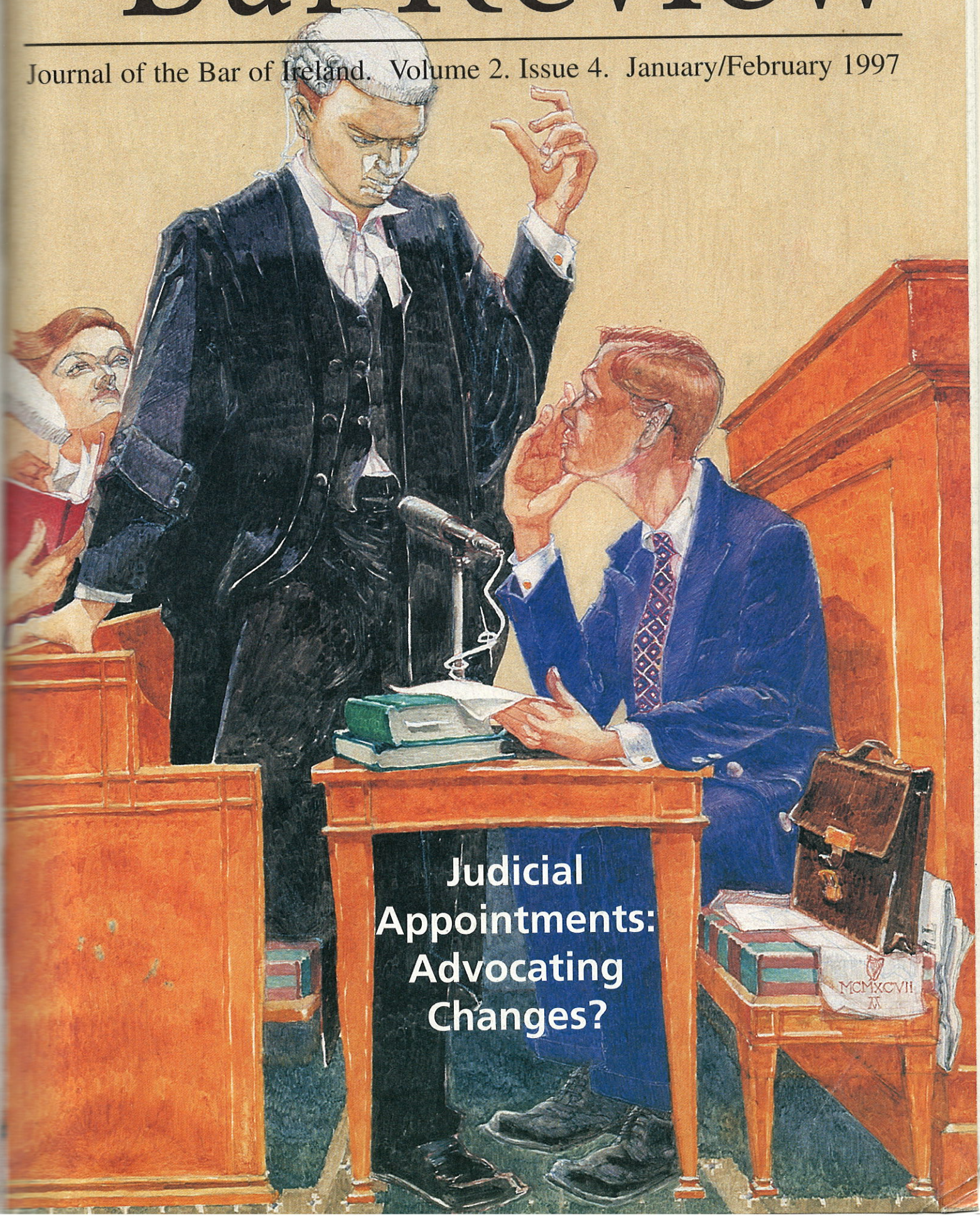
The Bar Review

Journal of the Bar of Ireland. Volume 2. Issue 4. January/February 1997



Judicial Appointments: Advocating Changes?

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Volume 2. Issue 4. Jan/Feb 1997. ISSN 1339-3426

Subscription (October 96 to July 97, 9 issues) £65.34 (21% VAT: £11.44) airmail post inclusive. Editorial and subscription correspondence to:

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Final of the National Butterworths / Bar Council Moot Court Competition

Venue: Supreme Court
Date: Friday, 7th March
Time: 4.30 pm

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Essay Competition

Organised by the Dublin Rape Crisis Centre and Sponsored by the Bar Council
Title: 'The Case for Separate Legal Representation - a Fair Procedure'

Guidelines: Competitors are expected to take account of the following:

(i) comparative case law particularly in jurisdictions such as Canada, Australia and the U.S.
(ii) the jurisprudential perspective and arguments for and against the question of Separate Legal Representation for a rape complainant and its effect throughout the criminal trial
(iii) Type written essays not to exceed 4,500 words.
(iv) Essays to be submitted to: The Director, Dublin Rape Crisis Centre, 70 Lower Leeson Street, Dublin 2, no later than Monday, 7th April, 1997

Essays Invited From: Law Students, Apprentice Solicitors and Devilling Barristers

Prizes.
1st prize: £750
2nd prize: 500
3rd prize: 250
The winning essay will be published in The Bar Review.

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Court Delays

Judge Johnson has communicated that he is now in a position, as of 29th January, 1997, where he is unable to fill his List every day. Accordingly, he would invite any solicitor who has a case ready to apply to him an he will give him an immediate date for hearing.

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13th International Marine Insurance Seminar An Intensive Three Day Training Course

Wed, 23rd April - Friday, 25th April
Park Lane London,

The programme includes essential features of the law and practice of marine insurance, including; the nature of the contract, including the concept of 'utmost good faith', the scope of various Institute clauses, the rights, duties and obligations of the insurer and insured and marine insurance fraud.

Contact: Nigel Shattock; 0044 171 553 1000

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Staff Changes

Best wishes to Mark McDonnell who has left the Accounts office for a one year leave of absence. Doreen Keoghane replaces Mark in the Accounts office and Donna McKeefry who has taken a position with the staff of the Law Library which arises from a job sharing arrangement between Joan McGreevy and Deirdre Lambe.

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Academy of European Law, Trier

The Academy of European Law, Trier is a non-profitmaking foundation supported by the European Union. Its purpose is to organise a wide variety of events for the practising lawyer and to provide a forum for the international exchange of experience on both general and specific issues of EC law.

The Academy is seeking to recruit a European Affairs Lawyer (part-time) to assist in the planning and organisation of post-graduate courses and seminars. He/She should have a general sound knowledge of European Community law, have English as a mother tongue with good spoken German and knowledge of French. The successful candidate will be involved primarily in justice and home affairs, consumer protection and litigation in the EU courts in Luxembourg. The appointment is available immediately and may possible be converted into a full time post later.

Please send CV to Europaische Rechtsakademie Trier, Dasbachstr. 10, D-54292 Trier

Tel: 00 49 651 147100

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Conference on Copyright and Related Rights in the 21st Century

on Saturday, 22nd March, 1997
in the
Berkeley Court Hotel

Speakers include:
Jukka Leides,
Finnish Government Representative
Jorn Reinbothe DG XIV,
EU Commission
Jeff Kushen,
US Trade Representative Office, Geneva
Mihaly Ficfor,
World Intellectual Property Organisation

Contact: Pauline Walley.

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Cork Bar Opening

The Cork Bar Library was officially opened last month at Courthouse Chambers, Washington Street, Cork by the Attorney General, Mr. Dermot Gleeson, S.C. The new library provides office facilities, reading room, library books and access to electronic legal materials for the Cork bar.
Contact: Brigid Molloy. 021 278300.

Judicial Appointments: Advocating Changes?

Traditionally, skills in advocacy acquired through practice at the Bar have been considered the most suitable qualification for appointment of judges to the High and Supreme Courts and only barristers with 12 years practice may be appointed directly to these courts. While solicitors may be appointed directly as judges to the District and Circuit Court, 4 years judicial experience as a Circuit Court judge is required before they are eligible for appointment to the High Court. These qualifications for appointment as judges to the Higher Courts are currently under review by a Working Group, established by the Department of Justice and chaired by Professor Colm O hEocha, which will consider among other issues, whether the pool of potential candidates to be appointed to the Higher Courts should be extended.

The qualifications for appointment of judges to the Higher Courts are of the greatest significance to the administration of justice in our courts and the Bar Council welcomes the establishment of the Working Group and the opportunity it presents for a full debate on this significant issue.

The Higher Courts sit at the apex of our court structure. Given the distinction in jurisdiction between the various courts, cases heard in the High Court are typically of greater significance and involve matters of greater legal difficulty and complexity than those heard in the Circuit Court. Also, all decisions from the Lower Courts can be appealed to the Higher Courts and the system of precedent means that decisions of the Higher Courts are binding on all Lower Courts in matters concerning identical relevant facts. All Circuit Court and District Court decisions may be judicially reviewed by the High Court and appeals by way of 'case stated' mean that points of law raised in the Circuit courts can be brought to the attention of the higher courts for authoritative interpretation and for a binding ruling as to how they are to be interpreted in the future. In addition, while the legislature has enormous law making power, it is the Higher Courts who determine, through the application of the system of appeals and the doctrine of binding precedent, how that law is actually applied in the cases coming before the courts. In particular, decisions as to the constitutionality of legislation is reserved to the Higher Courts.

The role of the judge in the Supreme and High Courts in carrying out these functions takes place within the context of our common law legal system which emphasises the role of oral argument by opposing advocates in an adversarial context.

When confronted by the evidence and arguments of each advocate for the clients on opposing sides of a case the task of the judge is to: ensure that all relevant and admissible facts are considered; exclude those matters which are irrelevant and inadmissible; identify and interpret and draw inferences from the important and essential facts; consider, interpret and apply the law to those facts with impartiality and rigorous independence, and, having regard to the relevant facts and applicable law, weigh up the merits of the respective arguments and make a decision on the case.

Each of these tasks, with the exception of making a decision on the case, will also be carried out by each of the advocates appearing in the case. In the overwhelming majority of cases, that advocate is a barrister. The judge himself will have acquired skill and experience to help in carrying out those aspects of the judicial task during his career at the Bar and to date, the only training, experience and skill required of such judges by way of qualification for their appointment, has been the completion of a number of years' practice as a successful advocate in court.

In acquiring the requisite qualification for judicial appointment to the Higher Court as a practising advocate, almost every aspect of the judge's task will have been focused on court. The task of the advocate, while sometimes referred to as no more than a rather suspect verbal dexterity, requires: the provision of an opinion on the relevant legal arguments; consideration of the facts to identify relevant and admissible evidence to support their client's case and weaken that of their opponent; advising on witnesses who may supply such evidence; and advising on the presentation of a case in accordance with the rules of evidence and procedure.

Also, even when advising outside the direct context of litigation the advocate's advice is often rendered by reference to how a court (and of necessity a judge) is likely to consider or deal with any particular issue. In addition, the preparation of each case by the advocate involves the research and consideration of a number of other cases and an analysis of the process of judgment in such cases.

Each part of the advocate's task therefore involves understanding precisely how judges approach their task. If an advocate cannot understand how a judge would decide an issue he or she cannot usefully advise the client. If an advocate cannot understand or appreciate how judges approach facts and law, he or she cannot advantageously present his or her client's case. Not only therefore are the tasks of the judge closely allied to those of the advocate (the elucidation and analysis of fact by application of the rules of evidence and the research, analysis and application of law as argued by oral advocates in an adversarial context) and not only are the qualities required of both the judge and the advocate very similar (detachment and independence) but the daily exercise of the advocate's trade is itself directed to an understanding

of the manner in which judges carry out their duties.

