision to make a deportation order. Section 3(9)(a), prior to its amendment by the 2000 Act, simply provided that a person who was the subject of a deportation order would be required to present himself at such a date, time and place as was specified in the notice of deportation for the purpose of his or her deportation from the State.

Under section 5(1) of the 1999 Act (in its original form), where a person against whom a deportation order is in force is suspected, with reasonable cause, of having failed to comply with any provision of the deportation order or any requirement in a deportation notice, he or she is liable to arrest without warrant by an immigration officer or member of the Garda Síochána. Subsection (2) allows a person so arrested and detained to be placed on a means of transport in order to effect his or her removal from the State and to be deemed to be in lawful custody until departure from the State (section 5(2)).

Although a limit of 8 weeks in total is placed on any such detention by section 5(6), this period excludes: (i) any period spent on remand or serving a prison sentence, (ii) any period spent on board a means of transport pursuant to this section, (iii) any period during which proceedings are being taken challenging the validity of a deportation order. However, in the event of a challenge to an order, the court hearing those proceedings, or any subsequent appeal, may on application to it decide whether to continue the detention or release the person concerned. Any such release may be made subject to whatever conditions the court considers appropriate, including residency or reporting requirements or the obligation to surrender any passport or travel documents (section 5(5)).

Changes under the Illegal Immigrants (Trafficking) Act 2000

Section 10 (a)(i) inserts a new subsection 3(1A) into the 1999 Act, allowing a person who is to be deported to be detained in order to effect deportation. In conjunction with this, a new subsection (1) is substituted for section 5(1) of the 1999 Act, conferring an extended power of arrest and detention on immigration officers or members of the Garda Síochána which goes considerably beyond that contained in the original section. Thus, section 3(1A) provides:

> "A person the subject of a deportation order under this section may be detained in accordance with the provisions of this Act for the purpose of ensuring his or her deportation from the State."[22]

The argument put forward by Counsel for the Attorney General, during the course of the Article 26 reference, and the position accepted by the Court, was that this section did not introduce any "new or draconian power of detention."[23] Section 3(1A) instead merely underlines the fact that the power to detain is ancillary to the inherent power of the State to deport aliens, now regulated by section 3 of the 1999 Act. The Court took the view that the provision does no more than confirm the principles in relation to the detention of illegal immigrants set out by Flood J. in the context of earlier legislation in *Gutrani v Governor of Wheatfield Prison and Minister for Justice*:[24]

> "The essence of the present application is that the Minister's power of detention under the said provisions are for the purpose of fulfilling the deportation order and not otherwise, and that such deportation must take place within a reasonable period from the time [of initial detention], having regard to all relevant factors and circumstances."[25]

Counsel for the Attorney General argued that section 3(1A) had the effect of limiting, rather than widening, the scope of the power to detain given by section 5 of the 1999 Act. The Supreme Court emphasised in its judgment that the detention of an illegal immigrant for any other purpose apart from effecting deportation must be considered unlawful. Likewise, any detention originally imposed in order to implement a deportation order will become unlawful if it becomes clear that deportation cannot be carried out within the eight week period.

Section 5 of the 1999 Act (as amended)

For those representing asylum seekers and for human rights organisations generally, the amendments to section 5 of the 1999 Act have caused the most concern. This is because they have serious implications for any non-national who, having exhausted all the procedures for processing asylum claims, becomes the subject of a deportation order under the 1999 Act.

Section 5(1), outlined above, as originally enacted, permitted the arrest and detention of a person who had not complied with the terms of a deportation order with a view to effecting his or her removal from the State. It was an essential prerequisite to the exercise of that power that a garda or immigration officer had a reasonable suspicion that the terms of a deportation order or notice had actually been breached.

The new section 5 (1)(a) retains this requirement at subsection (1)(a), but goes on to allow detention in three additional circumstances, where it is suspected that a person-

b) intends to leave the State and enter another state without lawful authority,

c) has destroyed his or her identity documents or is in possession of forged identity documents, or

d) intends to avoid removal from the State.

Counsel assigned by the Court argued that the new section 5 was unconstitutional in that it offended the right to personal liberty guaranteed by Article 40.4.1. In particular, it was argued that the provisions of subsections (b) and (d) in so far as they envisaged an act yet to occur, amounted to a form of preventative detention inconsistent with the principles laid down in *People (Attorney General) v O'Callaghan.*[26]

The Supreme Court did not accept that the provisions of section 5 (as amended) would constitute an infringement of the right to personal liberty. Significantly, the Supreme Court took the view that the concept of preventative detention had no application in relation to a decision to detain under the 1999 Act. Preventative detention as discussed in *O'Callaghan* related to detention for the purpose of preventing the commission of a crime and as such offended the concept of the presumption of innocence. Detention under section 5 of the 1999 Act may have the effect of preventing the commission of a crime but its purpose is quite different, being "to secure the implementation of the deportation order."[27]

Once again the legality of a person's detention must be assessed by reference to the purpose for which he is being detained. If therefore a person is detained in circumstances where deportation is not possible or is not seriously being pursued, such detention is open to challenge notwithstanding the fact that there may be evidence that the detainee intends to avoid removal from the State.

"The legality of a person's detention must be assessed by reference to the purpose for which he is being detained. If therefore a person is detained in circumstances where deportation is not possible or is not seriously being pursued, such detention is open to challenge notwithstanding the fact that there may be evidence that the detainee intends to avoid removal from the State."

Review of Detention

The failure to provide for any form of review, by either a senior officer or a member of the judiciary, of the detention of potential deportees was the second major ground of unconstitutionality put forward. It was argued that this was particularly pertinent having regard to the fact that potential deportees could conceivably be held for more than eight weeks due to the exclusion of certain periods by section 5(6)(b). Legitimate detention, it was argued, was characterised by an inbuilt system of checks and balances to ensure that the detention of a person for any appreciable time could not result from the decision of just one person.

The Supreme Court, however, endorsed the views expressed by Counsel for the Attorney General that there is no necessary constitutional rule that detention cannot be lawful unless there is a means of recourse to a court to adjudicate on its lawfulness. The level of safeguards necessary in relation to legitimate forms of detention "depends on the circumstances and the nature of the detention."[28]

The Safeguards

According to the Supreme Court, the detention at issue had to be seen in context. The bottom line was that, at this stage, the detainee had no entitlement to be in the country. His rights were limited and certainly did not parallel those of citizens. In essence, it was sufficient if his detention were for the necessary statutory purposes. The Court, for its part, was not prepared to set any higher threshold, in terms of controlling the exercise of the power to detain, than that contained in the Act:

> "There would, of course be nothing wrong in the Oireachtas in its wisdom expressly providing for periodic review of the detention by a court or for some supervisory role by higher officers in the gardai or the Minister's department, but the absence of specific provisions of that kind does not necessarily render the legislation unconstitutional. The court considers that in all the circumstances the safeguards which do in fact exist ... are perfectly adequate to meet the requirements of the Constitution in the context of the particular form of detention relevant to this reference."[29]

The Court identified the following safeguards to protect the rights of potential deportees:

(1) The principles set out in the *East Donegal* case mean that the executive power to detain must not be unnecessarily exercised. If, during the course of a person's detention under the Act, circumstances change rendering deportation unnecessary or impossible, the relevant authority must bring the detention to an end, even if the permitted 8 weeks have not elapsed. Moreover, "this should be done independently of any application in that regard by the person concerned."[30]

(2) Judicial review proceedings may be taken challenging the validity of a deportation order under section 5 of the Illegal Immigrants (Trafficking) Act 2000, in which case the court has jurisdiction, under section 5(5) of the 1999 Act, on application to it, to direct the release of a person with or without conditions attached.

(3) If it is thought that the exercise of the powers of detention is *ultra vires*, an application can be brought for judicial review seeking an order compelling the reconsideration of the grounds of detention. Such an application for judicial review will be made under RSC Order 84 (as opposed to an application for judicial review under section 5 of this Act).

