The Bar Review

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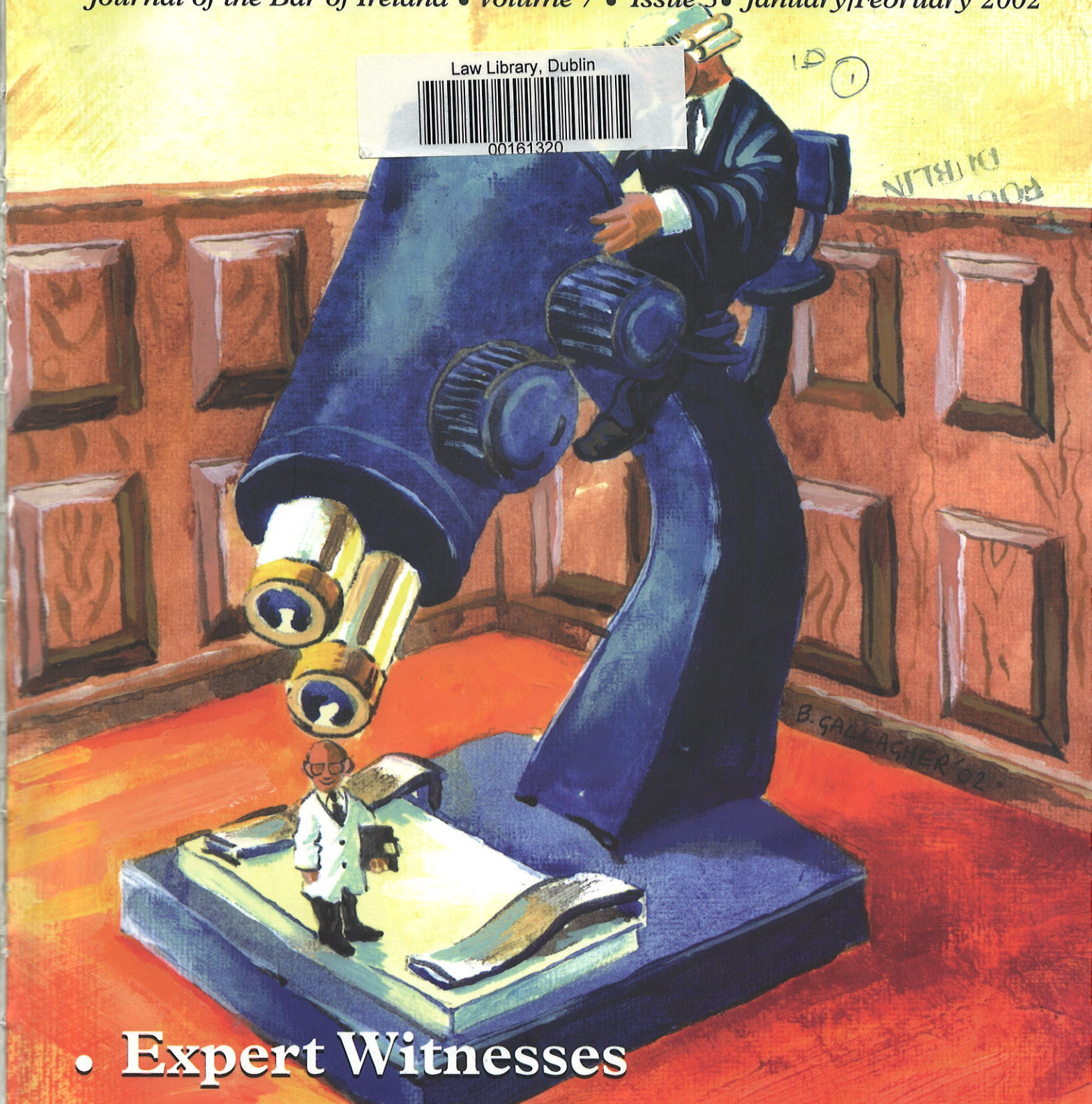

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COURTS SERVICE
An tSeirbhís Chúirteanna

Working Group on the Jurisdiction of the Courts
Invitation to make observations: criminal jurisdiction

The Working Group, which is chaired by Mr. Justice Nial Fennelly of the Supreme Court, has been established by the Board of the Courts Service. The terms of reference of the Working Group are as follows:

> *" I. To examine the existing jurisdiction of the courts of Ireland and make recommendations as to any changes which, in the opinion of the Working Group, are desirable in the interests of the fair, expeditious and economic administration of justice, including proposals for the establishment of new courts jurisdictions, whether appellate or first instance, for determining the appropriate number of judges for each jurisdiction and the supporting staffs required in such jurisdictions and for alterations in the quantitative or geographical limitations of existing jurisdictions;*
>
> *II. With a view to I., to conduct research into:*
>
> *(a) the manner in which the courts of Ireland have operated since their establishment in 1924 and are likely to continue operating in the future on the assumption that the existing structures remain unchanged;*
> *(b) the manner in which the administration of justice is conducted in other jurisdictions to the extent that the Working Group considers such research might be helpful;*
>
> *III. To make such further recommendations as to changes in the law which, in the opinion of the Working Group, are desirable in order to secure the fairer, more expeditious and more economic administration of justice;*
>
> *IV. To make such interim reports as it considers appropriate."*

The Working Group will be examining the jurisdiction of the Courts in a series of modules, the first of which is concerned with the jurisdiction of the courts in criminal proceedings, followed by modules on jurisdiction in civil proceedings and changes in court structures. Further modules may be established if considered necessary.

To assist it in the process of public consultation which it has commenced under Module I, the Working Group invites written observations on the jurisdiction of the courts in criminal proceedings from interested bodies and individuals, and may invite any party making written observations to attend before it to provide further assistance. Observations made to the Working Group may be subject to disclosure on submission of the Working Group's reports to the Board of the Courts Service.

Observations should be addressed to:
The Secretary, Working Group on the Jurisdiction of the Courts,
Green Street Courthouse, Dublin 7
or by e-mail to: wgjuris@courts.ie

The Working Group would hope, without imposing a deadline, to receive observations within four weeks.

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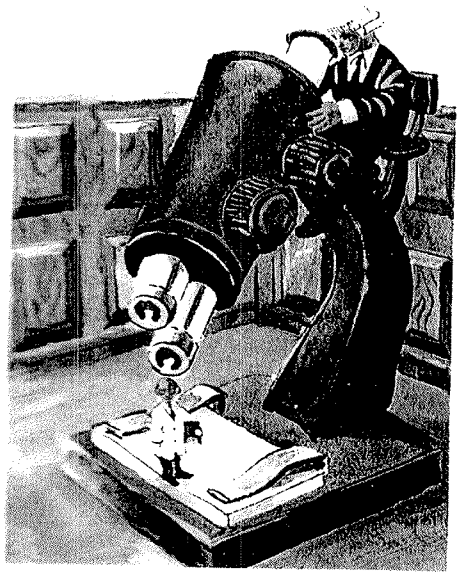

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AN OFFICE OF THE GARDA SIOCHÁNA OMUDSMAN

The decision of the government to establish a tribunal of inquiry into the death of Richard Barron and the subsequent controversy in relation to the McBrearty family is to be welcomed. Provision is being made for the inquiry, set up following consideration of the report of Shane Murphy SC, to take place on two separate tiers. In general, Mr Justice Frederick Morris will hear evidence in public. If necessary, however, testimony will be given in private when the Sole Member is of the opinion that criminal and civil proceedings already in being might be prejudiced. The provision for such a two-tier inquiry is a procedural necessity, and should be defended as such against those doubters who may suspect that a screen is being drawn in order to protect the Gardaí against undue public scrutiny.

The decision to establish this tribunal of inquiry may be contrasted with ongoing calls for the establishment of a public judicial inquiry into the death 13 years ago of Pat Finucane, the Belfast Solicitor. The Stevens investigation has yielded little of significance, and the Finucane family remain sceptical about the proposals put forward last year in Weston Park in England. On that occasion Tony Blair, the British Prime Minister, announced that an investigation would be carried out into the existence of state involvement in the deaths of Finucane as well as the in the murders of Rosemary Nelson, Robert Hamill, Billy Wright, Bob Buchanan, Harry Breen, Lord Justice Maurice Gibson and his wife, Cecily.

Despite failing to establish a public judicial inquiry into the role of the police in the Finucane case, the authorities in Northern Ireland have taken considerable steps to ensure public confidence in the new Police Force of Northern Ireland. The appointment of a Police Ombudsman in the North was made with precisely this purpose in mind and not without considerable pressure from the Irish government. In the short period since her appointment, Nuala O'Loan, the incumbent of the new office, has already demonstrated that this move towards greater police accountability has been a worthwhile one.

While the record of the Garda Siochána in this country has on the whole been quite exemplary, recent scandals involving members of the Garda Siochána have however dented public confidence in them. An effective Garda Siochána requires strong public confidence in the police force, and the best way of achieving that is by establishing a Police Ombudsman which would ensure that any complaints against the Gardaí are independently investigated. Non-public internal investigations do little to assuage public concerns. The rationale for a Police Ombudsman is quite independent of any issues arising in the McBrearty controversy.

Apart from establishing a Police Ombudsman it is necessary to immediately ensure that it becomes routine Garda practice to record interviews electronically. There can be no sensible objection to this procedure. It will ensure that that if any issue arises in the Criminal Courts as to the legality of any particular interview, there is an independent record available for the Courts. Such a development will not only protect the rights of an accused person but also will protect the Gardaí from false allegations relating to the conduct of investigations.

RBITRATION: REMISSION TO REMEDY A "PROCEDURAL MISHAP"

Rory White BL *and* ***Ercus Stewart SC*** *critically appraise the recent High Court decision in McCarrick v. The Gaiety (Sligo) Ltd on the power of the Courts to remit arbitration awards to the arbitrator for reconsideration under section 36(1) of the Arbitration Act 1954.*

Introduction

Today an ever increasing number of disputants are choosing alternative methods of dispute resolution to civil litigation as they realise that despite their soft and fussy image, alternative methods are in practice fast and focused.[1] Arbitration can be distinguished from other alternative methods of dispute resolution. In *King and Another -v- Thomas McKenna and Another,* Lord Donaldson MR stated that "arbitration is not an entirely private matter ... the State stands in the background."[2] The Courts can ultimately be asked to enforce awards or set aside or remit arbitral awards.

In Ireland, the Arbitration Acts 1954 - 1980 provide a statutory framework for the resolution of domestic disputes by arbitration and for enabling the courts to both assist and supervise the arbitral process.[3] Under the 1954 and 1980 Acts, the High Court is the relevant Court in Ireland. The Arbitration (International Commercial) Act 1998 which incorporated the Model Law into Irish law and which governs all international commercial arbitration, has again emphasised the importance of the High Court.

The scope of the power to remit

There is no appeal from the award of an arbitrator. In Lord Diplock's words, parties choosing arbitration favour "finality" over "legality".[4] However, the courts are empowered to set aside awards[5] or to remit them to the arbitrator for reconsideration. Section 36(1) of the Arbitration Act 1954 provides that "In all cases of reference to arbitration, the Court may from time to time remit the matters referred or any of them to the reconsideration of the arbitrator..."

For many years section 36(1) was interpreted very narrowly by the courts. It was considered that the remission jurisdiction was restricted to four grounds, namely:

1. where there is some defect or error patent or on the face of the award ;
2. where the arbitrator has admitted that he made some mistake and desires to have the matter remitted to correct it;
3. where new significant evidence, which despite all reasonable diligence was not discovered before the award, has since come to light ; and
4. where there has been misconduct on the part of the arbitrator.

McCarrick v. The Gaiety (Sligo) Ltd.

The traditional limits of the court's jurisdiction to remit under section 36(1) were tested recently in the High Court.[6] In *McCarrick -v- The Gaiety (Sligo) Ltd* an arbitrator was appointed to determine, upon rent review, the rent of a premises at Wine Street, Sligo. On the 1st June 2000, at a preliminary meeting attended by solicitors for both the Applicant/ Lessee and the Respondent/ Lessor, it was agreed that the issue should be determined on the basis of written submissions and that a formal hearing would not be required.

The next day the arbitrator issued directions to the parties laying down a timetable for the exchange of submissions and the forwarding of submissions to the arbitrator. In compliance with the arbitrator's directions, the Respondent furnished submissions to the Applicant's solicitors and to the arbitrator. However, the Respondent's diligence was in stark contrast to the Applicant's inactivity. No submissions on behalf of the Applicant were exchanged or submitted within the time stipulated by the arbitrator.

On the 14th July 2000 the arbitrator sent a letter to the Applicant's solicitors advising them of his intention to visit the premises but this elicited no response. On the 25th July 2000

the arbitrator wrote to the Applicant's solicitors stating that he had inspected the premises. He confirmed that he had not received any submissions from the Applicant and advised that on the basis of the evidence before him, he intended to make an award during the week commencing Monday 31st July 2000. On the 1st August 2000, the arbitrator made his award.

Subsequently, on the 4th August 2000, the arbitrator received submissions from the Applicant dated the 27th July 2000. He replied to the Applicant advising that he had already made his award, and shortly afterwards two copies of the final award dated the 1st August 2000 were furnished to the parties.

The Applicant applied to the High Court to have the award remitted pursuant to section 36(1) of the Arbitration Act 1954, on the ground that it would be unjust to allow the award on the rent review to stand because it had been made without taking the Applicant's submissions into account. The Respondent replied that the circumstances in which the court could interfere were limited and that these facts were not within any of the recognised circumstances.

A novel ground

The High Court remitted the award to the arbitrator. While it was clear that the award could not be remitted under the established grounds for remission, Herbert J indicated that the circumstances in which the court can remit under section 36(1) were not limited to the established grounds. He pointed out that in the leading cases on the scope of section 36(1) - *Keenan -v- Shield Insurance Company Limited* and *Tobin and Twomey services Limited -v- Kerry Foods* - the Supreme Court had decided only what was necessary for the disposal of the issues in those cases.[7] According to Herbert J the Supreme Court in *Keenan* "did not purport to determine the question of the general application of section 36(1), and the issue was not argued before the Court." Likewise, in *Tobin and Twomey:*

> "the general exercise by the High Court or the Supreme Court of what is clearly a wide power to remit under section 36(1) of the Arbitration Act 1954 was not an issue which [was - *sic.*] required to be determined by the Supreme Court in that case and was not fully argued (if, indeed it was argued at all) before the Court."

As a result, Herbert J was of the opinion that in an appropriate case the existing grounds under section 36(1) could be expanded upon. The learned trial judge stated -

> "... I cannot see any imperative of policy, reason or justice which should cause this Court to set any permanent, inflexible and immutable limits to the exercise of the wide power conferred upon it by the Oireachtas in section 36(1) of the Act for the purpose of ensuring justice and fairness between parties within the arbitration framework."

In England it had also formerly been thought that the jurisdiction to remit a case was confined to a number of established grounds. Herbert J gave detailed consideration to the decision in *King and Another -v- Thomas McKenna and Another* where the Court of Appeal had expanded the remission jurisdiction under section 22 of the Arbitration Act 1950 (the English equivalent to section 36). In this unusual case, the arbitrator had not been made aware of a sealed offer before awarding costs with the result that costs were awarded against the wrong party. The aggrieved party applied to have the award remitted to the arbitrator so that he could reconsider his award on costs. The other party conceded that if the arbitrator had known of the sealed offer he would have made a different award on costs but contended that the court did not have jurisdiction to remit the award in these circumstances.

The Court of Appeal remitted the award to the arbitrator. The Master of the Rolls stressed that parties cannot always expect arbitrators to make 'right' awards - i.e., to apply the correct law to the true facts - but they can and should expect a just and fair arbitral procedure. He observed that the remission jurisdiction under section 22 of the Arbitration Act 1950 existed to ensure fairness in the arbitral procedure. He stated:

> "[Section 22] is designed to remedy procedural deviations from the route which the reference should have taken towards its destination (the award) and *not* to remedy a situation in which, despite having followed an unimpeachable route, the arbitrators have made errors of fact or law and as a result have reached a destination which was not that which the court would have reached."

In determining the limits of the court's power under section 22, Lord Donaldson stated that he could see no reason why the jurisdiction of the court should be limited to the established or traditional grounds for remission. In his view the section gave the courts the power to remit an award in instances other than the established grounds to remedy "procedural mishaps" or misunderstandings. He stressed, however, that the court should only remit an award on this ground where it would be inequitable to allow the award to stand without some further reconsideration by the arbitrator.

> The Court of Appeal held that the failure of counsel to make clear that a sealed offer had been made was a "procedural mishap" and that it would be inequitable to allow the award to take effect without some reconsideration by the arbitrator. In ordering remission the Court of Appeal ordered that the party at fault for the "procedural mishap" should pay all the costs "in or about the remission."
>
> Herbert J adopted the analysis of Lord Donaldson MR. He was of the opinion that what had happened in *McCarrick* was a "procedural mishap" similar to that in *King and Another.* He was satisfied that the Applicant's failure to furnish submissions within the time stipulated "did not result from a deliberate or conscious decision". He held that what occurred was "an error in the nature of an oversight" which had the effect of denying the Applicant the opportunity to make submissions. Herbert J. continued that the award on the rent review had serious implications for the Applicant/Lessee's business and if allowed to stand would cause the Applicant hardship.

"This is an important decision. It establishes that, notwithstanding the fact that the arbitrator has acted properly, an award may be remitted where due to a "procedural mishap" the subject of the reference has not been ruled upon with the benefit of submissions from both parties and it would be inequitable to allow the award to stand."

Although the "procedural mishap" was the fault of the Applicant, Herbert J. was of the opinion that this was not a decisive factor. He quoted with approval the decision in *Sokratis Rokopoulos -v- Esperia S.P.P., "the Aros"*, where Brandon J. stated:

> "The Court does not necessarily refuse to assist a party out of difficulty because he has got into it by his own fault, although it may impose strict terms with regard to costs and other matters as a condition of giving such assistance." [8]

Herbert J remitted the award to the arbitrator for reconsideration but imposed stringent terms as to costs. He ordered that the Applicant pay the costs of the Respondent in or about the remission and that the Applicant pay the costs of the High Court proceedings. He further ordered that the Applicant would be responsible for one half of the fees, costs and outlay of the award made upon reconsideration.

"Herbert J's judgment shows that the courts will not refuse to remit an award where the applicant party was at fault for the procedural defect. However, the applicant party will be penalised by costs...The costs penalty should protect finality in arbitrations by deterring parties from applying to have the award remitted under the novel ground in *McCarrick* except in the most serious circumstances."

Comment

This is an important decision. Firstly, Herbert J's judgment enunciates a novel ground for remission under section 36(1). It establishes that, notwithstanding the fact that the arbitrator has acted properly, an award may be remitted where due to a "procedural mishap" the subject of the reference has not been ruled upon with the benefit of submissions from both parties and it would be inequitable to allow the award to stand.

Moreover, Herbert J tentatively suggested that in an appropriate case the grounds for remission under section 36(1) could be expanded upon. He stated:

> "In my judgment, the occasions upon which this Court will exercise its discretion to remit matters referred or any of them to the reconsideration of the Arbitrator remain open, but very limited. It is not necessary or indeed appropriate for the Court to put the matter further than this."

However, Herbert J counselled that the courts in exercising their supervisory jurisdiction under section 36(1) must in all cases show restraint. Otherwise, he warned, the courts "would become embroiled to a wholly unacceptable degree in the contractual arrangements and agreements of the parties."

Secondly, Herbert J's judgment shows that the courts will not refuse to remit an award where the applicant party was at fault for the procedural defect. However, the applicant party will be penalised by costs. Both the High Court in *McCarrick* and the Court of Appeal in *King and Another* viewed strict terms as to costs as a sufficient penalty to the party at fault.

This approach can be seen in other types of cases. In *Walsh v. Shield Insurance Co. Ltd* an arbitration agreement limited the time in which arbitration could be commenced.[9] The applicant sought an extension of time within which to commence an arbitration to avoid undue hardship pursuant to section 45 of the Arbitration Act 1954. Hamilton J (as he then was) extended the time. However, he ordered that the applicant pay for the costs of the motion and that the applicant not be awarded costs of the arbitration even if he was successful.

The costs penalty should protect finality in arbitrations by deterring parties from applying to have the award remitted under the novel ground in *McCarrick* except in the most serious circumstances.

Thirdly, although the arbitrator in *McCarrick* made his award on the basis of only one party's submissions, no allegation of misconduct was made against him under section 38. Therefore, this case affirms the power or jurisdiction of an arbitrator to proceed *ex parte* where the other party has not complied with the arbitrator's reasonable directions.

This jurisdiction was first recognised in *Grangeford Structures (In Liquidation) -v- S.H. Ltd,* where the Supreme court rejected an application to have an award set aside on grounds of misconduct where the arbitrator had made an award on the basis of only one party's submissions.[10] In *Grangeford McCarthy* J. stated that:

> "...an arbitrator has an inherent power to issue directions requiring the parties to submit details of their claim or claims, to fix a date or dates for the hearing of the reference and, in a proper case, to proceed on such date or dates despite the absence of one or other party."

Parties choose arbitration because it is a quick and cheap method of dispute resolution. An arbitrator has no power to dismiss a claim for want of prosecution or to give an award in default of defence.[11] Therefore, it is important that an arbitrator have the power to proceed *ex* parte in the face of an obstructive or dithering party to ensure that delay and costs do not escalate.

However, although Herbert J's judgment affirms the power to proceed *ex parte*, there may be a danger that it also undermines it by establishing a ground for remission where the arbitrator has reasonably proceeded *ex parte*. The decision in *Grangeford* was not referred to in Herbert J's judgment and may not have been cited. Perhaps, therefore, this threat to the finality of awards may be evaluated by setting out the facts of Grangeford and asking whether the award in that case would be remitted today under the novel ground enunciated in *McCarrick*.

In *Grangeford* a dispute between the parties was referred to arbitration pursuant to an arbitration clause in the parties' agreement. The arbitrator issued directions requesting that a claim be filed by the plaintiff and a reply and counterclaim, if any, be filed by the defendant. The plaintiff duly filed its claim and the defendant filed a document by way of defence. Two months later, the defendants wrote to the arbitrator stating that they were formulating a substantial counterclaim.

Nothing further occurred for another two months. The arbitrator wrote to the parties granting the defendant 21 days to file a new amended defence and counterclaim. This direction was not complied with by the defendant. The arbitrator wrote to the defendant stating that he had not received the documents and fixed a date for the hearing.

At the hearing the defendant's solicitor applied to have the hearing adjourned, and the matter was adjourned until that afternoon to allow the solicitor to consult his client. When the hearing resumed, the defendant's solicitor again applied for an adjournment, and when this was refused he withdrew from the hearing. The hearing then continued in the absence of the defendant and the arbitrator made an award on the basis of the plaintiff's evidence alone.

If the defendant applied to have this award remitted under the novel ground in *McCarrick* it is very unlikely that the court would accede to the application. Unlike the facts of *McCarrick*, the defendant's actions in *Grangeford* could not be characterised as "an error in the nature of an oversight" or a "procedural mishap". The defendant's actions could represent a conscious attempt to frustrate the progress of the arbitration. Moreover, on the facts of *Grangeford* it would not be inequitable to allow the award to stand.

It seems reasonable to conclude that the arbitrator's power to proceed *ex parte* in the face of an obstructive party will not be undermined by the novel ground for remission enunciated in the *McCarrick* case. The ground will only come to the assistance of a party who has acted *bona fide* and where there has been a genuine procedural mishap. As Ralph Gibson LJ stated in *King and Another*:

> "...the jurisdiction to remit should not ... be available to enable a party to an arbitration to repent of a considered decision by himself or his legal representatives ... in order for him to pursue a different course on remission to the arbitrator."

The Last Word

The "arbitration friendly" approach of the Courts in Ireland is best illustrated in the oft quoted, and followed, judgment of McCarthy J in *Keenan -v- Shield Insurance* [1988] I.R.89,[12] which includes the following statement of principle :

> "Arbitration is a significant feature of modern commercial life; there is an International Institute of Arbitration and the field of international arbitration is an ever expanding one. It ill becomes the Courts to show any readiness to interfere in such a process; if policy considerations are appropriate, as I believe they are in a matter of this kind, then every such consideration points to the desirability of making an arbitration award final in every sense of the term."

Herbert J's judgment shows a willingness in the courts to develop the law in appropriate circumstances, while keeping ever alive to the need for finality in the arbitral process. ●

Footnotes

1. See the comments of Mike Marsh, Financial Times, 21st January, 2001
2. *King and Another -v- Thomas McKenna and Another* [1991] 1 All ER 653
3. Arbitration Act, 1954 and Arbitration Act, 1980
4. Lord Diplock quoted in *King and Another -v- Thomas McKenna and Another* [1991] 1 All ER 653
5. Section 38 of the Arbitration Act, 1954 provides "Where an arbitrator ... has misconducted himself or the proceedings ... the Court may set the award aside".
6. *McCarrick -v- The Gaiety (Sligo) Ltd,* High Court, Herbert J., 02/04/01
7. *Keenan -v- Shield Insurance Co. Ltd.* [1988] I.R. 89. (Supreme Court, McCarthy J.) (High Court, Blayney J.) *Tobin & Twomey Services Ltd -v- Kerry Foods Limited and Kerry Group Plc* [1996] 2 I.L.R.M. 1; (Supreme Court, Blayney J., 6/3/1996) (High Court, Laffoy J., 22/04/1998) [1998] ADRLN 31; [1996] 1 I.C.L.M.D. 9; (High Court, Carroll J., 6/10/1995)
8. *Sokratis Rokopoulos -v- Esperia S.P.A., "the Aros"* [1987] 2 Lloyd's Reports 456. In this regard see Walsh -v- Shield Insurance *Walsh -v- Shield Insurance Co. Ltd.* [1976] I.L.R.M. 218 (High Court, Hamilton J., 8/12/1976)
9. *Walsh -v- Shield Insurance Walsh -v- Shield Insurance Co. Ltd.* [1976] I.L.R.M. 218 (High Court, Hamilton J., 8/12/1976)
10. *Grangeford Structures Ltd (in liquidation) -v- S.H. Ltd* [1990] I.R. 351; [1990] I.L.R.M. 277. (Supreme Court, Griffin J., 11/07/1989) [1988] I.L.R.M. 129 (High Court, Costello J., 28/03/87).
11. *Bremer Vulkan Schiffbau Und Maschinenfabrik -v- South India Shipping Corporation* [1981] AC 909; [1981] 1 All E.R. 289; [1981] 1 Lloyd's Rep. 253.
12. *Keenan -v- Shield Insurance* [1988] I.R.89

Relevant Cases

McCarrick -v- The Gaiety (Sligo) Ltd, High Court, Herbert J., 02/04/01

Keenan -v- Shield Insurance Co. Ltd. [1988] I.R.89. (Supreme Court, McCarthy J.) (High Court, Blayney J.)

Tobin & Twomey Services Ltd -v- Kerry Foods Limited and Kerry Group Plc [1996] 2 I.L.R.M. 1; (Supreme Court, Blayney J., 6/3/1996) (High Court, Laffoy J., 22/04/1998)
[1998] ADRLN 31; [1996] 1 I.C.L.M.D. 9; (High Court, Carroll J., 6/10/1995); (1996) C.L.P. 77

Walsh -v- Shield Insurance Co. Ltd. [1976] I.L.R.M. 218 (High Court, Hamilton J., 8/12/1976)

Grangeford Structures Ltd (in liquidation) v S.H. Ltd [1990] I.R. 351; [1990] I.L.R.M. 277.
(Supreme Court, Griffin J., 11/07/1989) [1988] I.L.R.M. 129 (High Court, Costello J., 28/03/87).

Bremer Vulkan Schiffbau Und Maschinenfabrik -v- South India Shipping Corporation [1981] AC 909; [1981] 1 All E.R. 289; [1981] 1 Lloyd's Rep. 253.