It is entirely unremarkable therefore that successive generations have considered training in advocacy, obtained by successful practice at the Bar, to be an essential training for judicial appointment and why, in turn, it can be acknowledged by all sides that the country has been well served by judges of integrity and ability drawn from the ranks of such practising advocates.

Since the foundation of the State, an independently minded judiciary has provided an effective and necessary check on the power otherwise concentrated in the hands of the Government and administration. It is impossible to imagine a social history of Ireland in the present century without devoting a considerable chapter to the beneficial effects of a series of important court decisions and indeed, within the various viewpoints expressed in this debate conducted thus far, there has been unanimity as to the general high quality of judges of the superior courts of Ireland to date.

However, just because the present system is proven and accepted to have been successful and effective is not in itself, even in an area as delicate and important as the administration of judges, a reason not to contemplate change, even radical change, where it is proven to be clearly advantageous.

In contesting the primacy of training and experience in advocacy as a qualification for judicial appointment to the Higher Courts, other qualities have been suggested, such as a thorough knowledge of the law and human qualities such as patience, courtesy and compassion. However, while it is clear that those qualities are essential to the execution of the judicial task, they are not in themselves sufficient. Indeed, these qualities are not an alternative to the criterion of advocacy but an essential part of the qualities required in order to be a successful advocate. The practical application of the skills of advocacy require not only skills in legal research, analysis and presentation, but also a thorough knowledge and appreciation of present rules and procedures and, vitally, an understanding of how legal principles may be developed, expanded or adapted to deal with new and emerging situations. The role of the judge of the Higher Courts in interpreting law is intimately connected with the ability of the advocate to introduce such possible interpretations of legal principles in their presentation of their clients case. In addition, the human qualities of patience, courtesy and compassion which a judge must display when called upon to adjudicate on matters of fundamental importance to individuals are the same qualities which are required of an advocate when preparing to act as his client's advocate in court at an invariably stressful time in that client's life.

It has been stated that the present system restricting qualification for appointment to the Higher Court excludes 80% of other lawyers from being appointed as such judges. However, the strength of such numbers is only relevant if those 80% have demonstrable talents which have been recognised as qualifying them for judicial appointment, Similarly, any contention that the restriction of qualification to practising advocates is anti-competitive overlooks the fact that competition can only take place between categories of persons who similarly equipped to execute the task. To exclude persons not properly equipped is not a distortion of the market but a recognition that the public interest requires that certain qualities be acquired before that market may be entered.

The jurisdiction and role of the judges of the Higher Courts as final authority in matters of fact and final interpreter in matters of law require different attributes and therefore different qualifications from those governing eligibility for appointment to the lower courts. A consideration of the role of judges of the Higher Courts demonstrates that the best possible form of training for judicial appointment to those courts is that of an advocate. Since 1971, all barristers and solicitors may act as advocates in our courts and with the exception of Deputy Shatter (in family law cases) no solicitor appears as an advocate before the High or Supreme Court on any regular basis.

Judicial experience in the Circuit Court is a possible alternative to advocacy as a qualification for appointment to the Higher Courts. However, while service in the Circuit Court at least provides for the possibility of scrutiny, both public and professional which practice at the Bar provides of itself in assessing the qualities of prospective judges, in fact there have historically been very few appointments made to the Higher Courts by this route.

The most effective way to expand the pool of candidates for judicial appointment to the Higher Courts is to expand the numbers of lawyers with skill and experience as advocates. If the qualification is extended to include either solicitors (without a requirement for advocacy or judicial experience) or non-practising lawyers or indeed any other class of citizens, the pool of potential candidates will be expanded to necessarily include a vast preponderance of lesser qualified candidates with an increased possibility of a poor, or at least less optimal, appointment. In recognition of this fact the United Kingdom does not permit the appointment of solicitors or anyone else to the High Court Bench without either experience or formal training in advocacy, or alternatively, judicial experience. Comparisons with other jurisdictions further afield are of lesser value since the nature of the legal system and the division of functions vary considerably.

However, expansion of the pool of candidates is not required in order to ensure that such positions are filled by a suitably highly qualified candidate. The Bar Council recommends that training and experiene in advocacy or, alternativiely, judicial experience, should remain as the primary qualification for appointment to the Higher Courts. Such changes as require to be made should focus on ensuring that the most suitable candidates are selected from the present pool an on ensuring that once appointed, they are given every assistance to help in the optimum execution of their task. ❑

Judicial Review of Planning Decisions

and Subsection (3B), Local Government (Planning & Development) Act, 1992

James Macken, S.C., 14 January 1997

Most barristers would now be aware that applications for leave to issue judicial review of decisions of a planning authority or An Bord Pleanala are different to other applications for judicial review. The two most salient differences are that such applications must be made on notice, and the applicant is not just required to demonstrate that he or she has an arguable case; the Court must be satisfied that there are substantial grounds for contending that the decision is one that should be quashed under the principles set out in O'Keeffe v An Bord Pleanala [1992] ILRM 237 and [1993] 1 I.R. 39.

There are, of course, other differences as well, in fact the procedure deserves careful scrutiny and has built up a significant body of case-law in the short period since 19 October 1992 when it first came into effect. When one considers the well-documented reluctance of the Courts in this State to decide cases without having heard all the evidence, or to entertain preliminary points which could have the effect of disposing of actions before all relevant witnesses have been given a hearing, it is clear that Subsection (3B) is breaking new ground, since it provides that:

(a) an important category of administrative decisions (which can significantly affect public amenity, the environment, or private rights) can now only be challenged by way of application to the Courts on notice to the body that has made the decision and to all other interested parties;

(b) a preliminary hearing must be held as to whether the application discloses substantial grounds, and

(c) the result of that preliminary hearing is final, there being no appeal to the Supreme Court unless the constitutional validity of a law is in issue.

The 1963 Act

The Local Government (Planning & Development) Act, 1963 did not seek in any way to restrict recourse to the Courts by any person dissatisfied with a decision of the planning authority or of the Minister for Local Government, on appeal. Objectors or developers unhappy with planning decisions were free to issue a plenary or special summons seeking declaratory and/or injunctive relief or to commence State Side proceedings seeking to quash such decisions by way of certiorari. Many such proceedings were in fact issued and many developers complained that objectors or business rivals were turning to litigation and were using delaying tactics to hinder or prevent development for which permission had been granted. Indeed it was not unknown for persons carrying on unauthorised developments or unauthorised uses to issue proceedings for the sole purpose of delaying or frustrating action by the planning authorities.

The 1976 Act

The Local Government (Planning & Development) Act, 1976 attempted to address some of the excesses of the situation and introduced a new and stringent time limit by inserting a new subsection (3A) into s. 82 of the 1963 Act. This amendment provided that a person should not by prohibition, certiorari, or in any other legal proceedings whatsoever, question the validity of a planning decision, "unless the proceedings are instituted within the period of two months commencing on the date on which the decision is given."

No restriction was placed on the type of proceedings that might be issued within this time limit. Thus, as long as the time limit was observed, proceedings could be by way of Plenary or Special Summons, Circuit Court Civil Bill, State Side proceedings, or by Judicial Review proceedings under Order 84 of the 1986 Rules of the Superior Courts. While State Side or Judicial Review proceedings would normally be listed before the High Court within a short time of being issued and thereafter be subject to judicial control of the length of time taken to bring them to a hearing, other types of proceedings might be (and often were) subject to significant delays. In the case of High Court proceedings issued in the Central Office, many months might elapse before the proceedings were even served.

Thus the 1976 Act was not sufficiently effective in reducing the volume of "speculative or obstructionist

litigation" that was seen by many involved in the promotion of industrial development as a hindrance both to inward investment and to the growth and expansion of existing businesses. An idea took hold that the normal process of applying to the High Court for leave to issue Judicial Review proceedings was not filtering out speculative actions effectively.

The 1992 Act

It is in this context that the Local Government (Planning & Development) Act, 1992 once again amended Section 82 of the 1963 Act by substituting two new subsections (3A) and (3B) for the subsection (3A) inserted by the 1976 Act.

The new subsection (3A) reads as follows:

"A person shall not question the validity of :

(a) a decision of a planning authority on an application for a permission or approval under Part IV of this Act, or

(b) a decision of the Board on any appeal or on any reference, otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (hereinafter in this section referred to as 'the Order'.)"

It should be noted that, so far as the planning authority is concerned, only decisions on applications for permission or approval are protected in this way; there are many other decisions, such as the adoption of development plans, the making of special amenity area orders, the revocation or modification of permissions, and so on, that would not come under this subsection. In a recent *ex tempore* judgment Laffoy J held that where a planning permission provided that "details of entrances shall be submitted for the approval of the planning authority prior to construction." and drawings were submitted and approved informally, that the decision was not a decision "on an application for permission or approval, " since such applications are required by the Regulations to observe certain formalities, such as public notices, cf. Boyne Valley Fruit Farms Ltd v Drogheda Corporation 1996.

Who must be served?

Subsection (3B) then goes on to provide that the application for leave to apply for judicial review shall be made (i) within the period of two months commencing on the date on which the decision was given and (ii) be made by motion on notice, to the various parties set out in the subsection. If the judicial review application relates to a decision of the planning authority, the planning authority must be served as well as the applicant for the permission or approval, unless they are one and the same as the applicant for judicial review.

If the decision challenged is one of An Bord Pleanala, the Board must be served and every other party to the appeal or reference, which would, of course, include the planning authority. This can involve service on a large number of notice parties, particularly if the appeal has been controversial. In the Arcon case (Scott and others v An Bord Pleanala and Arcon Mines) [1995] 1 ILRM 426, the applicants were a group of 14 residents of the Galmoy area and, since five of them had been parties to the appeal to An Bord Pleanala, those five people were also named and served as notice parties. The reason for such, perhaps excessive, caution is that if all parties required by the statute to be served have not been served within the two month period, then the application must fail : see KSK Enterprises v An Bord Pleanala [1994] 2 ILRM 1.

That decision of the Supreme Court (Finlay CJ) also held that an application on notice is made for the purposes of the statute when a Notice of Motion, Grounding Affidavit, and Statement of Grounds are filed and served on all the parties who are required to be served by Section 82 (3B) of the 1963 Act, but the motion need not be either moved or listed in Court before the two months expire. The motion must be "grounded in the same manner specified in the Order in respect of an *ex parte* motion for leave."

It is worth noting that once the matter comes before the Court, the Court itself may order that other persons should be served, on the authority of the following passage from the judgment of Finlay CJ in O'Keeffe v An Bord Pleanala :

" If application is made for liberty to issue proceedings for judicial review and the claim includes one for certiorari to quash the decision of a court or of an administrative decision-making authority, the applicant must seek to add as a party any person whose rights would be affected by the avoidance of the decision impugned. If liberty is granted, the court should, except for special reasons, ordinarily add such person as a party."