(4) The remedy of *habeas corpus* - an inquiry under Article 40.4.2 of the Constitution - is always available to non-nationals.

It should be noted that the Supreme Court took the view that the legislative regime put in place under the extended grounds of detention provided for in section 5 (as amended) did not in any way contravene Article 5 of the European Convention of Human Rights.[31]

The safeguards cited by the Supreme Court offer a person detained under the provisions of Section 5 of the1999 Act (as now amended) varying degrees of comfort. While it must be presumed that the relevant executive authority will generally exercise its power constitutionally and that the power to detain will not be exercised unnecessarily, the absence of a system of automatic review makes it difficult for a person detained to evaluate the legality of his detention. The situation of a detained person may change over a period of time. Travel arrangements may prove difficult to put in place, the state of destination may refuse to accept a person, or for some other reason deportation may become impractical or impossible in the short term. The detained person may not have this information, or might be unaware of the change of circumstances, which may have a fundamental effect on the legality of his detention. In addition, given an already overworked and under-resourced immigration service, cases in which there is an arbitrary deprivation of a person's liberty may be more than a remote possibility.

The remedy of *habeas corpus* also has its weaknesses. In *habeas corpus* proceedings, the court has often considered itself limited to the question of whether there is power in law to detain the person, rather than seeing it as a means of reviewing the exercise of the discretion to detain. In circumstances where a person is detained who is the subject of an unchallenged (or unsuccessfully challenged) deportation order, the court under *habeas corpus* proceedings may not look behind that order. This was acknowledged by the Supreme Court:

> "In proceedings brought pursuant to Article 40.4.2 challenging the legality of a person's detention, that detention may be justified by reason of the existence of a deportation order. The fact that the deportation order has been previously unsuccessfully challenged in judicial review or had not been challenged at all within the time permitted by section 5 may be sufficient to constitute the deportation order as a lawful basis for that person's detention."[32]

The most effective way for a person detained under section 5 of the 1999 Act (as now amended) to force a review of his detention will be by way of judicial review by either challenging the deportation order itself under section 5 of the Illegal Immigrants (Trafficking) Act or by challenging the detention itself by way of judicial review under RSC Order 84. An application for judicial review of the decision to detain or an application for an extension of time in which to apply for leave for judicial review of a deportation order under section 5 of the 2000 Act may be made concurrently with an application for *habeas corpus*.

By failing to provide some method by which a person's detention under section 5 of the 1999 Act can be reviewed, it seems likely that an ever increasing amount of the High Court's time will be taken up with cases of this nature.

Power to Impose Conditions

Section 10 (a) (ii) amends section 3(9)(a) of the 1999 Act, by expanding the list of requirements that may be included in a notice under section 3(3) (b)(ii) of a decision to deport a person. The statutory notice may now require the proposed deportee, in addition to presenting himself to such member of the Gardai Siochana or immigration officer at such date, time, place as specified, also to produce any travel documents, passport, ticket etc. in his possession, needed for deportation to the garda or officer at the specified date, time and place; to co-operate in any way necessary to enable the same parties to obtain such documentation for the deportation; to reside or remain in a particular area or place in the State pending removal from the State; to report at given intervals to a particular Garda Siochana station or immigration officer and to notify a specified member of the Gardai or immigration officer as soon as possible of any change of address. Furthermore, a deportation notice made by the Minister may now be amended by a garda or immigration officer who may choose to impose any of the above conditions which were not included in the notice originally.

The Supreme Court dismissed arguments made by Counsel assigned by the Court that these provisions represented the delegation of the Minister's powers to a garda or immigration officer. In the view of the Court, the provisions related to

"While it must be presumed that the relevant executive authority will generally exercise its power constitutionally and that the power to detain will not be exercised unnecessarily, the absence of a system of automatic review makes it difficult for a person detained to evaluate the legality of his detention."

"minor matters" and the Court saw no reason why the Minister should have the "exclusive role" in relation to regulation.

> "These extended provisions do not appear to result in any unfair or unconstitutional hardship on a person the subject of a deportation order. They are intended to facilitate the implementation of the deportation order. It is difficult to see how the requirements can give rise to a legitimate, still less to a constitutional complaint."

Service of Notices

The final significant criticism of the Act centred on section 10 (c)(ii), which amends the provisions of section 6 of the 1999 Act in relation to the service of notices and inserts a new section 6(2). This provides that where a notice has been sent by prepaid registered post or other form of recorded delivery (as prescribed by the Minister) to a person at the address most recently furnished by him, or to the address given by him for service, it shall be deemed to have been duly served on or given to the person on the third day after the day on which it was sent.

Counsel assigned by the court argued that this provision further infringed the right of access to the courts of non-nationals. It was submitted that this could lead, in some instances, to constructive rather than actual service, with the result that a person could end up being deported without having had a chance to avail of the statutory procedures. The Supreme Court took the view that a person who is seeking asylum should be pro-active rather than passive. It is not unreasonable for the State to require such a person to accept that the address given by him or her for service should be the one at which service by a form of recorded delivery should be deemed as good service.

Conclusions

The Supreme Court, throughout its judgment, made repeated reference to the limits on its role in the context of an Article 26 reference. Its function was to determine, by applying the principles of *East Donegal*, whether the legislation before it was capable of a constitutional construction. In so doing, it was careful not to be seen to interfere with matters it believed to be within the discretion of the legislature. The Court took the view that it was beyond its remit to strike down legislation simply because it may not be as effective as it should be.

Ironically, this approach to the interpretation of sections 5 and 10 of the Illegal Immigrants (Trafficking) Act 2000 may result in the operation of the Act being somewhat different from that which was originally envisaged. It was hoped that the Act would streamline the practice and procedure in the asylum process and reduce the number of legal avenues open to a person the subject of a deportation order. It would seem, however, that the potential for litigation in the post deportation order period has instead been increased.

A greater proportion of the High Court's time may now be taken up with asylum cases. An application for judicial review will involve at least one lengthy hearing and, in many cases, two. To secure the release of a person detained under section 10 of the Act will require an application to the High Court. Given the possible limitations of a *habeas corpus* application, practitioners may be more inclined to seek judicial review to effect the release of a detained client. The knock on effect this will have on all those involved in the asylum process, in the legal aid services available[34] and on the State purse can be readily imagined.●

1. Unreported, 28 August 2000.
2. *Pok Sun Shum v Ireland* [1986] ILRM 593 at 599
3. [2000] ILRM 50.
4. It is not unusual now for judicial review to be prescribed as the only procedure by which a person can question the validity of administrative decisions. Examples of such statutory provisions, which also place restrictions on the right to apply for judicial review, were given in the submissions on behalf of the Attorney General. In relation to this particular legislation, the Supreme Court concluded that judicial review was not an inadequate remedy. It was not the function of the court to decide the matters listed in section 5(1) anew on their merits but to determine the validity of the decisions as a question of law.
5. Dail Debates Official Report, 20 June 2000
6. At page 18
7. The Court took the view that they did not have to deal with the issue of immediate deportations in the context of this reference: "Whether a person is entitled to remain within the State for a minimum period of time in order to exercise a constitutional right to bring judicial review proceedings, is a matter to be determined in appropriate proceedings in the High Court concerning the powers of deportation. Section 5 of the Bill does not purport to affect the exercise by the State of its power or its discretions in the implementation of a deportation order."
8. *East Donegal Co-Operative Livestock Mart Limited v Attorney General* [1970] IR 317
9. [1989] I.R. 656
10. At page 8
11. As amended by section 42 of the Local Government (Planning and Development) Act 1976
12. [1989] I.L.R.M. 282
13. At page 44
14. At page 38
15. [1994] 3 IR 593
16. at page 42
17. [1995]2I.L.R.M. 125
18. At page 45
19. At page 51
20. Article 34.4.3 provides "the Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court..."
21. At page 53
22. Section 3(1) of the 1999 Act as amended by Section 10(a)(i) of the 2000 Act.
23. At page 59
24. High Court (Flood J.), *ex tempore*, unreported, 19 February 1993.
25. At page 59
26. [1966] IR 501 - the principles in the O'Callaghan case were recently affirmed in *PO'C v The Director of Public Prosecutions*, Supreme Court, unreported, 6 July 2000.
27. At page 65
28. At page 66
29. At page 66
30. At page 69
31. Article 5 of the Convention provides inter alia that "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law....(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition...(2) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."
32. At page 50.
33. At page 62
34. The Refugee Legal Services has been established by the Legal Aid Board to provide legal advice and assistance in this area.