Sokratis Rokopoulos -v- Esperia S.P.A., "the Aros" [1987] 2 Lloyd's Reports 456

King and Another -v- Thomas McKenna and Another [1991] 1 All ER 653

IRISH CONTRACT LAW REFORM AND THE EUROPEAN COMMISSION'S AGENDA

Professor Robert Clark* *considers the implications of the recent Commission Communication on European Contract Law for the future convergence and possible harmonisation of substantive contract law rules in Europe.*

Introduction

European integration, within the context of conscious efforts to produce convergence of structural and doctrinal matters, sometimes relies upon appeals to historical circumstances. Surprisingly, perhaps, this is becoming increasingly evident in some areas of private law. Scholars such as Professor R. Zimmerman, *in The Law of Obligations, Roman Foundations of the Civilian Tradition*[1] argues that, from the middle ages to the French Revolution, Europe enjoyed a *ius commune* and that the English common law tradition (European in its inception) was not significantly radically different from continental law in terms of methodology and legal rules. We may add, of course, that the law merchant,[2] as a European trading code, also hints at a level of pre-Napoleonic convergence of substantive private law. The recent work of Lando and Beale[3] in producing a major study on European contract law,[4] the research of the Hondius Group in relation to the European Civil Code,[5] and groups such as SECOLA,[6] all point towards a significant level of scholarly co-operation in this field within Europe. The European Commission has been financially supportive of many of these initiatives and is also active as an agency that is keen to obtain empirical evidence, even if anecdotal in nature, on the extent to which substantive contract rules may inhibit the Single Market. Observations from Irish commercial players are welcome,[7] but it would be a mistake to see the European Commission's latest text as only being an information gathering exercise.

The Commission Communication

The Communication from the Commission to the Council and the European Parliament on European Contract Law[8] has attracted a significant amount of exposure and attention. The reason for this is I think rather obvious. The title of the document itself suggests some kind of expansionist agenda on the part of the European Commission. Is Brussels about to abolish some quinky features of national private law such as the rule against past consideration or promissory estoppel? Recall Jim Hacker's successful candidacy for Prime Minister in *Yes Minister*[9] by seizing upon the issue of saving the British sausage from abolition by Brussels. In reality, the Communication is a rather modest one: it is, to quote the Executive Summary, "intended to broaden the debate on European Contract law involving the European Parliament, Council and stakeholders, including businesses, legal practitioners, academics and consumer groups."

In truth the Communication should be seen as a text which can be said to come rather late into an already active debate on the need for greater harmonisation of civil law in Europe generally, and European contract law in particular. The European Parliament as far back as 1989[10] sponsored moves to have a common code on civil law drawn up, and in 2000 the European Parliament stressed that "greater harmonisation of civil law has become essential in the internal market."[11] The Council of Ministers also set an agenda for substantive law scrutiny and approximation of laws at Tampere in 1999,[12] and the Commission has now responded by way of the present Communication. The Commission however has actively supported harmonisation initiatives in the form of the Beale and Lando study, *Principles of European Contract Law Parts I and II*[13] as part of the Single Market agenda, and, as the originators of Community legislation, the European Commission has, in effect, created the substantive law provisions that make up the *Acquis* Communautaire. The *Acquis* is essentially composed of a number of core directives, supplemented by sectorial initiatives in areas such as public procurement, commercial agency, insurance and financial sectors such as investment services. The Communication itself[14] identifies the Directives on consumer goods and guarantees,[15] on unfair contract terms in consumer contracts,[16] on package holidays,[17] distance contracts,[18] doorstep contracts,[19] consumer credit[20] and timeshares[21] as being central to the evolution of common principles. But the Communication also acknowledges that other texts such as those dealing with direct marketing and privacy, and electronic commerce, are also central to the harmonisation movement. This leads to one important conclusion; because the approach

to legislation in the area of substantive rules on private law is "piecemeal", to use the Commission's own term,[22] it is difficult to disentangle "core" values from the "penumbra".

Let me give an example of this from the area of data protection. The ability of a seller to use unsolicited marketing techniques - postal mail, automated dialling, SPAM, for example - to put products or services before identifiable individuals has been the subject of at least 5 directives.[23] This means, in private law terms, that the ability of business to issue invitations to treat or offers is constrained by the privacy interest. But the shape of legislation has ebbed and flowed, there being no clear rule about whether the offer or invitation to treat can only be made if individuals have chosen to receive the message (opt in) or if they have not previously objected to receiving the message (opt out). Clearly, business interests prefer the latter, while consumer interests choose to champion the former.[24] In an e-commerce age, the resolution of this issue is of central importance, but for the moment there cannot be said to be a clear rule on invitations to treat which forms part of the *acquis*. There are some specific provisions in the Distance Contracts Directive about marginal commercial technologies such as automated dialling and the need for prior consent of consumers,[25] but specific rules of this kind are not of much practical importance even to mainstream issues such as pre-contractual communications by sellers.

"Vicarious" Harmonisation

Apart from community texts, the Communication draws attention to other international instruments that would compel a degree of convergence, should they be adhered to by all member states. Interestingly, the Communication does not appear to view these other texts as being very significant. In particular, the Communication draws attention to the quite staggering lack of uniformity in relation to the adherence of member states to broader international texts. The 1990 Vienna Convention on Contracts for the International Sale of Goods is in force in 12 of the 15 Member States, but the UK, Ireland and Portugal are not contracting parties.[26] UN Conventions and Unidroit texts, as well as Council of Europe instruments, have also been largely ignored throughout Europe. In Ireland, Irish law has given effect to those provisions of the UNCITRAL model law on e-commerce, and the 1962 Council of Europe Innkeepers Convention.[27]

The point here is a rather simple one. The European Commission suggests that, in the absence of a broader international consensus on international commercial law rules, there will be a need for greater Community harmonisation. For the Commission, the issue is about the form such harmonisation will take at Community level, and in this context it is believed that other international texts will not be of any real significance in the EU.

Substantive Law Rules and the *Acquis* Communitaire

If we return to the earlier characterisation of "core" Community rules, as distinct from peripheral or atypical rules, we find that there are several common issues or approaches to problem resolution that the key Community texts identify. At the level of legal principle, for example, we can detect the influence of the duty to bargain in good faith or perform a contract in good faith as being central to the Unfair Terms Directive as well as to the Commercial Agents Directive. But is this a core principle? Given that the Unfair Terms Directive relates to business to consumer sales only, it is difficult to see that the *acquis* can be said to place this principle in lights, so to speak. If we try and also test whether such a principle is representative of national law, we can say that German law and the recognition of such a principle via scholarly championing of the principle of *culpa in contrahendo* would answer in the affirmative. But English judges are hostile to the principle when it is pleaded in the context of formation of a contract,[28] and Irish decisions, such as they are,[29] stop short of enunciating a general principle either way. Uniform Community texts on the formation and evidencing of a contract are also threadbare. I have drawn attention to the failure to resolve the issue of pre-contractual communications to identifiable persons, and only inertia selling rules are identified by the Communication as constraining freedom of movement.

While all the directives set out provisions on pre-contractual information requirements, and information requirements at and after the time of contracting, these rules differ as between each text and they have been criticised for lack of precision[30]. To return to the offer and acceptance rules for a moment, the Communication notes that the Vienna Convention has rules on formation but it should be noted that even through this is the case, they do not represent, nor could they represent, an international consensus on the best, or indeed the most practicable, approach to some formation issues.[31] The *acquis* is also strong in relation to cancellation rights in relation to doorstep contracts, consumer credit and timeshares, for example[32]. To this extent the *acquis* is consistent. Again, these examples are generally confined to consumer transactions. Other remedial provisions can be detected, as in the repair/replacement/price reduction remedies in the 1999 Directive on the Sale of Consumer Goods, but such detail is the exception that proves the rule. The rule is this; save in the area of consumer protection legislation, where pre and post contractual obligations to provide information abound, and where termination/cooling off period provisions are also common, Community legislation cannot be said to represent a coherent and consistent set of norms. True, there are some examples of horizontal harmonisation by "mosaic" texts[33] such as the

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e-Commerce Directive, the Directive on Distance Contracts and the Directive on Distance Marketing of Consumer Financial Services, but the most that can be said of such texts, as harmonisation models, is that each seems to be specific to electronic commerce. But again it has to be stressed that the application of most of the directives depends upon the existence of a supplier to consumer relationship, and it follows that where the transaction is a business to business contract there is no application for the *acquis* even if some legislation in member states may apply the Community rule to non-consumer transactions.[34] This is not to say that the *acquis* cannot affect business to business deals.[35]

Why is the European Commission concerned?

In most instances where the European Commission has prompted legislation in order to address contractual practices that are thought to undermine community interests, the legislative response has been predicated on the view that contractual practices such as licensing in the manufacturing industry may restrict competition. Thus, the need for legislation in the form of block exemptions, but again, the solution to this problem does not involve reform of substantive contract law but, rather, reform of contractual practices via standard clauses and notification mechanisms. Even in public procurement situations, contractual practices are required to conform to norms that do not change the substantive contractual rules within a proposed contract. However, there are some exceptions. In the area of intellectual property law the ability of a software licence to constrain the lawful user to de-compile a program is controlled by the 1991 Directive[36] as transposed into Irish domestic law[37], and the ability of parties to certain kinds of copyright transfers to "contract out" of exploitation rights is regulated in some instances.[38] These are very limited exceptions, and the uncertainty surrounding the status of the "work for hire" doctrine, as part of the Community *acquis*, attests to this fact.[39]

Community Divergence

The European Commission is concerned about the possibility that some conceptual tools may differ as between member states and that such differences may produce uncertainties and significant disparities of result. Examples given include the concept of damage in various national laws[40] and in particular the different approach to moral damage in relation to amenity or holiday contracts.[41] The European Commission also instances the different approaches that exist in relation to mandatory rules to regulate the liability of subcontractors.[42] As a single market exercise the European Commission expresses concern that different national laws might create disparities in transaction costs, as well as invoking the possibility that if certain member states have dispute resolution mechanisms that impose higher costs on businesses such factors will be a disincentive to trading within that market or will create competitive disadvantages[43] that will otherwise impede the development of the single market. In some situations the European Commission is clearly right to be concerned about the match between national laws and the extent to which contractual practices may impede competitiveness. For example, the tardiness of many debtors when paying contract debts can cause problems for SME's and of course the economic consequences may be severe, thus prompting a harmonisation measure in the form of the Late Payment.[44] But this is not a harmonisation of contract law issue; the Directive itself in recital 16 states that late payment constitutes a breach of contract.[45] What is being harmonised are payment rules and practices. Even though Ireland has legislation in place the Directive will compel a thorough review of, and some significant adjustments to, the 1997 Irish Act.[46] The Communication also puts forward some rather "false" problems in the sense that the Communication includes problems of incorrect or overlapping transposition of directives into national law, and it would be prudent to clearly distinguish between cases of this kind and true divergence issues.

The Four Options

In the Communication, the European Commission sets out four possible options in relation to the convergence of European contract law. These four options are:

1. For no action to take place, in other words, to leave the market to evolve contractual solutions which will solve some of these problems.[47]
2. To promote the development of a common contract law - a methodology driven by academic and practitioner led solutions.[48]
3. To improve the quality of existing legislation, to be achieved by reviewing and refining existing instruments.[49]
4. To promote new legislation in the form of new texts in the form of regulations or directives.[50]

It is my view that the first option will not be adopted. The history of Community involvement in private law reform suggests that market led solutions are not favoured; even in areas where the consumer protection agenda is not predominant as in the electronic commerce directive, the European Commission does not accept the desirability of a "leave alone" philosophy; regulation may be light (witness the modesty of the articles in the Electronic Commerce Directive on liability), but at least it is regulation in the form of legal norms. Nor does this writer expect the fourth option to be endorsed. Community legal texts in the area of copyright law, to provide an appropriate parallel, suggest that the chances of forcing agreement on mandatory rules or closed list solutions to harmonisation problems are not good. The Database Directive for example has led to differing transposition approaches in Member States,[51] although it would be stretching things to argue that the law is less harmonised now after the Database Directive than before. The "pick and mix" approach to the exceptions to the reproduction right and the making available right in the Information Society Directive[52] provides another example of inefficient convergence standards while the failure of the European Commission to address issues of abuse of bargaining power in relation to copyright licensing shows the real strength of the Commission vis-a-vis market forces.[53] One need only recall the fate of the 1991 Liability for Uniform Services Directive to suspect the lack of enthusiasm in Member States for top down legislation in the form of a Law of Contract regulation or directive. It is my guess, as an uninformed outsider, that the initiatives that will emerge will be a combination of options (ii) and (iii). The Commission will build upon the existing Code jurisprudence, will promote new research, and will continue to refine existing texts. On this latter point, it is to be hoped that greater uniformity on critical matters of detail will result. The cancellation rights and performance deadlines set by many of the Directives often depart radically from each other (for no apparent good reason), and when these provisions are transposed into national laws confusion is often heaped upon confusion. For example, SI 207 of 2001 giving effect to the Distance Contracts Directive is a model of opaqueness in this regard. It may also be expected that the European Commission may take a proactive approach to the development of sectoral codes and

contract models. An example can be bound in the area of personal data transfer to third countries and the work of the Article 29 Committee on preparing model contract provisions. One suspects that the European Commission and the European Parliament may well seek to produce a legislative text that may sanction the development of such codes rather than simply hoping that sectoral interests may produce standard contracts that are not anchored in the same way as is the work of the Article 29 Committee.[54]

Perhaps the biggest obstacles to the realisation of a modern European common law of contract are not too hard to identify. The communication itself identifies the principles of subsidiarity and proportionality as being critical legal and constitutional constraints. Subsidiarity killed off the 1991 Services Directive[55] and it has toned down the text of several Commission proposals, particularly the liability provisions in the Electronic Commerce Directive. But even if these principles are met, can we be satisfied that there is sufficient agreement on the normative provisions that will make up the common contract law of Europe? Are differences really more apparent than real? Work undertaken in various research projects across Europe appears to suggests that similar commercial problems are solved in the same way, in terms of net results, but the conceptual tools differ quite widely even as between jurisdictions that share the same historical traditions. On the other hand, any student of US Restatement jurisprudence or USA Uniform Commercial Code litigation will discern different patterns of decision making, especially at Circuit Appeals level, so this is not a uniquely European problem.

Implications for Irish law

If the present writer has been unduly negative so far about the Communication it is in the main because I do not think that there is sufficient evidence to support two central propositions that the Communication implicitly asserts:-

(a) that the State Market is being impeded by national contract laws;

(b) there is sufficient common ground to warrant the production of a meaningful uniform model that could pass either the subsidiarity or proportionality tests.

However, the fact that Community legal texts in the area of contract law have emerged is a matter for rejoicing. Without the need to transpose EU Directives as a counterweight to the virtual apathy that exists in Leinster House to reform of lawyers' law, such as the law of contract, the scope of our commercial law statute book does not bear thinking about. Three simple examples come to my mind. Contracts for the sale of goods to the value of £10 or more, when executory, are unenforceable unless evidenced in writing.[56] Contracts to buy a house are still governed by a law dating back to 1695.[57] Finally, there is still no legislative (or indeed judicial) answer to the question: What degree of restitution is possible following upon a frustrated contract?[58] Other examples will readily spring to the mind of readers with even a cursory knowledge of Irish commercial law. In terms of statutory reform of specific contractual matters, the record of the Oireachtas in the last thirty years has not been uniformly threadbare. Statutory rules relating to marriage contracts and employment contracts have transformed by significant legislative initiatives but, apart from consumer protection statutes enacted in 1978, 1980 and 1995, primary legislation in substantive areas of contract law has been sparse indeed. Sadly, the appetite in Ireland for commercial law reform in general has not been whetted by reform proposals originating in the Law Reform Commission. In the area of substantive law, there are really only three of the first 64 Reports of the Law Reform Commission that can be said to be primarily contractual in nature. These are Report No. 15 on Minors Contracts,[59] Report No. 42 on the Vienna Convention[60] and the Gazumping Report.[61] None of these reports have resulted in legislative amendments of even in draft bills. The work of the Law Reform Commission has, on the whole, shown a decided focus towards family law, criminal law and procedure, tort, and land law and succession. The excellent work that the Law Reform Commission does must be acknowledged, but it has not been a forum for effecting changes to Irish commercial law in general and contract law in particular. There are some very hopeful signs that in its new programme for the years 2000 to 2007[62] the Law Reform Commission will focus on some key issues of electronic commerce law, and the intention to examine the doctrine of privy of contract is to be welcomed.[63]

So, while I welcome the scope[64] of Community legislation in ensuring that Irish commercial law is kept relevant to international commercial conditions I do not think that it is at all healthy for Irish commercial law to be exclusively shaped by the Community legislator. Some consideration should be given to evolving new ways of codifying, revising or renewing Irish commercial law and/or contract law. Support for a government Commission on Contract Law from the legal profession would be a welcome first step and, given the topicality of the European Commission Communication, there appears to be no more opportune time for new institutions and fresh resources to be put together to allow Ireland to play a full part in shaping the new European commercial law.

Conclusion

The movement towards the creation of a European Civil Code, with particular relevance to contract law and commercial law generally, is gathering pace. While the Community texts are uneven in terms of application to areas that are not firmly within the consumer protection or single market camps, there are significant developments in relation to formation rules and pre- and post-contractual notice transparency rules. Even if core values such as the duty to contract in good faith remain of uncertain scope, the European Commission will, in all probability, push forward with model contract solutions and a more expansive and integrated approach to existing and future legislation. It is this writer's view that a European Code is not likely to emerge from the Communication and subsequent events. If Irish contract law is to be capable of addressing even basic issues that existing statute law and case law is currently uncertain about, the Communication affords an opportunity to effect root and branch transformation of this key area of private law. But new resources, new thinking and a completely different attitude to commercial law reform is needed if Irish contract law is not to stagnate further.[65] ●

"Some consideration should be given to evolving new ways of codifying, revising or renewing Irish commercial law and/or contract law. Support for a government Commission on Contract Law from the legal profession would be a welcome first step."

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1. Clarendon Press, (Oxford), (1996)
2. Holdsworth, *A History of English Law* Vol. 1 pp. 562 - 573, stressing the importance of the laws of Oleron in shaping English commercial law decision-making.
3. The Lando Commission.
4. *Principles of European Contract Law Parts I and II* (Kluwer) (2000)
5. Hartkamp, Hesslink, Hondius, Joustra, Du Perron (eds) *Towards a European Civil Code*(2nd ed) (Kluwer) (1998)
6. Society of European Contract Law (www.secola.org).
7. COM (2001) 398 Final paragraph 35, on inconsistencies between EC rules; e-mail address is *European - Contract - Law @ cec.eu.int.* It is understood that submissions are still being collated.
8. COM (2001) 398 Final
9. *See Yes Prime-Minister - The Scripts* (BBC) (1984)
10. OJC 158, 26.6, 1989, p. 400.
11. European Parliament Resolution of 16 March 2000; OJC 377, 29.12. 2000 p. 323.
12. Presidency Conclusions, Tampere (SI (1999) 800).
13. (Kluwer), (2000).
14. Paragraph 8.
15. 1999/44/EC. See Bird (2001) 9 ERPL 279 on transposition into Irish law.
16. 93/13/EC. See S.I. No. 27 of 1995.
17. 90/314/EC. See the Package Holidays and Travel Trade Act 1995.
18. 97/7/EC. See S.I. No. 207 of 2001.
19. 85/577/EC. See SI No. 224 of 1989.
20. 87/102/EC. See the Consumer Credit Act, 1995.
21. 94/47/EC. See SI. No. 204 of 1997.
22. Paragraph 35.
23. 95/46/EC; 97/7/EC; 97/66/EC; 2000/31/EC and the proposed new Telecoms Data Protection Directive.
24. This tension is not confined to data protection: see the debate over the Brussels Regulation and Rome II as discussed by Motion [2001] CTLR 209.
25. These are not transposed by S.I. 207 of 2001 and must await the long overdue Data Protection Bill.
26. Paragraphs 18-20. For an Irish debate on adherence see LRC Report 42 (May 1992).
27. In the Hotel Proprietors Act 1963 and the Electronic Commerce Act 2000. On the latter see generally, Haigh, *Contract Law in e-commerce Age (Roundhall) (2001).*
28. *Walford v. Miles* [1992] 2 AC 128
29. *Rooney -v- Byrne* [1933] IR 609; *Carroll v An Post National Lottery* [1996] 1 IR 443.
30. See the discussion on the Distance Contracts Directive, Article 5, in Brownsword and Howells [1999] J.B.L. 287 at 300 - 303.
31. See Clark, *Contract Law in Ireland* (4th ed) p. 14 - 15.
32. Some commentators have doubted their effectiveness. Eg., see Brownsword and Howells, op.cit.
33. Mosaic in the sense that similar or identical rules are used in different directives to deal with the same or similar issues, in this case direct marketing.
34. Inertia selling rules in the distance contracts rules in S.I. No. 207 of 2001 reflect the sale of goods rules found in the Sale of Goods and Supply of Services Act 1980.
35. Eg, E.U. Competition rules and the Electronic Commerce Directive.
36. Eg, E.U. Competition rules and the Electronic Commerce Directive.
37. 91/250/EC
38. S.I. No. 26 of 1993, as replaced by the Copyright and Related Rights Act, 2000.
39. See Directive 92/100/EC
40. Contrast article 2.3 of Directive 91/250/EC on ownership of computer programs with recital 29 of the Database Directive (96/9/EC). On this latter point the Irish legislation has opted for work for hire; section 23(1) of the Copyright and Related Rights, Act, 2000.
41. Communication, footnote 18.
42. Communication, footnote 19
43. Communication, footnote 15
44. Communication, paragraph 32.
45. 2000/35/EC
46. Prompt Payment of Accounts Act 1997
47. For example extension of the law to professionals with significant results of the Irish legal profession. I am grateful to Eugene Regan for this point.
48. Paragraphs 49 - 51
49. Paragraphs 52 - 56
50. Paragraphs 57 - 60
51. See the study by Gester in [2000] Comms. Law 347
52. 2001/29/EC
53. See comments by Hugenholtz [2000] EIPR 499
54. In an important article in which he advocates a codification by way of multilateral treaty, Van Gerven explores the legal basis for codification; see [2001] ERPL 485 AT 495-6
55. OJ 1991, C 12/8, principally because of opposition to liability rules for telecommunications operators and information service providers
56. Sale of Goods Act 1893, section 4. Whey was this not repealed in the 1980 legislation?
57. Statute of Frauds 1695. But see the Electronic Commerce Act 2000 on evidentiary issues.
58. No Irish statute has been passed to address the remedial dimension of frustrated contracts and case law is inconclusive.
59. The Communication specifically excludes employment contracts and family law: See paragraph 14.
60. (1985)
61. (1992)
62. LRC59-1999
63. LRC - Second Programme 2000 (PN 9459).
64. Note the preparation of a draft SI by the Department of Enterprise, Trade & Employment to remove the privity doctrine from the Article 26 transfer to third countries problem in areas of data protection law. The UK has solved this problem by primary legislation on privity of contract.
65. The *shape* of Irish law as a result of community legislation, on the other hand, is very unsatisfactory. With the exception of the areas of consumer credit and the Package Holidays Directives, all transposing measures have been Statutory Instruments with the resulting loss of clarity due to the absence of parliamentary scrutiny or other critical review of proposals, as well as the resulting domestic democratic deficit (for which the EU is not responsible).

HAT MAKES A TERM IN A STANDARD FORM CONTRACT UNFAIR?

In the light of recent English authority, ***John Breslin BL*** *considers the options open to the Irish Courts for testing whether a term in a consumer contract is unfair.*

Introduction

Recently the Director of Consumer Affairs ('the Director') obtained an order from the High Court[1] to the effect that certain specified terms in standard form building contracts were unfair pursuant to the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995.[2] The Director obtained the order pursuant to Regulation 8 which enables her to apply to the High Court for such an order. This was the first use by the Director of her powers under the Regulations. The case dealt with certain terms and conditions of standard form house-building contracts. No written judgment appeared however.

Not only do the Regulations give the Director certain regulatory powers with regard to standard form consumer contract terms, they are, of course, also framed in such a way that consumers can treat unfair terms as unenforceable. Accordingly, the Regulations are of immense importance to advisors to any business which operates in the retail area, and to advisors to aggrieved consumers. Given the fact that no judgment appeared to have been handed down in the recent case brought by the Director, those advising businesses or consumers must look elsewhere for discussion of the basis upon which particular terms will be unenforceable under the Regulations.

The framework of the regulations

The Regulations implement the EC Council Directive on Unfair Terms in Consumer Contracts.[3] The Directive can accordingly be called in aid in interpreting the Regulations. The Regulations apply to any standard form contract between a consumer (being an individual acting outside the course of a trade, business or profession) and a business selling goods or supplying services to the consumer.

Some guidance is given in the Regulations as to what 'unfair' means. First, Regulation 3 (2) provides as follows:

> 'For the purpose of these Regulations a contractual term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, taking into account the nature of the goods or services for which the contract was concluded and all the circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent.'

Furthermore, Schedule 3 to the Regulations contains an indicative and non-exhaustive list of generic terms which are deemed to be unfair. They include such things as terms which attempt to bind the consumer to terms before he or she has had the opportunity to become acquainted with it, or inappropriately binding the consumer to obligations where the supplier of goods or services is excused from its obligations.

The order made recently with regard to the standard form house-building contracts affords good examples of terms which might be adjudged unfair in the light of Schedule 3 to the Regulations:

(a) One term (Term 2 in the first schedule to the order) was to the effect that if the consumer failed to pay any instalment of the contract price on time, then the builder could sell the property, whereupon the builder could keep any profit arising from the sale, but if there was a loss on the sale the consumer was liable. Presumably this was struck down on the basis that it provided that the consumer would pay a disproportionately high sum in compensation for his or her breach (paragraph 1 (e) of Schedule 3 to the Regulations).

(b) Term 10 provided that the builder could freely assign the benefit of the building contract but the consumer had no equivalent right. Presumably this was struck down because of paragraph 1 (p) of Schedule 3 to the Regulations, which prohibits terms which give the seller of goods or supplier of the service the possibility of transferring its rights and obligations without the consumer's agreement, where this may serve to reduce the guarantees for the consumer.

(c) Term 12 contained a wide exclusion clause exempting the builder from any liability for any loss or damage sustained by the consumer by reason of any delay howsoever caused. Presumably this was impermissible in the light of paragraph 1 (b), which prohibits the inappropriate exclusion or limitation of liability on the part of the

seller/supplier in the event of total/partial non-performance, or inadequate performance by the seller/supplier of its contractual obligations.

The order made by the High Court in the case brought by the Director concerned specific clauses in house-building contracts. However, some of the clauses struck down are of potentially wide application, and are commonly found in contracts of various types. Term 1, for example, was a common enough type of clause - the 'entire agreement' clause. Here, the parties agree that the written contract constitutes the entire agreement between the parties so that the obligee cannot seek to derive contractual rights from the obligor's oral representations or warranties, or from terms contained in extraneous documents (e.g. correspondence).

The notion of 'good faith' is one which is, in general, alien to contract law in Ireland and in the United Kingdom.[4] Mere inequality in bargaining power in itself creates no legal consequences in contract law, and the grounds for attacking contractual provisions in normal trading relationships as being unconscionable is severely limited. Accordingly the Regulations introduce an important ground for attacking contractual provisions in standard form consumer contracts.

In determining whether a term satisfies the requirement of good faith, regard is to be had to matters set out in Schedule 2 to the Regulations. These are (a) the strength of the parties' respective bargaining positions; (b) whether the consumer had an inducement to agree the term; (c) whether the goods or services were sold or supplied to the special order of the consumer; and (d) the extent to which the supplier has dealt fairly and equitably with the consumer (whose legitimate interests he has taken into account).