Evidence on the application

The application, as I said before, must be grounded in the same manner as an *ex parte* application under Order 84. There must therefore be a Notice of Motion, Statement of Grounds and grounding affidavit or affidavits. These should be sufficient to identify clearly the decision impugned and to show that there are substantial grounds for contending that the decision is invalid or ought to be quashed. If the decision is to grant or refuse permission, the grant or refusal should be exhibited. If it is contended that the deciding authority could not rationally have made the decision, the applicant "must, so far as reasonably possible, identify and prove in evidence the material upon which the decision was made." (cf O'Keeffe v An Bord Pleanala). To do this the applicant may, in the words of MacCarthy J. in O'Keeffe, "call in aid the procedural weapons of discovery of documents and interrogatories," even at a very early stage in the proceedings.

However, given the very short time limit for the making of the application, it is difficult to see how discovery can effectively be brought into play before the two months expire. Thus the applicant must do the best he or she can with the material on the public planning file and/or with the report of the inspector appointed by An Bord Pleanala, which

will normally summarise all the relevant materials being considered as part of the appeal. These reports are, of course, now available on request. When the decision involved is more complex, such as a decision on whether or not a particular development would constitute a material contravention of the development plan, the relevant materials may not be so readily available. In Byrne and others v Wicklow County Council and others (Keane J. 3 November 1994); the LUGGALA case, the County Council filed an affidavit showing what materials were before the Manager when he made his decision.

Clearly the Court has a discretion to admit such evidence, in order to ensure that its decision is based on the true facts of the situation, but in the majority of cases the practice to date has been to treat such applications as dealing solely with the question of whether the applicant can make a case that there are substantial grounds for contending that the decision is invalid or should be quashed. Thus the preliminary application is heard on the basis of the facts as deposed by the applicant and his or her expert or supporting witnesses, and on the basis of the grounds set out in the Statement of Grounds.

The respondent or the notice parties do not, at this preliminary stage, serve Notice of Opposition or file replying affidavits. The issues to be canvassed in the preliminary hearing are, it is submitted, issues of law arising from agreed or admitted facts, and the function of the Court is to decide whether there are substantial grounds, not to determine the issues. See the judgment of Egan J. in the Supreme Court in Scott and others v An Bord Pleanala and Arcon Mines Ltd, and also the judgment of Murphy J. in Keane and another v An Bord Pleanala and Commissioners of Irish Lights and others (Murphy J. 20 June 1995 unreported Law Library Vol 19 4782), where he states, in relation to the one ground of the thirteen on which leave was sought, which he found to be substantial :

" Whilst I indicated that I was willing to decide this narrow question of law, the Applicants contended that the only function of the Court at this stage was to determine whether it was an appropriate case in which to grant leave to apply for Judicial Review. Whilst I am reluctant to delay the proceedings, I believe that the Applicants are correct in their contention as to the limited function of the Court at this stage and in the circumstances I believe that leave should be granted ...."

See also the judgment of Carroll J. in McNamara v An Bord Pleanala and others (the Kill Dump case) [1995] 2 ILRM 125 :

"What I have to consider is whether any of the grounds advanced by the appellant are substantial grounds....I am not concerned in trying to ascertain what the eventual result would be. I believe I should go no further than satisfy myself that the grounds are 'substantial'... I draw distinction between the grounds and the various arguments put forward in support of those grounds. I do not think I should evaluate each argument and say whether I consider it is sound or not. If I consider a ground, as such, to be substantial, I do not also have to say that the applicant is confined in his arguments at the next stage to those which I believe may have some merit. "

It should, however, be noted that, while the applicant may be at large so far as arguments are concerned, the grounds as originally stated and served cannot be amended: in Keane and another v An Bord Pleanala and Commissioners of Irish Lights (above) the applicants sought to amend the statement of grounds by including two additional paragraphs. Murphy J.

"declined to permit the proposed amendments as to do so would be to permit the Applicants to bring the amended case outside the time limit prescribed by the 1992 Act"

See also Barr J. in McNamara v An Bord Pleanala [1996] 2 ILRM 339; the substantive hearing of the Kill Dump application, where he further held that the applicants could not rely on a general statements that the Environmental Impact Statement was defective or the decision irrational and then later refine these "catch-all" pleas by outlining specific defects at a later stage. While Mr Justice Barr was clearly of the view that the specific grounds of objection must be known to the respondent at an early stage, he did not consider that the applicant should have to produce all his evidence at an early stage:

"This clearly implies that the obligation on the applicant includes not merely informing the developer within time that his planning permission is being challenged, but also within the requisite time scale making him aware of the specific grounds for the proposed challenge so that he may know the case he has to meet. The applicant is not precluded from introducing evidence after expiration of the two month limitation period in further support or amplification of the grounds of objection he relies on; provided that such grounds are specified in his original documentation which has been served on all relevant parties within time. It should be emphasised, however, that the applicant's statutory obligation regarding appropriate notice to the developer within time, extends only to his grounds for challenging the planning permission. Apart from service of an affidavit verifying such grounds, he has no obligation to furnish any other information within the limitation period as to evidence or arguments in support of the case he proposes to make on judicial review."

Given that this is the nature of the preliminary hearing, it is very much a matter of tactics for the respondent and associated notice parties whether they decide to join battle at the preliminary hearing stage or put in replying affidavits and Notice of Opposition and oppose the application in the substantive hearing. Bearing in mind that a case may require substantial argument and yet not disclose substantial grounds: the Arcon case lasted for three days in the High Court and two days in the Supreme Court and the Luggalla case lasted for three days in the High Court, a respondent anticipating a protracted preliminary hearing may wish to keep its powder dry and decline to oppose the preliminary application. This was the course adopted in Boland v An Bord Pleanala (High Court unreported 9 December 1994 Law Library Vol 8 p. 2149) which concerned an application to quash a permission for the development of a new ferry terminal in Dun Laoghaire

harbour. In the Kill Dump case , the preliminary application was intiially opposed by both the respondent An Bord Pleanala and the Notice Parties the four Dublin local authorities, but An Bord Pleanala withdrew its opposition on the second day of the application, which went on for a further five days before leave was finally granted by Carroll J. On the substantive hearing An Bord Pleanala successfully opposed the application for Judicial Review.

I would suggest that where there is likely to be a conflict on the facts, or on the interpretation of the facts by experts, or even where the respondent and/or notice parties wish to put before the court a substantial body of additional factual information by way of background or amplification, then it is more appropriate for the preliminary application not to be opposed and for issue to be joined on the substantive application. Otherwise, one risks trying the same matter twice on the same evidence, at considerable expense and waste of court time. The fact that an application on notice is not opposed, does not in itself, of course, relieve the applicant of the burden of satisfying the Court that the grounds advanced are substantial.

Substantial Grounds

Subsection (3B), as we have seen, provides that :

"...leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed."

What then, are substantial grounds ? It should first be borne in mind that the majority of applications for judicial review of planning decisions will fall to be determined under the principles set out in O'Keeffe v An Bord Pleanala, and thus must surmount a "high hurdle", in the words of Keane J, in the Luggalla case. In that case the decision challenged was the conclusion reached by the Wicklow County Manager that the proposed development; the construction of an interpretative centre by the Office of Public Works in a scenic wooded area of the Wicklow Mountains, was not a material contravention of the development plan. Keane J stated in the course of his judgment (3 November 1994) that in order to succeed in being granted leave to apply for judicial review under the Subsection (3B) proceedure, the applicants:

"...have to satisfy me that there are substantial grounds for contending, not that there were some grounds before the Planning Authority, but grounds of an inadequate nature, not that there were grounds before them which, on balance, could not be expected to weigh in the balance against the grounds that they would urge, but that there were no grounds on which the Planning Authority could have arrived at its decision."

In the case of Scott and others v An Bord Pleanala and Arcon Mines Ltd , Egan J., delivering the judgment of the Supreme Court, said:

"What meaning should be given to the word 'substantial' ? I gain little assistance from the views expressed by various judges in O.Dowd v North Western Health Board and Murphy v Greene as they were dealing in the main with allegations of factual matters, whereas the present case is concerned with a contention of law. I fall back on a word which is so often used as a test in legal matters. It is the word 'reasonable' and I suggest, therefore, that the words 'substantial grounds' require that the grounds must be reasonable."

Carroll J in McNamara v An Bord Pleanala (No 1) adopted the above dictum of Egan J. and amplified it as follows:

"In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned in trying to ascertain what the eventual result would be. I believe that I should go no further than satisfy myself that the grounds are 'substantial'. A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial."

The views of Carroll J. as thus expressed, were adopted by Murphy J. in Keane and another v An Bord Pleanala and Commissioners of Irish Lights, and by McCracken J. in Mulhall v An Bord Pleanala and Petrogas Gas Ltd (unreported 21 March 1996, Irish Times, 10 June 1996) Before leaving this subject, it is worth pointing out that the distinction between a challenge on the basis of irrationality and a challenge on a point of law may not be an easy one to make in practice, since an error of law within jurisdiction may not be reviewable. In Max Developments v An Bord Pleanala [1994] 2 IR 121, Flood J. held that it was within the jurisdiction of An Bord Plenaala to decide mixed questions of fact and law and that if the Board erred in law in deciding that an environmental impact statement was not required in a particular case, it erred within jurisdiction and that therefore the allegation that the decision was wrong in law was not a substantial ground within the meaning of Subsection (3B). See also Irish Asphalt v An Bord Pleanala (unreported, Costello P. 28 July 1995 Law Library Vol 8 p. 2494)

Constitutionality?

It is often suggested that because the time limit is so short and the subsection vests no discretion in the Courts to entend the time, even where there has been misrepresentation, fraud or mistake, that the constitutionality of the time limit is open to question. However in Blessington and District Community Council v Wicklow County Council (unreported, Kelly J. 19 July 1996), the applicants brought an application for leave to issue judicial review of a decision to grant planning permission to Aosog Centres Ltd to demolish a house and construct facilities for an outdoor youth centre at Ballyknockan, County Wicklow. The decision was made on 22 March 1995, but the application was not made until 29 April 1996. The applicant sought to surmount this difficulty by seeking a declaration that the relevant statutory provisions are repugnant to the constitution.

Kelly J. held as follows:

" Although the relief concerning the constitutionality of the statute is the first one prayed for, it is clear that it

only arises for consideration if I am satisfied that the Applicant has, in the words of the same section 19, 'substantial grounds' for contending that the decision is invalid or ought to be quashed. If I am so satisfied, then I must next consider whether the Applicant has made out a sufficient case to be permitted to apply for the declaratory relief concerning the constitutionality of the limitation provision. If the Applicant does not establish 'substantial grounds', it will not have locus standi to raise the constitutional issue."

In the event, Kelly J. found that the grounds advanced were not substantial and refused leave to apply for judicial review. He went on to record his view that the Applicant would have "great difficulty in attempting to assert an entitlement to have the limitation provision declared unconstitutional," having regard to the following dictum of Finlay CJ in Brady v Donegal County Council [1989] ILRM 282 at 293:

" The whole issue of constitutional validity depends in this case upon the submission with regard to the absence from the subsection of 'a saver against an exceptional case such as the present one.' If the present case is not exceptional; if the advertisement was duly published and if the ignorance of the Plaintiffs was not caused or contributed to by any act, wrongful or otherwise, of the Defendant, then the absence of any saver from this subsection has not damnified the Plaintiffs nor would its presence have been of advantage to them."

No Appeal

The decision of the High Court, whether on the preliminary application for leave to apply or the subsequent application for judicial review, is final (unless the constitutional validity of any law is in question) and no appeal lies to the Supreme Court save with the leave of the High Court. Such leave can only be granted :

"Where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."