HE PROHIBITION OF INCITEMENT TO HATRED ACT 1989 - A PAPER TIGER?

Following calls for a review of hate legislation in Ireland, **Conor Keogh BL** *identifies a number of ways in which the law might be reformed.*

Introduction

The recent announcement by the Minister for Justice, John O'Donoghue, that he has initiated a review of the Prohibition of Incitement to Hatred Act 1989 is to be welcomed.[1] One of the negative characteristics of our recent economic growth and the concomitant rise in numbers seeking asylum has been the increase in racist and xenophobic attitudes in this jurisdiction. A less subtle manifestation of this phenomenon has been the willingness of certain public figures and media to whip up anti-immigrant sentiment through populist soundbites and tendentious reportage.[2] Representatives of asylum support groups and members of the travelling community have been quick to call for reform of the present law, and have deplored the apparent difficulties in grounding a conviction under the legislation. On the other hand, concerns have been raised by others as to the dangers of regulating views and opinions in what purports to be a democratic society.[3] It is held that if dissenting views are restricted, a general climate of repression may develop, eroding democracy and leading to the abuse of other human rights. On this view, it is argued that the best antidote to speech is more speech.

International Precedents

International law encourages States to introduce legislation that penalises incitement to hatred. There are two main instruments that require this, as follows:

(1) Article 20 of the International Covenant on Civil and Political Rights[4] provides *inter alia* that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, shall be prohibited by law."

(2) Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination 1966[5] requires that States "shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin."

States are further required to "declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law."

The 1989 Act

The preamble to the 1989 Act declares it to be "An Act To Prohibit Incitement to Hatred On Account of Race, Religion, Nationality or Sexual Orientation." In both form and content it closely mirrors Part 3 of the British Public Order Act 1986. It makes it an offence to publish, distribute or display written material, or to use words, or to distribute, show or play a recording of visual images or sounds if:

"The written material, words, behaviour, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred."

Section 2(1)(a) makes it an offence to publish or distribute to the public material which is threatening, abusive or insulting, if it is intended or likely to stir up hatred. A total defence is made available by Section 2(2)(a) if the defendant can prove that he or she was not aware of the content of the material and neither

"International law encourages States to introduce legislation that penalises incitement to hatred. There are two main instruments that require this,Article 20 of the International Covenant on Civil and Political Rights, and Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination 1966."

suspected nor had reason to suspect that it was threatening, abusive or insulting. Section 2(1)(b) makes it an offence to use threatening, abusive or insulting words or behaviour or to display written material if it is intended or likely to stir up hatred. There is a specific exclusion if the conduct is inside a private residence and is not seen or heard by anyone outside of that residence. 'Private residence' is defined in section 2(3) as any structure used as a dwelling and to include, *inter alia*, a tent, caravan or other movable structure. It does not include a structure in which a public meeting is being held. Section 2(2)(b)(ii) makes available essentially the same defence as is created under Section 2(2)(a).

Section 2(1)(c) makes it an offence to distribute, show or play to the public any visual or sound recording which is threatening, abusive or insulting, if it is intended or likely to stir up hatred. Again, the defence created by section 2(2)(a) is also applicable to this offence.

Section 3 makes it an offence to include in any broadcast or television or radio service any item involving visual images or sounds which are threatening, abusive or insulting, if this is intended or likely to stir up hatred. This offence may be committed simultaneously or separately by the broadcaster, producers or directors and by the performers who actually engage in the offending conduct. Subsections 3(3), 3(4) and 3(5) provide specialised defences for each of these possible categories of persons. However, broadcasters will escape liability only if they prove that it was not reasonably practicable for them to remove the offending material. Section 3(6) provides an additional defence for all categories of accused, in that they may attempt to prove that they did not know and had no reason to suspect that the item was threatening, abusive or insulting.

"The emphasis on the explicit tone of the language used, rather than on the implicit effects of the message expressed, will act as a bar to prosecution in many instances. In particular, material presented in a somewhat moderate manner, but with highly offensive content, is likely to be excluded."

Section 4 makes it an offence to make or prepare or to have in one's possession any written material or any visual or sound recording which is threatening, abusive or insulting and if it is intended or likely to stir up hatred. The offence may be committed by a person who keeps such material for future publication by another, as well as those who intend to publish themselves. Again, the form of defences that apply in sections 2 and 3 are applicable here also.

Prosecutions under sections 2, 3 and 4 may only be brought with the express consent of the Director of Public Prosecutions. The penalties are set out in section 6. A conviction on indictment has a maximum sentence of two years and/or a £10,000 fine. Where a defendant is convicted summarily, he or she may be sentenced to a maximum of six months imprisonment and/or a £1,000 fine.

The Act also makes provision for a power of direct arrest without warrant and a power to search premises, but only with a warrant. Section 9(2) creates offences that are committed by persons who obstruct or interfere with Gardai carrying out a search under the authority of a warrant.

.

Interpretation

The 1989 Act creates five different offences with regard to incitement to hatred. Each offence has certain common elements. For the conduct in each provision to be punishable, the written material, words, behaviour, visual images or sounds, as the case may be, must be "threatening, abusive or insulting." These terms have not been judicially considered in an Irish context. However, it is instructive to note the decision of the House of Lords in *Brutus v. Cozens*[6] in its interpretation of the word "insulting" in a non-racial context under the British Public Order Act 1936. Lord Reid expressed the view that:

> "The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is ..... It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved."[7]

It is not possible to say, a priori, that behaviour or words that affront other people, even causing them to express resentment, are necessarily insulting. However, "insulting behaviour does not lose its insulting character simply because no one who witnessed it was insulted, any more than it would lose its liability to provoke a breach of the peace merely because no one who witnessed it broke the peace",[8] or that the defendant did not intend any particular person to be insulted.[9] The net issue seems to be whether an ordinary and reasonable person who hears the words would be insulted. The emphasis on the explicit tone of the language used, rather than on the implicit effects of the message expressed, will act as a bar to prosecution in many instances. In particular, material presented in a somewhat moderate manner, but with highly offensive content, is likely to be excluded.

It is submitted that the Irish courts would find merit in applying these same criteria in interpreting the 1989 Act.

The second proof required to ground a conviction is that the written material, words, behaviour, visual images or sounds, as the case may be, "are intended or, having regard to all the circumstances, are likely to stir up hatred." Hatred is defined in section 1(1) as follows:

> "In this Act 'hatred' means hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation."

"The classification of the conduct at issue will depend upon the character of the person(s) to whom it is directed ... Thus racist material sent to a member of the Jewish community is unlikely to stir up hatred although the same material sent to an anti-Semite will. It is anomalous that a neo-nazi can be prosecuted if he harangues an audience of fellow fascists, but not an audience of Asians."