The Regulations apply to all the terms in a standard form contract other than what the United Kingdom parliament has, in its equivalent of the Regulations, dubbed 'core terms'. Core terms are effectively terms which relate to the consideration or other basic commercial features of the contract. So Regulation 4 provides as follows:

> 'A term shall not of itself be considered to be unfair by relation to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, as against the goods and services supplied, in so far as these terms are in plain, intelligible language.'

Accordingly, the aim of the directive was not the promotion of better trading standards or the control of price and quality.

The Regulations preserve the *contra proferentem* rule of construction and provide that any unfair term is deemed to be unenforceable against the consumer. Accordingly, while much of the content of the Regulations merely confirms judicially created mechanisms for correcting an imbalance as between contracting parties (such as the *contra proferentem* rule, and certain of the Scheduled terms) the Regulations represent a fundamental realignment in the balance of power between a consumer and a retailer or retail service provider.

First National Bank plc case - United Kingdom

Significant assistance can be obtained by those advising consumers or businesses from the recent decision of the House of Lords in *The Director General of Fair Trading v First National Bank plc.*[5] This, too, was the first decision under the United Kingdom equivalent of the Regulations.

The facts of the case were as follows. The Plaintiff is the equivalent of the Director and is charged with the enforcement of the UK equivalent of the Regulations. The Defendant ('the Bank') was a licensed credit provider which provided re-mortgaging facilities to consumers. The terms of the Bank's standard form contract included the 'boiler plate' provision that interest on outstanding principal would accrue not only before any judgment obtained by the Bank, but also after it. The term also provided that any interest accruing after judgment would not merge with the judgement. This provision arises from the phenomenon which occurs when judgment is granted upon a contract debt. The contract merges with the judgment and the principal becomes owed under the judgment and not the contract. Unless otherwise excluded by contract,[6] any interest obligation also merges with the judgment such that interest accrues pursuant to the court's power to award interest - and not under the contract. If there is no merger of the contract with the judgment, then the interest meter continues to tick.

While the interest provision was somewhat technical, even arcane, it had significant implications for defaulting debtors against whom the Bank obtained judgment. A judgment debtor could be given the right to repay the judgment debt by installments, or over a period of time (referred to as a 'time order'). If he complied with such an order, the effect of the 'no merger' provision in the loan agreement was that he none the less faced a bill for contractual interest accruing post-judgment. Depending on the rate of interest, and the duration of the installments, the post-judgment interest could exceed the amount of the judgment. The judgment debtor could, in fact, avoid this happening by asking the court to write off the interest - but few judgment debtors (or their advisers) appeared to be aware of this.

The Director General of Fair Trading brought proceedings to have the term declared unfair. As far as the Director General of Fair Trading was concerned, the issue was essentially one of transparency, namely the concern that the average consumer would not be aware of the effect of the clause if he defaulted on the loan and repaid the amounts due pursuant to an instalment order made by the court.

First National Bank plc - first instance

At first instance Evans-Lombe J dismissed the Director General's application.[7] He took the view that the provision with regard to post-judgment interest was not inherently unfair. He said:[8]

> 'As a first step in answering the question whether the provisions of [the relevant term] are unfair, it seems to me appropriate to stand back, and without reference to statute or authority, consider whether, had a potential borrower had the effect of [the relevant term] drawn to his attention immediately before entering into a loan agreement containing that clause, he would immediately have replied to the question that they were unfair.'

He then considered that because the effect of the provision was to require the agreed rate to be paid so long as the amounts owing where outstanding it could not be viewed as inherently unfair.

As well as potential unfairness in substance, Evans-Lombe J considered whether there was any procedural unfairness. In other words, did the term deprive the consumer of an advantage he may reasonably be expected to receive? Evans-Lombe held that the actual term complained of did not do so - although he strongly hinted that if there were procedural unfairness in this regard, it arose from consumers being unaware of their right to ask the court to reduce or extinguish altogether the rate of interest payable.[9]

First National Bank plc - Court of Appeal

The Director General of Fair Trading appealed to the Court of Appeal, who reversed the decision of Evans-Lombe J. The Court of Appeal was swayed by the transparency issue. Peter Gibson LJ was unenthusiastic about the trial judge's approach - namely to ascertain the fairness or otherwise of a term by reference to a hypothetical borrower. He said:[10]

> "The test of unfairness is not to be judged by personal concepts of inherent fairness apart from the requirements of the directive and the regulations, and we are far from convinced that a borrower would think it fair that when he is taken to court and an order for payment by installments has been tailored to meet what he could afford and he complied with that order, he should then be told that he has to pay further sums by way of interest...
>
> In our judgment the relevant term is unfair within the meaning of the regulations to the extent that it enables the bank to obtain judgment against a debtor under a regulated agreement and an instalment order...without the court considering whether to make a time order, or, if it does and makes a time order, whether also to make an order...to reduce the contractual interest rate. The bank, with its strong bargaining position as against the relatively weak position of the consumer, has not adequately considered the consumer's interests in this respect. In our view the relevant term in that respect does create unfair surprise and so does not satisfy the test of good faith, it does cause a significant imbalance in the rights and obligations of the parties by allowing the bank to obtain interest after judgment in circumstances when it would not obtain interest under [the relevant courts legislation] and no specific benefit to compensate the consumer is provided, and it operates to the detriment of that consumer who has to pay interest."

These comments are interesting in that the court was prepared to contemplate unfairness arising from the actual operation of the clause in particular circumstances rather than by reason of inherent unfairness in the term itself.

First National Bank plc - House of Lords

The Bank appealed successfully to the House of Lords. Like the trial judge, their Lordships were of the view that there was nothing inherently unfair in the Bank bargaining for interest to be paid after judgment was entered against the borrower. Like Evans-Lombe J (but unlike Peter Gibson LJ) Lord Millett was of the view that the 'reasonable borrower' test was a useful one for evaluating whether the term was or was not fair. Their Lordships recognised that borrowers who had defaulted on loans and who had judgment entered against them and were given time to repay the judgment debt would be legitimately aggrieved by the fact that contractual interest would continue to run - notwithstanding that the borrower made all his instalment payments. However, their Lordships were of the view that this phenomenon did not render the actual term unfair. Rather, this called for amendment to the scheme for the granting of judgments at in the County Court,[11] so that the court could factor into the judgment any contractual interest to be paid. From this it might be extrapolated that for a term to be unfair under the Regulations, it is not enough that in particular circumstances the consumer might be aggrieved by its operation. Something over and above this must be established.

There seemed to be general consensus as to what this additional factor was. In Lord Bingham's words:[12]

> "A term falling within the scope of the regulations is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith. The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty...The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the consumer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the customer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the regulations."

Lord Millett put it this way:[13]

> "There can be no one single test...It is obviously useful to stress the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. But the

"For a term to be unfair under the Regulations, it is not enough that in particular circumstances the consumer might be aggrieved by its operation. Something over and above this must be established...The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty...The requirement of good faith in this context is one of fair and open dealing."

> inquiry cannot stop there. It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion. The list is not necessarily exhaustive; other approaches may sometimes be more appropriate."

Lord Millett took the view that the hypothetical borrower would not be surprised by a term which meant that contractual interest would accrue after judgment until payment. He also pointed out that this is a standard term in commercial loan facilities. The unfairness arose not from the actual term, but from the fact that due to a quirk in the rules of the County Court, the court's judgment would not necessarily encompass all of the borrower's contractual commitments.

The key difference between the approach taken by the Court of Appeal and the House of Lords, respectively, appears to be that the House of Lords was not prepared to hold that a term was unfair because it operated in a prejudicial manner in particular circumstances. The Court of Appeal, by way of contrast, was prepared so to hold; and in addition, the question of contractual transparency was an important issue. The contract should not contain hidden 'traps'.

Core terms

Whilst the judges at first instance and on appeal were divided as to whether the impugned term was unfair, they were unanimous in rejecting the Bank's contention that the term was a 'core' term and accordingly immune from attack pursuant to the Regulations. Lord Steyn said this about UK Regulation 3 (2) (the equivalent of Regulation 4 which states that 'core' terms are outside scrutiny):[14]

> '...reg 3 (2) must be given a restrictive interpretation. Unless that is done reg 3 (2) (a)[15] will enable the main purpose of the scheme to be frustrated by endless formalistic arguments as to whether a provision is a definitional or an exclusionary provision. Similarly, reg 3 (2) (b)[16] must be given a restrictive interpretation. After all, in a broad sense all terms of the contract are in some way related to the price or remuneration. That is not what is intended. Even price escalation clauses have been treated by the Director as subject to the fairness provision...It would be a gaping hole in the system if such clauses were not subject to the fairness requirement.'

Conclusions

It is submitted that the following conclusions can be drawn from the House of Lords decision in the *First National Bank* case:

1. The burden of proof is on the consumer, or the Director, to satisfy the court that a particular term is unfair.

2. The court will be astute to attempts to characterise the term as a 'core' term in an artificial or contrived manner thereby rendering it immune from challenge.

3. The term, in order to be struck down, must be inherently unfair: it is not enough if it turns out to be unfair in particular circumstances or due to extraneous factors.

An important issue for advisers to consumers and businesses is to predict whether the Irish courts would adopt the restrictive approach evident in the ruling of the House of Lords, or the broader approach based on contractual transparency manifested by the Court of Appeal decision. It may be that the obligation impliedly imposed on service providers by Schedule 2 to the Regulations to take into account the legitimate interests of the consumer may impel the court towards the approach adopted by the Court of Appeal. Contractual transparency is, arguably, one of the consumer's legitimate interests. ●

1. In the matter of an application pursuant to Regulation 8 (1) of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995: Record No 229SP/2001, hearing dated 5th December 2001.
2. SI No 27 of 1995, as amended by S.I. No. 307 of 2000, which enables consumer organisations established for the purpose of protecting consumer rights to bring an application for injunctive relief.
3. Directive 93/13 of 5th April 1993.
4. *Interfoto Picture Library Limited v Stiletto Visual Programm Ltd.* [1989] QB 433.
5. [2001] 2 All ER (Comm) 1000.
6. *Economic Life Assurance Society v Usborne* [1902] AC 147
7. [2000] 1 All ER 240.
8. *Ibid.* at 249.
9. As was done in Southern and District Finance plc v Barnes [1996] 1 FCR 679.
10. [2000] 2 All ER 759 at 770.
11. The jurisdiction for the making of orders under agreements regulated under the UK consumer credit legislation.
12. [2001] 2 All ER (Comm) 1000 at 1010.
13. *Ibid.* at page 1021.
14. *Ibid.* at page 1015.
15. Which effectively provides that the definition of the subject matter of the contract is immune from scrutiny.
16. Which effectively provides that the price or remuneration is immune from scrutiny.

PRINCIPLED DISCRETION: TOWARDS THE DEVELOPMENT OF A SENTENCING CANON

In a comprehensive analysis of recent sentencing practice, ***Tom O'Malley BL,*** *Lecturer in Law, NUI Galway, identifies emerging principles governing the exercise of sentencing discretion in the Irish Courts.*

Introduction

The Irish sentencing system has its share of critics at home, but abroad it has some admirers who approve of the authority still vested in our judges to consider the circumstances of the offender as well as the nature of the offence when selecting sentence.[1] The admirers are mostly to be found in jurisdictions where, during the past few decades, strategies of various kinds, including mandatory sentences and guideline systems, have been introduced in order to curtail judicial discretion. In many cases, these strategies have caused more problems than they have solved, and in some American states pressure is now growing to reallocate more discretion to judges. For example, the Governor of New York has recently promised to amend the Rockefeller drug laws which were adopted in the 1970s and which provide for draconian mandatory penalties for certain drug offences.[2] This is not to suggest that the international tide of professional and political opinion has turned conclusively in favour of judicial discretion. Some guideline systems have proved reasonably successful,[3] and there are many committed advocates of formal structures to reduce disparity and promote consistency. When Kate Stith and Jose Cabranes, a Yale professor and a federal judge respectively, published *Fear of Judging*,[4] a trenchant and highly-esteemed critique of the U.S. federal guidelines, an equally distinguished critic accused them of reflecting "a mesalliance between post-modern scepticism of the very idea of rational legal rulemaking and a near-mystical vision of individual judges as the sole legitimate dispensaries of moral judgment in criminal law."[5] The debate continues.

Our sentencing system remains highly discretionary; that much is certain. It has the advantage of allowing the particular circumstances of each case to inform the choice of sentence. On the debit side, it has the potential to produce unwarranted disparity especially, perhaps, in relation to offences of low to medium seriousness where there is no concrete guidance on the circumstances in which a custodial sentence is justified. The objective therefore should be to promote and implement a policy of *principled discretion* under which judges would retain the discretion they already enjoy, but exercise it in accordance with settled principles. Consistent with public law rules on the exercise of discretionary powers, departure from these principles would be permissible when a novel or exceptional aspect of a case so required.[6] To a great extent, this is what Irish judges already do, and considerable strides have been made in recent years by the Supreme Court and Court of Criminal Appeal in articulating general sentencing principles in the context of specific cases. Two practical problems remain. The first is that judgments of the Court of Criminal Appeal are seldom reported and inadequately circulated.[7] As a result, practitioners cannot bring them to the attention of trial judges as often as they should. Secondly, the Court of Criminal Appeal is not always consistent in its own sentencing jurisprudence, particularly in regard to the weight to be attributed to certain aggravating and mitigating factors.

This article will digest and briefly comment upon some recent sentencing judgments and related developments. It is part of a larger project which will attempt to map out an elementary system of narrative guidance based on existing precedents and to provide a template, albeit a rudimentary one, for future developments. Structured sentencing, like structured decision-

"Our sentencing system remains highly discretionary; that much is certain. It has the advantage of allowing the particular circumstances of each case to inform the choice of sentence. On the debit side, it has the potential to produce unwarranted disparity especially, perhaps, in relation to offences of low to medium seriousness where there is no concrete guidance on the circumstances in which a custodial sentence is justified."

making generally, can be defended on two grounds: justice and pragmatism. Pace Stephen who argued in the late 19th century that sentencing disparity was a natural and beneficial consequence of judicial independence,[8] it is scarcely compatible with modern notions of justice that two similarly situated offenders convicted of similar offences should receive markedly different punishments. From a more pragmatic perspective, principled sentencing is essential for maintaining public confidence in the system itself. Recent demographic changes in Ireland illustrate the importance of this factor. While other countries, such as Britain, became multiracial and multicultural over a generation or two,[9] Ireland has undergone this change within a few years.[10] The experience of many Western countries has been that once members of racial and ethnic minorities begin to come into contact with the criminal justice system, allegations of structural bias tend to emerge. And, in some jurisdictions, these allegations have proved to be well founded.[11] It is all the more important, therefore, to have settled principles against which individual decisions can be assessed and, indeed, to have mechanisms for the systematic collection of data on the processing of criminal cases from the point of complaint to the point of final disposition.[12]

Our immediate objective, then, must be to develop a kind of sentencing canon consisting of leading precedents developed over time by the superior courts. These precedents will be authoritative, but not inflexible. They will be authoritative in the sense that they must be brought to the attention of trial courts and appellate courts in all cases where they are relevant. The courts in turn will be expected to consider them, and to follow them unless a different approach is justified by the facts of the case. Judges who find it necessary to diverge from existing precedents will hopefully articulate their reasons for doing so, as this will further enrich the canon itself. That, at any rate, is the model being proposed here. In the absence of hard data on existing sentencing practices, it would be premature to propose numerical guidance similar to that occasionally provided by the English Court of Appeal (Criminal Division) and it might not be desirable in any event.[13] Finally, it will be noted that this model places the onus on advocates as much as on judges to develop principled sentencing through a dynamic reliance upon existing precedents and the fashioning of new ones. Sentencing principles may, of course, change over time in response to altered public perceptions of crime seriousness and the appropriateness of certain sanctions.[14] But any change that takes place should, at least, be conscious change.

RECENT DEVELOPMENTS

General Trends

Sentencing policy in recent years has been shaped in part, though only in part, by two competing trends. The first is a trend towards the intensification of punishment. This is manifested most clearly in the Sex Offenders Act, 2001 which introduced compulsory registration requirements, backed up by the threat of sanction, for persons convicted of certain sex offences. Some will argue that registration does not amount to punishment, and there is some international case law to support this contention. But the fact remains that it is a direct consequence of conviction which imposes obligations on the offender and, to an extent, restricts his freedom of choice on release from prison. Many other examples of intensification

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can be found in statutory provisions dealing with confiscation, restitution, compensation and so forth. It is not denied that such measures can be fully justified in particular cases, but it is submitted that the courts should be entitled to take them into account when assessing the primary punishment. Indeed, the Court of Criminal Appeal seemed to adopt such an approach in *The People (D.P.P.) v Redmond.*[15] The other identifiable trend is towards diversification as is reflected most notably in the drug court recently established in Dublin. It is also reflected in cases dealt with elsewhere in this article where the courts have acknowledged the value of rehabilitative measures and stressed their importance for society as well as for offenders. The trend towards intensification is largely politically motivated and is reflected in legislation, whereas the trend towards diversification is usually inspired by judicial initiatives. Most countries nowadays have competing trends of this nature within their sentencing systems. But the existence of such tensions shows the continuing need for a more coherent policy on the purposes of punishment and, in particular, on the use of imprisonment.

Impact of Euro Changeover

By virtue of an EC Council Regulation,[16] directly applicable to all member states since 1 January 1999, the "irrevocably fixed" conversion rate between the Euro and the Irish pound is one Euro to IR£0.787564. Fines and other penal sums should therefore be calculated accordingly. In most cases, this will cause little difficulty as courts have discretion as to the amounts to be imposed, subject to a general limit. Occasionally, however, a court's jurisdiction will depend on a certain threshold being reached, so it is important to have exact Euro equivalents. The Euro Changeover (Amounts) Act 2001 was introduced for this purpose. It provides, for example, that the amount of £10,000 in section 15A of the Misuse of Drugs Act 1977[17] is to be replaced with 13,000 Euros with effect from 1 January 2002. Similar changes have been made in respect of the Proceeds of Crime Act 1996 and the Criminal Justice Act 1994.[18]

Revised maximum sentences for sexual assault

The Sex Offenders Act 2001 alters the sentencing scheme for sexual assault yet again. Sexual assaults committed after 27 September 2001, the date on which the Act came into operation,[19] will carry a maximum sentence of 10 years' imprisonment and 14 years if the person against whom the assault was committed was under 17 years of age at the time.[20] Since the Criminal Law (Rape) (Amendment) Act 1990 came into force in January 1991, the maximum sentence for sexual

assault has been five years. Before that, the offence was known as indecent assault, and, when committed against a female, carried a maximum sentence of 10 years by virtue of section 10 of the Criminal Law (Rape) Act 1981.[21] Before that again, section 6 of the Criminal Law Amendment 1935 had provided for a two-year maximum sentence in respect of a first offence of indecent assault against a female, with a five-year maximum for a second or subsequent offence. Indecent assaults against males had carried a maximum sentence of 10 years' imprisonment under section 62 of the Offences Against the Person Act 1861 until the Criminal Law (Rape) (Amendment) Act 1990 renamed both indecent assault offences as sexual assault and altered the maximum sentence to five years. The offence of aggravated sexual assault, introduced by the Act of 1990, which carries a maximum sentence of life imprisonment remains unchanged by the Act of 2001. Needless to say, the applicable maximum sentence is that which applied when the offence was committed, and not at the time of sentence. In view of the many delayed prosecutions for sex offences now being initiated, a person convicted of a sexual assault may be subject to a two-year, five-year, ten-year, or 14-year maximum depending on when the offence was committed. Finally, it should be noted that the Supreme Court has now firmly decided that the offence of indecent assault had an independent existence at common law and was unaffected by the abolition of common assault in the Non-Fatal Offences Against the Person Act 1997.[22] That is hopefully the last we will hear of the matter.

Summary Disposal of New Theft Offences

The Criminal Justice (Theft and Fraud Offences) Act 2001 is a major piece of legislation which abolishes and replaces several earlier statutes including the Larceny Acts of 1916 and 1990, the Forgery Acts of 1861 and 1913 and other related provisions. It will come into force on dates to be determined by the Minister but among those provisions which came into force on the passing of the Act is section 53. This provides that an indictable offence under the Act may be dealt with summarily by the District Court provided the usual conditions are fulfilled.[23] In such a case the maximum sentences available are a fine of £1,500, 12 months' imprisonment or both. Under the Criminal Justice Act 1984, the maximum fine generally available following summary conviction for an indictable offence is £1,000 but that is subject to any specific provisions such as that now included in the Act of 2001.

Constitutional justice at the sentencing stage

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The sentencing process, like the rest of the trial, is subject to the rules of constitutional justice. A convicted person is entitled to a fair hearing before being sentenced. This includes, where appropriate, the right to cross-examine witnesses and, in all cases, to make a plea in mitigation. In *Nevin v. Crowley*[24] the applicant was convicted of certain road traffic offences, and the District Judge had adjourned sentence pending the preparation of a report on the applicant's suitability for community service. However, as the applicant was leaving the court, he made what was considered to be an unacceptable remark to the prosecuting Garda. The Garda thereupon brought the applicant back before the Judge who peremptorily imposed a six-month prison sentence and a two-year disqualification from driving. It appears, although there was some dispute on the matter, that the applicant's legal representatives had no opportunity to cross-examine the Garda or make representations as to sentence. The Supreme Court (per Murray J) upheld the decision of O'Sullivan J who had quashed the conviction and sentence on *certiorari* and refused to remit the matter to the District Court. Murray J said that "the right of an individual charged with an offence before a court, to test by examination the evidence tendered on behalf of the prosecution, to be allowed to call evidence, to be heard in argument or submission before judgment is a fundamental right guaranteed by the Constitution."[25] He said that the District Judge should have asked the applicant if he wished to consult his legal advisors or have invited those advisors to make representations on behalf of their client before proceeding to deal with the evidence of the Garda and imposing a prison sentence.[26]

In *R v. Olbrich*,[27] the High Court of Australia dealt with the issue of fact-finding at the sentencing stage. The Court insisted that the sentencing process is "a vital part of an unconcluded trial" and said that "specifying the facts which justify the sanction is no less important a judicial task than identifying the facts which justify conviction."[28] It specifically approved the majority decision in *R v. Storey* as to the standard of proof to be required. In the latter case it was held that a judge:

> "may not take facts into account in a way that is *adverse* to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account *in favour* of the accused, it is enough if those circumstances are proved on the balance of probabilities".

Judicial review should not be used a means of prohibiting a particular judge, or any judge, from selecting sentence after a conviction has been recorded. In *Mellett v Reilly*[30] Carroll J held that judicial review should not lie "on a *quia timet* basis in the interval between a finding of guilty and the recording of a conviction and/or passing of sentence." She said it was important that the Respondent judge should be allowed to make his sentencing decision leaving aside any irrelevant considerations. If the Applicant was dissatisfied with the sentence, he could always appeal to the Circuit Court.

Bail pending appeal

The Criminal Procedure Act 1993 amended the law governing the grant of bail by the Court of Criminal Appeal by providing that bail may be granted pending an application for leave to appeal as well as pending the

appeal itself. The change is particularly important for persons serving short sentences imposed following conviction on indictment, as their sentences may otherwise have expired by the time their applications for leave come on for hearing. Nowadays, an application for leave is almost invariably treated as the appeal itself and the entire matter is disposed of in one hearing. The principles to be applied by the Court when dealing with applications for bail were considered by the Supreme Court in *The People (D.P.P.) v Corbally*.[31] The applicant in this case was appealing against conviction, but the same principles would generally apply to appeals against sentence as well. The Court said that bail should be granted where "the interests of justice require it, either because of the apparent strength of the applicant's appeal or the impending expiry of the sentence or some other special circumstance."[32] The Court went on to say that it must always be borne in mind that the applicant for bail is a convicted person and the Court of Criminal Appeal should therefore exercise its discretion sparingly.[33] Later in its judgment, the Supreme Court said that bail "can only be granted where without having to consider the entire transcript some definite or discrete ground of appeal can be identified and isolated and is of such a nature that there is a strong chance of success on the appeal."[34] In *Corbally*, the Supreme Court dismissed the applicant's appeal on the basis that there was no discrete ground that could be identified and evaluated in the absence of a full hearing. It will be noted, however, that the fundamental principle articulated by the Court in Corbally mentioned the impending expiry of a sentence as one of the main factors indicating that bail is required in the interests of justice. It is submitted therefore that, in sentencing appeals, when the sentence being served by an applicant is likely to expire before the hearing date, the Court of Criminal Appeal, before refusing bail, should satisfy itself on the basis of available information that the sentence does not appear to be manifestly excessive or otherwise wrong in principle. This seems more or less consistent with the approach of the Court in *The People (D.P.P.) v Quinn* where there was an application for bail because of the brevity of the sentence being served and the apprehension that it might have expired before the hearing of the appeal. The Court dismissed the application because there was doubt as to whether the sentence would be reduced on appeal. The applicant was serving a 9-month sentence for larceny, an offence which carries a ten-year sentence. The Court was clearly influenced by the maximum sentence. However, it would appear to have given inadequate recognition to the reality that a great many larceny offenders do not immediate custodial sentences.

Rehabilitation and deterrence

One of the more intractable problems in sentencing is the difficulty in securing consensus on the dominant purpose of punishment[35] or, more realistically, getting consensus on the circumstances in which one purpose should prevail over the others. In *The People (D.P.P.) v R.O.D.*[36] the Court of Criminal Appeal gave some indication of the circumstances in which rehabilitation is appropriate. The appellant/respondent[37] had been given an effective sentence of one year after pleading guilty to several sex offences, including rape and buggery, committed against two of his sisters. Some of the offences were committed as long ago as 1971. The Court of Criminal Appeal suspended the sentences in their entirety and dismissed the D.P.P.'s application for review on the ground of undue leniency. The appellant in this case had submitted himself to treatment at the Granada Institute, which specialises in the treatment of sex offenders, and it was reported that he was making excellent progress. Perhaps the most significant aspect of the Court's judgment is the assertion that the public interest can be served by rehabilitation.[38]

All too often it is assumed that imprisonment is the sole means of advancing the public interest. A custodial sentence may well be the only realistic option when the offending has been especially serious. But in terms of crime reduction, a rehabilitative strategy will often be far more productive. A similar approach was adopted by the Court of Criminal Appeal in *The People (D.P.P.) v M.S.*[39] where it was held (inter alia) by Denham J that "protection of society may sometimes be best achieved by a supervised release after treatment than a later release with no treatment or supervision."[40] The courts also seem more inclined to accept that persons with drug, as opposed to alcohol, addictions are more likely to benefit from treatment in the community than from imprisonment.

There seems to be a reasonable consensus that deterrent sentences are appropriate for offences of importing drugs or supplying drugs to others, even when the offenders can point to personal circumstances which would otherwise operate as mitigating factors. In several recent appeals, the Court of Criminal Appeal seems intent on sending out a clear message that offences of dealing in drugs and importing drugs will be treated severely even though there may be mitigating circumstances and the offenders may not, in fact, have derived any significant benefit from the transaction. Thus in *The People (D.P.P.) v Renald*[41] it seemed that the applicant had made only £200 out of the transaction, yet the Court gave him an effective sentence of three years (reduced from five). In *The People (DPP) v Gethins,*[42] the Court varied a sentence from a suspended term of imprisonment , despite the presence of many mitigating factors. The offender was convicted of importing cannabis and possessing it for sale or supply.