Such leave was granted in four of the cases referred to above, namely KSK v An Bord Pleanala, Scott and others v An Bord Pleanala and Arcon Mines Ltd, Boland v An Bord Pleanala, and Keane v An Bord Pleanala and Commissioners of Irish Lights. In the last of these cases, the point on which the certificate of leave to appeal was granted by Murphy J was that An Bord Pleanala, in granting permission for the erection of a LORAN C radio mast on Loop Head, took into consideration the fact that the State had entered into international agreements relating to the communications system of which the mast was to form a part and the fact that the communications system would be of benefit to air and sea navigation over a wide area, and thus did not confine itself to considering only the proper planning and development of the particular area concerned. The Supreme Court, in delivering an *ex tempore* judgment on 12 March 1996, held that it was relevant to consider in deciding whether the ground was substantial the fact that the judge of first instance had certified it to be a point of law of exceptional public importance , and went on to hold that the point was new and novel and clearly substantial and important.

Interestingly enough, once the case is before the Supreme Court pursuant to such a certificate, the appellant is not confined to arguing the point of law in respect of which the certificate was granted. In Scott v An Bord Pleanala and Arcon Mines Ltd, Egan J., in delivering the judgment of the Court states that, by analogy with the granting of a certificate of leave to appeal from the Court of Criminal Appeal to the Supreme Court under Section 29 of the Courts of Justice Act, 1924, the appeal lies against the decision of the Court and "need not be restricted to the consideration of any point of law certified." He expressly adopted the dictum of Walsh J. in The People v Giles [1974] IR 422:

"The appeal lies against the decision of the Court of Criminal Appeal and there is nothing in the statute which confines it to the point certified, if any. The decision 'involves' the point of law but, according to the Act, it is against 'the decision' that the appeal lies. The 'point of law' is not the decision."

If leave to appeal is refused, however, no appeal will lie against the decision to refuse: cf Irish Asphalt v An Bord Pleanala (unreported Supreme Court 22 May 1996, Barrington J. Law Library Vol 5 p. 1476), in which it was held by a full Court of five judges that Article 43.4.3 clearly provides for the making of exceptions to the general right of appeal from the High Court to the Supreme Court, that Subsection (3B) creates such an exception and that, accordingly, the Supreme Court has no jurisdiction to hear such an appeal.

Developer free to act

There is no doubt that the height of the legal hurdle which an applicant must surmount if they are to quash an administrative decision, and particularly a planning decision, was raised significantly by the decision of the Supreme Court in O'Keeffe v An Bord Pleanala . To that hurdle the 1992 Act has added a new and formidable procedural hurdle. Together they form what in showjumping terms might be called a combination jump. The purpose and intent of these obstacles in the way of judicial review is clearly set out by Finlay CJ in his judgment in KSK v An Bord Pleanala, as is, by implication, the willingness of the courts to implement them:

"From these provisions, it is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authorities, and in particular one must assume that it was intended that a person who has obtained a planning permission should at a very short interval after the date of such decision, in the absence of a judicial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably be left in a position to act with safety on the basis of that decision."

❑

The Privilege Against Self-Incrimination in light of Saunders v United Kingdom

Paddy Dillon-Malone, Barrister

Can the privilege against self-incrimination or the right to silence be invoked to prevent the admission in subsequent criminal proceedings of statements or evidence obtained under a legal compulsion? Most certainly the answer is yes, but is such evidence inadmissible on those grounds per se? In Heaney v Ireland, the Supreme Court expressly reserved this question in relation to statements obtained under section 52 of the Offences against the State Act.[1] However, the effect of the ruling of the European Court of Human Rights in Saunders v United Kingdom is that national prosecuting authorities must temper the amount of such evidence presented or decline to present certain significant evidence, even if is introduced to cast doubt on credibility, if they are to avoid prejudicing the fairness of the trial.[2] Following this decision, it is likely that the Irish courts will be faced with a flurry of pleas for the exclusion of evidence based upon the far-reaching reasoning of the Court in that case, not only in relation to express statutory incursions on the privilege against self-incrimination, but also in relation to wider circumstances in which the accused may be said to have been under a compulsion to provide evidence. As urged in a strong dissent by Judge Martens[3], the reasoning of the majority of the Court in Saunders is flawed and may well have far-reaching and unfortunate consequences for the investigation and prosecution of fraud and other offences.

Convention law prior to Saunders

At issue in Saunders was whether the admission at the applicant's trial for fraud of statements obtained from him under legal compulsion was contrary to the right to silence and the right not to incriminate oneself. These two immunities had been characterised by the Court in Murray v United Kingdom as generally recognised international standards which lay at the heart of the notion of a fair procedure under Article 6 of the Convention. In that case, it had also not surprisingly held that the immunities were not absolute and could be subject to limitations including the drawing of adverse inferences from one's silence.[4] The only other previous decision of the Court concerned freedom from self-incrimination at the pre-trial stage.[5] In Funke v France, the applicant was convicted of an offence of failing to produce bank statements relevant to investigations into customs offences that might have been committed by him. Although not subsequently prosecuted for such offences, the Court held that, by attempting to compel him to produce incriminating evidence, the State had infringed his right to remain silent.[6]

The Commission in the Funke case had held that the legitimate interests of the community overrode the privilege in such circumstances[7], a conclusion which, as noted by Judge Martens in Saunders, is more rational and which corresponds with the position of the European Court of Justice and of the United States Supreme Court to the effect that whereas there exists a right to remain silent in subsequent criminal proceedings, there is no right to refuse to hand over documents, let alone an absolute right to do so.[8]

Nonetheless, it can be said that prior to the decision in Saunders it had yet to be decided whether Article 6 prohibited the admission per se in subsequent criminal proceedings of statements or evidence obtained under a legal compulsion. It is important to note, however, that the right to a fair hearing in Article 6 does not require that any particular exclusionary rules are followed in national courts in either civil or criminal cases: it is in principle for each State to lay down its own rules. This has the practical consequence that a successful challenge under the Convention to the admission of evidence in a particular case would normally be expected to result in a finding that, having regard to its effect upon the fairness of the proceedings taken as a whole, Article 6 had been breached. The consequences for domestic law and practice, including the policy choice as to whether to abrogate any legislative provisions affected or to abandon particular investigative practices, would then be assessed by the national authorities. Normally, therefore, the discretionary powers of the courts to admit or exclude evidence would remain unaffected.

Comparison with Irish law

In Ireland, the constitutionality of provisions providing for statements to be made or documents to be furnished under threat of penalty seems beyond doubt. The appropriate constitutional test is whether the interference with one's right to silence or, at a subsequent trial with one's privilege against self-incrimination, pursues a legitimate aim and is proportionate having regard to the safeguards provided for, if any, including evidential safeguards against undue prejudice in trial proceedings. In the High Court decision in Heaney, Costello J subjected the statutory incursion on the right to silence at issue to a

test of proportionality having regard to the presumption of innocence under Article 38.[9] The Supreme Court, by contrast, applied a proportionality test having regard to the right of freedom of expression (right of silence) under Article 40 of the Constitution. The rather bare decision of the Supreme Court relies upon the entitlement of the State to protect itself against crime, but the more careful judgment of Costello J provides a convincing argument for the constitutionality of such provisions and is, it is suggested, equally applicable to non-emergency legislation.

It is important also to note that Costello J, while accepting that the privilege against self-incrimination of both a suspect and of an accused at trial came within the terms of the guarantee of a fair trial in Article 38(1), adopted the comments of Templeman LJ in AT&T Istel Ltd v Tully to the effect that the privilege could only be justified on two grounds, first that it discourages the ill-treatment of a suspect and secondly that it discourages the production of dubious confessions.[10] In the Irish understanding of the notion, therefore, the privilege cannot be said to lie at the heart of the notion of a fair procedure, but may be restricted quite substantially. This difference as to the weight which the privilege enjoys explains why the Irish position differs from the conclusions reached by the Court in Funke v France.

In addition, there was no indication from either the High Court or the Supreme Court in Heaney that additional constitutional hurdles should be introduced to the admission per se of evidence obtained under a legal compulsion. If anything, in expressly reserving the point, the Supreme Court indicated that the question could be decided under the established common law and constitutional tests as to compulsion. This stands to reason, because evidence is either admissible, and subject to the trial judge's discretion to exclude on the grounds of prejudice, or inadmissible. Once the constitutionality of such provisions is accepted, admissibility cannot depend, for example, upon how or the extent to which the prosecution makes use of that evidence as opposed to the manner in which it was obtained. Yet this is precisely the effect of the decision of the European Court of Human Rights in Saunders.

The decision in Saunders

In its judgment in Murray, the European Court had expressed the view that the right to silence and the privilege against self-incrimination, by providing the accused with protection against improper compulsion by the authorities, contributed to avoiding miscarriages of justice and to securing the aims of Article 6.[11] This provided the starting point for its reasoning in Saunders, as follows:

"The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention.

The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.

In any event, bearing in mind the concept of fairness in Article 6, the right not to incriminate oneself cannot reasonably be confined to statements of admission or wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury the use of such testimony may be especially harmful. It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is made in the course of the criminal trial."[12]

In finding a violation in the present case, the Court noted that the interviews in question formed a significant part of the prosecution case: extensive use was made of them by the prosecution to establish the applicant's knowledge of events and his dishonesty, and by his co-accused in order to cast doubt upon his version of events. The Court also rejected the argument that the complexity of corporate fraud and the vital public interest in its investigation and prosecution could provide a justification for admitting the evidence: Article 6 guarantees applied to all types of criminal offences without distinction from the most simple to the most complex. Furthermore, in the Court's view, "the public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings".[13]

The thrust of these last statements, and the importance attached more generally by the Court to protecting the individual will of the accused, provide a strong basis for arguing that the Saunders decision extends not just to express statutory incursions on the right to remain silent, but to any situation in which compulsion may be said to have been operative in obtaining statements or evidence which can be shown to be dependent upon the will of the suspect. This is a curious distinction, and one which is bound to lead to artificial results in practice: what is the difference between the results of a breath test and the contents of a secret file? What is the difference between the production of documents under penalty to administrative authorities and the production of documents under a warrant? And, as asked by Judge Martens in his dissent, what about a PIN code or a password into a cryptographic system which is hidden in a suspect's memory?[14]

The other curious feature of the decision in Saunders, as already signalled above, is that the Court declined to decide head on, so to speak, the question of principle as to whether Article 6 prohibited the admission per se in the

subsequent criminal proceedings of statements or evidence obtained under a legal compulsion. Instead, having lumped together the right to silence and the privilege against self-incrimination and elevated them to central principles underlying the presumption of innocence and the fairness of criminal proceedings, the Court has sent a signal to domestic authorities and courts to adapt prosecution strategies and the interpretation of exclusionary rules of evidence in order to ensure that evidence obtained under compulsion does not form a significant part of the prosecution's case.