It was reported at the time of the ministerial announcement of the present review that it was being undertaken because of the difficulties in proving intent under the present law. It is not possible here to undertake an analysis of the weighty topic of intent under the criminal law.[10] Instead, it is apposite to consider the alternative test offered, namely "having regard to all the circumstances, are likely to stir up hatred." An important consequence of this formulation is that the classification of the conduct at issue will depend upon the character of the person(s) to whom it is directed. In terms of the overall efficacy of the Act, it is submitted that this is its Achilles heel. Given the political culture in this jurisdiction and our liberal democratic model of governance, racist pamphlets, broadcasts or speeches are unlikely to foment hatred amongst most right-minded citizens. Conversely, material or speeches aimed at confirmed racists may be the subject of prosecution as their hatred is likely to increase or be reinforced. It is submitted therefore that words which are "threatening, abusive or insulting" are more likely to disgust the general public than incite them to hatred. Thus racist material sent to a member of the Jewish community is unlikely to stir up hatred although the same material sent to an anti-Semite will. It is anomalous that a neo-nazi can be prosecuted if he harangues an audience of fellow fascists, but not an audience of Asians.

Parameters of Reform

In considering the most appropriate form of any amendments or new legislation in this area, the most difficult task involves striking a balance between protecting minorities from the pernicious effects of hate speech and guaranteeing freedom of speech. Article 10 of the European Convention on Human Rights11 states inter alia that:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

As appears from Article 10(2), this right is not absolute:

> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 40.6.1(i) of the Constitution states *inter alia* that:

> "The State guarantees liberty for the exercise of the following rights, subject to public order and morality:
>
> i) The right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State."

As mentioned earlier, concerns have been expressed as to the desirability of regulating any kind of discourse, no matter how offensive. In commenting on a proposed anti-hate speech amendment to the Australian Racial Discrimination Act 1975, Sir Maurice Byers Q.C. took the view that:

> "If speech is to remain free, offence, insult or humiliation cannot be banished. A certain force of expression and intensity of feeling are the inevitable characteristics of many forms of free expression and especially where political questions or historical antagonisms are being discussed or lie behind what is being discussed."[12]

The jurisprudential response to this argument was articulated by the Canadian Supreme Court in *R v Keegstra*[13] This case concerned the prosecution of a Canadian schoolteacher for the use of anti-semitic material in his history class. Chief Justice Dickson, for the majority, said:

> "I am aware that the use of strong language in political and social debate - indeed, perhaps even language intended to promote hatred - is an unavoidable part of the democratic process. Moreover, I recognise that hate propaganda is expression of a type which would generally be categorised as 'political' thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process. Nonetheless, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to the democratic process. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee."[14]

Accordingly, it is respectfully submitted that anti-hate speech legislation should be seen not simply as infringing free speech, but as promoting and protecting the values and principles of a free and democratic society.

Bearing these issues in mind, and having regard also to the principle that the legislative response to hate speech should always be proportionate, the following is a brief summary of areas in which, it is submitted, reform may be considered:

1. The condition that the behaviour or material must be 'threatening, abusive or insulting' could be removed. This would allow the incitement offence to encompass many of the more subtle and sophisticated manifestations of hate speech.
2. The requirement for material or conduct to 'stir up hatred' is demanding because 'hatred' is an extreme emotion. Therefore, a lower threshold of 'racial vilification' or 'racial hostility' may be more effective.
3. The assumption that appears to underpin the 1989 Act is that hate speech should be regulated because it has implications for public order and not because of any direct impact it may have on the feelings of the victim. This is reflected in the *de facto* distinction the Act appears to draw between direct and indirect hate speech. The current discrepancy whereby the law can intervene when racist material is sent between racists, but not when the victim group is directly targeted, is less than satisfactory. (A conviction would of course lie if the prosecution could prove an intention to stir up hatred).
4. The requirement that the consent of the DPP is to be obtained prior to initiating a prosecution generates an extra level of bureaucracy.
5. The maximum sentence upon conviction on indictment is 2 years imprisonment and/or a fine not exceeding £10,000, and this is arguably an inadequate penalty for the severe harm caused to the victim and the potential destabilising effects on society as a whole.

Conclusion.

Many critics argue that the current legislation is little more than a paper tiger and that the sum total of two prosecutions taken is a testament to this. In contrast, a comparative analysis of continental European practice illustrates a significantly more robust attitude in this regard. In France, the Gayssot law, which prohibits the practice of Holocaust denial, has led to the prosecution of prominent political figures such as Jean Marie Le Pen for his assertion that the holocaust was "a mere detail of history." The lessons of Treblinka, Belsen and Auschwitz, of Rwanda in 1994[15] and the ongoing ethnic violence in the Balkans are illustrative of the bitter fruits that are reaped when the mongers of hate are allowed free reign. Modern Ireland has increasingly become a multicultural society and this has created uncertainty and fear in certain quarters.

Notwithstanding these fears, it is necessary to remain vigilant in curbing those who would seek to move from legitimate debate into the realms of hate speech. Guarantees of free speech have been developed to protect the right of citizens to exchange views and opinions, not the right to undermine human dignity and put minorities at risk of violence. Vilification is itself an abuse of human rights.●

1. *The Irish Times*, 6 September 2000.
2. See Pollack, *An invitation to racism? Irish daily newspaper coverage of the newspaper issue,* in Kiberd (Ed), Media in Ireland: The Search for Ethical Journalism.
3. See O'Connor, *Hatespeech, like thoughtcrime, is not double plus good,* The Sunday Independent, 10 September 2000.
4. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966).
5. At a recent conference organised by the National Consultative Committee on Racism and Interculturalism, the Minister for Justice said the Government would ratify the Convention "in the coming months."
6. [1973] A.C. 854.
7. Ibid., at 861.
8. Per Donaldson L.J. in *Parkin v. Norman* [1983] Q.B. 92.
9. *Masterson v Holden* [1986] 3 AER 39.
10. For an analysis of the topic of intention, see Charleton, McDermott & Bolger, *Criminal Law* (1999).
11. European Convention on Human Rights 1950.
12. Byers, *Free Speech a Certain Casualty of Race Law,* The Australian, 21 November 1994.
13. *R v Keegstra* [1990] 3 S.C.R. 697
14. Ibid., at 735.
15. For an illustration of the role of hate speech in modern genocide, see Gourevitch, *We wish to inform you that tomorrow we will be killed with our families: Stories from Rwanda* (1999)

RESTORING COMPANIES TO THE REGISTER

Patrick Leonard BL considers the rules and procedures governing the striking out and restoration of companies to the Register of Companies in the light of changes introduced by the Companies (Amendment)(No 2) Act 1999.[1]

Introduction

Section 46 of the Companies (Amendment) (No.2) Act 1999 amends the Companies (Amendment) Act 1982 by the insertion of a new section 12. This new section now governs the principal ways in which a company may be struck off the register, and how an application to restore such a company may be made. This article looks at the new procedures introduced by this section and some related issues.

Striking off for failure to make annual returns

The obligation on a company to make an annual return is contained in sections 125 and 126 of the Companies Act 1963. Section 12(1) of the Companies (Amendment) Act 1982 provides that where a company does not, for one or more years, make such an annual return, the registrar of companies may send the company a registered letter stating that, unless all outstanding returns are delivered to him within 1 month, a notice will be published in Iris Oifigiúil with a view to striking the name of the company off the register.

Section 12(2) then goes on to provide that if the registrar does not receive all the outstanding returns within the month, he may publish in Iris Oifigiúil a notice that the company will be struck off the register and dissolved unless all outstanding returns are filed within a further period of one month. If, after this second month, the returns have still not been filed, section 12(3) of the Act of 1982 then provides that at the expiration of this second month, the registrar of companies may strike the company off the register, and publish notice of the strike off in *Iris Oifigiúil*. On the publication of this notice, the company is dissolved.

"Upon the dissolution of a company, it no longer has any legal status and accordingly cannot issue fresh proceedings, maintain proceedings in existence, nor be sued ... Accordingly, an unsecured creditor must bring an application to restore a company in order to recover the moneys due to it."

Striking off for failure to deliver a revenue statement

Section 882(2) of the Taxes Consolidation Act 1997 (as inserted by section 83 of the Finance Act 1999) requires, *inter alia,* every company which is incorporated in the State to deliver a statement in writing to the Revenue Commissioners giving certain particulars of that company's business and accounts.[2] Section 882(3) of the Act of 1997 provides that where a company fails to deliver such a statement, the Revenue Commissioners may give notice in writing to the registrar of companies of such default.