Impact of remorse

One of the strongest statements yet on the significance of remorse as a mitigating factor in sentencing is to be found in *D.P.P. v. Naughton*[43] where the accused had been sentenced to three years' imprisonment for aggravated sexual assault. The Court of Criminal Appeal (*per* Murphy J) dismissed the D.P.P.'s application for review on the ground of undue leniency. The Court said that remorse was the most important single factor in this case. It said that "everything has confirmed that his remorse was genuine" and the probation reports treated it

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as real and valid. This was a factor, the Court said, which the trial judge was entitled to take into account. The assault in this case was a particularly violent one. There was, as the Court acknowledged, not merely a threat to kill but, apparently, an attempt to choke the victim. In light of these factors, the upholding of a relatively lenient sentence on the ground of remorse is significant. This approach may be justified on the ground that a truly remorseful offender is less likely to reoffend and may be more willing to take steps to deal with his own behavioural problems.[44]

Victim impact statements and victim recommendations

Victim impact statements are useful for counteracting what cognitive psychologists describe as the availability heuristic. This is the human tendency to give undue weight to matters that are easily remembered.[45] Traditionally, in uncontested criminal cases, the facts placed before the court and the legal submissions made at the sentencing stage related mainly to the offender. Victim impact statements[46] remind the court of the injured party and the consequences of the offence. Two recent judgments, one by Hardiman J in the Supreme Court[47] and the other by Kearns J in the High Court,[48] will repay close attention from anyone dealing with victim impact statements. Neither judgment, as it happens, dealt directly with victim assessments. Both were concerned with the related issue of psychologist's reports commissioned by the D.P.P. in respect of complainants in sex offences cases where the offences were alleged to have been committed many years earlier. In both cases, as in *M.S. v. D.P.P.*,[49] the need for a thorough and comprehensive assessment of the subject was stressed. A mere recitation of the conventional wisdom on reasons for delay in reporting is not enough. In *A.W. v. D.P.P.*[50] Kearns J said:

> "Where and when requested to carry out a psychological assessment, it is in my view incumbent upon a psychologist to discharge such a function, in detail and depth, even if his brief is mainly to enquire into factors explaining delay. It is not sufficient, in my view, to set out a list of general principles relating to complaints of this nature and then attach them to a particular complainant without some understanding of the psychological makeup of the individual in question which would suggest whether these general principles, or some of them, were particularly apt or appropriate, or perhaps even irrelevant to the particular complainant."

"In *The People (D.P.P.) v R.O.D.* the Court of Criminal Appeal confirmed that unless a mandatory custodial sentence is prescribed by statute, a judge is never obliged to impose a custodial sentence. The Court went on to say that this did not leave the trial judge with unfettered discretion as failure to impose a custodial sentence in certain circumstances might amount to error in principle."

The same should apply *mutatis mutandis* to victim assessments. In particular, victim impact statements should be expected to explain in depth whether symptoms and problems currently being experienced by the victim are attributable to the offence and, if so, the degree to which they are so attributable. Furthermore, in this age of specialisation, the term "expert witness", as opposed to "professional witness", should be reserved for those at the cutting edge of their particular fields of expertise. The most convincing proof of this is for the witness to have made a significant contribution to research in that field. Meanwhile, in *R v. Namana*[51] the New Zealand Court of Appeal referred by implication to the importance of trial judges being "fully alert to the danger of placing undue weight on those parts of the victim impact statements that might be perceived as unduly emotive." As regards victim recommendations, the Court of Criminal Appeal said in *The People (D.P.P.) v R.O.D.*[52] that "a victim request [for leniency] of itself is not relevant but the reasons given for it may be relevant to the administration of justice." In this case, the victims were sisters of the offender, and family harmony seems to have been the value which the Court identified as being the reason for their request for leniency.

Custodial sentences not mandatory

In response to a question certified by the trial judge in *The People (D.P.P.) v R.O.D.*[53] the Court of Criminal Appeal confirmed that unless a mandatory custodial sentence is prescribed by statute, a judge is never obliged to impose a custodial sentence. The Court went on to say that this did not leave the trial judge with unfettered discretion as failure to impose a custodial sentence in certain circumstances might amount to error in principle. This is undoubtedly the case. A maximum sentence allows for the imposition of any amount of fine or imprisonment up to the specified limits and, absent a provision to the contrary, it also allows for the use of other general measures such as suspended sentences, probation orders and community service orders. Any limitations on the use of such measures must be carefully observed. For example, an offender may never be subject to more than 240 hours' community service and a community service order may not be imposed by the Special Criminal Court.[54]

Offences limiting fundamental rights

With the imminent incorporation of the European Convention on Human Rights into Irish law, lawyers must become familiar with the sentencing principles developed by the organs established under the Convention. The sentencing jurisprudence of the European Court and former Commission is not very extensive, but it has some important elements.[55] One principle which the Court appears to have accepted is that when an offence amounts to a limitation on one of the rights protected by Articles 8 to 11 inclusive of the Convention,[56] the penalty should be the least necessary to protect the social interest being advanced by the offence in question.[57] In an Irish context, this would be a relevant principle in, for example, the sentencing of a person convicted of possessing child pornography[58] contrary to section 6 of the Child Trafficking and Pornography Act 1998 or the punishment of certain forms of contempt of court. The European Convention does not, it should be emphasised,

Continued on page 156

Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 7, Issue 3

A directory of legislation, articles and written judgments received in the Law Library from the 26th November 2001 to the 15th January 2002.
Judgment Information compiled by the Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.
Senior Judicial Researcher: Shane Dwyer: LL.B. (Ling. Germ.), LL.M.

Judicial Researchers: Rory White: B.C.L.(N.U.I.), B.C.L.(Oxon.), B.L./Jason Stewart: LL.B., B.C.L. (Oxon.), B.L./AnthonyMoore:LL.B.(Ling.Germ.),LL.M.(Cantab.), B.L./Áine Clancy: LL.B.(Ling. Germ.), B.L./Joelle O'Loughlin: B.C.L., LL.M.(N.U.I.), B.L./Maria-Teresa Kelly Oroz: B.C.L., LL.M., B.L./Alison de Bruir: LL.B./Rachel Casey: LL.B

Administrative Law

Grimes v. Censorship of Publications Board
High Court: **Smyth J.** (ex tempore)
22/02/2000

Administrative; promptness; locus standi; applicant had lodged complaint against specific publication with respondent; respondent had decided that applicant's complaint had not been lodged promptly enough subsequent to publication of impugned material to comply with statutory provisions in this regard; applicant seeks leave to bring judicial review proceedings against respondents; whether application had been brought promptly; whether applicant had locus standi to bring such an action.
Held: Application dismissed.

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Complex conversations: legality, politics and constitutionalism in Northern Ireland
Harvey, C J
2000 CIIL & P 71

Rethinking Irish language policy: a legal perspective
Nic Shuibhne, Niamh
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Agriculture

Article

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Collins, Donncha
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Sarfaraz v. The Minister for Justice, Equality, and Law Reform
High Court: **Finnegan J.**
03/07/2001

Aliens; application for refugee status; compliance with statutory procedures; transitional statutory provisions; applicant seeks leave to apply for judicial review of refusal to grant refugee status; applicant had been interviewed under procedures then in force for assessing refugee applications; assessment of report and recommendation of official dealing with application under old procedures had been furnished to Minister after coming into force of new statutory assessment procedure; whether substantial grounds for contending that applicant is entitled to declaration that decision to refuse refugee status to applicant is null and void or failed to comply with proper procedures; whether interview conducted and making of report had been "step taken" within meaning of transitional statutory provision; s. 28, Refugee Act 1996.
Held: Relief granted; procedures to resume with consideration of report of interview conducted under old procedures applying new statutory provisions to assessment stage.

Ulhaq v. The Minister for Justice, Equality, and Law Reform
High Court: **Finnegan J.**
03/07/2001

Aliens; compliance with statutory procedures; applicant seeking leave to apply for judicial review; applicant's application for refugee status had been undertaken under old procedures; assessment leading to decision to refuse application for refugee status had been made without a recommendation being attached thereto; applicant seeks inter alia declaration that application be assessed using new procedures; decision to refuse refugee status had been made prior to receipt of such recommendation from assessor; whether refusal of application had been properly completed prior to coming into force of new procedures; whether step taken by Minister before commencement of Act corresponds to a step which is required to be taken by Refugee Applications Commissioner under Act; whether transitional provisions of new Act permit an assessment without a recommendation under old procedures; whether transitional provisions of new Act permit a decision on refugee status by a person authorised by respondent being made without a recommendation having been received; whether transitional provisions permit Commissioner to attach his own recommendation to report subsequent to receipt of decision by him; ss. 13, 28,

Refugee Act, 1996.
Held: Relief granted.

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SI 469/2001

Diseases of animals act, 1966 (foot-and-mouth disease) (restriction on imports from the united kingdom) (no.3) order, 2001
SI 490/2001

Diseases of animals act, 1966 (classical swine fever) (restriction on imports from spain) (no.2) (amendment) order, 2001
SI 502/2001

Diseases of animals act, 1966 (foot-and-mouth disease) (import of sheep for fattening and breeding from northern ireland) order, 2001
SI 503/2001

Foot and mouth (restriction on movement) (no. 6) (revocation) order, 2001
SI 470/2001

Arbitration

Article

Procedural mishap and the remission of arbitral awards: Catherine McCarrick v. The Gaiety (Sligo) Ltd.
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Breslin, John
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McCarthy, Niamh
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Walsh, Mary
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Butler, Brian
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Competition Law

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Dodd, Stephen
7(1) 2001 BR 12

The EC approach to essential facilities
Hinds, Anna-Louise
2001 ILT 298

Constitutional Law

Murphy v. Minister for Justice
Supreme Court: Keane C.J., **Murphy J.**, Murray J., McGuinness J., Hardiman J.
09/03/2001

Constitutional; access to justice; imposition of costs in civil proceedings; locus standi; appellant, a person of moderate means, seeks to challenge subordinate legislation by which fees are imposed on particular transactions involved in High Court proceedings; whether Constitution implies any general prohibition on imposition of duties or charges in civil proceedings; whether impugned charges are unreasonable; whether two specific charges complained of by appellant presented a significant obstacle to his engaging in litigation having regard to other proceedings which he has pursued and in particular the appeal herein; whether appellant established necessary locus standi to maintain these proceedings; s. 65 (1), Courts of Justice Act, 1936; s. 4, Supreme Court and High Court (Fees) Order, 1989 (S.I. No. 341 of 1989).
Held: Appeal dismissed.

Fitzgerald v. D.P.P.
High Court: **Kearns J.**
04/05/2001

Separation of powers; independence of judiciary; case stated procedure; constitutionality; challenge to constitutionality of statutory provision whereby a District Judge may not refuse to state a case where application for that purpose is made by first named or third named (Attorney General) defendants; whether statutory provision mandating a judge to exercise discretion is constitutional; whether legislation discriminatory; whether legislation is unwarranted interference in judicial domain; s. 4, Summary Jurisdiction Act, 1857; Art.34 of the Constitution.
Held: Legislation repugnant to the Constitution.

Articles

Complex conversations: legality, politics and constitutionalism in Northern Ireland
Harvey, C J
2000 CIIL & P 71

Rethinking Irish language policy: a legal perspective
Nic Shuibhne, Niamh
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Criminal Law

McNeil v. Judge Brennan
High Court: **Kinlen J.**
21/06/2000

Criminal; due process of law; decision to strike out criminal proceedings had been reversed in Supreme Court; matter had been remitted to District Court; respondent had said that he had "no option but to convict the applicant" in light of Supreme Court ruling when matter came before him; respondent had mistakenly convicted applicant and imposed penalty without hearing evidence; when informed that evidence had not been heard, respondent had heard evidence in full and imposed a more severe penalty; applicant seeks inter alia order of certiorari quashing conviction; whether statement of respondent and conviction of, and imposition of penalty on, applicant immediately thereafter, coupled with fact that initial conviction had not been preceded by calling of evidence had negatived original jurisdiction vested in respondent, preventing him from embarking on resumed hearing of matter; whether respondent had acted within jurisdiction.
Held: Application refused.

S.O.C. v. DPP
Supreme Court: **Hardiman J.**
13/07/2001

Criminal; indecent assault; appellant had been convicted of indecent assault; whether the offence of indecent assault had been misdescribed either in the summons or in the form of conviction of appellant in light of statutory provision changing name of offence from "indecent" to "sexual" assault; whether such offence had been abolished by statutory provision abolishing offence of "assault"; s. 2, Criminal Law (Rape) (Amendment) Act, 1990; s. 28, Non-Fatal Offences against the Person Act, 1997.
Held: Appeal dismissed.

The People (D.P.P.) v. Dreeling
Court of Criminal Appeal: **Murray J.**, O'Donovan J., McKechnie J.
27/02/2001

Criminal; undue leniency; D.P.P. seeks review of sentence on ground of undue leniency; whether D.P.P. has power to review an order deferring sentence; whether trial judge had embarked on sentencing process; whether definition of "sentence" in statute intended to include all orders dealing with the convicted person consequent upon his or her conviction, including an order deferring final sentence; s. 2, Criminal Justice Act, 1993;
Held: Application allowed; Court of Criminal Appeal not to be regarded as an alternative sentencing court.

The People (D.P.P.) v. Meleady
Court of Criminal Appeal: **Geoghegan J.**, Kearns J., Murphy J.
20/03/2001

Criminal; miscarriage of justice; applicants convicted of the theft of a car, carrying the owner on the bonnet of such car, threatening and assaulting the owner; identification evidence of owner and son only evidence against applicants; convictions quashed by a differently composed Court of Criminal Appeal based on the newly discovered facts of the location in the front of the car of a fingerprint not belonging to either applicant and the 'Walker' memorandum suggesting that the owner identified the applicant from police photographs prior to his identification in Rathfarnham courthouse; whether applicants entitled to a certificate to the effect that the newly discovered facts showed a miscarriage of justice had occurred; whether applicants are, on balance of probabilities and on foot of newly discovered facts, innocent of involvement in the offence for which they were convicted;

whether trial judge would have excluded the identification evidence as unsafe if he had been in possession of the newly discovered facts; s. 9, Criminal Procedure Act, 1993;
Held: Certificate granted on foot of the 'Walker' memorandum.

The People (D.P.P.) v. McDonagh
Court of Criminal Appeal: **Murray J.,** Johnson J., Kelly J.
31/05/2001

Criminal; application for leave to appeal against applicant's conviction for murder; whether, having regard to subjective test of provocation, there was any evidence on which trial judge ought to have allowed defence of provocation to be considered by the jury; whether, on the evidence, it would be open to jury to conclude it was reasonably possible accused had been subject of provocation; whether trial judge, when directing the jury as to the proper test for murder under the statute, is entitled and obliged to do so in the light of actual evidence and circumstances of case; whether, having directed the jury as to the defence of accidental stabbing, the trial judge had been correct in directing the jury that a conclusion on the facts of non-accidental deliberate stabbing should be regarded as murder; whether trial judge had been correct in ruling that there was no evidence of rebuttal within the meaning of the statute; s. 4, Criminal Justice Act, 1964.
Held: Appeal dismissed.

The People (D.P.P.) v. Murphy
Court of Criminal Appeal: **Denham J.,** Johnson J., O'Neill J.
12/07/2001

Criminal; applicant seeks leave to appeal against his conviction on charges of burglary and theft of a car; whether there had been sufficient evidence for trial judge to conclude that accused had not been under the influence of drugs at the time of his confession; whether a breach of regulations had taken place; whether accused had suffered prejudice as a consequence of the breach; whether there are factors additional to the breach of regulations which had rendered the statement inadmissible; whether the trial had been fair and just; whether probative value of fact that Gardaí knew the applicant and his nickname outweighed by prejudicial effect of that evidence on the jury; whether fact that trial judge's charge had recited evidence not before jury is to applicant's detriment; whether prosecution had unfairly embarrassed the defence before the jury; s. 12 (11), Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987; s. 7, Criminal Justice Act, 1984;
Held: Application for leave to appeal treated as appeal; appeal dismissed; conviction confirmed.

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Damages

Article

Forensic accounting and the calculation of commercial damages
Brennan, Niamh
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Education

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Mulligan, Emer
14 (2001) ITR 525

Employment

Article

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14 (2001) ITR 519

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Articles

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MacIntyre, Owen
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Regulation of marine pollution from shipping under Irish law
Sage, Benedicte
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European Law

Articles

Domestic tax legislation - a European case to answer
Hunt, Emer
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European community law and race discrimination: arguments in favour of legal action
McInerney, Siobhan
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E.U. proposals on environmental liability: a thorny issue revisited!
MacIntyre, Owen
2001 IP & ELJ 135

Merger control - an electric shock for Schneider/Legrand
McCarthy, Niamh
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On a wing and a prayer
Quigley, Conor
2001 (November) GLSI 8

The EC approach to essential facilities
Hinds, Anna-Louise
2001 ILT 298

VAT invoicing proposed directive
Somers, Jim
Keenan, Brian
14 (2001) ITR 498

Family Law

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The matrimonial home bill 1993 - should the government try again?
Woods, Una
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SI 527/2001

Hake (fisheries management and conservation) (no, 5) order, 2001
SI 528/2001

Monk (fisheries management and conservation) (no.5) order, 2001
SI 529/2001

Sea fisheries (conservation and rational exploitation) order, 2001
SI 557/2001
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Whiting (fisheries management and conservation) (no. 8) order, 2001
SI 530/2001

Freedom of Information

Article

The implications of new developments in public sector management for the freedom of information act
McDonagh, Maeve
2000 CIIL & P 54

Garda Síochána

Statutory Instrument

Garda Síochána (admissions and appointments) (amendment) regulations, 2001
SI 498/2001

Housing

Article

Social and affordable housing: a retrospective look
Galligan, Eamon
2001 IP & ELJ 149

Human Rights

Article

The European convention on human rights and Irish incorporation - adopting a minimalist approach
Murphy, Ray
Wills, Siobhan
7(1) 2001 BR 41

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Doolan, Brian
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Insurance

Rothwell v. Motor Insurers Bureau of Ireland
High Court: **McCracken J.**
06/07/2001

Insurance; negligence; onus of proof; personal injury; road traffic; damages; plaintiff involved in road traffic accident due to oil spillage on road surface caused by person and vehicle unknown; agreement had been concluded between Minister for Environment and defendant in relation to adequate compensation for persons suffering personal injury in road accidents caused by "negligent" driving of a vehicle in a public place, where the owner or user of the vehicle remains unidentified or untraced; whether it is reasonable to interpret 'negligent driving' in MIBI agreement as including managing and controlling a vehicle; whether doctrine of *res ipsa loquitur* applies; whether plaintiff has satisfied burden of proof; whether intention and purpose of agreement such that plaintiff entitled to receive compensation; whether contributory negligence on part of plaintiff.
Held: Doctrine of *res ipsa loquitur* does not apply; plaintiff has satisfied burden of proof; intention and purpose of agreement such that he should receive compensation, even thjough defendant not in a position to produce an explanation which might excuse liability; damages of £30,000 and special damages of £100 awarded.

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Who regulates the insurance industry?
Crowley, Louise
2001 CLP 241

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Health insurance (amendment) act, 2001 (commencement of certain provisions) order, 2001
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Article

Self-defence - a legal basis for the attacks on Afghanistan?
Keogh, Conor
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O'Dowd, T John
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Local Government

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SI 552/2001

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Medical Law

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SI 514/2001

Medicinal products (licensing and sale) (amendment) regulations, 2001
SI 512/2001

Negligence

Cassidy v. Wellman
Supreme Court: **Keane C.J., (ex tempore)** Hardiman J., Fennelly J.
31/10/2001

Damages; personal injuries; contributory negligence; defendants seek to appeal against judgment in which they were found 75% liable for injuries suffered by plaintiff; whether trial judge's inferences of fact had been satisfactory.
Held: Appeal dismissed.

Breslin v Corcoran
High Court: **Butler J.**
17/07/2001

Negligence; personal injury; road traffic; damages; first named defendant had left his car unattended and unlocked with keys in ignition and unknown person had stolen the car and injured plaintiff; it had been agreed that liability lay with either first named or second named defendant, the Motor Insurers' Bureau of Ireland: it had been settled that plaintiff entitled to recover £65,000 damages; whether plaintiff can succeed against second-named defendant; whether chain of causation between act to omission of first named defendant and injury to plaintiff had been broken; whether negligence and breach of statutory duty of first named defendant had been a *causa sine qua non* and not a *causa causans*.
Held: Damages awarded against second-named defendant; negligence and breach of statutory duty of first named defendant had been a causa sine *qua non*.

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Dee, Eoin
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Risk management for tax practitioners
Doyle, Donald
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Brady, Rory
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Pensions

Article

The pension fund you'll never spend
Berrigan, Tom
2001 (November) GLSI 22

Planning

O Connell v. Dungarvan Energy Limited
High Court: **Finnegan J.**
27/02/2000

Planning; unforeseen variations; planning permission had been granted to respondent with conditions imposed for development of gas fired combined cycle gas turbine plant; applicant seeks injunctive relief preventing respondent proceeding with development in purported violation of planning permission; applicant also seeks to join certain directors of respondent as parties and to sequestrate respondent's assets; whether development has commenced other than exempted development; whether demolition work undertaken by respondent falls within ambit of unforeseen variations of planning permission necessary to comply with other conditions imposed by same.
Held: Relief refused.

O'Connell v. O'Connell
High Court: **Finnegan J.**
29/03/2001

Planning; judicial review proceedings; application to amend statement to ground application for judicial review; arguable case; public local inquiry in respect of road scheme; applicant seeks leave to amend his statement to ground application for judcicial review by adding thereto additional reliefs and additional grounds; road planning authority had made alternative proposal to that previously outlined on final day of public local inquiry into proposed road scheme omitting part of scheme as originally proposed; whether omission of section of scheme is modification of same within meaning of statutory provisions; whether original Environmental Impact Statement covers such modification; whether applicant had been denied an opportunity to respond in any meaningful way to proposed modifications of scheme; s. 49, Roads Act, 1993.
Held: Applicant granted leave to amend statement to ground application for judicial review to include an order of prohibition directed to the inspector prohibiting him from presenting his report to the relevant Minister until such time as applicant is afforded opportunity to consider and make representations in respect of such recommended modification amongst reliefs sought.

Article

Social and affordable housing: a retrospective look
Galligan, Eamon
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European communities (environmental impact assessment) (amendment) regulations, 2001
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Local government (planning and development) (amendment) regulations, 2001
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Pollution

Library Acquisition

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N185.32

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Waste management (collection permit) (amendment) regulations, 2001
SI 540/2001

Practice and Procedure

O'Donovan v. Southern Health Board
Supreme Court: **Keane C.J.,** ***(ex tempore)***
Murphy J., Geoghegan J.
02/10/2000

Practice and procedure; non suit application; fair procedures; defendant had made application for non suit at conclusion of plaintiff's case in High Court; trial judge had inquired whether in the event of this application being unsuccessful counsel for defendant would be going into evidence; trial judge had ruled that there had been a case to meet, but had expressed view that if he had been dealing with case on basis that there was going to be no evidence for the defendant he would find in favour of defendant because he was satisfied even at that stage that on balance of probabilities plaintiff was not entitled to succeed; plaintiff seeks to appeal against judgment; whether trial judge, by giving indication that he did, had rendered trial unsatisfactory; whether fact that counsel for defendant had put substantial and relevant evidence before court had ensured that no injustice had been done to plaintiff.
Held: Appeal allowed; new trial ordered of all issues.

Molloy v. Dublin Corporation
Supreme Court: **Murphy J.,** Hardiman J., Fennelly J.
28/06/2001

Practice and procedure; third party notice; time limit; appellant had sought to serve third party notice on respondent in relation to negligence action; respondent had successfully applied to have third party notice struck out; whether third party notice had been served "as soon as is reasonably possible"; whether application for leave to issue third party proceedings had been postponed because of any want of information or evidence; s. 27, Civil Liability Act, 1961.
Held: Appeal dismissed; trial judge correct in setting aside third party order.

Hannigan v Director of Public Prosecutions
Supreme Court: Murray J., **Hardiman J.,** FennellyJ.
30/01/2001

Discovery; waiver of privilege; deficiency in form; appellant had been charged with offence of sexual assault and had sought and been granted leave to seek judicial review of decision of District Court; appellant seeks to appeal against orders of High Court relating to applications by him for discovery; appellant seeks discovery of specific document; whether where privileged material is employed in court in an interlocutory application, privilege in that and any associated material is waived; whether appellant should be entitled to have access to document to see whether it supports proposition in support of which respondent deployed it..
Held: Appeal allowed; order for the production for inspection of document.

Burke v. D.P.P.
Supreme Court: **Keane C.J.,** ***(ex tempore)***
Geoghegan J., Fennelly J.
21/06/2001

Discovery; material nature of documents; obligation to specify documents and give reasons; applicant is the subject of criminal proceedings; applicant had instituted proceedings to have these criminal proceedings prohibited by reason of alleged delay on the part of the prosecuting authorities; applicant seeks discovery of

certain documents in relation to these proceedings; whether High Court judge had been correct in law in refusing application for discovery; whether there had been any particularly significant delay on part of applicant in bringing application for discovery; whether documents sought are material; whether applicant had complied with statutory obligation to pinpoint documents or category of documents required and give reasons; 0. 31, r. 12, Rules of the Superior Courts [substituted by Rules of the Superior Courts (No. 2)(Discovery), 1999. SI No.233/1999].
Held: Appeal allowed; order of discovery in respect of specified statements taken in course of investigation granted.

Johnston v. Church of Scientology
Supreme Court: **Denham J.**, Murphy J., Murray J.
27/02/2001

Discovery; agency; defendants seek to appeal against order of discovery granted to plaintiff in relation to particular documents held by non-party deemed to be within power of defendants; whether documents in issue are in possession, custody or power of defendants; whether it had been established on the facts of the case that non-party holding relevant documents had been acting as agent for first named defendant in relation thereto; whether defendants have an enforceable legal right to obtain said documents
Held: Appeal allowed; a document is in the power of a party when that party has an enforceable legal right to obtain the document.

Enright v. Judge Finn
Supreme Court: **Murphy J.**, Murray J., Hardiman J.
17/05/2001

Non-party discovery; criminal proceedings; appellant, a qualified solicitor, is the subject of pending criminal proceedings instituted by second named respondent (the D.P.P.); appellant seeks discovery of documents held by non-party (the Law Society) which allegedly support contention that second named respondent, his servants or agents, acted wrongfully and unlawfully in furnishing information to non-party and in causing statutory investigative powers of non-party to be invoked; in separate proceedings instituted against non-party, appellant claims constitutional right to inspect documents of which he is now seeking discovery; whether documents sought are relevant and material to an issue arising or likely to arise out of current cause or matter; O.31, r. 29, Rules of the Superior Courts.
Held: Appeal allowed; order granted subject to appellant undertaking to discontinue plenary proceedings instituted by him against non-party.

Article

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Shiels, Dessie
2001 (November) GLSI 12

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Barron, Jane
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McKenzie, Agnes
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Statutory Instruments

Circuit court rules, 2001
SI 510/2001

District court districts and areas (amendment) and variation of days and hours (Portlaoise, Abbeyleix and Mountrath) order, 2001
SI 543/2001

District court districts and areas (amendment) and variation of hours (district 15) order, 2001
SI 544/2001

Rules of the superior courts (no. 4) (chief prosecution solicitor), 2001
SI 535/2001

Special criminal court rules, 2001
SI 536/2001

Prisons

Kelly v Governor of Mountjoy Prison
Supreme Court: Murray J., McGuinness J., **Geoghegan J.**
08/11/2001

Constitutional; habeas corpus; appeal against refusal of an application for an Article 40 inquiry; appellant sentenced to imprisonment; entitlement to remission; whether High Court judge had to some extent entered into speculation in relation to whether appellant was still in prison on foot of a warrant or alternatively has become disentitled to normal remission and was obliged to serve full term; whether usual conditional order should have been made.
Held: Appeal allowed; case remitted to High Court for conditional Order to be made and for proper Article 40 inquiry to be conducted.