Discussion

The decision in Saunders has no consequences for the formal validity of Irish provisions requiring persons under investigation to answer questions on pain of punishment, including those for example in the Companies Acts 1963 to 1990, the Bankruptcy Act 1988, the Criminal Justice Act 1984, the Road Traffic Act 1961 and the Customs Consolidation Act 1876. The Court, notably, did not directly apply its reasoning in Funke to pre-trial statements, as opposed to documents, and a direct conflict between the Convention standard and the Supreme Court decision in Heaney has thus been avoided. The decision in Funke remains problematic in relation to the formal validity of compulsory powers for the production of documents, but, as pointed out again by Judge Martens, the exact status of the Funke decision appears unclear following the Saunders judgment.[15]

The true significance of Saunders is that it could have a substantial chilling effect upon the use of such provisions, and lead in practice to self-incrimination being raised in opposition to the introduction of any and all evidence connected to answers obtained in pre-trial investigations. In addition, the decision has important implications for the use of evidence obtained in other contexts. For example, evidence obtained from the execution of confiscation orders under the Proceeds of Crime Act falls within the rule against self-incrimination. More generally, the wide rationale underlying the Court's reasoning might allow for the application of this new rule in circumstances where the accused felt bound to answer questions from persons in authority including, conceivably, from employers in an internal investigation into fraud in circumstances where he or she had no access to legal advice.

Irish courts are under no obligation to follow the reasoning adopted by the European Court of Human Rights,[16] and it may well be that courts may avoid conflicts with the Convention by continuing to decide upon the exclusion of evidence in cases before them having regard to the existing exclusionary rules. It appears more likely, however, that the European Court's wide interpretation in Saunders of the privilege against self-incrimination must, in the absence of a reversal by that Court, be accommodated by the Supreme Court when next the issue comes before it.

For the State, the question arises as to what alternatives may be availed of in order to successfully prosecute complex commercial frauds and other offences which are likely to depend upon evidence obtained under a legal compulsion. One answer may be to place greater reliance upon evidential inferences and presumptions and upon reversals in the evidential burden of proof. Some few years ago, as a result in particular of cases then recently decided in Canada and in the USA, attention was briefly focused in this jurisdiction on the validity of such mechanisms having regard to the presumption of innocence. Following the decisions of the Supreme Court in O'Leary v AG[17] and in Hardy v Ireland[18] it appears now to be the law that if the burden or presumption can be read in a constitutional manner and be classed as evidential in nature only, then, just as the right to fair procedures is known to save similar provisions in a civil context[19], no further inquiry need be made as to the justification for such measures. Whereas the proportionality test applied to such measures under the European Convention is more satisfactory and could be regarded as the appropriate test under Irish law too following its acceptance by the Supreme Court in Heaney, the decision of the European Court in Murray v United Kingdom shows that such measures, appropriately framed, will not fall foul of the Convention. To this extent, therefore, the Irish position accords with the Convention standard, and may afford some solace to prosecutors in the wake of Saunders. ❑

1 Judgment of 23 July 1996, not yet reported. The Court thus appears to have case doubt on its previous decision in The People (DPP) v McGowan [1979] IR 45
2 Judgment of 17 December 1996, not yet reported
3 At pp. 36 - 46 of the transcript (joined by Judge Kuris)
4 (1996) 22 EHRR 29
5 In K v Austria (Com Rep. A 255-B (1993)) a case which was ultimately settled before the Court, the Commission found a breach of the applicant's freedom of speech under Article 10 in circumstances where he had been fined for refusing to give evidence at the trial of persons on drug trafficking charges on the ground that this would prejudice his defence in criminal proceedings pending against him for purchasing drugs from them - this no doubt accords with the Irish position whereby trial judges are under a duty to warn such witnesses as to their right to refuse to answer questions on the grounds of self-incrimination.
6 (1993) 16 EHRR 257
7 Reproduced in Series A no. 256, pp.33 et seq. §§ 63-65
8 Cf. Paragraph 11 of the dissenting opinion, citing the Orkem and Otto/Postbank judgments of the ECJ of 18 October 1989 and 10 November 1993, and the decision of the US Supreme Court in Braswell v US 487 US 99.
9 (1994) 3 IR 593.
10 Ibid, 603. The decision in ISTEL is reported in (1993) AC 45. For a fuller discussion, cf Redmond, The Privilege against Self Incrimination in the context of the 1990 Companies Act, [1992] ICLJ 118
11 At paragraph 45 of the judgment
12 At paragraphs 68 - 71 of the judgment
13 At paragraphs 72 - 74 of the judgment
14 The full argument of Martens J is set out in paragraphs 7 - 12 of his opinion.
15 At paragraph 12
16 Under international law, the Convention produces obligations of result only.
17 (1995) 1 IR 254 and ; cf. Ni Raifeartaigh, Reversing the Burden of Proof in a Criminal Trial(1995) ICLJ 135.
18 Judgment of 18 March 1993
19 See recently the decision of Laffoy J in Countyglen PLC v Carway & Others, judgment of 20 February 1996, not yet reported.

Legal Update

The Bar Review
Volume 2. Issue 1. January 1997. ISSN 1339-3426

A directory of legislation, articles and written judgments from 5th December 1996 to 1st February 1997.

Judgment summaries compiled by the Legal Researchers, Judges Library.
Edited by Desmond Mulhere Law Library, Four Courts, Dublin 7.

Administrative

McCann v. Minister for Education
High Court: **Costello P.**
10/10/1996

Application for judicial review; secondary school teacher applied for incremental credits; application refused; Intermediate Education Act, 1914; Rules for the Payment of Incremental Salary to Secondary Teachers; whether Minister had power to make "non-statutory" rules or "administrative measures" for the purpose of administering funds; whether proper discharge of Minister's responsibilities; whether regulations made by Minister valid; whether proportionality test applicable; whether reasonableness test applies to measures administering public funds; certainty and accessibility of law; whether regulations in breach of European law; Articles 6 and 52 EC considered
Held: Application dismissed; proportionality test confined to cases where legally protected rights attacked.

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Local Government Management Services Board (Establishment) Order, 1996
S.I.410/1996
Commencement date: 1.1.97

Local Government Staff Negotiations Board (Establishment) Orders, 1971 to 1996 (Revocation) Order, 1996
S.I.411/1996
Date signed: 20.12.96

Transport, Energy and Communications (Delegation of Ministerial
Functions) Order, 1996
S.I.395/1996
Date signed: 18.12.96

Article

Bork's Originalism: Reconciling Judicial Constitutional Interpretation
with the Rule of Law
Twomey, Adrian F
1996 ILT 278

Agriculture

Statutory Instrument
European Communities (Pesticide Residues) (Foodstuffs of Animal Origin) (Amendment) (No 2) Regulations, 1996
S.I.412/1996
Commencement date: 20.12.96

Animals

Statutory Instrument

Diseases of Animals (Bovine Spongiform Encephalopathy) (No 3) Order, 1996
S.I.415/1996
Commencement date: 1.1.97

Aviation

Bosphorus Hava Yallari v. The Minister for Transport, Energy & Communications & Ors.
Supreme Court: **Hamilton C.J.,** O'Flaherty J., Blayney J., Denham J.
29/11/1996

Appeal; aircraft operating from outside E.U.; decision to impound aircraft deemed ultra vires; whether Article 8 Council Regulation (EEC) No. 990/93 applicable; interpretation of regulation; Article 177 reference to ECJ
Held: Appeal allowed; bound by decision of ECJ

Bankruptcy

Official Assignee v. Duddy
High Court: **Shanley J.**
01/05/1996

Bankrupt adjudicated; s.4 Partition Act, 1868; order for sale sought by official assignee; s.61 Bankruptcy Act, 1988; sale of dwelling house and family home; whether exceptional circumstances warrant postponement of sale; interest of creditors; costs
Held: Sale of family home postponed for 10 years; costs awarded to official assignee

Broadcasting

Statutory Instruments

Video Recordings Act, 1989 (Classification of Video Works) Regulations,
1996
S.I.403/1996
Date signed: 19.12.96

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S.I.407/1996
Commencement date: 1.1.97

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S.I.398/1996
Commencement date: 31.12.96

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Commencement date: 31.12.96

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S.I.399/1996
Commencement date: 18.12.96

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High Court: **McCracken J.**
21/11/1996

Winding up petition; s. 213 Companies Act, 1963; whether company unable to pay its debts; whether ulterior motive behind petition; court discretion; company subject to other legal proceedings; remaining creditor opposed to petition; whether winding up in the interests of creditors; s.309, 1963 Act; company trading successfully; loss of principal asset if winding up granted
Held: Petition stayed pending outcome of other legal proceedings

Statutory Instrument

Merger or Take-over (Notification Fee) Regulations, 1996
S.I.381/1996
Commencement date: 1.1.97

Article

The Irish Takeover Panel Bill 1996
Clarke, Blanaid
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Competition

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Prudence Creole S.A. v. Gaelic Union Reinsurance
High Court: **Costello P.**
18/12/1996
Contract of reinsurance; motion for summary judgment; plaintiff company registered in France; whether fair and reasonable probability of bona fide defence; whether plaintiff can sue on contract entered into between defendant and broker; whether liability where failure to pay premium; whether claim to stay proceedings governed by lex fori
Held: Motion granted; stay of proceedings refused

Constitutional

McMenamin v. Ireland
Supreme Court: **Hamilton C.J., O'Flaherty J., Blayney J.,** Denham J., Barrington J.
19/12/1996

Judicial review; declaration; statutory arrangements for pensions of District court judges; de facto diminution in remuneration; whether in breach of Art.35(5); whether state constitutionally obliged to enact pension schemes which are not irrational or wholly inequitable; whether appropriate to grant relief; separation of powers; whether disparity in pension arrangements for District and Circuit court judges in breach of constitutional equality requirements
Held: Not appropriate to grant relief, owing to respect which organs of state owe to one another;
[per Hamilton CJ: pension scheme not irrational or wholly inequitable, but failure to adjust scheme to take account of changing socio-economic circumstances was in breach of Art.35(5)]
[per Blayney J: no constitutional duty not to enact irrational or wholly inequitable pension schemes for judiciary]
[per O'Flaherty J: loss of income represented an unconstitutional erosion of judicial independence]

Donnelly v. Ireland & Ors.
High Court: **Costello P.**
03/12/1996
S. 13 Criminal Evidence Act, 1992; whether provisions permitting reception of evidence by means of live television link in conflict with right to fair procedures; whether right of accused to physical confrontation with accuser; whether use of link by children should be decided on case by case basis
Held: Provisions not in conflict with right to fair procedures; no constitutional right to physical confrontation; no need to consider use of link on case by case basis

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1996 ILT 278

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Statutory Instrument

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Will the investment intermediaries act 1995 prevent bubbles bursting?
Goldberg, David Abrahamson, Maurice
1996 CLP 255 (Part I) 1996 CLP 271 (Part II)

Contract

Duggan v. AIB Finance Ltd.
Supreme Court: Hamilton C.J., O'Flaherty J., **Keane J.***
* ex tempore
19/11/1996
Agreement for transfer of bank debt; parties obliged to alter transfer date to comply with Ministerial Order; whether alteration of transfer date contrary to agreement; agreement conditional on completion of certain matters by certain date or by later date agreed by parties; whether parties agreed to later date; whether requirements of Judicature Act in relation to assignment of legal choses in action applicable
Held: Alteration of transfer date not contrary to agreement as parties bound to comply with Ministerial Order; parties agreed to completion of matters by later date; Judicature Act requirements inapplicable as equitable assignment

O'Donnell & Co. Ltd. v. Truck & Machinery Sales Ltd.
High Court: **Moriarty J.**
07/06/1996

Counterclaim; agreement for sale and exchange of goods; s.14(2) and s.14(4) Sale of Goods Act, 1893 & 1980; whether goods reasonably fit for required purpose; whether negligent misrepresentation and or statutory misrepresentation pursuant to s.45(1) Sale of Goods and Supply of Services Act, 1980; whether contributory negligence; s.34(1) Civil Liability Act, 1961; damages
Held: Negligent and Statutory misrepresentation; contributory negligence found