Where the registrar of companies receives such a notice in writing from the Revenue Commissioners, section 12A(1) of the Companies (Amendment) Act 1982 provides that the registrar may send the company a registered letter stating that, unless the statement is delivered to the Revenue Commissioners within 1 month, a notice will be published in *Iris Oifigiúil* with a view to striking the name of the company off the register. Section 12A(2) of the Act of 1982 then goes on to provide that if the Revenue Commissioners do not receive the statement within the month, the registrar may publish in Iris Oifigi'il a notice that the company will be struck off the register and dissolved unless the statement is delivered to the Revenue Commissioners within a further period of one month.

If, after this second month, the statement has still not been delivered, section12A(3) of the Act of 1982 then provides that at the expiration of this second month,

the registrar of companies may strike the company off the register, and publish notice of the strike off in *Iris Oifigiúil*. On the publication of this notice, the company is dissolved.

Consequences of the strike off and dissolution of the company

Proceedings

Upon the dissolution of a company, it no longer has any legal status and accordingly cannot issue fresh proceedings, maintain proceedings in existence, nor be sued.

Assets of the company

By virtue of section 28 of the State Property Act 1954, if a company is dissolved :

(a).all land which was vested in it or held in trust for it (except for land which it holds in trust for another person) becomes the property of the State, subject to any incumbrances or charges affecting the land immediately before the dissolution of the company;

(b).all personal property (excluding chattels real but including choses-in-action) which was vested in or held in trust for it becomes the property of the State.

By virtue of section 29 of the 1954 Act, any real or personal property which becomes the property of the State under section 28 stands vested in the Minister for Finance. Thus, a company which has been dissolved will not be in a position to sell any property which it formerly owned.

Position of Creditors

As noted above, it is not possible for a creditor to bring proceedings against a company which has been dissolved and, accordingly, an unsecured creditor must bring an application to restore a company in order to recover the moneys due to it.

A creditor with security over land is in a better position in that section 28 of the State Property Act 1954 provides that the State takes real property subject to any incumbrances or charges affecting the land immediately before dissolution. This does not apply to creditors who hold security over pure personalty.

Liability of Officers and Members of the Company

Section 12B(1) of the Act of 1982 provides that:

"The liability, if any, of every director, officer and member of a company the name of which has been struck off the register under section 12(3) or section 12A(3) of this Act, shall continue and may be enforced as if the company had not been dissolved."

This section envisages the continuation of any liabilities which existed at the date of the dissolution of the company, and not the creation of new liabilities on dissolution. Accordingly, it does not make the directors of a company personally liable for the debts of the company on dissolution.

For a member, it would mean that any unpaid liability on shares would remain in being notwithstanding the dissolution. Similarly, a director who acted in breach of his fiduciary duty to a company remains liable for this breach of fiduciary duty. However, as these causes of action appear to be assets vested in the State, it seems unlikely that such liabilities would be enforced in most cases.[3] On the other hand, there are circumstances[4] in which the directors of an insolvent company can owe duties to the creditors of the company. In such circumstances, and if that insolvent company were struck off the register, it would appear that any liabilities of the directors to the creditors would remain in being notwithstanding the strike off.

Application to Restore Company to the Register.

There are a number of different ways in which the application to restore a company to the register can be made:

Petition to the High Court by a member, officer or creditor

At the moment, the most common form of application is by way of petition to the High Court. Such an application is now provided for in section 12B(3) of the Companies (Amendment) Act 1982 as follows:

> "If any member, officer or creditor of a company is aggrieved by the fact of the company's having been struck off the register under section 12(3) or 12A(3) of this Act, the court, on an application made (on notice to the registrar of companies, the Revenue Commissioners and the Minister for Finance) by the member, officer or creditor, before the expiration of 20 years from the publication in Iris Oifigiúil of the notice referred to in section 12(3), or as the case may be section 12A(3) of this Act, may if satisfied that it is just that the company be restored to the register, order that the name of the company be restored to the register, and ... upon an office copy of the order being delivered to the registrar for registration, the company shall be deemed to have continued in existence as if its name had not been struck off."

"In order to comply with RSC Order 75 rule 6, it would seem proper for the notice of motion to also seek the directions of the court as to the proceedings to be taken...Before giving their consent, the Revenue Commissioners will normally require all outstanding tax returns in relation to taxes payable for the period prior to and since dissolution, as well as all accounts and tax calculations to vouch these returns, together with an undertaking that all outstanding taxes will be paid within one month of the restoration of the company to the register."

"The Chief State Solicitor represents both the registrar of companies and the Minister for Finance, and will not normally indicate whether the registrar of companies or Minister for Finance will consent to the application prior to the service of the proceedings on him."

Order 75 rule 4(o) of the Rules of the Superior Courts 1986 provides that such an application must be made to the High Court by way of a petition.[5] In such an application, the petition must be presented to the Central Office, and a notice of motion should be issued grounded on the affidavit of the petitioner seeking to have the company restored to the register. In order to comply with RSC Order 75 rule 6, it would seem proper for the notice of motion to also seek the directions of the court as to the proceedings to be taken.

Service of Documents

In every application under section 12B(3), the application should be on notice to the registrar of companies, the Minister for Finance and the Revenue Commissioners. In the case of an application by a creditor of the company, it would also appear necessary to serve the directors and secretary of the company. The Chief State Solicitor represents both the registrar of companies and the Minister for Finance, and will not normally indicate whether the registrar of companies or Minister for Finance will consent to the application prior to the service of the proceedings on him. In addition to serving the Chief State Solicitor, the proceedings should be served on the registrar of companies (14 Parnell Square, Dublin 1) and the Minister for Finance (State Property Section, Department of Finance, Upper Merrion Street, Dublin 2). Normally, the Chief State Solicitor requires at least 10 days in order to take instructions as to whether the registrar of companies and Minister for Finance are consenting to the application.

The Revenue Solicitor represents the Revenue Commissioners and the proceedings should be served both on the Revenue Solicitor (Dublin Castle, Dublin 2) and on the Company Restoration Section of the Revenue Commissioners (Office of the Revenue Commissioners, 9/15 Upper O'Connell Street, Dublin 1).

Outstanding Returns to the Companies Office, Tax Returns and section 882(2) Statements

Generally the registrar of companies will require delivery of all outstanding returns prior to the issue of proceedings. In consequence, a letter from the registrar of companies confirming that this has been done should be exhibited in the affidavit grounding the motion. Similarly, it seems preferable that the section 882(2) statement be forwarded to the Revenue Commissioners prior to the issue of the proceedings and, if possible, an averment to this effect should also be included in the affidavit grounding the motion.

If these matters are not included in the grounding affidavit, the provisions of section 12B(5) of the Act may come into effect. If the application to the restore the company is made by an officer or member of the company, section 12B(5) requires the court, unless cause is shown to the contrary, to insert a provision in the order that it shall not have effect unless the annual returns or the section 882(2) statement (as appropriate) are delivered within 1 month of the date of the order.

Before giving their consent, the Revenue Commissioners will normally require all outstanding tax returns in relation to taxes payable for the period prior to and since dissolution, as well as all accounts and tax calculations to vouch these returns, to be forwarded to them prior to the making of the application, together with an undertaking that all outstanding taxes will be paid within one month of the restoration of the company to the register. An averment to this effect should be included in the affidavit grounding the application.

Obviously, a creditor will not be able to have the returns and statements delivered to the registrar of companies and Revenue Commissioners. In order to provide for this situation, section12B(6) of the Act provides that where the application is made by a creditor, the court shall include a direction in the order that one of more specified members or officers of the company shall within a specified period deliver all outstanding returns or section 882(2) statements (as appropriate).