Enright v Minister for Justice, Equality and Law Reform
Supreme Court: Murray J., McGuinness J., **Geoghegan J.**
08/11/2001

Prisons; access to welfare officer or psychologist; separation of powers; appeal from order refusing leave for judicial review; complaint by applicant that he is not recieving services of welfare officer or pyschologist in prison; whether court has jurisdiction to intervene;; whether applicant has established that European Prison Rules adopted by Committee of Ministers of Council of Euroope form part of Irish domestic law.
Held: Appeal dismissed.

McCowan v Governor of Mountjoy Prison
Supreme Court: Murray J., McGuinness J., **Geoghegan J.**
08/11/2001

Constitutional; habeas corpus; appeal against refusal of application for habeas corpus; applicant had challenged validity of guilty verdict returned at his trial; applicant had alleged that his conviction was in respect of one or more of the charges which he claims were added to the indictment on the third day of a four-day trial in circumstances which denied him an opportunity of preparing and presenting a defence to those charges; whether applicant had established sufficient grounds for an inquiry pursuant to Article 40.4.2 of Constitution
Held: Appeal allowed; case remitted to High Court for Order to be made and appropriate Article 40 inquiry conducted.

Proceeds of Crime

F.J.M. v. J.R.
High Court: **O' Sullivan J.**
21/12/2000

Proceeds of crime; applicant seeks interlocutory order prohibiting second-named defendant from disposing or dealing with certain property; due to inappropriate service first-named defendant not involved in application; first named defendant was brother of second named defendant; applicant accepted that property originally purchased by second named defendant with "clean" money; alleged that property subsequently sold to first named defendant with money that constituted proceeds of crime; whether there would be a serious risk

of injustice to second named defendant if order under s. 3 of the Proceeds of Crime Act 1996 was made.
Held: No substantial risk of injustice; inappropriate to make order at this stage as second named defendant wished to advance constitutional arguments prior to any appeal on present ruling.

Criminal Assets Bureau v S.H.
Supreme Court: **Keane C.J.,** Murphy J., Murray J.
26/10/2001

Proceeds of crime; defendant seeks stay on High Court Order giving certain reliefs to plaintiff including declaration as to liability of defendant as to payment of tax and finding that defendant is liable to plaintiffs in the sum of £1,778,343.76; whether justice of case requires such stay to be granted and whether any particular hardship will be caused to person against whom order may operate; whether plaintiffs had been justified in not being satisfied to rely on the mareva injunction; whether appeal should proceed as one appeal.
Held: Relief refused

Property

Crofter Properties Limited v. Genport Limited
High Court: **McCracken J.**
24/07/2001

Land; application for judgment in respect of rent and arrears; application for further and better discovery; original claim of plaintiff had been for possession of premises and for arrears of rent payable under lease by defendant; counterclaim on part of defendant for damages including exemplary or aggravated or punitive damages for injurious falsehood; negligent misstatement; defamation and wrongful interference with economic interests of defendant; matter had been adjourned with defendant retaining possession of property and paying specified rent and arrears to plaintiff pending settlement of all issues; proceedings had been delayed through no fault of either of the parties; whether plaintiff had made out a case that it would be greatly prejudiced if present terms of adjournment continued; whether, in relation to counterclaim for damages, widening of scope of action subsequent to amendment of pleadings allowed in Supreme Court entitled plaintiff to further and better discovery in relation to certain documents held by defendant.
Held: Application for judgment refused; application for further and better discovery granted

Article

The matrimonial home bill 1993 - should the government try again?
Woods, Una
2001 (4) IJFL 8

Records & Statistics

Statutory Instruments

Statistics (census of population) order, 2001
SI 491/2001

Statistics (output prices) order, 2001
SI 483/2001

Statistics (balance of payments) order, 2001
SI 542/2001

Refugee Law

Library Acquisition

Collection of international instruments and other legal texts concerning refugees and displaced persons
Geneva Division of International Protection of the Office of the United Nations High Commissioner for Refugees 1995
C205

Road Traffic

Statutory Instruments

European communities (motor vehicles type approval) (no.2) regulations, 2001
SI 554/2001

Road Traffic (licensing of drivers) (amendment) (No.2) regulations, 2001
SI 516/2001

Road traffic (licensing of trailers and semi-trailers) (amendment) (no. 2) regulations, 2001
SI 541/2001

Road traffic (national car test) (no 3) regulations, 2001
SI 550/2001
Directive 96/96

Road traffic (public service vehicles) (amendment) (no.2) regulations, 2001
SI 534/2001

Road vehicles (registration and licensing) (amendment) (no.2) regulations, 2001
SI 537/2001

Sea & Seashore

Article

Regulation of marine pollution from shipping under Irish law
Sage, Benedicte
2001 IP & ELJ 142

Social Welfare

Article

Ireland's other treaties - social security agreements explained
O'Brien, Pat
14 (2001) ITR 609

Solicitors

Article

Professional negligence of solicitors
Dee, Eoin
2001 ILT 282

Statutory Instruments

Solicitors acts, 1954 to 1994 (apprenticeship and education) regulations, 2001
SI 546/2001

The solicitors acts, 1954 to 1994 (euro changeover) regulations, 2001
SI 504/2001

Succession

Messitt v. Henry
High Court: **Finnegan J.**
13/07/2001

Succession; appropriation; deceased had died intestate leaving defendant, his sister, entitled to half his estate and plaintiffs, neices and nephews, entitled to other half between them; defendant had duly given notice of her intention to appropriate to herself in satisfaction of her entitlement in the estate part of the lands thereof; plaintiffs seek order prohibiting appropriation of estate of deceased; whether plaintiffs had complied with statutory provision which requires a party within six weeks from the service of a notice on him to apply to the Court to prohibit the application; whether Special Summons is a sufficient invocation of statutory provision; whether instance of taxation is relevant; whether Court has justification in interfering to prevent defendant acting bona fide on advice obtained; whether substantial equal value between appropriated and unappropriated lands; s.55(3), Succession Act, 1965.
Held: Order granted; appropriation proposed would be inequitable and would unduly benefit defendant

Taxation

Articles

2001 short tax year - compliance implications & considerations
Duffy, Gavin
14 (2001) ITR 493

Domestic tax legislation - a European case to answer
Hunt, Emer
14 (2001) ITR 579

Encashment tax
Sexton, Lisa
14 (2001) ITR 505

German tax reduction act 2000
Medlar, Ciaran
14 (2001) ITR 625

Inspector of taxes v Ringmahon Company
Carr, Padraic
14 ITR 476

"Law of CAT" finance act 2001 edition
Williams, Ann
14 (2001) ITR 487

New economy companies & manufacturing relief
Walsh, Mary
14 (2001) ITR 511

Offsetting or withholding of repayments or overpayments
Lyons, Mary
14 (2001) ITR 605

Patrick J O'Connell v Thomas Keleghan
Ramsay, Ciaran
14 (2001) ITR 469

"Returning to Ireland - portfolio planning for the private individual" - case study
Moran, Dave
14 (2001) ITR 477

Revenue online service
Hussey, Frank
14 (2001) ITR 523

Risk management for tax practitioners
Doyle, Donald
14 (2001) ITR 635 [part 1]

Share acquisitions - support for VAT recovery
Butler, Brian
14 (2001) ITR 588

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Collins, Donncha
14 (2001) ITR 613

Tax relief for fees paid for third level education
Mulligan, Emer
14 (2001) ITR 525

The cost to the tax practitioner of rushed reform
Kelly, Suzanne
14 (2001) ITR 483

The criminal assets bureau and taxation - recent developments
Hunt, Patrick
14 (2001) ITR 573

The stamping of options
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Transfer of business relief - a new VAT trap?
Timmins, Chris
14 (2001) ITR 591

VAT invoicing proposed directive
Somers, Jim
Keenan, Brian
14 (2001) ITR 498

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Income tax Finance act 2001
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Clarke, Giles
8th ed
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M336.76

Ray's practical inheritance tax planning
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Hitchmough, Andrew
Wilson, Elizabeth
Dunn, Sarah
6th ed
London Butterworth Tolley 2001
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Taxation of capital gains Finance act 2001
Appleby, Tony
Carr, Frank
Dublin Institute of Taxation 2001
M337.15.C5

Tolley's taxation in the Republic of Ireland 2001
Saunders, Glyn
Dublin Tolley 2001
M335.C5

Statutory Instruments

Taxes consolidation act, 1997 (commencement of chapter 3 of part 23) order, 2001
SI 505/2001

Taxes (electronic transmission of corporation tax returns under self assessment) (specified provision and appointed day) order, 2001.
SI 522/2001

Torts

Articles

Risk management for tax practitioners
Doyle, Donald
14 (2001) ITR 635 [part 1]

The personal injuries assessment board
Brady, Rory
7(1) 2001 BR 39

Transport

Statutory Instruments

Carriage of dangerous goods by road regulations, 2001
SI 492/2001
DIR 94/55, DIR 2000/61, DIR 96/86, DIR 1999/47, DIR 95/50, DIR 2001/26

Carriage of dangerous goods by road act, 1998 (commencement) order, 2001
SI 495/2001

Carriage of dangerous goods by road (fees) regulations, 2001
SI 494/2001

Tribunals

Article

Tribunals and politics: a fundamental review
Brady, Rory
2000 CIIL & P 156

Wardship

K., In re.
High Court: **Morris P.**
09/06/2000

Wardship; capacity to institute proceedings; applicant, committee of the person of the ward, seeks to institute proceedings for the provision to the ward of funds to enable him to obtain nursing and maintenance services; whether committee of the person of the ward entitled to commence proceedings on behalf of the ward
Held: Application dismissed; it is the duty of the committee of the estate of the ward to institute such proceedings.

Wills

Library Acquisition

The construction of wills
Keating, Albert
Dublin Round Hall Ltd 2001
N125.C5

AT A GLANCE

Court Rules

Circuit court rules, 2001
SI 510/2001

European Directives

Carriage of dangerous goods by road regulations, 2001
SI 492/2001
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Carriage of dangerous goods by road act, 1998 appointment of competent authorities) order, 2001
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European communities (energy efficiency requirements for ballasts for fluorescent lighting) regulations, 2001
SI 511/2001
DIR 2000/55

European communities (environmental impact assessment) (amendment) regulations, 2001
SI 538/2001
DIR 85/337
DIR 97/11

European communities (internal market in natural gas) (compulsory acquisition) regulations, 2001
SI 517/2001
DIR 98/30

European communities (machinery) regulations, 2001
SI 518/2001
DIR 98/37

European communities (transport of dangerous goods by rail) regulations, 2001
SI 500/2001
DIR 96/49, DIR 96/87, DIR 1999/48, DIR 2000/62

European communities (statistics in respect of carriage of goods and passengers by sea) regulations, 2001
SI 501/2001
DIR 95/64

Road traffic (national car test) (no 3) regulations, 2001
SI 550/2001
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Sea fisheries (conservation and rational exploitation) order, 2001
SI 557/2001
Council Regulation (EC) 850/1998

Winter time order, 2001
SI 506/2001
DIR 2000/84/EC

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1/2001 Aviation Regulation Act, 2001
Signed 21/02/2001
SI 47/2001 (Establishment Day)

2/2001 Customs And Excise (Mutual Assistance) Act, 2001
Signed 09/03/2001

3/2001 Diseases Of Animals (Amendment) Act, 2001
Signed 09/03/2001

4/2001 Broadcasting Act, 2001
Signed 14/03/2001

5/2001 Social Welfare Act, 2001
Signed 23/03/2001
S.I. 243/2001 = Part 5 Commencement.
S.I. 244/2001 = S.38 Commencement.

6/2001 Trustee Savings Banks (Amendment) Act, 2001
Signed 28/03/2001

7/2001 Finance Act, 2001
Signed 30/03/2001
S.I. 212/2001 = Commencement Of S169

8/2001 Teaching Council Act, 2001
Signed 17/04/2001

9/2001 Electricity (Supply) (Amendment) Act, 2001
Signed 17/04/2001

10/2001 Housing (Gaeltacht) (Amendment) Act, 2001
Signed 23/04/2001

11/2001 Industrial Relations (Amendment) Act, 2001
Signed 29/05/2001
S.I. 232/2001 = Commencement

12/2001 Acc Bank Act, 2001
Signed 29/05/2001
S.I. 278/2001 = Commencement

13/2001 Valuation Act, 2001
Signed 04/06/2001

14/2001 Health (Miscellaneous Provisions) Act, 2001
Signed 05/06/2001
S.I. 305/2001= Commencement
S.I. 344/2001 = Commencement (No.2)

15/2001 Irish Nationality And Citizenship Act, 2001
Signed 05/06/2001

16/2001 Euro Changeover (Amounts) Act 2001
Signed 25/06/2001

17/2001 Health Insurance (Amendment) Act, 2001
Signed 27/06/2001

18/2001 Sex Offenders Act 2001
Signed 30/06/2001
S.I. 426/2001 = Commencement

19/2001 Carer's Leave Act, 2001
Signed 02/07/2001

20/2001 Horse And Greyhound Racing Act, 2001
Signed 02/07/2001

21/2001 Nitrigin Eireann Teoranta Act, 2001
Signed 03/07/2001

22/2001 Motor Vehicle (Duties And Licences) Act,2001
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23/2001 Vocational Education (Amendment) Act, 2001
Signed 05/07/2001

24/2001 Children Act, 2001-07-31
Signed 08/07/2001

25/2001 Mental Health Act, 2001
Signed 31/07/2001

26/2001 Irish National Petroleum Corporation Limited Act, 2001
Signed 09/07/2001

27/2001 Prevention Of Corruption (Amendment) Act, 2001
Signed 09/07/2001

28/2001 Company Law Enforcement Act, 2001
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S.I. 438/2001 = Commencement (No.2) Order.

29/2001 Agriculture Appeals Act, 2001
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30/2001 Oireachtas (Ministerial And Parliamentary Offices) (Amendment) Act, 2001
Signed 14/07/2001

31/2001 Standards In Public Office Act, 2001
Signed 14/07/2001

32/2001 Dormant Accounts Act, 2001
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33/2001 Ministerial, Parlimamentary And Judicial Offices And Oireachtas Members (Miscellaneous Provisions) Act, 2001-08-20
Signed 16/07/2001

34/2001 Adventure Activities Standards Authority Act, 2001-08-20
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35/2001 Human Rights Commission (Amendment) Act, 2001
Signed 16/07/2001

36/2001 Waste Management (Amendment) Act, 2001
Signed 17/07/2001

37/2001 Local Government Act, 2001

38/2001 Electoral (Amendment) Act, 2001
Signed 24/10/2001

39/2001 Industrial Designs Act, 2001
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40/2001 Fisheries (Amendment) Act, 2001
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41/2001 European Communities And Swiss Confederation Act, 2001
Signed 01/12/2001

42/2001 Youth Work Act, 2001

43/2001 Ordnance Survey Ireland Act, 2001-12-13
Signed 05/12/2001

44/2001 Heritage Fund Act, 2001
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45/2001 Protection Of Employees (Part-Time Work) Act,2001
Signed 15/12/2001

46/2001 Horse Racing Ireland (Membership) Act, 2001
Signed 18/12/2001

48/2001 Air Navigation And Transport (Indemnities) Act, 2001

(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

Bills in progress up to 11/01/2002

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

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

Appropriation bill, 2001
1st stage - Dail

Arramara teoranta (acquisition of shares) bill, 2001
1st stage – Dail

Asset covered securities bill, 2001
Committee – Dail

Care of persons board bill, 2001
2nd stage - Dail

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

Central bank (amendment) bill, 2000
2nd stage - Seanad (Initiated in Seanad)

Children bill, 1996
Committee - Dail

Civil defence bill, 2002
1st stage - Dail

Companies (amendment) bill, 1999
2nd stage - Dail **[p.m.b.]**

Competition bill, 2001
1st stage – Seanad

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

Containment of nuclear weapons bill, 2000
Committee - Dail (Initiated in Seanad)

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

Corporate manslaughter bill, 2001
2nd stage – Dail **[p.m.b.]**

Courts bill, 2000
2nd stage - Dail

Courts and court officers bill, 2001
1st stage – Dail

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

Criminal justice (temporary release of prisoners) bill, 2001
1st stage –Dail

Criminal justice (theft and fraud offences) bill, 2000
Committee – Seanad (Initiated in Dail)

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

Disability bill, 2001
1st stage – Dail

Disability commissioner bill, 2001
1st stage – Seanad

Disability commissioner (no.2) bill, 2001
2nd stage – Dail **[p.m.b.]**

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
Committee - Dail **[p.m.b.]**

Electoral (control of donations) bill, 2001
2nd stage – Dail **[p.m.b.]**

Employment rights protection bill, 1997
2nd stage - Dail **[p.m.b.]**

Energy conservation bill, 1998
2nd stage – Dail **[p.m.b.]**

Equal status bill, 1998
2nd stage - Dail [p.m.b]

European convention on human rights bill, 2001
Committee – Dail

European union bill, 2001
Committee – Dail

Extradition (European union conventions) bill, 2001
1st stage – Dail

Family law bill, 1998
2nd stage – Seanad

Family support agency bill, 2001
Committee – Dail

Fisheries (amendment) (no.2) bill, 2000
2nd stage - Dail (Initiated in Seanad)

Freedom of information (amendment) bill, 2000
2nd stage – Dail **[p.m.b.]**

Gas (interim) (regulation) bill, 2001
2nd stage – Dail (Initiated in Seanad)

Harbours (amendment) bill, 2000
Committee - Seanad

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

Health insurance (amendment) bill, 2000
Committee - Dail

Health Ombudsman bill, 2001
2nd stage - Dail

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

Housing (miscellaneous provisions) bill, 2001
2nd stage –Dail

Housing (miscellaneous provisions) (no.2) bill, 2001
1st stage – Dail

Human reproduction bill, 2001
1st stage – Dail

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

Independent Garda Ombudsman bill, 2001
2nd stage – Dail

Interpretation bill, 2000
1st stage – Dail

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

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

Law of the sea (repression of piracy) bill, 2001
2nd stage – Dail (Initiated in Seanad)

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

Licensing of indoor events bill, 2001
1st stage – Dail

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 **[p.m.b.]**

Mental health (amendment) bill, 2001
2nd stage – Seanad

Ministerial, parliamentary and judicial offices and oireachtas members (miscellaneous provisions) bill, 2001

National stud (amendment) bill, 2000
Committee – Dail

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

Organic food and farming targets bill, 2000
2nd stage - Dail [p.m.b]

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

Patents (amendment) bill, 1999
Committee – Dail

Pensions (amendment) bill, 2001
Committee – Seanad

Postal (miscellaneous provisions) bill, 2001
1st stage –Dail

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

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

Private security services bill, 2001
1st stage - Dail

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

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

Prohibition of female genital mutilation bill, 2001
2nd stage – Dail **[p.m.b.]**

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 health (tobacco) bill, 2001
2nd stage – Dail

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

Pyramid schemes bill, 2001
1st stage – Dail

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

Railway safety bill, 2001
1st stage – Dail

Referendum bill, 2001
1st stage - Dail

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

Registration of births bill, 2000
2nd stage – Dail

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.]**

Residential institutions redress bill, 2001
2nd stage – Dail

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

Road traffic bill, 2001
1st stage -Dail

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
2nd stage - Dail

Sex offenders bill, 2000
Report - Dail

Shannon river council bill, 1998
Committee - Seanad

Social welfare (no.2) bill, 2001
1st stage - Dail

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

State authorities (public private partnership arrangements) bill, 2001
2nd 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.]**

Surgeon General bill, 2001
2nd stage - Dail

Sustainable energy bill, 2001
2nd stage –Dail (Initiated in Seanad)

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

Transport (railway infrastructure) bill, 2001
Report – Dail (Initiated in Seanad)

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

Tribunals of inquiry (amendment) bill, 2001
2nd stage – **[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]

Twenty-first amendment of the constitution bill, 2001
2nd stage – Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.2) bill, 2001
2nd stage - Seanad

Twenty-second amendment of the constitution bill, 2001
Committee – Dail

Twenty-third amendment of the constitution bill, 2001
Committee – Seanad

Twenty- fourth amendment of the constitution bill, 2001
2nd stage –Dail

Twenty- fifth amendment of the constitution bill, 2001
2nd stage – Dail **[p.m.b.]**

Twenty-fifth amendment of the constitution (protection of human life in pregnancy) bill, 2001
Committee – Dail

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

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

Waste management (amendment) bill, 2001
1st stage – Dail

Waste management (amendment) (no.2) bill, 2001
Report (Initiated in Seanad)

Whistleblowers protection bill, 1999
Committee - 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
FSLJ = Financial Services Law Journal
GLSI = Gazette 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
IJFL = Irish Journal of Family Law
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.

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prohibit the existence of such offences. It simply requires that any sentences imposed should reflect the fact that a fundamental human right is being restricted, albeit in the public interest. The same argument might be made in respect of certain offences created by the Criminal Justice (Public Order) Act 1994, especially the offence of publicly distributing or displaying material that is threatening, abusive, insulting or obscene. This offence is a clear limitation on the right to free speech.

Mothers convicted of Non-Violent Dishonesty Offences

In *R v. Mills*[59] the English Court of Appeal listed certain factors which should be considered when sentencing women who are responsible for young children and who have been convicted of shoplifting or other non-violent dishonesty offences. The Court noted that (a) the capacity of the prison service to achieve anything of benefit to the offender during a short sentence was limited; (b) where the offender was the sole support of young children, the court should bear in mind the consequences for the children of their mother being sent to prison; and (c) since 1993 there had been a remarkable and undesirable increase in number of female prisoners. It went on to say that where the offender was of previous good character, the offences were out of character and there was every reason to think she would not offend again, the court should avoid sending her to prison and using other methods of repaying the harm done to the community.[60] In this case, the Court quashed an eight-month prison sentence and replaced with a six-month community rehabilitation order. It is suggested that a similar approach should be adopted in Ireland, especially in light of the protection accorded to the family under Article 41 of the Constitution and the personal rights of children under Article 40, as well as the rights of children under the UN Convention on the Rights of the Child which Ireland has ratified. Most sentencing judges probably follow such a principle already, but it would be useful to have a formal statement of it.

The reviewable sentence

The practice of imposing reviewable sentences will hopefully come to an end following on the Supreme Court's judgment in *The People (D.P.P.) v Finn.*[61] Having analysed the various difficulties to which such sentences give rise and their incompatibility with the separation of powers, the Court concluded that "sentences in this form are undesirable, having regard to the serious legal questions which arise as to their validity, and that the practice of imposing them should be discontinued."[62] What the courts still continue to impose are part-suspended sentences, e.g. a sentence of five years with the last two suspended. The logic of these sentences is not always clear either. Sometimes, for example, the suspended portion will be in recognition of the fact that the offender has pleaded guilty or that there is some other mitigating factor. However, it is part of sentencing law that credit should be given for these matters in the calculation of sentence. It would seem more logical if sentencing judges were to spell out that the sentence would have been of a certain length were it not for the mitigating factors involved. If part suspended sentences are to remain available, they should be governed by a statutory provision spelling out the kind of conditions by which suspension may be governed and the portion of the sentence against which remission is to be calculated. Granted, such sentences do serve a purpose in the sense that the offender faces a longer sentence if he or she misbehaves during a certain period after completing the term actually served, but more specific rules along the lines indicated are needed, as are some guidelines on the circumstances in which it appropriate to impose such sentences.

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Prosecution Appeals

Several principles have been established or confirmed as a result of recent references by the D.P.P. to the Court of Criminal Appeal under section 2 of the Criminal Justice Act 1993 (or prosecution appeals against sentence, as they are commonly called). In *Redmond* the Court held that in order to justify interference with a sentence referred under this section, an error of principle must be demonstrated, as in the case of a defence appeal. This is certainly the correct approach given that one of the main purposes of such references is to reduce sentencing disparity.[63] In the earlier case of *D.P.P. v. McCormack*[64] the Court had said that:

> "undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaos in exceptional circumstances, have been caused by an obvious error in principle".

The High Court of Australia, where there are broadly similar statutory provisions, has also held that an error of principle is required, saying that this "may involve the adoption by the primary judge of an incorrect principle, giving weight to some extraneous or irrelevant matter, failing to give weight to some material considerations, or a mistake as to the facts."[65] The Australian court went further, however, by acknowledging that a case may arise where there is no identifiable legal error but where the sentence imposed was "so manifestly unreasonable or plainly wrong, that the appellate court will be able to infer that, in some unidentified way, there has been a failure to exercise the power properly."[66] In such a case the appellate court will be justified in intervening.

Section 2 of the Criminal Justice Act 1993 provides that if the D.P.P. wishes to refer a sentence to the Court of Criminal Appeal on the grounds of undue leniency, he must do so "on notice given to the convicted person, within 28 days from the date on which the sentence was imposed." Section 1(1) of the Act defines "sentence" as including a sentence of imprisonment and "any other order made by a court in dealing with a convicted person" other than an order under the Lunacy Acts or an order postponing sentence in order to obtain medical, psychiatric or probation reports. In *The People (D.P.P.) v Finn*[67] a question arose as to the date from which the 28 days should be calculated in relation to reviewable sentences (see below). The Court held that the period ran from the date on which the original sentence was imposed, and that there was nothing in the Act of 1993 to suggest that the D.P.P. was to be given two opportunities to make an application to the Court of Criminal Appeal. The latter court also held in *The People (D.P.P.) v Dreeling and Lawlor*[68] that an order deferring sentence is to be interpreted as a sentence for the purpose section 2 of the Act. The Court (*per* Murphy J) noted that the section excludes from the definition of sentence a postponement for the obtaining of specified reports (as just noted), but not postponement for any other purpose. The Court said that once the sentencing judge "makes an order concerning the manner in which a convicted person is to be dealt with a consequence of his conviction, the judge must be considered as having commenced the sentencing process."[69] An order deferring sentence (as in this case on the terms that the defendants would abide by the orders of the Probation and Welfare Service and remain drug free) was clearly a sentence. Therefore, the 28-day period ran from the date of that order. These decisions are to be welcomed on the ground that, as the Supeme Court noted in *Finn*,[70] the right conferred on the D.P.P. by the Act of 1993 is a novel jurisdiction and a clear departure from the traditional principle of finality attaching to sentences imposed by trial courts and which might be construed as being favourable to convicted persons.

When deciding if a particular sentence is unduly lenient, the Court of Criminal Appeal is entitled to take account of the previous record of the accused. This would appear to be the principle informing the Court's decision in *D.P.P. v. Dodd*[71] where an effective sentence of two years' imprisonment was increased to three and half years for the offence of dangerous driving causing serious injury. The Court said that the original sentence was unduly lenient "largely and mainly" because of the accused person's previous criminal record which included a five-year prison sentence imposed in England for dangerous driving causing death.

Relevant date for determining "appropriate sentence" in prosecution appeals

In *D.P.P. v Egan*[72] the Court of Criminal Appeal (per Hardiman J), in line with earlier decisions, said that when it came to deciding on the appropriate sentence to be substituted for the original sentence, "'appropriate' means appropriate to the circumstances pertaining at the time the application for review is heard." In that case, the Court was of the view that the sentence imposed, when viewed in the context of the time of its imposition, was unduly lenient. The offender had been given an effective sentence of three months' imprisonment for sex offences involving teenage youths, whereas the Court indicated that a 12-month sentence would have been more appropriate. However, the Court took account of what had happened in the meantime. The offender had been to prison, been released, had lost his job as a result and had taken steps to rebuild his life. The Court said that, following on the approach adopted in *D.P.P. v M.S.*[73] the interests of both society and the offender would best be served by allowing that process to continue. It therefore decided to affirm the original sentence. There are at least two other grounds which support this result. One, which was mentioned by the Court, is that appeal courts should, as a rule, be slow to return a person to prison once he has been released.[74] The second is that if the difference between the sentence actually imposed and that which the Court seem to consider appropriate was only nine months or so, then it is questionable if a sentence should be varied following a prosecution appeal in order to reflect so small a difference. The lapse of time between the date of the original conviction or sentence and the hearing of the appeal is another factor to be taken into account.[75]

The "double jeopardy" element of prosecution appeals

In *The People (D.P.P) v Heeney*[76] the Supreme Court expressed some surprise at a reference to "double jeopardy" in the context of a prosecution appeal against sentence. The term is, indeed, a rather unfortunate one and, in such a context, has nothing to do with double jeopardy in the traditional sense. However, it is widely used in England and elsewhere to refer to a discount granted to a defendant when a prosecution appeal succeeds. The essence of the principle is summed up in the following passage from *Attorney-General's Reference No 3 of 1993*,[77] one of the many illustrations of its operation:

> "We have to bear in mind the element of double jeopardy in all Attorney-General's references: the offender has been sentenced, he then hears that the sentence is to be reviewed, he has the added suspense and anxiety of waiting and attending on the hearing."