Commercial Fleet Truck Rental Ltd. & Ors. v. The Mayer Company
High Court: **Costello P.**
11/10/1996

Option to purchase premises and annexed license; whether breach of contract; claim for specific performance; vendor precluded from varying terms; whether license assignable; waiver; whether plaintiff entitled to damages
Held: Plaintiff entitled to specific performance; damages set off against balance of purchase price

Clarke v. Kilternan Motor Co. Ltd.
High Court: **McCracken J.**
10/12/1996

Agreement to run service station; delay in payment by plaintiff; termination of agreement; whether terminated by defendant; whether reasonable notice given to plaintiff; whether plaintiff's failure to pay constituted fundamental breach
Held: Agreement terminated by plaintiff's fundamental breach; not necessary to consider what constituted reasonable notice
Article

Guarantees under attack
Breslin, John
1996 CLP 243

Copyrights, Patents & Designs

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Newman, Jonathan
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Criminal

People (DPP) v. Gannon
Supreme Court: **Blayney J.,** Denham J., Barrington J., Murphy J., Lynch J.
17/12/1996

Conviction for rape; appeal; newly discovered facts; whether conviction unsafe and unsatisfactory; test to be applied
Held: Test is objective; on the evidence, the newly discovered facts would not have assisted appellant in any way

Freeman v. DPP
High Court: **Carney J.**
18/11/1996

Arrest in dwelling house under s.41(1) Larceny Act, 1916; Article 40(5) of Constitution; inviolability of dwelling house; whether arrest permitted; whether evidence obtained as a result of illegal entry and arrest admissible; whether detention under s.4 Criminal Justice Act, 1984 following illegal arrest valid; whether conviction under s.16 Criminal Justice Act, 1984 following invalid detention valid

Held: Arrest under s.41(1) not permitted; evidence admissible due to extraordinary excusing circumstances; conviction quashed due to invalidity of detention

Statutory Instruments

Criminal Justice Act, 1994 (Section 46(1)) Order, 1996
S.I.344/1996
Commencement date: 3.12.96

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Faulkner v. Minister for Industry & Commerce
Supreme Court: Hamilton C.J., **O'Flaherty J.,** Barrington J.
10/12/1996

Appeal; job promotion; equality; whether discrimination on grounds of sex; discrimination found by Equality Officer; opposite finding by Labour Court; whether reasons for decision of Labour Court adequate; whether judicial review more appropriate procedure
Held: Appeal dismissed
Fennelly & Ors. v. Midland Health Board
High Court: **Carroll J.**
06/12/1996

Equality; Council Directive 76/207/EEC; s.265(1) Mental Treatment Act, 1945 forbidding male nurses from caring for female patients in mental institutions; plaintiff male nurses claiming breach of this statutory duty; whether s.265(1) contrary to directive
Held: S.265(1) discriminatory; no application in domestic law

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S.I.371/1996
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Hyland, Niamh
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Equity

Bank of Nova Scotia v. Hogan & Anor.
Supreme Court: O'Flaherty J., Blayney J., **Murphy J.**
06/11/1996

Bank loan; security provided by way of equitable deposit of title deeds to three residential properties; husband provided security by way of deposit on two of the properties and wife did same for third property; failure to repay; claim by wife that bank did not provide her with independent legal advice and that undue influence was exercised over her with regard to deposits; whether undue influence exercised by husband; whether bank in a fiduciary position; whether bank acted negligently and in breach of fiduciary relationship;
Held: No undue influence exercised by husband; no equity against him to have transaction set aside; no undue influence exercised by bank
Highland Finance (Ireland) Ltd. v. Sacred Heart College of Agriculture Ltd. (In Receivership) & Ors
Supreme Court: **Blayney J.,** Denham J., Barrington J.
27/11/1996

Doctrine of subrogation; sale of milk quota; purchase money advanced by plaintiff; whether plaintiff entitled to be subrogated to vendor's lien
Held: Prima facie right to be subrogated to vendor's lien nullified by inconsistent terms of loan; application of doctrine of subrogation not required by justice and reason

European

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Commencement date: 3.12.96

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Needham v. Western Fisheries Board & Ors.
High Court: **Murphy J.**
06/11/1996

Appeal against Galway, Connemara and Ballinakill districts bye-law no. 689, 1994; bye-laws pursuant to s.11 Fisheries (Consolidation) Act, 1959; whether bye-law an emergency measure; whether plaintiff's right to earn livelihood infinged; whether implementation of bye-law contrary to natural justice
Held: Bye-law confirmed as emergency measure

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S.I.414/1996
Commencement date: 20.12.96 to 5.1.97

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S.I.18/1997
Commencement date: 15.1.97 to 31.1.97

Cod (Restriction on Fishing) (No 4) Order, 1996
S.I.368/1996
Commencement date: 1.12.96 to 31.12.96

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S.I.423/1996
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S.I.422/1996
Commencement date: 1.1.97

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Commencement date: 1.1.97 to 31.1.97

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Commencement date: 1.1.97 to 31.1.97

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Injunctions

Barrio Farm Machines Ltd. & Ors. v. Case United Kingdom Ltd.
High Court: **McCracken J.**
24/10/1996

Application for interlocutory injunction; plaintiffs held exclusive dealership for spare parts; defendants served notice on plaintiffs terminating agreements; whether six months constitutes adequate and reasonable notice for termination; arguable case made; balance of convenience lay in maintaining status quo; continue supply of spare parts
Held: Mandatory injunction granted directing defendants to supply spare parts to plaintiffs

Insurance

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O'Regan Cazabon, Attracta
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Judicial Review

Molloy v. DPP & Garda Commissioner
Supreme Court: **O'Flaherty J.***, Barrington J., Murphy J.
*ex tempore
22/11/1996

Appeal against refusal to grant leave to apply for judicial review; summons for breaching s.2, Criminal Justice (Forensic Evidence) Act, 1990; allegations of gardai impropriety
Held: Grounds for judicial review all matters which could be brought before court of trial; appeal dismissed

Kavanagh v. Government of Ireland & Ors.
Supreme Court: Hamilton C.J., O'Flaherty J., Blayney J.,**Barrington J., Keane J.**
16/12/1996

Certiorari; declaration; accused sent for trial in Special Criminal Court; whether court jurisdiction restricted to "subversive" offences; whether government duty to keep under review question of whether ordinary courts adequate to secure effective administration of justice
Held: Special Criminal Court jurisdiction not limited to subversive offences; question of whether ordinary courts adequate to secure effective administration of justice primarily a political question, in which courts should be extremely reluctant to interfere; appellant failed to displace presumption of constitutionality of government actions

Rafferty & Ors. v. Bus Eireann
High Court: **Kelly J.**
21/11/1996

Change in duties of bus drivers; whether changes in work practices or changes to conditions of service contrary to s.14 Transport (Reorganisation of CIE) Act, 1986; whether judicial review available; whether National Rail and Bus Union has locus standi
Held: Judicial review available; union has locus standi in representative capacity; changes constitute changes in work practices

Navan Tanker Services Ltd. v. Meath County Council & Anor.
High Court: **Carroll J.**
13/12/1996

European Communities (Vehicle Testing) Regulations, 1991; appointment of vehicle testers; exercise of discretion by issuing authority; applicant not informed that adequate service already in existence; whether breach of natural justice; whether legitimate expectation to be heard on question of adequacy of supply
Held: Breach of natural justice; legitimate expectation to be heard; certiorari granted

McCarthy v. DPP & Judge Delap
High Court: **Johnson J.**
20/12/1996

Certiorari and prohibition sought against District Court conviction; applicant's solicitor interrupted by judge; comments made by judge to applicant's solicitor; whether applicant afforded full opportunity to argue case
Held: Applicant not afforded full opportunity to argue case; breach of rule that justice be seen to be done; certiorari and prohibition granted

Land Law

Dublin Corporation v. Underwood
Supreme Court: Hamilton C.J., O'Flaherty J., **Keane J.**
12/12/1996

Compulsory purchase order; compensation; whether owner of property entitled to recover re-investment costs as part of compensation in addition to open market value of property, in circumstances where owner not in occupation; s.2 Acquisition of Land (Assessment of Compensation) Act 1919; assessment of compensation; principle of equivalence; recover neither more than or less than total loss
Held: Appeal dismissed; owner entitled to recover re-investment costs

Kavanagh & Kavanagh v. Delicato
High Court: **Carroll J.**
20/12/1996

Sale of land; vendor seeking specific performance; whether adequate note or memorandum to satisfy Statute of Frauds; whether appropriate to dispense with consent requirement under Family Home Protection Act, 1976
Held: Adequate note or memorandum; consent requirement dispensed with

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Local Government

Merriman v. Dublin Corporation & Anor.
Supreme Court: Hamilton C.J., O'Flaherty J., **Keane J.**
10/12/1996

Negligence claim; plaintiff injured; open gully on road; County Council found liable; whether gully constitutes a sewer within meaning of s.2 of Public Health (Ireland) Act 1878; whether Corporation or County Council obliged to repair it; whether within domain of corporation or County Council; Local Government (Sanitary Services) Act 1948
Held: Appeal dismissed; duty of County Council to repair sewer

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S.I.410/1996
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Date signed: 14.11.96

Negligence

Mulligan v. Holland Dredging Co. (Irl) Ltd.
Supreme Court: Hamilton C.J., **O'Flaherty J.**, Murphy J.
21/11/1996
Accident on ship; personal injuries; statutory safety and inspection requirements complied with; whether defendant negligent
Held: Negligence not established

McKenna v. Wall
Supreme Court: **Hamilton C.J.**, O'Flaherty J., Blayney J., Barrington J., Keane J.
29/11/1996

Road traffic accident; claim dismissed; whether trial judge misdirected himself and erred in law in finding no evidence of negligence
Held: No misdirection by trial judge; appeal dismissed

McDonagh v. O'Connell Ltd. & Ors.
High Court: **Barr J.**
24/10/1996

Personal injuries at work; whether contractor owed duty to plaintiff although latter under exclusive control and direction of corporation; whether de facto employer negligent; whether contributory negligence
Held: Contributory negligence found; damages awarded

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S.I.413/1996
Commencement date: 1.1.96

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S.I.29/1997
Date signed: 15.1.97

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S.I.5/1997
Date signed: 7.1.97

Planning

Carty & Carty Construction Ltd. v. Dublin County Council
High Court: **Costello P.**
16/10/1996

Development; planning permission refused by council due to inadequacy of sewage facilities; granted by board on appeal; bye-law approval refused by council acting as sanitary authority under Public Health (Ireland) Act, 1878; whether council negligent or acted ultra vires in refusing approval
Held: Negligence not established; council not ultra vires acting as sanitary authority under 1878 Act; sanitary authority not bound to exercise discretion in same way as board

Lord Henry Mountcharles v. Meath County Council
High Court: **Kelly J.**
17/12/1996

Judicial review; planning application to quash warning notice; holding of open air concerts without planning permission; whether warning notice time barred by s.26(3A) Local Government (Planning and Development) Act, 1963; question of unauthorised use; whether material change of use for short periods require planning permission; whether holding of concerts constitute normal use of lands; test of normal use; question of fact
Held: Application failed; holding of concerts not normal use of lands; occasional use