It should be noted that a petitioner will also have to discharge the costs of the Chief State Solicitor and the Revenue Solicitor[6].

Assets of the Company

As set out above, where a company has been dissolved all real and personal property (other than land held by it upon trust for another person) vests automatically in the Minister for Finance on behalf of the State. In light of this, the petitioner will normally aver in the grounding affidavit that neither the Minister for Finance nor the State has in any way, either directly or indirectly, intermeddled with the assets or property of the company, and further that the petitioner is unaware that any other party alleges or has alleged that the Minister for Finance or the State has so intermeddled in the assets or property of the company.

Discretion of the Court

Section 12B(3) of the Act states that the High Court may restore a company to the register "if satisfied that it is just that the company be restored to the register."

Where the application is made by a member or officer in circumstances where the company has failed to file returns or to deliver a section 882 statement, it would seem appropriate to include in the grounding affidavit an explanation of why the relevant documentation was not delivered, and an explanation of how the warning letter sent by the registrar to the company was ignored. In addition to this, it would seem necessary for the grounding affidavit to set out the reasons why the petitioner says that it would be appropriate for a court to exercise its discretion to make the order restoring the company to the register.

Where the application is made by a creditor, the petitioner should set out how the debt is owed to it and state that it intends to pursue the restored company for the debt if the

application is successful. In addition, such a petitioner must show that it was a creditor at the time when the company was struck off the register.[7]

Typically, a company will have failed to file returns through inadvertence and wishes to continue trading or sell property. In these cases, the application will normally be brought well within the 20 year period permitted in section12B(3) of the Act.

In *Re Timbiqui Gold Mines Ltd.*[8], Buckley J. stated that a person who takes an assignment of a debt from a company which he knows to be dissolved could not maintain that he was 'aggrieved', for the purposes of a restoration application, and further that a petitioner must show to the court that there would be a substantial benefit accruing to the members or petitioners if the company was restored in order to justify a court to exercise its discretion.

In *Re Eden Quay Investments Limited,*[9] the company had owned a large number of shares in Hibernian Transport Companies Limited, and was struck off the register eighteen years prior to the application. At the time of dissolution, the shares were considered worthless. In 1993, the Supreme Court held that the shareholders in Hibernian Transport Companies Limited were entitled to benefit from a substantial surplus arising from the liquidation of that company. In light of the fact that Eden Quay Investments Limited would be unable to prove its claim in the winding up of the Hibernian Transport Companies Limited unless restored to the register, Keane J. granted the application.

In *re Haltone (Cork) Ltd.*[10] is an example of where the court granted an application by a creditor. In that case, the petitioning creditor had obtained judgment against the company in England in 1991 and obtained an order permitting enforcement of that judgment in Ireland in 1992. In 1993, the company was struck off for failure to file returns. O'Hanlon J. restored the company to the register so that the petitioning creditor could pursue a remedy against the directors of the company under section 251 of the Companies Act 1990.[11] (Having regard to the provisions of section 12B(1) of the Companies (Amendment) Act 1982 providing for continuation of liability of directors on dissolution, an application to restore the company may not be strictly speaking necessary in such circumstances.)

Ancillary orders under section 12B(3)

Section 12B(3) of the Act of 1982 also provides that where an order is made restoring a company to the register:

> "the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly may be as if the name of the company had not been struck off or make such other order as seems just."

This section replaces the former section 12(6) of the Companies (Amendment) Act 1982 in identical terms. The former section 12(6) was recently considered in detail in *Re Amantis Enterprises Limited.*[12] In that case, Amantis Enterprises Limited had been placed in voluntary liquidation in 1994 and had issued plenary proceedings against a number of other companies in 1996. Unbeknownst to the liquidator or directors of the company, Amantis had been struck off the register in 1993. An application, on notice to the defendants in the plenary proceedings, was brought to restore the company to the register, and an issue arose as to the construction of the then section 12(6) of the Act. The petitioner contended that section 12(6) had the automatic effect of validating all acts of the company between dissolution and restoration. The defendants in the plenary proceedings contended that formal orders were required in order to validate such acts of the company as the appointment of the liquidator and commencement of proceedings, and that it would not be just to make such orders. O'Neill J. held that the words 'the company shall be deemed to have continued in existence as if its name had not been struck off' have the automatic effect of validating retrospectively all acts done in the name of the company during the period between its dissolution and the restoration of its name to the register.[13] This was on the basis that the intention of section 12(6) was to preserve the validity of transactions entered into during a period of dissolution where frequently that dissolution is unknown to either the company or its officers or to third parties dealing with it.

In relation to the final words of the section giving the power to make supplemental orders or directions, O'Neill J. held that the power to create specific orders did not qualify the scope of the preceding general words but enabled the court to achieve to the fullest extent consistent with justice the 'as you were' position of the company.

An example of such an additional order may be found in the English case of *Re Boxco Ltd.*[14], where the company, which had been struck off the register for failure to file its annual returns, purported to create a legal charge on its property during the period when legally it was no longer in existence. In the order restoring the company to the register, Pennycuick J. held that as the company was solvent, and no further legal charges had been created, and as the order would prejudice no one, the company should be retrospectively put in the position as if the legal charge had been duly created and the particulars duly delivered for registration.[15]

A further example of such an order was made in *Re Donald Kenyon Limited*[16] where a mortgagee entered into possession of houses owned by the company in 1940, and subsequently sold them. The company was struck off the register in 1949. After sale of the houses and discharge of the sum due to the mortgagee, there was a surplus which would have been payable to the company had it not been dissolved. In 1956, a director of the company applied to have it restored to the register and stated in the petition that: "It is apprehended that all the debts of the company at the time of its dissolution have since become statute-barred and that, after paying the costs of the liquidation, there should be a substantial surplus available for distribution amongst the contributories of the company." Roxburgh J. made the order restoring the company and inserted a provision in the order that, in the case of creditors whose debts were not statute-barred at the date when the company was dissolved, the period between the date of dissolution and the date when the name of the company was restored to the register should not be counted for the purpose of the Limitation Acts.

Section 12B(4) of the Act provides that if the court considers it appropriate, the court may include a provision in the order restoring a company to the register that the officers of a company or any one of them should be liable for the whole or part of a debt which was contracted during the period when

"Section 12B(4) of the Act provides that if the court considers it appropriate, the court may include a provision in the order restoring a company to the register that the officers of a company or any one of them should be liable for the whole or part of a debt which was contracted during the period when the companystood struck off the register."

the company stood struck off the register. In light of this section in the Act, it would seem proper to include in the affidavit grounding the application details of any debts which were incurred during the period, and any reasons why the officers of the company should not be made personally liable for them. This provision does not appear to have received detailed judicial consideration, and the circumstances in which a court will impose such liability on an officer of the company are not clear.

Nature of the application

In *Re Amantis Enterprises Limited*, the High Court heard submissions from several parties apart from the petitioner and Registrar of Companies. The defendants in the plenary proceedings brought by the company were notice parties to the petition. Similar applications to be joined as notice or third parties to petitions to restore companies have been rejected in the English courts.

In *Re Portafram* Ltd,[17] Harman J. considered the nature of the application made under section 653 of the English Companies Act 1985, which is similar to section 12B(3) of the Companies (Amendment) Act 1982, and stated that:

> "Such applications are ... proceedings which do not, on the face of them, lead to the determination of any issue at all. They are a curious form of quasi-administrative proceedings whereby the court, on being satisfied of various matters, exercises a power given by Parliament to resuscitate, by restoration to the register, a company which is then, by Act of Parliament, deemed to have continued to exist at all times."