In *Attorney-General's References Nos 37 and 38 of 1997*[78] Lord Bingham C.J. referred to the "invariable practice of [the Court of Appeal that] some adjustment must be made to reflect the fact that the offenders are being sentenced for a second time" He noted that this was often described "but perhaps not very aptly" as double jeopardy.[79] The English Court of Appeal has also said that discount assumes particular importance when a custodial sentence is substituted for a non-custodial one[80] or where there have been repeated adjournments of the appeal hearing.

Impact of increased maximum sentence

A legislative decision to increase the maximum sentence for an offence is be interpreted as a legislative signal to the courts to make some increase in sentences actually imposed. The New Zealand case, *R v Spartalis*[81] which is a leading common-law precedent on this issue, was cited, apparently with approval, by the Court of Criminal Appeal in *The People (D.P.P) v Sheedy*.[82] In the latter case, the relevant maximum sentence had been doubled to ten years' imprisonment, but the Court was satisfied that the trial judge had taken the increase into account. The same principle has been stressed by the Court in several recent cases involving the new section 15A of the Misuse of Drugs Act 1977 (considered below under "Sentencing for Drug Offences"). In both The People (D.P.P) v Renald[83] and

The People (D.P.P.) v Duffy[84] it was said that particular attention must be paid to maximum sentences specified by modern, as opposed to ancient, legislation as this reflects current thinking on the gravity of the offences in question. The Court also said that this principle is all the more relevant when a mandatory minimum sentence is specified, even though departures from that minimum are statutorily permitted in specified circumstances.[85]

Taking offences into consideration

McCauley and Walsh[86] provided the Court of Criminal Appeal with a rare opportunity to consider section 8(1) of the Criminal Justice Act 1951 (as amended) which allows for further offences to be taken into account at sentencing. Here, the D.P.P. argued that the trial court had erred in principle in failing to increase significantly the sentences imposed for the offences of conviction in view of the offences taken into account. The Court of Criminal Appeal rejected this argument, holding that while the trial court could have increased sentence for this reason, it was not obliged to do so, particularly as the offences in question had been taken into consideration without objection from the prosecution. In reaching this decision, the Court was doubtless influenced by the fact that the 14-year sentences imposed for the offences of conviction in this case, namely manslaughter, malicious wounding and possession of firearms, were amongst the longest sentences imposed in modern times for such offences.[87]

Sentencing for drug offences

The Criminal Justice Act 1999 (which inserted section 15A in the Misuse of Drugs Act 1977) provides that a person who has in his possession for sale or supply controlled drugs with a market value of £10,000 or more is liable to a maximum sentence of life imprisonment and, at the court's discretion, a fine. However, a person convicted of such an offence, unless a child or young person, must be sentenced to at least 10 years' imprisonment unless the court is satisfied that there are exceptional circumstances relating to the offence or the person committing the offence which would make a minimum ten-year sentence unjust in all the circumstances. For this purpose, the court may consider "any matters it considers appropriate" including whether the person pleaded guilty and whether he or she materially assisted in the investigation of the offence. The 10-year minimum sentence has rarely been imposed to date, but it has given rise to some difficulties in terms of the role, if any, it should serve as a benchmark sentence. In *Renald*[88] the Court of Criminal Appeal held that while the Act of 1999 does not authorise the use of the minimum sentence as a benchmark, "in the sense of providing a figure by reference to which particular reductions or discounts should be afforded having regard to material circumstances existing in the particular case", statutory sentencing limitations are "of the utmost importance in recognising the gravity of the offence and determining the appropriate punishment".[89] However, one reason why the court took this view is that adopting the ten-year sentence as a benchmark might lead to unduly lenient sentences in particular cases given that the maximum sentence is life imprisonment. In *D.P.P. v Hogarty*[90] the Court again cautioned against the use of the 10-year sentence as a benchmark but again it would seem on the ground that it might lead to an unduly lenient sentence in the case of a serious offence.

It is submitted that the proper approach to take is to ask, first, if in view of all the circumstances of the case a minimum sentence of 10 years is called for. This would mean taking account of the mitigating factors listed in the new section 15A and if it were found that they did not exist, then a sentence of ten years or more may be imposed. However, if it is found that there are factors present which justify a departure from the ten-year mandatory minimum, then the court should proceed to assess the overall gravity of the offence, without "counting down" from the ten-year minimum. However, it should have regard to that minimum as a general legislative indication of the seriousness with which such offences are to be viewed. This approach would appear to be in harmony with the judgments in *Renald and Duffy*.

Attacks on the Elderly

In *D.P.P. v Kennedy and Wills*[91] the Court of Criminal Appeal once more stressed the very serious nature of attacks on elderly persons living alone or in isolated areas. The offenders and two others, wearing balaclavas or something similar over their heads, had entered the home of a 77-year old man and robbed him of £600 in cash. The trial judge adjourned sentence for a year to let the offenders collect some money to compensate the victim. Each of the offenders eventually came up with £1,000 compensation whereupon the trial judge gave each of them a five-year suspended prison sentence. The Court of Criminal Appeal held that the failure to impose an immediate custodial sentence in this case was an error in principle and a substantial departure from what would have been an appropriate sentence. The Court also criticised the trial judge's decision to adjourn sentence for a year when the appropriate sentence was clearly a custodial one. In this case, as in others such as *Egan*[92] considered earlier, the Court had to assess the circumstances as they existed at the time of the appeal. Bearing all of these circumstances in mind, it decided to impose a five-year prison sentence on each offender, but to suspend the final four and a half years in each case. This was still a lenient sentence for an offence that must, by any standards, rank towards the top of any scale of offence gravity.

Sentencing for Dangerous Driving

The Road Traffic Act 1994 increased the maximum sentence for dangerous driving causing death from five to ten years' imprisonment. In *The People (D.P.P.) v Sheedy*[93] the Court of Criminal Appeal (*per* Denham J.) set out a list of aggravating and mitigating factors which were relevant in selecting sentence for such an offence. While the factors listed reflect the particular circumstances of that case, they are helpful for dangerous driving cases generally. The aggravating factors were: death having been caused, excessive speed, manner of driving, consumption of alcohol and fact that the car was new to the offender and he should have taken more care. The mitigating factors were: guilty plea, no previous convictions, helpful attitude of offender, previous attitude to life, remorse and the effect of the offence and sentence on the offender's future.[94] Considerable variations are still evident in sentencing for dangerous driving causing death or serious injury. Prison sentences seem to be the norm and are seldom less than two years. Occasionally, a suspended sentence is imposed, though it is difficult to identify any rationale for the most of the variations in sentencing for this offence at trial court level. ●

1. As the Court of Criminal Appeal said in *D.P.P. v McCormack* [2000] 4 I.R. 356 at 359: "The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused".
2. *New York Times*, September 2, 2001.
3. Recent research by the Vera Institute of Justice suggests that the guideline systems of some U.S. States have contributed to lower incarceration rates. See www.vera.org
4. Chicago, 1998. See also Freed, "Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers" (1992) 101 Yale L.J. 1681.
5. Bowman, "Fear of Law: Thoughts on *Fear of Judging* and the State of the Federal Sentencing Guidelines" (2000) 44 *Saint Louis University Law Journal* 299 at 309.
6. *British Oxygen Co. Ltd v. Minister of Technology* [1971] A.C. 610.
7. On a more positive note, the *Irish Reports* are now carrying more Court of Criminal Appeal judgments than heretofore.
8. Stephen, "Variations in the Punishment of Crime" (1885) 2 *The Nineteenth Century* 755, discussed at more length in O'Malley, "Resisting the Temptation of Elegance: Sentencing Discretion Reaffirmed" (1994) 4 I.C.L.J. 1.
9. Mason, *Race and Ethnicity in Modern Britain* 2nd edn (Oxford, 2000).
10. According to Central Statistics Office data, for example, more than 98% of the population of Ireland in 1996 were born in the island of Ireland or in Britain.
11. Leading works on this topic include, Tonry, *Race, Crime and Punishment in America* (New York, 1996), Mauer, *Race to Incarcerate* (New York, 2001), Hood, *Race and Sentencing* (Oxford, 1992), Baldus et al, "Racial Discrimination and the Death Penalty in the post-*Furman* era" (1998) 83 Cornell L. Rev. 1683; Note, "Constitutional Risks to Equal Protection in the Criminal Justice System" (2001) 114 Harvard L. Rev. 2098; Jefferson and Walker, "Racial Minorities within the Criminal Justice System' [1992] Crim L.R. 83. See also the magisterial dissenting opinion of Brennan J in *McCleskey v Kemp* 481 U.S. 279 (1987) at 320 et seq.
12. See the comments of Court of Criminal Appeal (*per* Denham J) in *The People (D.P.P.) v Sheedy* [2000] 2 I.R. 184 at 193-194, and Tata, "The Application of Artificial Intelligence and 'Rules' to Systems Supporting Discretionary Judicial Decision-Making." (1998) 6 *Artificial Intelligence and Law* 203.
13. *The People (D.P.P.) v Tiernan* [1988] I.R. 250
14. On the relationship between sentencing policy and public opinion, see Shute, "The Place of Public Opinion in Sentencing Law" [1998] Crim L.R. 465.
15. CCA, 21 December 2000 (Hardiman J).
16. Council Regulation (EC) No 2866/98 of 31 December 1998, OJ L 359 31.12.1998.
17. Inserted by the Criminal Justice Act 1999 and providing for a presumptive minimum sentence of 10 years imprisonment for certain drug offences when the street value of the drugs is £10,000 or more.
18. Schedule 4 of the Act of 2001.
19. S.I. No 426 of 2001.
20. S. 37.
21. This was in respect of indecent assault against a female. Indecent assaults against males already had a 10-year maximum under section 62 of the Offences Against the Person Act 1861.
22. *S.O.C. v Governor of Curragh Prison*, Supreme Court, unreported, 13 July 2001.
23. The conditions are spelt out in section 53 but they are essentially the same as those specified in section 2 of the Criminal Justice Act, 1951 as amended by s. 8 of the Criminal Justice (Miscellaneous Provisions) Act, 1997.
24. [2001] 1 I.R. 113.
25. [2001] 1 I.R. 113 at 118, referring to *The State (Healy) v Donoghue* [1975] I.R. 325, 349 (O'Higgins, C.J.).
26. Ibid. 118.
27. (1999) 199 C.L.R. 270.
28. *Ibid.* at 282.
29. [1998] 1 V.R. 359 at 369.
30. High Court, unreported, 4 October 2001 (Carroll J).
31. [2001] 1 I.R. 180. Judgment was delivered by Geoghegan J with whom Keane C.J. and Denham, Murphy and Hardiman JJ agreed.
32. *Ibid.* 186.
33. *Ibid.*
34. *Ibid.* 188.
35. The main purposes of punishment are retribution, general deterrence, specific deterrence, rehabilitation, incapacitation and censure.
36. [2000] 4 I.R. 361.
37. The D.P.P. had brought a cross-appeal against leniency of sentence.
38. The Court (per Geoghegan J) at p. 367 says that "on the other hand, there is a strong public interest in this man becoming a safe member of society."
39. [2000] 2 I.R. 592.
40. *Ibid.* p. 601.
41. CCA, 23 November 2001
42. CCA, 23 November 2001
43. CCA, 18 May 1999.
44. Remorse also appears to have been a relevant factor in *D.P.P. v McCormack* [2000] 4 I.R. 356 where the Court of Criminal Appeal decided not to impose a custodial sentence for offences of rape and aggravated sexual assault.
45. See Posner, *Frontiers of Legal Theory* (Harvard, 2001).
46. For which provision was made in the Criminal Justice Act, 1993.
47. *J.O.C. v. D.P.P.* [2000] 3 I.R. 478, at 529.
48. *A.W. v. D.P.P.* High Court, unreported, 23 November 2001.
49. High Court, unreported, 5 December 1997 (McCracken J).
50. High Court, unreported, 23 November 2001.
51. [2001] 2 N.Z.L.R. 448 at 459.
52. [2000] 4 I.R. 361, 368.
53. [2000] 4 I.R. 361.
54. Criminal Justice (Community Service) Act 1983, ss 1(1), 3(2) and 5(1).
55. For an authoritative analysis of the relevant law, see Emmerson and Ashworth, *Human Rights and Criminal Justice* (London, 2001), Chapter 16.
56. Briefly, the rights in question are personal and family privacy (Art. 8), freedom of thought, conscience and religion (Art. 9), freedom of expression (Art. 10) and freedom of assembly and association (Art. 11). All are drafted in the same format, the first paragraph expressing the right and the second allowing for restrictions in the interests of public safety, the protection of health and morals, the protection of the rights of others and so forth.
57. Support for this proposition may be inferred from *Laskey v.U.K.* (1997) 24 E.H.R.R. 39; *Hoare v U.K.* [1997} E.H.R.L.R. 678; *Worm v Austria* (1998) 25 E.H.R.R. 454.
58. This is prima facie a restriction of the principle that what a person reads in the privacy of their own home is beyond the reach of the law: *Stanley v Georgia* 394 U.S. 557 (1969).
59. Court of Appeal, Criminal Division, 14 January 2002 (*The Times* 30 January 2002).
60. This is a summary of the judgment as reported in The Times law reports.
61. Supreme Court, unreported, 24 November 2000. I have discussed this in more detail in "Principles of Sentencing: Some Recent Developments" (2001) 1 *Judicial Studies Institute Journal xxx*
62. P. 44 of transcript.
63. In *Everett v The Queen* (1994) 181 C.L.R. 295 at 306, McHugh J said that Crown appeals facilitate uniformity in sentencing which is "of great importance in maintaining confidence in the administration of justice in any jurisdiction."
64. [2000] 4 I.R. 356 at 359.
65. *Dinsdale v The Queen* [2000] HCA 54 at [58]. A similar approach has been adopted in Scotland. See *H.M. Advocate v Bell* 1995 S.L.T. 350 and Maher, "Crown Appeals against Sentence in Scotland" [1998] Crim L.R. 854.
66. *Ibid.* at [59].
67. Supreme Court, unreported, 24 November, 2000.
68. CCA, 27 February 2001.
69. Page 9 of transcript.
70. Unreported, 24 November 2000.
71. Unreported, 19 April 1999 (Lynch J).
72. [2001] 1 I.L.R.M. 299 at 307.
73. [2000] 2 I.L.R.M. 311.
74. *R. v Bartkow* [1978] 1 C.R.S. 36 (Nova Scotia) quoted by the Court in *Egan* at p. 308.
75. *D.P.P. v Kennedy and Wills*, CCA, 27 February 2001.
76. [2001] 1 I.R. 736.
77. (1993) 14 Cr. App.R. (S) 739 at 744.
78. [1998] 2 Cr. App.R. (S) 48 at 52.
79. *Ibid,*
80. *Attorney-General's Reference No 41 of 1994* (1995) 16 Cr. App.R.(S) 792 at 795.
81. [1979] 2 N.Z.L.R. 265.
82. [2000] 2 I.R. 184 at 193.
83. CCA, 23 November 2001.
84. CCA, 21 December 2001.
85. "...the very existence of a lengthy mandatory minimum sentence is an important guide to the courts in determining the gravity of the offence and the appropriate sentence to impose for its commission." (*The People (D.P.P.) v Renald* and quoted with approval in *D.P.P. v Duffy.*
86. CCA, 25 October 2001 (Keane C.J.).
87. See p. 6 of transcript.
88. CCA, 23 November 2001.
89. Page 7 of transcript.
90. CCA, 21 December 2001.
91. CCA, unreported, 27 February 2001.
92. [2001] 2 I.L.R.M. 299
93. [2000] 2 I.R. 184.
94. *Ibid.* 195-196.

CONTEMPT FOR FAILURE TO MAKE DISCOVERY FOLLOWING *The Sole Member v Lawlor*

Cathal Murphy BL *considers the law relating to contempt for failure to make discovery in the light of the recent decision of the Supreme Court on the appeal brought by Liam Lawlor TD against the order of the Honourable Mr. Justice Smyth in The Sole Member v Liam Lawlor*

Preliminary

On the 12th December 2001, the Supreme Court delivered its judgment on Liam Lawlor's appeal against the ruling and sentence imposed by Smyth J in the High Court on the 31st July 2001. It is necessary to give a brief history of the Lawlor proceedings to date in order to understand fully both the way in which the matter came before the Supreme Court and the respective rulings of the High Court and the Supreme Court.

On the 8th June 2000, the Sole Member of the Tribunal of Inquiry into Certain Planning Matters and Payments ('the Respondent') made an order, pursuant to his powers under the Tribunals of Inquiry Acts, directing Liam Lawlor ('the Appellant') to make discovery of various documents, the particulars of which are not relevant to this discussion, save for the fact that the period for which discovery was to be made extended back to 1974. The Appellant did not comply with this order, and the Respondent applied to the High Court for an order compelling the Appellant to comply with the order of the 8th June. Smyth J granted that order on the 24th October 2000. Again, the Appellant did not comply, and the matter was re-entered before the High Court by way of Motion for Attachment and Committal of the Appellant for contempt. In his reserved judgment, delivered on the 15th January 2001, Smyth J said:

> "In my judgment, the contempt of the order of the High Court and the Supreme Court [The Appellant had unsuccessfully appealed part of the order of the 24th October] are of a most serious character and do not only justify the imposition of a custodial sentence, they demand it."[1]

The sentence that was imposed by Smyth J consisted of a fine of IR£10,000, together with a 3 month custodial sentence, suspended, but for the first 7 days, to the 23rd November 2001. In addition, the Appellant was required to furnish further Affidavits of Discovery over the ensuing months. The suspension of the balance of the term of imprisonment was dependent upon the Appellant complying fully with his discovery obligations. There was periodic case management by the Court, and the matter was ultimately listed before the Court on the 3rd July 2001. The Court was informed that the Respondent had certain concerns regarding the adequacy of the discovery to date. Smyth J fixed dates for the delivery of affidavits and the matter was heard on the 20th, 23rd, 24th and 25th July 2001. In his reserved judgment, delivered on the 31st July 2001, Smyth J took "a conspectus view of the evidence sufficient to enable me to conclude as I have on the question of compliance"[2], holding that there had been non-compliance of a "serious character" with the order of the court. He expressly identified three areas of non-compliance. Firstly, the absence of any documents relating to a land deal, known as the 'Coolamber lands'; secondly, a lack of genuine effort to procure documents from third parties; thirdly, a failure to comply with

"In both the high Court and the Supreme Court, the form of schedule filed by the Appellant was deemed to b a significant failure, in and of itself, anc both Courts noted that the duty to make proper discovery rests with the party making the discovery. There is nc obligation on the other party to draw attention to deficiencies in the manner in which the discovery was made."

the express order of the court to deliver an affidavit in the form prescribed by the Rules of the Superior Courts, and in particular the delivery of an inadequate second schedule (documents that were once but are no longer in the deponent's possession, etc).

As a consequence of that finding, Smyth, J ordered that the Appellant should serve another 7 days in custody, pay a fine of IR£5,000 and deliver a further Affidavit of Discovery on or before the 7th September 2001. The learned High Court Judge refused a stay on his order, and the Appellant sought and was granted a stay by the Supreme Court pending an appeal to that court.

The Appellant's Notice of Motion contained eleven grounds of appeal. However, in essence the Appellant made four principal submissions; firstly, there had been full and sufficient compliance; secondly, if there was any non-compliance, it was of a technical and lesser character remedied by swearing another affidavit; thirdly, the sanction imposed was disproportionate, unreasonable and excessively harsh; fourthly, the learned trial judge had erred in law in taking a 'conspectus view' of the evidence, and in not identifying incidents of non-compliance with sufficient particularity. In its reserved judgment, delivered by Keane CJ on the 12th December 2001, the Supreme Court dismissed the appeal, unanimously upholding the order of the High Court intimating that the order made was, in terms of severity, the bare minimum:

> "I would not consider the imposition of a further week's sentence of imprisonment and a fine of £5,000 - or indeed a significantly increased penalty - excessive or disproportionate."[3]

Many aspects of the judgments, both in the High Court and the Supreme Court, are not of relevance to the present discussion as they deal with matters specific to the instant case and the personal dealings of the Appellant. What can be extracted of general application are the Courts' views on a party's discovery obligations under the Rules of the Superior Courts, and the law of contempt. I will deal with these topics in turn.

Failure to comply with Form 10, Appendix C

One of the specific findings of the High Court, endorsed by the Supreme Court, was the Appellant's failure to comply with the requirements under the Rules of the Superior Courts to file an Affidavit of Discovery in compliance with Form 10, Appendix C.

"The general comment as to the inadequacy of a pro-forma schedule expands on the Supreme Court's ruling in the Bula case, where it was held that where privilege is claimed in respect of documents, those documents must be categorised with sufficient particularity to allow..the party for whom the order was made to assess the claim of privilege, and to raise any challenge. It would now appear that this obligation extends to the second schedule."

As already stated, the Appellant was obliged to furnish further affidavits of discovery, subsequent to the 15th January 2001, on a two weekly basis, and this he did. However, as the discovery process would therefore be incomplete until the final affidavit, these affidavits related to each batch of documents discovered rather than to every document as would be the case under a standard order for discovery. Therefore, it was agreed between the parties that the final affidavit would operate as a master affidavit, making the usual averments and containing the appropriate schedules as to documents in the deponent's power, possession or procurement, as to privileged documents as to and documents no longer in the deponent's power, possession or procurement. This final affidavit was sworn on the 11th May 2001. In this affidavit, the Appellant deposed as follows:

> "I say that I have had, but have not now, in my possession or power or procurement the documents relating to the matters raised to date in this inquiry as set forth in the second schedule hereto and that the reasons that same are no longer in my possession or power are as set forth in the said second schedule."

The second schedule to the affidavit read as follows:

> "Various records, processed cheques, photocopies of documents, invoices, bills, correspondence and similar documentation that may have been in your deponent's possession over those years, 1973 to date, but which has been lost, destroyed, stolen, burnt or thrown away over those years but which had not been found or returned, and cannot be recalled for the purposes of this affidavit; and also documentation that may be in the possession of third parties and which has been sought by your deponent and which has not been procured or returned despite request as already set out and referred to in the correspondences previously discovered herein."

Smyth J held that the Appellant was not entitled to provide a pro-forma second schedule in this form, in doing so that he was not in compliance with the orders of the High Court, and that this non-compliance was of a serious character. It was submitted on behalf of the Appellant that the form adopted was one that was commonly used, and was the accepted practice for the second schedule. In the alternative, Counsel submitted that, had the Appellant been made aware of the Respondent's concerns over the form adopted, the matter could have been rectified by the Appellant filing a supplemental Affidavit containing a more considered second schedule. Both submissions were rejected in the High and Supreme Courts. In both Courts, the form of schedule filed by the Appellant was deemed to be a significant failure, in and of itself, and both Courts noted that the duty to make proper discovery rests with the party making the discovery. There is no obligation on the other party to draw attention to deficiencies in the manner in which the discovery was made. It was also noted that, even if one accepted that there was a duty to raise objections to the form of discovery, the Appellant could not rely upon any such duty in the instant case, as "the defendant [could not] have been under any doubt as to his obligations in this context, since this had been specifically referred to in the application to the High Court in January of this year."[4]

The general comment as to the inadequacy of a pro-

forma schedule expands on the Supreme Court's ruling in the *Bula case*[5], where it was held that where privilege is claimed in respect of documents, those documents must be categorised with sufficient particularity to allow the party for whom the order was made to assess the claim of privilege, and to raise any challenge. It would now appear that this obligation extends to the second schedule; an affidavit of discovery must include a considered second schedule. Even if a pro-forma schedule was the accepted practice, both courts refused to recognise the legitimacy of such a practice. The Supreme Court quoted with approval the law as stated by Bray on Discovery:

> "The purpose of the affidavit of documents is not merely to enable production to be ordered from the party himself. Its object is also to discover the existence of documents which have been in his possession or power and what has become of them and in whose possession they are (see the Form App. Ch. I) and also of documents in which he has a joint property with other persons not before the court (and their names see Ante, p.198) and which therefore he cannot be ordered to produce, in order that the adversary may be enabled (1) to get production or even possession of them from the persons who have possession of or a property in them: see Ante, pp. 21 -23; (2) and to extort their contents by means of interrogatories..."

and concluded, generally, that:

> "Where it has not been shown to be unduly burdensome or impracticable, then, in my view, the obligation remains on the person making discovery to comply precisely with the format envisaged by the rules and set out in Appendix C, Form No. 10."[6]

and in regard to the present case:

> "As to the third matter - the compliance with Form No. 10 of Appendix C - I have already pointed out that, while the rules as to the discovery of documents no longer in a parties possession or power should not be construed in a manner with would be unduly burdensome or impracticable, that did not justify the use of the formula adopted by the defendant in relation to the second schedule in this case."[7]

One of the specific examples of non-compliance, as already mentioned, was in respect of documents relating to the 'Coolamber lands'. It was held that the interest of the Tribunal in this land deal must have been known to the Appellant and therefore, he should have discovered those documents. In the alternative, if he no longer had those documents, he should have listed them with sufficient particularity, in the second schedule, to enable the Respondent to identify the documents, their nature, and who might have them now. Therefore, in holding that the delivery of a pro-forma second schedule amounted to serious non-compliance, the High and Supreme Courts had the advantage of a specific example of the inadequacy of a pro-forma second schedule in the case under consideration. Had there merely been a general complaint by the Respondent, as to the inadequacy of the second schedule furnished by the Appellant, not fortified by a concrete example, the court might well have viewed that inadequacy as a trivial matter, as the Appellant urged.

"The Supreme Court stated that the obligation to furnish a considered second schedule would not necessarily apply where it would be unduly onerous or burdensome on the party making discovery...However, under the Rules, discovery is necessarily of a limited nature, identified as necessary and relevant to the issues between the parties. It is therefore difficult to envisage a scenario where the duty to furnish a considered second schedule would be unduly onerous or burdensome."

The Supreme Court stated that the obligation to furnish a considered second schedule would not necessarily apply where it would be unduly onerous or burdensome on the party making discovery. It went on to conclude that in the present case, the Appellant was not entitled to furnish a second schedule in the form that he did. On this point, it is hard to envisage a case that could be categorised as being unduly onerous or burdensome, if the present case was not so viewed by the court. It must be remembered that the order for discovery covered a period running from 1974 to the present, and related to every financial transaction that the Appellant had any connection with during that period. It must also be remembered the Appellant's industry over the years was prodigious to say the least, and involved numerous business ventures in several jurisdictions, and concerned countless bank accounts, again in several jurisdictions. Rightly or wrongly, the investigation by the Tribunal amounts to a 'fishing expedition', an exercise no longer permitted by the Rules of the Superior Courts as they apply to a normal *lis inter partes*. Under the Rules, discovery is necessarily of a limited nature, identified as necessary and relevant to the issues between the parties. It is therefore difficult to envisage a scenario where the duty to furnish a considered second schedule would be unduly onerous or burdensome on the relevant party to a lis inter partes, as the relevant party must only address his mind to a very limited category of documents, usually confined to a relatively short time span. Under these limitations, the party making discovery should be in a position to provide a considered second schedule in almost every case.