Flynn & O'Flaherty Properties Ltd. v. Dublin Corporation
High Court: **Kelly J.**
19/12/1996

Planning application; decision refusing permission not communicated to applicant within prescribed time; whether default permission should be granted; whether application entitled to more than one extension of time for application under s.26(4A) Local Government (Planning and Development)Act, 1963; exercise of discretion of judge in granting default permission
Held: Default permission granted; applicant entitled to more than one extension of time

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Supreme Court: **O'Flaherty J.***, Barrington J., Murphy J.
*ex tempore
22/11/1996

Application to extend time to bring appeal against order under Order 122, rule 11, RSC 1986 dismissing action; order stayed in the event of plaintiff serving fresh notice of trial as soon as allowed; order not complied with; notice of trial set aside; whether time for bringing appeal could be extended
Held: No grounds for appeal against order; application dismissed

Aer Rianta International CPT v. Walsh Western International Ltd.
Supreme Court: **O'Flaherty J.***, Barrington J., **Murphy J.**
***dissenting**
28/11/1996

Appeal from refusal to grant liberty to amend defence; defendants applied as quickly as possible for amendment after discovery of error
Held: Justice required that amendment be allowed

Lewis v. Minister for Enterprise & Employment
High Court: **Costello P.**
09/10/1996

Application for third party discovery; direction under s.16 Companies Act, 1990 made by Minister impugned in main action; whether all documents sought relevant; onus on plaintiff to show third party has relevant documents
Held: Order granted

McSorley & McSorley v. O'Mahony
High Court: **Costello P.**
06/11/1996

Application to stay proceedings; claim of professional negligence against solicitor; damages previously awarded against concurrent wrongdoer; application of s.18(1)(b) Civil Liability Act, 1961
Held: Proceedings stayed as unable to confer any benefit on plaintiff

McMahon Ltd. & Bedford Row Investment Ltd. v. Lynch Ltd. & Ors.
High Court: **Flood J.**
20/11/1996

Application to amend defence; whether amendment necessary; determination of pre-

liminary issue; O.34 r.2 RSC; whether nature of case unsuitable for preliminary issues
Held: Applications refused

Coates v. Judge O'Donnell & DPP
High Court: **Geoghegan J.**
26/11/1996

Order of prohibition sought; s.79 Courts of Justice Act, 1924; applicant brought before District Court not in area where crimes had been committed or where applicant resided; whether District Judge had jurisdiction; whether defect can be rectified by amendment to s.79 effected by s.41(4) Courts and Court Officers Act, 1995
Held: Order granted

National Authority for Occupational Safety & Health v. Gabriel O'Brien Crane Hire Ltd.
High Court: **McGuinness J.**
10/12/1996

Case stated from District Court; prosecution of summary offences under Safety, Health and Welfare at Work Act, 1989; whether summons procedure provided for in Courts (No.3) Act, 1986 available
Held: Procedure available

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Marray, Eamon
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Real Property

Gleeson v. Feehan
Supreme Court: Blayney J., Barrington J., **Keane J.**
21/11/1996

Intestacy; adverse possession; whether title acquired by several next of kin by way of adverse possession of lands of deceased person was title to which they would have become beneficially entitled on due administration; whether such title acquired by way of adverse possession against other next of kin acquired as joint tenants; whether such next of kin in shared occupation with non next of kin in adverse possession against personal representatives or in adverse possession against next of kin not in occupation; whether such title acquired as joint tenants or tenants in common.
Held: Title acquired not that to which next of kin would have become beneficially entitled on due administration; such title acquired as joint tenants; next of kin in shared occupation with non next of kin in adverse possession as joint tenants against personal representatives

Smyth v. Halpin & Stokes
High Court: **Geoghegan J.**
20/12/1996

Proprietary estoppel; extension built to family house by son in expectation of fee simple; reversionary interest in house left in will to daughter; whether son had equitable right to reversionary interest
Held: Doctrine of proprietary estoppel applied; reversionary interest vested in son

Records & Statistics

Statutory Instrument

Statistics (Balance of Payments) Order, 1996
S.I.378/1996
Commencement date: 3.12.96

Road Traffic

Homan v. Kiernan & Lombard & Ulster Banking Ltd.
Supreme Court: **O'Flaherty J.,** Barrington J., Keane J.
22/11/1996
Road traffic accident; motor vehicle lease agreement; failure by lessee to insure vehicle in accordance with conditions of lease; whether vehicle driven with owner's consent; whether owner liable for lessee's negligence under s.118, Road Traffic Act, 1961
Held: Consent not vitiated by lack of insurance; owner liable

Guerin v. Guerin
Supreme Court: Blayney J., **Keane J.,** Murphy J.
18/12/1996

Road traffic accident; whether driver had implied consent of owner to drive car
Held: Appeal allowed; evidence not capable of supporting an inference of implied consent.

Gallagher v. Kelly
High Court: **Budd J.**
17/10/1996

Road traffic accident; issue of liability; whether defendant exceeding speed limit; whether duty on pedestrian concerning his own safety; whether contributory negligence; damages
Held: Contributory negligence found

Article

Road Traffic Accident Cases and Hospital Charges - a Warning
Johnson, Keenan
1996 GILSI 333

Sea & Seashore

Statutory Instrument

Port Companies (Appointment of Local Authority Directors) Regulations, 1996
S.I.335/1996
Date signed: 14.11.96

Social Welfare

Statutory Instruments

Social Welfare (Consolidated Payments Provisions) (Amendment) (No 7) (Unemployment Assistance) Regulations, 1996
S.I.375/1996
Commencement date: 27.11.96

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(Assessment of Means) Regulations, 1996
S.I.374/1996
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Social Welfare (Consolidated Payments Provisions) (Amendment) (No 9)
(Treatment Benefit) Regulations, 1996
S.I.383/1996
Commencement date: 1.1.97

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S.I.373/1996
Date signed: 27.11.96

Social Welfare Act, 1996 (Section 22) (Commencement) Order, 1996
S.I.372/1996
Commencement date: 27.11.96

Solicitors

Phelan Holdings (Kilkenny) Ltd. & Phelan v. Hogan & Ors.
High Court: **Barron J.**
15/10/1996

Legal proceedings; conflict of interest between solicitor and client; failure by solicitor to inform client of conflict; assessment of damages; whether damages for mental injury
Held: Damages awarded for breach of duty; no damages for mental injury

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Solicitors (Advertising) Regulations, 1996
S.I.351/1996
Commencement date: 1.1.97

Solicitors (Practising Certificate 1996 Fees) Regulations, 1995
S.I.350/1995
Commencement date: 1.1.96

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S.I.400/1996
Commencement date: 1.1.97

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S.I.401/1996
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S.I.349/1995
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1996 GILSI 381

Taxation

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Valuation Appeal (Fees) Regulations, 1996
S.I.417/1996
Date signed: 31.12.96

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S.I.27/1997
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Delays in the Delivery of Reserved Judgments

The President of the High Court has requested that the following memorandum on the matter of court delays by brought to the attention of all barristers. Concerns about delays should be addressed to the President who will ascertain the position and communicate the date when it is anticipated that judgment may be delivered.

(1) The shortage of iudges has had a significant effect on the length of time which elapses between the date on which a judgement is reserved and the date on which it is delivered. As a general rule when judges finish one case they take up another and when cases are finished early or are adjourned they made themselves available to take up another case from the list in another court. Only very rarely and in exceptional circumstances will a judge be able to work on a reserved judgement immediately the case is concluded in lieu of hearing another case, a situation which is obviously very undesirable). Judgements are therefore written either before or after the hours of sitting on other cases, on week-ends, or in vacation.

(2) Because judges are aware of the delays in the lists they are reluctant to request time-off to write reserved judgements and very rarely do so.

(3) Delays in delivering reserved judgements can arise from a number of, sometimes inter-related, causes:

(a) The case itself in respect of which judgement is reserved may have been a long and complex one and considerable time may be required to evaluate the evidence and legal issues involved and compose a judgement.

(b) The nature of the cases in a list assigned to a judge over a given period may involve the need to reserve judgement in a number of cases and so a backlog of reserved judgements may be built up.

(c) Illness

(4) It is believed that the appointment of three extra judges of the High Court will not only help to reduce delays in waiting lists but also may assist in reducing delays in the delivery of reserved judgements. After discussing how best to maximise the opportunities now offered the following measures are being introduced.

(a) The Chief Registrar will prepare towards the end of each term a list of all cases in which judgements have been reserved and are outstanding and the date on which they have been reserved and the name of the judge concerned and send it to the President.

(b) In considering assignments for the forthcoming term the President will have regard to information on the list and when necessary and after discussion with the judge concerned, allow time off in individual cases to write reserved judgements.

(c) The benefit of a practice which enables a judge to have time off from other assignments immediately a case is concluded to write a judgement reserved is obvious (and is recognised in other jurisdictions by the appointment of a sufficient number of judges to enable this practise to be adopted). It is hoped that extra judges will be appointed to permit this to be done in this jurisdiction. Meanwhile, in the absence of an ability to adopt such a practice here it is proposed that regular discussions should take place with the President to see if, when a case is concluded and judgement reserved, an opportunity then exists to allow time off from other assignments to write it.

(d) The Chief Registrar will towards the end of each term send to each judge a list of all cases in which he/she has reserved judgement and the date on which it was reserved.

(e) All complaints about delays should be sent to the President and judges will notify the President of complaints they receive. The Chairman of the Bar Council and the President of the Law Society will be informed that clients concerns about delays should be addressed by their legal advisers to the President.

❑

Voice Recognition

Greg Kennedy, Information Technology Executive

For many years it has been the stuff of science fiction to be able to talk to your computer. We are all familiar with scenes like this in such programs as Star Trek, but now, we don't have to wait until the 24th century for this technology. Up until now the ability of the computer to understand your voice has been limited by the speed of the microprocessor. Now we have the equivalent of a Cray supercomputer sitting on our desks and we are now quickly approaching the ideal of throwing out our keyboards and mice to replace them with a single microphone.

Though not quite there yet, the latest speech-recognition programs are closer than ever to reaching the ultimate goal of speaker-independent, continuous dictation. The newest programs allow you to speak naturally when giving your PC commands such as "Open file" but they still require you to pause slightly between words during dictation. However, the length of that pause continues to decrease and vendors expect to reach that continuous-dictation holy grail in the next few years. Until then, the ever-increasing power of PC hardware, combined with more-sophisticated voice-recognition software, makes voice recognition a viable choice for many users.

In this article we will look at what is involved in using dictation software, looking at two in particular, DragonDictate from Dragon Systems and VoiceType 3.0 from I.B.M.

What do I need to be able to talk to my computer?

First, you will need a special circuit board fitted to your computer which has specialised functions to process sound. These devices are given the generic name of sound cards. More specifically you will need a "SoundBlaster" compatible sound card. SoundBlaster was one of the first sound cards ever introduced for the PC by Creative Labs Inc.

The second requirement is a PC capable of processing your dictation fast enough. This translates to a PC with the Pentium or Pentium Pro microchip and 16 Megabytes (Mb) of RAM. Also the dictionaries and programs take up a fair bit of hard disk space, 38Mb for VoiceType, 28Mb for DragonDictate. Each generally adds another 5-10Mb per additional user.

After that the only other thing you need is the voice recognition software. The two that I have looked at are DragonDictate and VoiceType 3.0.