In that case, the company and a member, Mr. Dutch, sought to have the company restored to the register. At a time when the company had been dissolved, Sharpe Hythe Limited entered into a contract with what purported to be the company, Portafram Limited. A dispute then arose, and Sharpe Hythe Limited discovered that Portafram Limited had not been in existence at the time of the making of the contract. It then issued proceedings against Mr. Dutch personally on the ground that he had individually contracted with it, or alternatively had warranted his authority to contract on behalf of the non-existent company. Sharpe Hythe Limited objected to the restoration of Portafram Limited to the register on the basis that if the order were made, it would retrospectively validate the contract made by Portafram Limited and make the proceedings against Mr. Dutch void.

Harman J. rejected Sharpe Hythe Limited's application to be joined to the application to restore the company to the register on the basis that:

> "a restoration application is not one which leads to issues being determined on a lis inter partes; it is one where the court has to be satisfied of various matters before jurisdiction to restore the company exists, and then has to exercise a discretion whether the company ought to be restored."

The question of whether other parties should be before the court has particular relevance having regard to section 12B(4) of the Act of 1982 which provides that a court can make an officer of a company personally liable for any liability incurred during the period when the company was struck off. In the absence of any information as to what liabilities were incurred during the period between dissolution and restoration, it is hard to see how a court can properly exercise its jurisdiction under this section of the Act. This particularly raises the question as to whether a petitioning member or officer should be required to give full details of any such debts and liabilities, and set out why such an order should not be made.

Difference between section 12B(3) of the Companies (Amendment) Act 1982 and section 310 of the Companies Act 1963

Section 310 of the Companies Act 1963 provides that:

> "Where a company has been dissolved, the court may at any time within 2 years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

In *Re Amantis Enterprises Limited*[18], O'Neill J. stated, obiter, that:

> "this section makes provision for declaring void a dissolution of a company where the company has been dissolved either as a result of a voluntary liquidation or a court liquidation, in contra distinction to section12(6) [now replaced by section12B(3)] which provides for a situation where a dissolution of a company results from the company being struck off the register under the provisions of section 12 of the Act of 1982."

Later in the judgment, O'Neill J. referred to the English case of *Morris v. Harris,*[19] in which it was held that the equivalent section to section 310 was "clearly confined to cases where dissolution succeeds the complete winding up of the company's affairs and cannot take effect at all except at the instance, or with the knowledge, of the liquidator, the company's only executive officer."[20] However, in England there has been substantial dispute as to whether this decision is correct, and Gower's Principles of Modern Company Law[21] states that in most cases an applicant has a choice of applying under either provision, i.e., in Ireland, under either section 12B(3) of the 1982 Act or under section 310 of the 1963 Act. Accordingly, in *Re Wood & Martin Ltd,*[22] a company which had been struck off the register by the registrar purported to pass a resolution for a voluntary winding up. In response to the application of the purported 'liquidator' under the equivalent section to section 310 to declare the dissolution void, Megarry J. held that the purported liquidator was an 'other person who appeared to the court to be interested' and accordingly made the order declaring the dissolution void.[23]

"Whereas there is no specific procedure provided for in the Circuit Court Rules, Order 5 rule 8 of the Circuit Court Rules 1950 allows the issue of a Civil Bill where relief is sought "against any person", or a petition "where there is no person against whom an action can be brought." It would be helpful for practitioners if a practice direction were given, or specific rules made in relation to such applications."

Section 12B(2) of the 1982 Act now provides that the court shall have power to wind up a company the name of which has been struck off the register. There is authority to the effect that in order to do this, an application must be first made to restore it to the register.[24] However, in *Re Thompson & Riches Ltd*,[25] an applicant under the equivalent section to section 310 was a member of the company who had applied to court for an order winding up the company in ignorance of the fact that it had been struck off the register. Slade J. accepted that there was jurisdiction to grant the application to declare the dissolution void but indicated that it would be preferable to have applied under the section equivalent to section12B(3) of the 1982 Act.[26]

There are substantial differences in the two procedures. Firstly, the application under section 12B(3) of the Act of 1982 may be made within 20 years of the notice in Iris Oifigiuil dissolving the company. The application under section 310 of the Act of 1963 must be made within 2 years of the dissolution. Secondly, an order under section 310 does not have the automatic effect of validating any transactions made by or with the company during the period of dissolution. If an order is made "such proceedings may be taken as might have been taken if the company had not been dissolved." Presumably, any assets of the company which vested in the State would revert to the company,[27] although there does not appear to be express statutory provision for this consequence of restoration to the register.

It is unclear as to whether an application can be made to declare a dissolution void in circumstances where the company has been dissolved under the provisions of section 12 of the Act of 1982. If a company is dissolved by the section 12 procedure after the appointment of a liquidator, there would appear to be no *locus standi* for that liquidator to apply for the restoration of the company under section 12B(3) of the Act of 1982. There may be other situations where there is no *locus standi* under section 12B(3) but an applicant might be able to persuade a court that he was a "person who appears to the court to be interested" for the purposes of section 310 of the Act of 1963.

Application by a creditor to the Circuit Court.

Section 12B(9) of the Act allows an application by a creditor to restore a company to the register under section 12B(3) of the Act of 1982 to be made to the Circuit Court. Unfortunately, no Circuit Court rules have, as of the date of the writing of this article, been made in relation to such applications, and there are no provisions for the issue of a petition in the Circuit Court as matters stand. Some practitioners in the Dublin Circuit Court have applied in the Circuit Court by way of an ordinary civil bill naming the registrar of companies and the officers of the company as defendants, and others have brought petitions. Whereas there is no specific procedure provided for in the Circuit Court Rules, Order 5 rule 8 of the Circuit Court Rules 1950 allows the issue of a Civil Bill where relief is sought "against any person", or a petition "where there is no person against whom an action can be brought." It would be helpful for practitioners if a practice direction were given, or specific rules made in relation to such applications. Presumably, all of the matters set out above in relation to the applications by creditors by way of petition in the High Court would apply equally to applications in the Circuit Court.

Fast-Track Applications by a member or officer of the company

Section 12C(1) of the Companies (Amendment) Act 1982 provides that if a member or officer of a company wishes to apply to have a company restored to the register within 12 months of the notice in Iris Oifiguil, the application may be made to the register of companies. The application is made by way of an 'H1' form, and the company must deliver all outstanding returns to the registrar, all outstanding section 882(2) statements to the Revenue Commissioners, and pay all appropriate late filing fees. The Companies Registration Office have introduced a fast track restoration procedure which allows for the restoration within 1 day if all documentation is in order and all fees paid. Details are available on the website of the Companies Registration Office.[28]

Section 12C(2) of the 1982 Act provides that on registration of such an application, and on payment of the appropriate fees, the company shall be deemed to have continued in existence as if its name had not been struck off the register.

Application by the Registrar of Companies

Section 12B(7) of the Act allows the registrar of companies to make an application for the restoration of a company, on notice to each person who, to his knowledge, is an officer of the company. This application could be made by way of petition in the High Court, or by virtue of section 12B(9) of the Act in the Circuit Court. As with applications by creditors, there are no rules of court in relation to this in the Circuit Court.

Conclusion

Given that the Companies Registration Office were issuing 7,000 strike off notices a week in March 2000, the application to restore a company to the register is likely to become very common. There are a number of matters of law and practice which require clarification in this area, and no doubt they will soon receive full judicial exploration and clarification.●

1. I wish to gratefully acknowledge two articles upon which I have extensively relied, Lyndon McCann BL, *Striking off the Register and Section 12 of the Companies (Amendment) Act 1982* (1990) 84 G.I.L.S 125; and Kilda Mooney BL, Restoring Companies to the Register (1997) Bar Review 226. In addition, I have made extensive reference to Courtney, *The Law of Private Companies*, Gower's Principles of Modern Company Law, and Buckley on the Companies Acts.