Contempt of Court

The law recognises two forms of contempt, criminal contempt and civil contempt. Efforts to categorise the two neatly have been unsuccessful and the modern view would seem to be that the behaviour complained of might amount to civil or criminal contempt depending on the circumstances surrounding the contempt. For example, an act that amounts to civil contempt may assume the character of criminal contempt where the behaviour of the contemnor is openly defiant and contumelious. As to the appropriate sanction to be imposed, it was traditionally assumed that the objective in respect of criminal and civil contempt was punitive and coercive, respectively. However, it has been recognised in recent times that the sanction for civil contempt can legitimately possess a punitive element to mark the court's disapproval of the

"The Supreme Court appears to have approved the view that a particular act that amounts to contempt can be either criminal or civil depending on the circumstances, and that the appropriate sanction to be imposed is determined by the objective to be achieved. It would seem to be the case that regardless of the nature of the contempt, the goal to be achieved is the important determining factor when it comes to the appropriate sanction. Therefore, it is no longer the case that, where a custodial sentence is imposed for criminal contempt, it must be determinate."

behaviour. This is the case, for example, where a fine is imposed for a past breach of a court order in circumstances where the order cannot be complied with due to the nature of the breach (e.g. the destruction of discoverable documents). In addition, the sanction for criminal contempt can properly possess a coercive element, as might be the case, for example, where the objective is to ensure that a witness answers a question in a trial.

As to the standard of proof applicable to civil contempt proceedings, following various decisions where the standard applied ranged from the civil to the criminal standard depending on the nature of the contempt and the possible consequences for the contemnor, it would now appear that the preferred view is that the criminal standard should be applied in all cases[8]. In addition, it is generally assumed that the various safeguards that accrue to the benefit of the accused in a criminal trial accrue to the benefit of the contemnor in contempt proceedings.

In delivering his judgment on the 31st July 2001, Smyth, J said as follows:

> "I have taken a conspectus view of the evidence sufficient to enable me to conclude as I have on the question of compliance with the order of the 15th January 2001. I leave to the Tribunal the task of dealing with the material as it now exists supplemented by the further affidavit of discovery I hereby direct. This may entail calling the Defendant on more than one occasion. If he has to be recalled even more than once, so be it."[9]

On appeal, the Appellant submitted that, *inter alia*, the severity of the sentence imposed in the High Court belied a punitive element that was inappropriate to civil contempt proceedings, as they are coercive in nature. Keane CJ, delivering the judgment of the Court, reviewed the applicable law governing contempt of court, and addressed the distinction between criminal and civil contempt as to the coercive or punitive objective. While first noting that the Tribunal of Inquiry was conducting inquisitorial proceedings, and not adversarial, he went on to say as follows, having quoted the dissenting judgment of McLoughlin J in *Keegan -v- de Burca*[10]:

> "In that case, the essential issue for determination was as to whether a refusal to answer a question during the course of civil proceedings constituted contempt in the face of the court which was criminal contempt and accordingly punishable only by a determinate sentence. The majority of the court were of the view that it was a criminal contempt and hence punishable by a determinate sentence only. McLoughlin J was of the view that, since the primary object of the imposition of the sentence in that case was to ensure that the question was answered, it was appropriate to deal with it by means of an indeterminate sentence until the contemnor had purged her contempt.
>
> "Accordingly, while the decision suggests that there may be some room for a difference of view as to whether a sentence imposed in respect of civil contempt is exclusively - as distinct from primarily - coercive in its nature in civil proceedings generally, I am satisfied that where, as here, the proceedings are inquisitorial in their nature and the legislature has expressly empowered the High Court to secure compliance with the orders of the tribunal, it cannot be said that a sentence imposed in respect of a contumelious disregard of the orders of the tribunal and the High Court is coercive only in its nature. The machinery available for dealing with contempt of this nature exists not simply to advance the private, although legitimate, interests of a litigant: it is there to advance the public interest in the proper and expeditious investigation of the matters within the remit of the tribunal and so as to ensure that, not merely the appellant in this case, but all persons who are required by law to give evidence, whether by way of oral testimony or in documentary form, to the tribunal comply with their obligations fully and without qualification."[11]

This suggests that the Supreme Court approves of the view that a particular act that amounts to contempt can be either criminal or civil depending on the circumstances, and that the appropriate sanction to be imposed is determined by the objective to be achieved. It would seem to be the case that regardless of the nature of the contempt, the goal to be achieved is the important determining factor when it comes to the appropriate sanction. Therefore, it is no longer the case that, where a custodial sentence is imposed for criminal contempt, it must be determinate. If the goal is to mark the court's disapproval, then a determinate sentence is appropriate. Whereas, as identified by McLoughlin, J, if the goal is to coerce the contemnor, then a determinate sentence would not necessarily achieve the desired goal. By the same token, where the contempt is civil, the goal may not inevitably be to coerce the contemnor, but where it is so coercive the imposition of an indeterminate sentence (that can be reactivated in the event of a continuing contempt) is appropriate. It is to be noted that in this respect the position differs from that obtaining in England where the imposition of an indeterminate sentence for contempt is no longer permissible.[12]

Expanding on the basic premise that the appropriate sentence to be imposed is conditional upon the goal to be achieved, the Court went on to approve the statement of the law handed down by the English Court of Appeal in *Re W B (an infant)*[13]. In that case, Lord Denning MR summarised the proper position as follows:

> "The sentence... did not come into operation at once and automatically on a breach being proved. The court has a discretion, analogous to a suspended sentence in the criminal courts. Imprisonment is not the inevitable consequence of a breach. The court has a discretion to do what is just in all the circumstances. It can reduce the length of the sentence or can impose a fine instead."

Historically, the view was that the imposition of a fine was inappropriate in civil contempt proceedings, as the purpose of such proceedings was coercive, and the imposition of a non-recoverable fine had no coercive effect. However, since it is now accepted by the Supreme Court that there can be a legitimate punitive dimension to the sanction imposed for civil contempt, the imposition of a fine would seem to be an acceptable sanction. Further, the Supreme Court appears to approve as good law the possibility that the sanction imposed by the court can combine coercive and punitive elements where, for example, the goal is to ensure compliance with an order while also marking the court's disapproval.[14]

Keane CJ noted that the nature of the contempt at issue was civil contempt, and this was agreed between the parties. It is certainly arguable that the manner in which the Appellant met the orders of the court altered the nature of the Appellant's contempt from civil to criminal. There is judicial authority for the argument that where the refusal to comply with a court order is contumacious and openly defiant, it renders the contempt criminal. In *Poe -v- Attorney-General of British Columbia*, a decision of the Canadian Supreme Court, Kellock J considered the nature of contempt in the following manner:

> "The context in which these incidents occurred, the large numbers of men involved and the public nature of the defiance of the order of the Court transfer the conduct here in question from the realm of mere civil contempt ...into the realm of a public depreciation of the authority of the Court tending to bring the administration of justice into scorn..."[15].

In *United Nurses of Alberta -v- Attorney-General for Alberta*, another decision from that jurisdiction, McLachlin, J endorsed the above view in the following terms:

> "While publicity is required for the offence, a civil contempt is not converted to a criminal contempt merely because it attracts publicity...but rather because it constitutes a public act of defiance of the court in the circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt."[16]

Arguably, the circumstances surrounding the present case are such that the behaviour of the Appellant could in fact have been viewed as amounting to criminal contempt. There have been orders extant requiring discovery for a substantial period of time; there has been admitted non-compliance of a serious character with previous orders of the court; there has been admitted refusal to answer questions at the public sittings of the Tribunal; there have been omissions in discovery up to and including the most recent court hearings. And finally, there have been two judgments of the High Court, and one judgment of the Supreme Court, holding the Appellant to be in contempt of the orders of those courts, and also that contempt to be of an egregious and contumelious character. In the words of Fennelly J "I have come to the conclusion that ...the Appellant has so patently defied the order of the court and, more particularly, has sworn at least one affidavit that is demonstrably so incomplete as to entail deliberate deception."[17]

Further, the High and Supreme Courts could have viewed the Appellant's behaviour as amounting to contempt *in facie curiae*. In the proceedings before the High Court, the solicitor for the Respondent filed an affidavit and, *inter alia*, made the following averement:

> "It appears that the Defendant was involved with Mr. Goodman in this purchase which was funded by means of an advance of IR£350,000 by Mr. Goodman to the Defendant on the terms that the parties would share the proceeds of a later transaction involving the onward sale of the lands for development. There is no documentation whatsoever in any of the folders produced by the Defendant in discovery in relation to these matters."

The Appellant filed a replying affidavit, and addressed this averment in the following terms:

> "At all times my involvement in relation to the Finnstown lands was primarily as an adjoining land owner who recognised the potential for these lands. I, in light of my working relationship with Mr. Larry Goodman, recommended the lands to him. It was at all times up to Mr. Goodman to decide whether to purchase the lands or otherwise. I was not involved in the purchase or ownership, nor did I have any interest in the lands either before or subsequent to their acquisition."

In later supplemental affidavits, the Appellant resiled from this position in light of further information furnished to the court by the Respondent. The High Court ruled on this issue in the following terms:

> "The events in large measure were and are not of distant memory. Such correspondence and documentation arose immediately before and during early inquiries made by the Tribunal. I am satisfied that there has been a serious failure to comply with the Court Order."[18]

On the issue of the above averment by the Appellant, Keane CJ concluded:

> "To put it at its mildest, his averment on oath...was less than candid. That, of itself, would render this a serious and conscious failure by the defendant to comply with his discovery obligations. Seen in the context of the finding made by the trial judge on January 15th, 2001 and not contested by him that the defendant had already been in contempt of the High Court orders "in a deliberate and most serious manner" meriting a sentence of imprisonment of three months, his further failure to comply with his discovery obligation was rendered even more serious."[19]

Fennelly J., who chose to deliver a separate judgment on this issue, concluded:

> "I have concentrated on this one aspect of the contempt, because it is so egregious. I am satisfied that his failure to respect the order of the Court in this one respect alone justified the imposition on him of the further period of imprisonment and the fine imposed by the learned trial judge."[20]

"Arguably, the circumstances surrounding the present case are such that the behaviour of the Appellant could in fact have been viewed as amounting to criminal contempt."

Conclusions

The judgment of the five member Supreme Court was unequivocal in approving the approach adopted by Smyth J. It is interesting to note that one of the main grounds upon which the Appellant rested his appeal was that the learned High Court judge had taken a "conspectus" view of the evidence. On first principles, this is certainly a strong submission; where a person is to be deprived of his liberty, he is entitled to be made aware of the reasons, and it was submitted on behalf of the Appellant that Smyth J had erred in law in choosing to remain silent on all but three of the matters complained of by the Respondent. Keane CJ did not accept this submission, stating:

> "In the light of the previous history of the matter, he was clearly entitled also, in my view, to make no finding until that further affidavit was filed as to the other matters which were in contention between the parties and I do not infer from his judgment that he was taking into account, in reactivating the suspended sentence to the extent that he did, any matters other than the matters in respect of which he had made express findings of non-compliance."[21]

The Chief Justice clearly distances the sentence imposed from the matters that were not specifically adjudicated upon, while approving of the approach adopted by the High Court. It is worth noting that, in his judgment, Smyth J specifically stated that he was leaving the matters as they now stood for the Tribunal. This would seem to support the inference drawn by the Supreme Court that the sentence related exclusively to the three specific findings of non-compliance rather than to the complaints of the Respondent as a whole. It is certainly arguable that the reason that the conspectus view was not fatal to the judgment was, firstly, statement by Smyth, J, and secondly, as noted by Keane CJ, the provision for the filing of the supplemental affidavit on or before the 7th September 2001. Both factors indicate that there had been no adjudication other than on the three matters addressed.

As regards a party's discovery obligations, it would seem that in the appropriate cases, where it is not unduly onerous or burdensome, it is not sufficient to prepare a pro-forma second schedule as to documents no longer in the Defendant's power, possession or procurement. However, as already addressed, it is difficult to envisage such a burdensome case. This raises the question as to the duty of a party's legal advisors to establish as a certainty that the case is one where it is acceptable to use a pro-forma second schedule or not. As was clearly stated by the Supreme Court, it is not for the party in whose favour the order was made to challenge the adequacy or otherwise of the schedule, or to raise any concerns he might have with the party making discovery.

It is worth noting that the approach adopted by the Respondent was that, once contempt proceedings were instituted, the prosecution of those proceedings to ensure that the orders of the court are complied with was no longer a matter exclusively for the parties, as the court has a recognisable interest in the proceedings that is independent of the interests of the parties. In contempt proceedings, the party in whose favour the order was granted may be satisfied that the order has been complied with or may not wish to prosecute the matter any further. However, this does not deny the court its inherent power to police its orders. This view is fortified by case law, succinctly put by Sir John Donaldson P in *Heatons Transport (St Helens) Ltd -v- Transport and General Workers Union:*

> "Once proceedings for contempt of court have been set in motion it is not open to the parties to settle the matter of contempt. They can certainly settle the dispute which they may have with each other.....But as far as the contempt of court is concerned, that is a different matter and one with which we are deeply concerned."[22]

Indeed, Miller on Contempt of Court goes further suggesting that where the contempt is contumacious then the public interest transcends that of the parties involved.[23]

The Supreme Court has delivered yet another strong judgment in support of the Tribunals; challenges to the orders of those bodies will not be entertained lightly. Lastly, the Supreme Court obviously took the view that the nature of the Appellant's contempt was serious, in and of itself, but was also compounded by the fact that it tended to bring the courts into contempt in a very public manner. The Appellant's position as a public representative compounded the matter even further. A concisely stated by Smyth J in his judgment of the 15th January 2001:

> "The blatant defiance of Mr. Lawlor to the Tribunal in his refusal to answer questions is a failure to abide not only by the order of the High Court of the 24th October 2000 but much more importantly the order of the Supreme Court that Mr. Lawlor attend to give evidence to the Tribunal in relation to the documents and records to which the orders related. That he did so as a citizen is a disgrace. That he did so as a public representative is a scandal."[24] ●

1. Page 52, Lines 8-11
2. Page 24, Lines 22-24
3. Page 57
4. Page 56
5. *Bula Limited (In Receivership) -v- Crowley* (1991) I IR 220
6. Page 51
7. Pages 55-56
8. Re Bramblevale Ltd [1970] Ch. 128
9. Pages 24-25
10. [1973] IR 223
11. Pages 46-48
12. Contempt of Court Act 1981
13. [1969] 1 All ER 594
14. *Australian Meat Industry Employees Union v. Mudginberri Station Pty. Ltd.* [1986] 161 CLR 98
15. [1953] 2 DLR 785, 795 - 6
16. [1992] 89 DLR (4th) 609, 637
17. Page 1-2
18. Page 19, Lines 1-7
19. Pages 53-54
20. Page 8
21. Page 52
22. [1972] AER 1214, 1220
23. 3rd Edition, Pg. 54
24. Page 51, Lines 17-26

XPERT EVIDENCE: THE AUSTRALIAN EXPERIENCE

The Honourable Justice Peter Heerey, *Federal Court of Australia; Judge in Residence, University College Dublin*

The following is the text of a paper delivered to the Copyright Society of Ireland at The Law Library, Distillery Building, Dublin on 5 December 2001

"An expert", said Mark Twain, "is some guy from out of town." More recently Michael Howard QC, an English barrister, referred to expert witnesses as "the usual cabal of log-rollers, time-servers, self-publicists and people with friends".

Some modern commentators wring their hands and, as is not uncommon with lawyers, hark back to a Golden Age. Thus Lord Woolf in his Access to Justice Report (Interim Report, 1996, p 183) quoted the following outburst:

> "Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients."

However the Golden Age, if there ever was one, might be considerably further back than is usually assumed. *In Thorn v Worthing Skating Rink Co* (1877) 6 Ch D 415n Jessel MR said with characteristic pungency:

> "...the mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the Court. A man may go, and does sometimes, to half a dozen experts... He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, will you be kind enough to give evidence? And he pays the three against them their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of 50. I was told in one case...that they went to 68 people before they found one...That is an extreme case no doubt, but it may be done, and therefore I have always had the greatest possible distrust of scientific evidence of this kind, not only because it is universally contradictory, and the mode of selection makes it necessarily contradictory, but because I know of the way in which it is obtained."

Lawyers are often accused of anti-intellectualism. To the extent that such a criticism has some foundation, it may have something to do with a professional experience in which, whatever the scientific or technical discipline involved, if the litigation stakes are high enough there never seems to be a shortage of impressively credentialled experts arrayed on opposing sides.

Today the complexity of science expands at an exponential rate. (For convenience I will use the term "science" as extending to technical expertise generally and including disciplines such as engineering, economics and sociology.) Looking back to the 1960s, a decade when many of today's judges commenced their professional careers, there are many fields of science which were not merely less complicated than today; they simply did not exist.

Quite apart from these changes, there are problems inherent in the resolution of scientific disputes in a forensic setting. These spring both from the nature of science itself, and from the constraints of the litigious process.

To a non-scientist, such as a lawyer or judge, science has an aura of seamless certainty. But scientists themselves caution against this. The distinguished Australian scientist Sir Gustav Nossal, in an address to the Australian Legal Convention in Melbourne in 1997, commented:

> "To a far greater extent than is generally realised, scientific truths are shaded or nuanced."

After noting that scientific papers will usually have a "cautious tone of voice" with a "liberal sprinkling of qualifications", Sir Gustav points out:

> "This is not to say that there is not, at any given time, a corpus of generally accepted knowledge in a field, but rather to emphasise that future research (if history is any guide)will show that knowledge to be incomplete in many ways, and occasionally wrong in important respects. Moreover, these shades of gray are more of a problem in biology and medicine than in the more basic sciences of physics and chemistry. Indeed, one of the great paradoxes of current civilisation is the huge power and success of science and technology, yet a certain fuzziness at the cutting edge. A stable scaffolding does exist, but many of the legal controversies of necessity surround the still malleable outer envelope. Scientific truth accretes by small degrees. This creeping progress makes yes/no answers difficult. And yet, in...the witness box... the scientist must perforce come to some bottom line, some definite explanation or opinion."

So scientific issues about which eminent scientists themselves have doubt fall to be decide by judges who, in common law countries at any rate, usually do not have much in the way of formal scientific education. In Australia, as in Ireland, young people go sraight from secondary school to University law schools, usually at about age 18. In many instances, education will have switched to a humanities track before the end of secondary school. In my own case for example, there was not scientific education much beyond the study of the reactions of sulphuric acid and iron filings. There has been some amelioration of this in recent years when it has become very common, and indeed compulsory in some Australian Universities, for law students to take combined degrees. Law/Arts, Law/Economics or Law/Science are popular options.

Still I would hazard a guess that now, and for quite a while, the non-legal tertiary education of most Australian judges is likely to have been in the humanities. Not that I consider that a matter of regret. Law is centrally concerned with the analysis of language and human conduct. The humanities, and in particular language, literature and history, provide an endlessly informing background and frame of reference for legal practice.

So the hard fact is that litigation in Australia today has to be conducted by lawyers and judges who often are not inclined by education, or taste, to the contemplation of scientific matters. As Sir Owen Dixon once remarked (Jesting Pilate,1966);

> "It is not surprising...that a lawyer's general reading and his intellectual interests, if he happens to possess any, are not often scientific."

Perhaps persons inclined to the study and practice of law are more comfortable with verbal concepts than the three-dimensional world of science. But I hasten to add that cognitive theory is but one of the many areas of science in which I speak with no authority at all.

Some argue that an increased knowledge of science on the part of the judge is essential. Thus Australian academics Odgers and Richardson have sternly urged that "it is imperative that attention be given to educating judges" in this respect and that legal education should "ensure that future lawyers and judges are knowledgeable enough to make sound decisions when confronted with scientific questions." ((1995)18 UNSWLJ 108).

Certainly worthwhile things can be done in judicial education. Last year our Court, in conjunction with the Law Council of Australia, held a one day seminar on economic issues for judges and a select number of practitioners. I thought it was valuable to get some structured instruction, albeit at a fairly elementary level, away from the combative environment of the courtroom.

But as Pope reminds us, a little learning is a dangerous thing (An Essay on Criticism, 1711, II, 15). I do not see general scientific education for judges as a panacea for perceived ills in the present system. For example, a judge in our Court might go, in the space of a few months, from a competition law case with economic evidence as to market definition, to a copyright case involving architectural plans, to an Admiralty collision case involving seamanship and navigation, to a patent case involving DNA and molecular biology. One doubts whether there can be general scientific education (presumably at public expense) which can make the judge an expert in these disparate disciplines, and others. Moreover, the judge needs time for work on non-scientific cases and important activities like watching television and going to the football.

The difficulties facing both scientist and judge are compounded by the nature of the forensic process. Speaking from the viewpoint of a scientist, Sir Gustav Nossal makes the point that

> "...the formality and seriousness of the proceedings, and their highly structured nature, differ from what scientists usually experience. In answering tough questions after a seminar, responding to criticisms from a grant review committee, or countering negative comments from a referee of a paper, scientists are used to argument and conflict but there is usually ebb and flow, thrust and parry, dynamism of interchange. The set piece, stately quality of examination and cross-examination can lead to a set of incompleteness: if only I had said so and so; if only they'd asked me."

From a judge's perspective, there is also formality and remoteness. Sometimes, as a witness leaves the box, the judge feels that he is perhaps not really on top of the evidence, but does not know how to express what it is he does not know. But the witness is gone forever. While writing the judgment later (sometimes, regrettably, much later), the judge cannot ring up the expert and ask that some apparent conundrum be explained.

When thinking about the role of the expert witness we perhaps tend to overlook the fact that the expert witness is but a species of the genus witness. The expert has much in common with his or her humble sibling the lay witness. As Rudyard Kipling wrote, well before the era of political correctness,

> "The Colonel's lady
> And Rosie O'Grady
> Are sisters under the skin."

All witnesses are engaged in an act of persuasion; they seek to have the information they convey, be it fact or opinion, accepted by the judge or jury. Part of this exercise involves what Aristotle, in the seminal work on rhetoric, called ethical appeal; that is to say the plausibility conveyed by the reputation of the speaker and the way he presents his argument, as distinct from the logic of the argument itself (see Posner, "Overcoming Law", Harvard University Press, 1995, pp 498 et seq.)

My friend Justice Geoffrey Davies of the Queensland Court of Appeal has written ((1997) 6 Journal of Judicial Administration 179,189):

> "In many cases, a judge, being unable to fully understand the expert evidence because of its complexity, may be compelled to decide between competing opinions on some wholly artificial basis; who was the more qualified witness; who explained the matter more simply; whose reasoning was apparently more logical or which view is more conservative."

I agree that reasoning of this kind does occur. But I am not sure that it is "wholly artificial" or that judges are necessarily at fault for using such techniques. I see nothing wrong in accepting one expert rather than another because the one has more impressive credentials (if that were not so, it would be irrelevant to receive evidence of witnesses' CVs). Likewise, clarity of reasoning as a basis for accepting an expert is no different from accepting a lay witness because his or her evidence is coherent and rational. And taking the more conservative view may be just another way of applying an onus of proof, in itself a rational basis for decision-making.

There is another characteristic commonly found in witnesses, whether expert or lay. They tend to support the side that calls them. I do not mean dishonestly, but usually they like "their" side to win. Obviously enough this is not universally the case. Not infrequently a witness will be un-cooperative, or even hostile in the legal sense and thus liable to cross-examination by the party who called him or her. But thinking back over my own time as a barrister I recall being struck many times by the enthusiasm of witnesses who had no personal or business connection with my clients, whose only reason for being involved in the case was a happenstance such as seeing the other party driving against the red light. Perhaps it is only human nature that once you are on a team, however that comes about, you tend to identify with that team's success. As the Aubrey/Maturin novels of Patrick O'Brian vividly portray, the press-ganged sailors of Nelson's Royal Navy fought with tenacity and courage notwithstanding the mode of their recruitment.

With expert witnesses there are of course powerful additional factors tending to partisanship: large fees, professional reputation and sometimes a strong attachment to some stereotypical professional attitude. A few years back the High Court of Australia reproved a New South Wales judge who had referred to three doctors, habitually called by defendants in personal injury cases, as "the Unholy Trinity" and "the usual panel of doctors who think you can do a full week's work without any arms or legs." (*Vakuata v Kelly* (1989) 167 CLR 568 at [67].) The judge in question was an able and experienced one. I suspect his sin was one of intemperate expression rather than inaccurate observation.

In the Federal Court we have used a number of techniques in attempting to grapple with the problems posed by expert evidence. Not all of these are original, but I hope they will be of interest. The ones I propose to say a little about are:

* Guidelines for expert witnesses
* Pre-trial conferences of experts
* Court-appointed experts and assessors
* An interesting procedure popularly known as The Hot Tub

To put these in context, I should first mention that our Court operates under an Individual Docket System. This means that when a case is commenced it is allotted to the docket of a particular judge who manages the case up to and including trial. That judge will give all the procedural directions, hear any interlocutory disputes, fix the trial date and conduct the trial.

The Guidelines were issued by the Chief Justice, the Hon M E J Black AC, on 15 September 1998. They deal with the expert's general duty to the Court, the form of the expert evidence and experts' conferences.

The Guidelines state that the expert has an "overriding duty to assist the Court on matters relevant to the expert's area of expertise." The expert is "not an advocate for a party" and the paramount duty is to the Court and not to the person retaining the expert. These are worthy aspirations, although necessarily subject to the frailties of human nature and the pressures of litigation in the ways I have mentioned.

As to the form of the expert evidence, the Guidelines implicitly assume that the expert will furnish a written report (indeed virtually all witnesses in the Federal Court today provide their evidence in written form prior to trial). The report is required to give details of

* the expert's qualifications
* literature or other material used
* assumptions made
* the identity of persons who conducted tests or experiments
* a summary of opinions provided
* reasons for each opinion

At the end of the report the expert should state that he or she has made all enquiries believed to be desirable and appropriate and that no matters regarded by the expert as relevant have been withheld from the Court.

There must be attached to the report, or summarised in it, all instructions given to the expert, whether orally or in writing.

If at any stage after exchange of reports the expert changes his or her view, that change should be communicated in writing to the other side.

Finally, as to conferences between parties at the direction of the Court, it is stated that it would be improper conduct for an expert to be given or to accept instructions not to reach agreement. If at such a meeting the experts cannot reach agreement they should specify the reasons why.

I have found the Court-directed conference a particularly useful exercise with accounting evidence. A conference can

produce from a bewildering barrage of figures a concise statement as to the underlying concepts or assumptions which are really at issue. And in one very complicated case about predatory pricing a conference of accountants produced complete agreement on a whole range of pricing data, complete with coloured graphs and overlays.

I turn to Court-appointed witnesses and assessors. The former give evidence like any other witness; the main difference being that they are called by the court. The latter act as advisors to the judge, assisting him or her in the understanding of technical evidence. I will concentrate on assessors since they involve perhaps the more radical departure from traditional procedures, albeit not a new one in some jurisdictions. For example, it is a long established practice in England for assessors to sit with judges in Admiralty claims.

Under section 217 of the Australian Patents Act, the Court "...may, if it thinks fit, call in the aid of an assessor to assist it in the hearing and trial or determination of any proceedings under this Act." No further detail is provided in the Act, Regulations or Court Rules as to how this is to operate in practice. The provision has existed in Australian patent legislation since 1903, but until the case I shall mention in a moment had been used only once. That was in 1935 and was by consent (*Adhesives Pty Ltd v ADGI* (1935) 55 CLR 523).

In 1997 I heard a contested application for the appointment of an assessor in a patent case involving EPO and genetic engineering: *Genetics Institute Inc v Kirin-Amgen Inc* (No 2) (1997) 149 ALR 247. There were some legal objections raised, but essentially the factual argument was that the subject matter wasn't all that difficult anyway. Leading Counsel for the opponent was Annabelle Bennett SC who, as it happens, has a Ph D in bio chemistry herself. She told me that these matters are today taught in secondary schools and are discussed in the general media in publications such as The Economist. I resisted this siren song. In doing so I was comforted by an earlier New Zealand decision of Barker J where his Honour said, with characteristic Kiwi pragmatism:

> "...if the matter becomes as easy as the respondent would have it, then no great harm is caused if the scientific adviser in the end becomes somewhat redundant." (*Beecham Group Ltd v Bristol-Myers Co* [1980] 1 NZLR 185,188)

Ironically, Annabelle's side ultimately succeeded at trial ([1998] FCA 740), a result which I am glad to say was upheld on appeal ([1999] FCA 742). The assessor who was appointed, Professor Ross Coppel Head of Microbiology at Monash University, later told me that when the trial started the technology was at about third year undergraduate level, but by the time it finished we were at a post-doctoral stage.

Of the legal objections, the first was that appointment would be an unconstitutional conferring of Federal judicial power on a person who is not a judge appointed under Chapter III of the Constitution. In rejecting that argument I said:

> "The judgment in the case, the exercise of the judicial power, remains that of the judge. In exercising judicial power, a judge is routinely assisted by persons who are not judges: counsel, solicitors, the witnesses, the judge's Associate and secretary and other court staff." (149 ALR, 250)

The second argument was that the assessor's having access to the judge in the absence of the parties would breach the rules of natural justice (see Re *JRL; Ex parte CJL* (1986) 161 CLR 342). It is doubtless fundamental that once a case is about to get underway "a judicial officer keeps aloof from the parties and from their legal advisers and witnesses"(*R v Magistrates Court at Lilydale; Ex parte Ciccone* [1973] VR 122,127). But a court appointed assessor is, pro tem, a member of the court's staff. As Mason J said in *JRL*, the proscription against judicial contact

> "... does not, of course, debar a judge hearing a case from consulting with other judges of his court who have no interest in the matter or with court personnel whose function is to aid him in carrying out his judicial responsibilities. The same standard is applied in the code of judicial conduct for United States Judges, approved by the Judicial Conference of the United States" (161 CLR, 351)

Importantly for present purposes, the last point made by Mason J is reflected in a form of order made in US Federal Courts which speak of the expert having communication with the judge in the same way as does the judge's clerk (the equivalent of the Australian Judge's Associate).

Nevertheless the mode of communication between judge and assessor remains a matter of controversy. At one extreme, the assessor might be limited to written communications, which would be made available to the parties. Also the assessor might be restricted to advising on the general scientific background of the case with the actual contested issues being treated as a "no go" area. At the other extreme, the judge might have private and unrestricted access to the assessor.

At the subsequent trial in *Genetics* ([1998] FCA 740) I followed the latter course. Professor Coppel sat on the bench with me. He did not participate directly in the hearing, but on occasions would suggest something which I could put to a witness or counsel. On retiring we would discuss the case fully. If, as a result of these discussions, I developed some new thoughts about the case, I would as far as possible try to raise them with witness or counsel when the hearing resumed. When writing the judgment, I would discuss my drafts with the expert to avoid scientific solecisms.

To an Adversarial System Fundamentalist, all this seems heretical. Opposition to such a modus operandi has a number of strands. These include a fear that the parties (or more particularly their lawyers) will lose control of the case. Another is what might be called the Super Judge Syndrome. Some judges will relate anecdotes of how they quickly mastered the most abstruse areas of science, to the unfeigned admiration of the parties and their experts.

It is critical of course that the assessor has to be, and be seen to be, totally independent as well as appropriately qualified. But, that given, I have difficulty with a party who says in effect: "The evidence and the law must lead to a judgment for us. However, if your Honour just doesn't understand the case, but happens to stumble into a judgment in our favour without creating appeal grounds, then that's quite OK."

Put another way, the judge has to produce a judgment in which facts are found which are properly open on properly admissable evidence. The law has to be applied correctly to those properly found facts. If all this does not happen, the judgment will not survive the appellate process. So, once again assuming the *sine qua non* of the assessor's independence, I think the parties are adequately protected.

As to the second point, perhaps there are Super Judges. And on any view, in the vast majority of cases judges will have to do the best they can in the old-fashioned way, the appointment of an assessor being a very expensive exercise. I can only say that if the case warrants it, and an assessor is likely to assist materially in the efficient production of a correct decision supported with cogent reasons, then I think this procedure ought to be available to judges who feel they would benefit from it.

I should say that my views have not completely prevailed within our Court. A new rule, Order 34A of the *Federal Court Rules*, provides for the appointment of what is called an "Expert Assistant". Such a person may only be appointed with the consent of the parties and must provide to the Court and the parties a written report. However, I do not think this rule impinges on the independent statutory power to appoint an assessor under section 217 of the Patents Act in cases under that Act.

In England assessors have been used from time to time in scientific cases, both at trial and appellate level. In *Biogen Inc v Medeva plc* [1997] RPC 1, a case involving the same field of science as *Genetics*, the House of Lords had two expert advisors. Lord Goff of Chieveley (at 31) described their assistance as "invaluable". In the United States the US Court of Appeals for the Ninth Circuit has recently approved the appointment of a "technical advisor": *Association of Mexican-American Educators v California* 231 F 3d 572, 590 (2000).

Now, to the Hot Tub. This innovative procedure was developed by my former colleague Justice Lockhart when sitting as President of the Trade Practices Tribunal. That body, now called the Australian Competition Tribunal, decides whether authorisation should be given on public benefit grounds to arrangements otherwise contrary to the competition law provisions of the *Trade Practices Act 1974*. The procedure has since been used in trials in the Federal Court itself.

The procedure involves the parties' experts giving evidence at the same time. Written statements will have been filed prior to trial. After all the lay evidence on both sides has been given, the experts are sworn in and sit in the witness box - or at a suitably large table which is treated notionally as the witness box. They do not literally sit in a hot tub. Constraints of propriety and court design dictate a less exciting solution. A day or so previously, each expert will have filed a brief summary of his or her position in the light of all the evidence so far. In the box the plaintiff's expert will give a brief oral exposition, typically for 10 minutes or so. Then the defendant's expert will ask the plaintiff's expert questions, that is to say directly, without the intervention of counsel. Then the process is reversed. In effect, a brief colloquium takes place. Finally, each expert gives a brief summary. When all this is completed, counsel cross-examine and re-examine in the conventional way.

In my experience, this procedure brings a number of benefits, which include the following. First, the experts give evidence at a time when the critical issues have been refined and defined and the area of real dispute narrowed to the bare minimum. Secondly, the judge sees the opposing experts together and does not have to compare a witness giving evidence now with the half-remembered evidence of another expert given perhaps some weeks previously and based on assumptions which may have been destroyed or substantially qualified in the meantime. Thirdly, the physical removal of the witness from his party's camp into the proximity of a (usually) respected professional colleague tends to reduce the level of partisanship. Fourthly, it can save a lot of hearing time. In the predatory pricing case that I mentioned (*Australian Competition and Consumer Commission v Boral Ltd* [1999] FCA 1318), the lay evidence took some four weeks, but the expert evidence of two distinguished economists, which was fundamental to the whole case, was disposed of in a day.

The profession, and in particular the Bar, was initially not too well disposed to this procedure. Again, I suspect, it was seen as a losing of control. Who knows what these crazy scientists might say once let loose in the Hot Tub? But counsel are a resilient breed and the more capable ones before too long adapted their style to this new setting. True it is, if you really don't like something new you can always find arguments against it. Thus it has been argued that this procedure deprives a defendant of the right to make a no case submission at the end of the plaintiff's case. That may be correct enough in theory, but in modern commercial litigation, especially over intellectual property, the no case submission is anyway rare to the point of extinction.

To conclude, the reality is that for the foreseeable future we are likely to have non-expert judges deciding disputes on issues of expertise. There is going to be more and more of this kind of litigation, and it is going to become more and more complex. We have to meet this challenge in an imaginative and innovative way, while retaining those values which are truly fundamental to the common law systems of which we are the custodians and our societies the beneficiaries. ●

Note. Australian authorities may be found at **www.austlii.edu.au**

WARDING DAMAGES TO A PARTY TO AN ANTI-COMPETITIVE AGREEMENT

In its recent judgment in ***Courage Ltd. v. Crehan,*** *the European Court of Justice established for the first time that a party to an anti-competitive agreement may, in certain circumstances, be entitled to damages under Article 81 of the EC Treaty.* ***Brian Kennedy BL*** *examines the implications of the decision for parties in a weak bargaining position who enter into anti-competitive vertical agreements.*

Background

The case of *Courage Ltd v Crehan*[1] arose out of the operation of a beer tie which formed part of a standard form lease agreement entered into between the plaintiff brewery, which leased thousands of public houses in the UK, and its tenants. The beer tie required the defendant, a tenant publican, to purchase beer exclusively from the plaintiff. Such agreements are common in the UK.

The defendant contested an action for the recovery of a sum for unpaid beer deliveries and counter-claimed for damages, asserting that the beer tie was contrary to Article 81 of the EC Treaty. He contended that the plaintiff sold its beers to independent tenants of pubs at substantially lower prices than those imposed on himself and other tied tenants. It was argued that this price differential lowered the profitability of tied tenants, driving them out of business.

The English High Court threw out the defendant's damages claim, on the basis that a party to an anti-competitive agreement under Article 81 was a party to an illegal agreement who, accordingly, could not recover damages from the other party. This conclusion followed a previous decision of the Court of Appeal in *Gibbs Mew v. Gemmell.*[2]

On appeal, the Court of Appeal referred a series of questions to the European Court of Justice (ECJ). It asked whether a party to an anti-competitive agreement could rely on a breach of that provision before a national court to obtain relief, and in particular damages, from the other party ; whether EC law precluded a national rule providing that courts should not allow a person to plead and/or rely on his own illegal actions as a necessary step to recovery of damages ; and, if such a rule was inconsistent with EC law in certain circumstances, what factors should be taken into consideration in assessing the merits of a damages claim.

Pre-existing English Law

The position in English law prior to the preliminary reference had been set out by the Court of Appeal in *Gibbs Mew*, another case where a tenant subject to a beer tie had counter-claimed for damages for breach of Article 81, along with restitution of monies paid under the tie, after the plaintiffs had sought possession and forfeiture for non-payment of rent and breaches of covenant.

In *Gibbs Mew*, the Court of Appeal commenced its consideration of the issue by asserting that Article 81 is designed to protect third party competitors. It stated that the parties to a beer tie which offends Article 81 are the cause, not the victims of the distortion, restriction or prevention of competition.

The Court of Appeal further considered that Article 81 not only made the agreement automatically void but also contained a prohibition and was a penal provision. Hence a breach was an illegality. English law did not allow a party to an illegal agreement to claim damages from the other party for loss caused to him by being a party to the illegal agreement. The court referred to *Tinsley v. Milligan,*[3] where the House of Lords held that a party making a claim which was affected by an illegal agreement could not recover if he was forced to plead or rely on the illegality. The Court of Appeal considered that the defendant's case fell within this principle.

The defendant in *Gibbs Mew* sought to rely on the principle, established in *Kiriri Cotton Ltd. v. Dewani,*[4] that a party who is not in *pari delicto* ("of equal fault") should be able to bring a claim against the other party. He argued that he was not in *pari delicto* in that he was, for obvious commercial reasons, the weaker party. The Court readily distinguished *Kiriri Cotton*, where the landlord had breached his statutory duty to observe the law, a duty which led to the imposition of a penalty on the landlord alone. The Court contrasted this duty with the prohibition in Article 81, which is imposed on all parties to an

agreement. It considered that the commercial positions of the parties were not relevant to Article 81, as it was concerned not with inequality of bargaining power between the parties to the agreement, but with the effect of the agreement on competition. In *Trent Taverns v. Sykes*,[5] a differently constituted Court of Appeal followed *Gibbs Mew* and refused to make a reference to the ECJ.

U.S. Law - Perma Life Mufflers

In deciding in *Courage* to make a reference to the ECJ, the Court of Appeal was influenced by the U.S. Supreme Court decision in *Perma Life Mufflers Inc. v. International Parts Corp.*[6] Here, the Supreme Court took a different approach to the doctrine of in *pari delicto* to that of the Court of Appeal in *Gibbs Mew*. It held that where a party to an anti-competitive agreement is in an economically weaker position, it may sue the other contracting party for damages.

In *Perma Life*, the plaintiffs had entered into dealership sales contracts with the defendants, who manufactured automobile mufflers and exhaust system parts. The plaintiffs alleged that the defendants had violated a number of anti-trust provisions by discriminating in favour of some of their other customers and by including provisions in dealership agreements such as barring them from purchasing from other sources of supply, fixing resale prices, tying the sale of mufflers to the sale of other products and prohibiting sales outside designated exclusive territories. The plaintiffs had, however, made enormous profits as dealers and had eagerly sought to acquire additional franchises.

Judge Black, giving the majority opinion of the Supreme Court, noted that there was nothing in the language of the US anti-trust acts which indicated that the legislature wanted to make the doctrine a defence to anti-trust actions. The court had previously commented on the inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes. Previous decisions had been premised on a recognition that the purposes of the anti-trust laws are best served by insuring that private action will be an ever present threat to deter anyone contemplating business behaviour in violation of the anti-trust laws.

In light of these considerations, the Court held that the plaintiffs were not barred from recovery on the grounds that they had sought their franchises with knowledge of the terms, had enjoyed profits as dealers and had sought additional franchises. It considered that their participation was not voluntary in any meaningful sense, in view of the fact that they had agreed to clauses in the agreement which were clearly detrimental to their interests and to which they had allegedly continually objected.

Areeda & Kaplan[7] state that since the decision in *Perma Life*, the doctrine of in *pari delicto* has been all but ruled out as a defence to U.S. anti-trust suits, except perhaps where the plaintiff is a co-initiator or equal participant in the defendant's illegality. They note, nonetheless, that the plaintiff's participation in an anti-trust violation will often mean that it has not suffered actual compensable injury.

Accordingly, in the *Courage* preliminary reference, the ECJ had to consider whether it was appropriate to follow the approach of the English Court of Appeal or that of the U.S. Supreme Court. The key issue was the tension between the principle that there should be an effective remedy to discourage anti-competitive behaviour and the principle that a party should not profit from its own wrong.

The Opinion of Advocate General Mischo

Advocate General Mischo considered that EC law precluded a national rule preventing a party, subject to a clause which infringed Article 81, from recovering damages from his co-contractor on the sole ground that he was a party to the agreement.

The Advocate-General's reasoning was based on a consideration of the implications of the direct effect of Article 81. He considered that the individuals who could benefit from the rights established by such direct effect were primarily third parties, i.e. consumers and competitors who had been adversely affected. He accepted that the parties to the agreement could not normally benefit from the same protection because they were the cause of the agreement, by application of the principle that a party may not profit from its own wrong.

Developing this point, the Advocate General questioned whether the mere fact of being a party to an agreement amounted automatically in all circumstances to a "wrong". In argument, the French government had referred to the unilateral practices of a party in a position of strength in a vertical agreement, such as the distribution of a circular imposing a minimum resale price by the supplier or imposing exclusivity in regard to a leasing business. He considered that such examples demonstrated that there were cases in which it was not at all clear that there was such a wrong and that the reasoning which automatically excluded a party to an anti-competitive agreement from the protection conferred by Article 81 was too formalistic and did not take account of the particular facts of individual cases. In his view, the cases in which the fact of being a party to an agreement did not amount to a wrong would be the exception, and indeed there would be no such cases in relation to horizontal agreements, but their existence could not be ruled out.

Advocate General Mischo considered that the test which should be used to determine whether a party to an agreement was in a position of wrongdoing was the responsibility which that party bore for the distortion of competition. When it genuinely bore such responsibility, that party could not benefit from the protection of Article 81. However, if that party's responsibility was not significant in view of the background against which that party was operating, for example where it was too small to resist the economic pressure imposed on it by the more powerful undertaking, there was no reason to deny it the protection of Article 81. In such a case, he felt, the reality was that the party in question had the agreement imposed on it rather than entering it freely. In the relation which it bore to the agreement, that party had more in common with a third party than with the author of the agreement. Accordingly, Article 81 could protect a party to an agreement where that party bore "no significant responsibility" for the distortion of competition.

Hence, the Advocate General considered that the English blanket prohibition on the award of damages infringed the effectiveness principle of EC law, which prohibits national rules which render virtually impossible or excessively difficult the exercise of EC law rights.[8] In so concluding he rejected the plaintiff's argument, which was that if the possibility of compensation were conceded, it would make participation in

an illegal act more attractive, as individuals would know that they could always be released from an unlawful contract and seek damages if the contract did not deliver the anticipated benefits. He preferred the view of the United Kingdom and the Commission that not only would the prospect of recovering damages constitute an incentive for weaker parties to denounce agreements infringing Article 81 but also, and perhaps more importantly, it would be an effective means of deterring the party in a position of strength from imposing an agreement restricting competition.

Turning to the circumstances which the national court should take into consideration in considering whether to award compensation, he reiterated, having regard to the principle that a party may not profit from its own wrong, that a party bearing significant responsibility for the distortion of competition should not be protected. The responsibility borne by a party was clearly significant if it was in *pari delicto*, i.e. equally responsible. On the other hand, the responsibility borne was negligible in the case of an injured party in a markedly weaker position than his co-contractor. In order to assess the responsibility, account must be taken of the economic and legal background against which the parties were operating and their respective bargaining power and conduct. The responsibility borne was negligible if the party was in a weaker position than the other party such that its freedom to choose the terms of the contract was seriously called into question.

Finally, he considered that a party bearing negligible responsibility was still required to provide evidence of reasonable diligence to limit the extent of its loss. The fact of not having declined to enter the agreement could not, on its own, be considered to be a failure to show such diligence.

The Judgment of the ECJ

As is customarily the case, the judgment of the ECJ is significantly shorter and less discursive that the Advocate General's opinion. The ECJ commenced its analysis by setting out certain well-established general principles: it referred to direct effect in general and, more specifically, to the direct effect of Article 81. It also referred to the importance of Article 81 in the scheme of EC law and the functioning of the common market. It considered that it followed from such principles that an individual could rely on a breach of Article 81 before a national court even where he was a party to a contract liable to restrict or distort competition.

Turning to the right to claim damages, the ECJ held that the full effectiveness of Article 81 and in particular, the practical effect of the prohibition laid down in Article 81(1), would be put at risk if it were not open to any individual to claim damages for loss caused to him by an anti-competitive contract to which he were a party. It considered that the existence of such a right strengthens the working of the EC competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, the ECJ considered that actions for damages before national courts could make a significant contribution to the maintenance of effective competition in the EC. It concluded that there should not, therefore, be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.

As regards the circumstances to be taken into account in deciding whether to award damages, the ECJ considered that EC law would not preclude national law from denying a party who was found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party, having regard to the principle that a litigant should not profit from his own unlawful conduct, where this is proven. Furthermore, national courts can take steps to ensure that the protection of rights guaranteed by EC law does not result in unjust enrichment. It stated that matters to be taken into account by the national court include the economic and legal context in which the parties find themselves and their respective bargaining power and conduct. In particular, the national court should ascertain whether the party seeking damages found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of his contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies open to him.

The ECJ referred specifically to the case where an individual agreement offends Article 81(1) for the sole reason that it is part of a network of similar agreements which have a cumulative effect on competition, a principle which it had established in its judgments in *Brasserie de Haecht (No. 1)*[9] and *Delimitis*.[10] The ECJ considered that in such a case, the party contracting with the person controlling the network could not bear significant responsibility for the breach of Article 81, particularly where in practice the terms of the agreement were imposed on him by the party controlling the network.

Implications of the Judgment

The ECJ's decision is a policy one: as the Advocate General pointed out, the existence of the right to claim damages provides an incentive for weaker parties to denounce agreements which infringe Article 81 and deters a party in a

"The circumstances to be taken into account in deciding whether to award damages...include the economic and legal context in which the parties find themselves and their respective bargaining power and conduct. In particular, the national court should ascertain whether the party seeking damages found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of his contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies open to him."

position of strength from imposing an anti-competitive agreement. It can be argued, however, that the ECJ's decision blurs the distinction between Articles 81 and 82 somewhat: as the English Court of Appeal noted, Article 82 expressly protects against the consequences of unequal bargaining power, in particular by prohibiting unfair trading terms. Previously, it was considered that Article 81 focussed on damage to third party competitors and to consumers, rather than on damage to parties to the agreement.

Turning to the judgment's practical implications, as Advocate General Mischo pointed out, it will only affect vertical agreements and will only be relevant in exceptional cases. Under the current thinking on vertical agreements, demonstrated in particular in the new block exemption,[11] most vertical agreements either fall outside the scope of Article 81 or are exempted under Article 81(3). Agreements which fall outside the block exemption, because the parties' market share exceeds 30% or because they include black listed provisions, may lead to a liability in damages. As the ECJ pointed out, where an agreement is contrary to Article 81(1) because it is part of a network of agreements, such as a distribution or franchise network, the party contracting with the "network controller" cannot be said to bear significant responsibility for the breach of Article 81.

It should be noted that in making the reference to the ECJ in *Courage*, the Court of Appeal made two assumptions which will be of significance in most cases of this type: first, that the restriction complained of was contrary to Article 81 and, secondly, that the defendant was damaged by actions taken under the agreement by the plaintiff. The defendant will need to establish both of these points before recovering damages. Furthermore, the issue of unjust enrichment is likely to arise as the defendant would have received the proceeds of sale for beer purchased under the beer tie and might also have rented his premises below market price. The point could also be made that the tenant benefited from the agreement in that potential competitors were foreclosed from the market. Finally, the defendant will need to show that it exercised reasonable diligence to limit the extent of its loss. No doubt the Court of Appeal will explore these issues when the case returns to it.

In practical terms, a party entering into a vertical agreement with a weaker co-contractor should be advised to pay specific attention to its conduct. In particular, it should be slow to impose standard terms and conditions on that party if there is a risk that such clauses may be anti-competitive. Its position would be strengthened if it could show that it engaged in a genuine process of negotiation with the weaker party.

Impact on National Competition Law

The question arises as to whether Irish courts, in interpreting domestic competition rules, will apply these EC law principles. The long title to the Competition Act 1991 states that it is an Act to prohibit the prevention of competition "by analogy" with Articles 81 and 82 of the EC Treaty. In *Blemings v. David Patton Ltd*,[12] however, Shanley J. pointed out that while judgments of the ECJ should have very strong persuasive force, it should be borne in mind that such judgments are based upon competition rules which are textually and contextually different to the 1991 Act and which are often affected by policy considerations, objectives or Articles of the Treaty which do not necessarily underpin the 1991 Act.

It is clear that policy considerations as to the effectiveness of competition law form the basis for the decision in *Courage*. It can be argued, however, that similar policy considerations should be taken into account by an Irish court interpreting the 1991 Act, in particular as greater reliance is placed on private action as a means of enforcement in Irish domestic law than in the EC system.

While English law in this area would appear to settled following *Gibbs Mew*, an argument could also be made as a matter of Irish domestic law that the weaker party to an anti-competitive agreement who does not bear significant responsibility for the distortion of competition, is not in fact in *pari delicto* with the stronger party and, accordingly, is entitled to rely on *Kiriri Cotton*.

Furthermore, it can be argued that a party to an agreement who did not bear significant responsibility for the distortion of competition is in a stronger position when relying on Irish law than E.C. law in that it has an express statutory right of action under section 6(1) of the 1991 Act, which confers such a right on any person who "is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited." It can be argued that this right supersedes any common law principles.

The position of such a party will be further protected if section 4(7) of the Competition Bill 2001, as initiated, is enacted. It provides that a court may make such order as to recovery, restitution or otherwise as between the parties to an agreement as may in all the circumstances seem just, having regard in particular to any consideration or benefit given or received by such parties on foot thereof. While the precise effects of the Courage judgment remain unclear, it is submitted that a judge applying section 4(7), if enacted, will end up engaging in a similar process to his counterpart applying EC law, although perhaps with a wider discretion. ●

1. Case C-453/99, judgment of the ECJ of the 20th September 2001 [2001] All ER (EC) 886
2. [1999] EuLR 588; [1999] 1 EGLR 43
3. [1994] 1 AC 340
4. [1960] AC 192
5. [1999] EuLR 492
6. (1968) 392 US 134
7. *Antitrust Analysis* (5th ed., 1997, at p.89)
8. Established in judgments such as *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* (Case 106/77) [1978] ECR 629 and *Amministrazione delle Finanze dello Stato v. San Giorgio SpA* (Case 199/82) [1983] ECR 3595
9. *Brasserie de Haecht SA v. Wilkin-Janssen* (Case 23/67) [1967] ECR 407
10. *Delimitis v. Henninger Brau AG* (Case C-234/89) [1991] ECR I-935
11. Council Regulation No. 2790/99 (OJ 1999 L336/21)
12. [2001] IR 385, at pp.411-2

SAFETY, HEALTH AND WELFARE AT WORK LAW IN IRELAND: A GUIDE

Any law book written by Raymond Byrne comes with high expectations. His co-authorship of The Irish Legal System and the Annual Review of Irish Law series have established him as one of the leading writers on Irish law. His new book does not disappoint. It is a comprehensive text that draws together all of the legislation, regulations, case-law and codes of practice on safety, health and welfare at work. Given that between 1990 and 1999 accidents and ill health at work have resulted in 600 deaths and over 80,000 compensation claims the need for this important book is self-evident.

This reviewer was particularly interested in the author's excellent treatment of criminal liability under the Safety, Health and Welfare at Work Act 1989. Because many of these cases are prosecuted at District Court level it can be difficult for a practitioner with a prosecution or defence brief to establish the relevant principles and rules that should apply to such cases. However Mr Byrne has gathered together all of the Irish precedents and has even included reports of District Court prosecutions. It would be almost impossible for a practitioner to obtain such information and this ensures that Mr Byrne's book will be cited as an authority in future cases. The book is practically orientated and covers such essential matters as pre-trial procedure, pre-trial publicity and corporate criminal liability. Perhaps the most useful section is the discussion of section 48(19) of the 1989 Act which provides for the prosecution of an individual officer of a corporate body, where that body is proved to have committed an offence with the consent or connivance of or neglect of that officer. In teasing out the scope of section 48(19) the author reviews Scottish and English authorities which, prior to reading this book, this reviewer was unaware of.

On the civil side the book examines a number of important, yet little-written on topics, such as noise, pregnancy and breastfeeding, stress and repetitive strain injury. The discussion of liability for workplace smoking in chapter 29 was particularly interesting and informative. It will be instructive to see which approach the Irish courts take to this controversial area of the law. Another highlight is the analysis in chapter 19 of the potential liability associated with flexible work patterns and e-working. An increasing number of people are working outside of the conventional workplace setting, and the legal consequences of this need to be fully understood by employers and practitioners.

The book's strength is the clear manner in which it is laid out. It is possible to identify whether a regulation or court case exists on a particular aspect of safety within a few seconds. The author deserves credit for setting out his extensive knowledge of this area in such a straightforward and informative manner. In fact this reviewer has only one minor quibble, which is that the cases cited are not given their full reported or unreported citations in the Table of Cases. Thus the reader had to rely on his or her own research skills in order to track down any case that he or she wishes to read in full. However this is something which can easily be remedied in a later edition. Overall, this book will be invaluable for health and safety practitioners, solicitors and counsel who have the task of traversing this difficult area of the law. At a time when the price of many law books is quite high, this work is very reasonably priced at 49 Euros. It is sure to be a success.

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