2. Section 882(2) of the Taxes Consolidation Act 1997 as inserted by section 83 of the Finance Act 1999 provides, *inter alia,* that:

"Every company which is incorporated in the State ... shall, in every case within 30 days of-

(a) the date of which it commences to carry on a trade, profession or business, wherever carried on,

(b) the date at which there is a material change in information previously delivered by the company under this section, and

(c) the giving of a notice to the company by an inspector requiring a statement under this section

deliver to the Revenue Commissioners a statement in writing containing particulars of-

(I) in the case of every company-

(I) the name of the company,

(II) the address of the company's registered office,

(III) the address of its principal place of business,

(IV) the name and address of the secretary of the company,

(V) the nature of the trade, profession or business,

(VI) the date up to which accounts relating to such trade, profession or business will be made up, and

(VII)such other information as the Revenue Commissioners consider necessary for the purposes of the Tax Acts..."

3. On the other hand, a director may be criminally liable in a number of ways for breaches of the Companies Acts. Such liability remains in force following dissolution and might well be pursued by the State.

4. *Re Frederick Inns Ltd* [1994] 1 I.L.R.M. 387

5. The form of a petition under the Companies Acts is provided for in Order 75, rule 4 of the Rules of the Superior Courts. The petition should be presented in accordance with RSC Order 5, rule 15. Curiously in light of the fact that the company has been dissolved, Order 75, rule 20 requires that a petition presented under Order 75, rule 4(o) be served on the company within 3 days of filing in the Central Office.

6. This seems obvious in the case of a petitioning member or creditor. In *Re Haltone (Cork) Ltd* [1996] IR 32, O'Hanlon J. held that a petitioning creditor should pay any fees due to the registrar of companies in connection with a restoration obtained by that creditor.

7. See Re *Timbiqui Gold Mines Ltd* [1961] 1 All ER 865 and *Re Aga Estate Agencies Ltd* [1986] BCLC 346. In *Re Timbiqui Gold Mines Ltd*, Buckley LJ held that "in order to qualify to be a petitioner under (the equivalent subsection), the petitioner must show that at the date when the company was dissolved he was a member or was a creditor, and that anyone who purported to become a member or creditor of the company afterwards, whether in ignorance or otherwise of the dissolution of the company, is not a person within the subsection."

8. [1961] 1 All ER 865

9. The Irish Times, 12 April 1994

10. [1996] 1 IR 32

11. Section 251 of the Companies Act 1990 allows, in certain circumstances, a creditor to bring proceedings *inter alia* for fraudulent trading against the directors of a company which has not been wound up.

12. [2000] 2 ILRM 177.

13. O'Neill J. quoted with approval the majority judgments of the Court of Appeal in *Tymans Ltd v. Craven* [1952] 2 QB 100. The defendants in the plenary proceedings had relied on the dissenting judgment of Jenkins LJ in that case and also on *Natural Nectar Products Canada Ltd v. Theodor,* Court of Appeal, British Columbia, 6 June 1990 and In *re Townreach Ltd* [1995] Ch 28.

14. [1970] Ch. 442

15. As to the requirement to deliver particulars of charges created over the assets of a company in Ireland, see Part IV of the Companies Act 1963 and Courtney, *The Law of Private Companies,* Chapter 15.

16. [1956] 3 All ER 596

17. [1986] BCLC 532

18. [2000] 2 ILRM 177

19. [1927] AC 252

20. For example, to allow a voluntary liquidator recover an asset which had been overlooked.

21. 6th edition, pp. 848ñ851

22. [1971] 1 WLR 293

23. See also *Re Belmont & Co. Ltd.* [1950] Ch. 10 and *Re Test Holdings (Clifton) Ltd* [1970] Ch. 285

24. *Re Cambridge Coffee Room Association Ltd* [1952] 1 All ER 112

25. [1981] 1 WLR 682

26. Further, he indicated that the appropriate procedure in this case is to apply to court for rescission of the existing order, liberty to amend his petition so as to include an application for restoration of the name of the company to the registration, an order for such restoration, and a new winding up order in accordance with the procedure set out in *Re Cambridge Coffee Room Association Ltd.*

27. *See Re C.W. Dixon Ltd* [1947] 1 All ER 517

28. http://www.cro.ie www.cro.ie

29. Information note, 13 March 2000, Companies Registration Office.

KING'S INN NEWS

Visit of President of Ireland to King's Inns

On Thursday 19 October 2000 King's Inns celebrated the bicentenary of the laying of the foundation stone of James Gandon's last great Dublin building. To mark the occasion, the President of Ireland, Mary McAleese, visited King's Inns and addressed a large gathering of members of the Law Library, the students of King's Inns, the Lord Mayor and many involved in the local community, in conservation and in politics. The president said that *"the King's Inns building has the enviable distinction of being a creation of James Gandon, that genius of architecture who has left such an impressive stamp all over the city. After his death, Gandon's son wrote that the design for the Inns was "a favourite study" of his father. The King's Inns was Gandon's last major undertaking; the dining-hall survives as his only major unaltered public interior."*

During the summer the Society undertook a major refurbishment project extending to cobbling and extensive resurfacing of the area in front of the western facade. Undoubtedly Gandon would have been pleased with the low granite wall which has been erected in front of the main facade and which will be used by the public for seating and viewing purposes. As the President said "not only does it build on an idea of Gandon's idea himself but it is a feature Gandon would surely have been delighted with, believing passionately as he did that all people should derive pleasure from public architecture."

The President also commended King's Inns for having made such a determined effort in forging links with the local community. She made particular reference to the fact that the interdenominational primary school, Educate Together, has been established as a school in the benchers' property at 11 Henrietta Street. *"If there was an image of aloofness attached to the legal profession in the past, this generation has set its face firmly in an altogether different direction. Here tradition and respect for heritage do not stand in the way of forging fresh new common relationships."*

The Chief Justice reminded those present that while the Society was celebrating the architectural bicentenary of King's Inns in its present location, the Society has been in existence for 460 years having been established in 1541. It is one of Ireland's oldest institutions and the oldest legal educational establishment in the country.

The Chief Justice was grateful for the support and enthusiasm that was received from the OPW and Dublin Corporation (through HARP) in enabling the creation of a piazza and the execution of the granite seat in front of the western facade.

The President on Her arrival at King's Inns with the Chief Justice and The Hon. Mr. Justice Moriarty

The President on with Two of King's Inn's Students Mary Jo Butler & Tim McNulty

HILARY DINING 2001

THURSDAY 11 JANUARY - WEDNESDAY 7 FEBRUARY

FRIDAY 12 JANUARY
(benching - see notice in Law Library)

FRIDAY 19 JANUARY
(benching - see notice in Law Library)

FRIDAY 2 FEBRUARY
(guest night)

Barristers may dine on any evening.

Please book with Claire Hanley at ☎ 878 0410.

For benchings only, please book with Peter Brien in the Law Library.

ΔKing's Inns - University of Georgia Moot

In September three students (Marion Berry, Padraic Lyons and William Abrahamson) and the Director of Education travelled to Athens, Georgia, for the biennial mooting exchange. The moot itself was a great success and gave rise to a very interesting debate. Two speakers from each team addressed a panel of four professors from the Law School at the University of Georgia on issues of international law and intellectual property. Much tribute is due to the organisers at the US end for providing a very enjoyable programme of events, ranging from a visit to a Civil War exhibition, to sampling traditional southern cuisine. The group also spent a couple of days in the City of Atlanta, where they visited the Supreme Court and received a warm welcome from the state's Chief Justice.

Kings Inns team preparing for the Moot with the Law School of the University of Georgia

Left to Right: William Abrahamson, auditor LSDSI, Marian Berry, Degree 2, Padric Lyons, Degree 2, Kelli Casey, Moot Coordinator at the University of Georgia in the background

To all members of the legal profession

EBS BUILDING SOCIETY
13 LOWER BAGGOT STREET,
(BESIDE DOHENY
AND NESBITS)

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

WE OFFER

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

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

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

JUST TELEPHONE
01 676 3663 /01 676 2135
01 676 4559 OR 676 1400
FOR AN IMMEDIATE QUOTE

PADRAIC HANNON
MANAGER

EBS
BUILDING SOCIETY