One of the biggest problems with voice recognition has been the infinitely varied ways in which people speak. Humans have little difficulty distinguishing between one person saying "tis a lovely day" and another person saying "it's a lovely day". However, it is radically different for the computer. We can do this pattern matching quite easily and quickly but the computer relies on a guessing algorithm to determine what you are saying. The computer gets over this by way of learning how you speak and all the little nuances you have in your speech. Because of this, any speech recognition program that you buy, including the two studied here, require an initial training period to become familiar with your voice. I can tell from bitter experience that this period, which can range from two or three days to a week or two, can be frustrating with many corrections and stoppages.

Is dictation all that I can do?

No. Another application of voice recognition packages is control of your programs and working environment. This essentially allows you to control your program, in my case Microsoft Word 97, just by using your voice. Whilst this may not sound like a great advantage, in practice it is one of the better and more accurate parts of voice recognition programs. I say this because control of applications, which is really controlling a fixed set of menus, is much easier for the computer. There are only so many ways you can say "New Document" or "Print Document". Therefore, the computer need only match your speech against the varying ways of saying two words. This is a small task when you consider that in straight dictation it has to match your word against tens of thousands in its dictionaries to find out what you said.

Is dictation accurate?

This question is best answered by describing the ways in which the recognition systems are sold. Most products are priced according to the size of the dictionary it has, normally 10,000 words. However, you can pay more and get a bigger dictionary e.g. 20,000 or 30,000 words. The more words you have in the dictionary the less training you will need to give the program and the fewer mistakes you will have as you dictate. In fact, Dragon Systems who publish the DragonDictate program sell a product called DragonLaw which is actually the same product but with a dictionary of legal terms included.

What training is required?

When the program starts for the first time it is in a raw state with the words in the dictionaries. There will be an initial period of training where you speak the most popular words, normally

about two hundred. The computer then has a foundation against which to check your speech. From there you can correct the recognition mistakes as you go. One key thing I noticed while using these packages is that correction is vital. The dictation program fine-tunes itself to the user as you dictate. If I say "recognition" and the computer displays "ignition" and I don't correct it there is an even greater chance of getting "ignition" the next time I say "recognition". So correct, correct, correct. The longer you use a particular package the more accurate the recognition becomes and the faster you can speak.

Is it like using a dictaphone?

Yes it is in that you are transferring your thought into speech and then into text. However, you cannot speak fluently i.e. run one word into another. In dictation mode you must pause between each word. This makes you talk in a very funny way, and I can safely say I felt more than a little self-conscious at first hearing myself speak like this. This is a limitation of the technology but it should fall to the side as computers get faster and speech recognition technology develops. Also, I found that the more I used the products the shorter the pause I could have between the words to the point that it was barely noticeable.

Can more than one person use the program?

Yes, you can have multiple users of the same program. However, each user will need to train the computer to their voice. Also, when the program starts you need to indicate who is using it by picking your name from a list.

What programs does it work with?

Both DragonDictate and VoiceType 3.0 will work with any Windows program because they are taking your voice commands and essentially converting them into keystrokes. DragonDictate has the advantage in that it will work with Windows NT Workstation, Windows 95 and Windows 3.x. However, I.B.M. are so confident in their product that they now ship it with their flagship operating system OS/2 Warp (a competing product to Windows) but it too will work with Windows 3.x and Windows 95.

Is it faster than typing?

Definitely. Although it may not come up to the speed of an expert secretary, for those members who do their own typing, especially those people who use the "hunt-and-peck" technique it can be much quicker. Again, this is assuming the dictation program has been trained to your voice. Also, where I found a definite speed increase was in the use of applications. I didn't need to go searching in menu after menu for a particular function in Microsoft Word, all I needed to do was say "How many words are in this document" and received my answer. This feature extends even further in that while you are using the mouse you can also use your voice. In essence this gave me the facility to do two things at once.

One way in which both systems speed up document preparation is the use of templates. How many times would you repeat the same sentence in a document? Several, I suspect. A template allows you to say a keyword to retrieve a larger piece of text. An example of this is the closing salutation in a letter. Rather than go to the trouble of saying "yours sincerely...etc,, etc, etc.," you can set up the dictation system to recognise the command "close letter" and let it type the rest. I used this frequently in this and many other documents for things like "MS Word = Microsoft Word", "Dragon = Dragon System", closing salutations. Barristers would have an even greater need for this when using precedents.

I.B.M. or Dragon?

This is a difficult question to answer given that they both have almost identical functionality and recognition ability. Also, to be fair to both packages they should really be used for several weeks each to allow it to fine-tune itself to your voice. This has not been possible.

I found however, that I.B.M.'s documentation far superior to Dragons and this allowed me to get up to speed quicker. To counter this Dragon has a much easier and quicker correction system. Another advantage of DragonDictate is context checking. This feature checks what you are saying and put the word for the correct context in e.g. "I would like to buy some wood too." This sentence has many pitfalls for a computer but DragonDictate got through it fine.

Having used both of them I would have a personal preference for DragonDictate for several reasons. First, I found DragonDictate easier to use, although the bad documentation was frustrating. Secondly, the correction system was better as mentioned above. DragonDicate came with a pre-loaded set of instructions for many of the popular programs i.e. Netsape Navigator, Windows Explorer, Word and WordPerfect for Windows.

Lastly, DragonDictate is Dragon Systems main product which means they put a lot of effort into it. This is not the case with I.B.M., it is one of many products they sell and has the potential to get swamped. I'm not saying this is the case, I just find companies who specialise in a particular market tend to put more into the product.

It's good to talk...

Although voice control of a computer is not perfect at the moment we are getting close. Using your voice to control the machine is a unique way of working and certainly faster and more satisfying than using a keyboard and mouse. If you decide to go for any of these systems be prepared for an initial period of, sometimes frustrating, training. However, it won't be long before you are sitting in front of the computer in full Star Trek garb telling the computer to "Engage", (however don't be surprised if you get an error message or your family fall around the house laughing at you!)

Both packages were kindly supplied for evaluation by Martin Dunne of VoiceIT, Unit 17, Inns Court. Wine Tavern Street, Dublin.

A Review of Developments in European Law

Paddy Dillon-Malone, Barrister.

Commercial Agents

By Statutory Instrument N° 31 of 1997, the government has moved to clarify the entitlement of self-employed commercial agents to compensation for damage resulting from termination of relations with their principal, a point which had been left unresolved in the Irish Regulations implementing Directive 86/653 on commercial agents (S.I. N° 33 of 1994) and which had prompted the Commission late last year to open proceedings against Ireland for non-implementation. The amendment to the Regulations confirms that as from the date of entry into force of S.I. N° 33 of 1994 on 1 January 1994 the agent is entitled to compensation for damage resulting from termination of the agency agreement, as defined in Article 17(3) of the Directive. Such damage is deemed particularly to occur in circumstances of termination which a) deprive the agent of his due commission whilst providing the principal with substantial benefits linked to the agent's activities, and, b) have not permitted the agent to amortise the costs and expenses incurred in the performance of the contract on the principal's advice. This may result in a more generous measure of compensation than the common law position whereby an agent can claim only the commission he would have received until the end of his contract subject to his duty to mitigate his loss.

This clarification comes hot on the heels of a judgment of the European Court of Justice which demonstrates the importance of the changes introduced by the Directive for the calculation of an agent's commission on commercial transactions, for the manner in which agents might conduct their business in order to maximise their entitlement to commission and, more generally, for the negotiation of commercial agency contracts. In Georgios Kontogeorgas v Kartonpak AE [1] the Court was called upon to interpret Article 7 of Directive 86/653, which provides as follows:

> "1. A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract:
>
> a) where the transaction has been concluded as a result of his action; or
> b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.
>
> 2. A commercial agent shall also be entitled to commission on transactions concluded during the period covered by the agency contract:
> - either where he is entrusted with a specific geographical area or group of customers,
> - where he has an exclusive right to a specific geographical area or group of customers, and where the transaction has been entered into with a customer belonging to that area or group.

Member States shall include in their legislation one of the possibilities referred to in the above two indents."

The Court held that the first indent of Article 7(2) must be interpreted as meaning that where a commercial agent is responsible for a geographical area, he is entitled to commission on transactions with customers belonging to that area even if they were concluded without any action on his part. In this connection, the Court pointed out that Article 6 of the Directive, which leaves it to the parties to the contract to specify what remuneration the agent will receive, concerns the agent's rate of remuneration and has no bearing on the transactions upon which commission is payable.[2]

The Court also had to consider whether the term 'customer belonging to that area' in Article 7(2) included cases where the customer is a legal person whose seat is located outside the area in which its business and trading activities are carried on. In answer, the Court stressed that the aim of the Directive was to regulate commercial relationships between the agent and his customers such as they appear in a real economic context, not in hypothetical cases, and that the question must therefore be governed by the place of the customer's actual commercial activities. The Court continued:

"It must be recognised that the principal may have several agents operating on the territory of a single member State, each with its own geographical area. It is therefore important to specify the place of the customer's commercial activities according to a criterion which makes it possible to preclude a single transaction from being regarded as attaching to the geographical areas of two or more agents.

Where a company carries on its commercial activity in various places, or where the agent operates in several

areas, other factors may be taken into account to determine the centre of gravity of the transaction effected, in particular the place where negotiations with the agent took place or should, in the normal course of events, have taken place, the place where the goods were delivered and the place where the establishment which placed the order is located."[3]

Recent developments in Intellectual Property

The Court has delivered two recent judgments which together throw light upon the balance between intellectual property rights and the free movement of goods.

In Joined Cases C-267/95 and C-268/95 Merck & Co. Inc. and Others v Pricecrown Ltd and Beecham Group plc v Europharm of Worthing Ltd[4], the Court was called upon to consider cases in which the patent holders of drugs patented in one Member State were seeking to oppose the importation of drugs from another Member State where they could not be patented but where, by reason of their contribution to combating illness, the patent holder was under either a legal or an ethical obligation to market them. It may be recalled that under the Court's established case-law, patent protection may impede the free movement of goods only in so far as this is justified in order to safeguard rights constituting the specific subject-matter of a patent, which is, in particular, to guarantee to the patent holder the exclusive right to use an invention with a view to manufacturing products and putting them on the market for the first time. Once the patent holder decides, in the light of all the circumstances, to market his product, even in a Member State where the law provides no patent protection for the product, he must then accept the consequences of his choice for the free movement of the product within the single market: he cannot oppose importation to one Member State of a product freely marketed by him in another Member State even if the product was not patentable there.[5]

In the present case, the Court interpreted this balance of interests as requiring, in answer to the question posed, that where a patentee is legally bound under either domestic law or Community law to market his products in a Member State, he cannot be deemed to have given his consent thereto and he is therefore entitled to oppose importation and marketing of the products concerned in the State where they are protected. However, the Court held that ethical obligations to provide supplies of drugs in Member States where they are needed, even though they are not patentable there, cannot provide a basis for derogating from the rule on free movement of goods.

In Fratelli Graffione SnC v Ditta Fransa,[6] the Court applied similar reasoning to the balance to be drawn between the free movement of goods, on the one hand, and the prohibition on importation of products under a particular trademark on the grounds that such a trademark is liable to mislead consumers. The Court recalled that protection against unfair competition could not be accepted as a ground for prohibiting an undertaking from using its right to import products from a Member State from another Member State where they were lawfully marketed, and to market them under a particular trademark in the Member State of importation, in circumstances where other traders had the same right even if they did not use it. Nonetheless, Council Directive 89/104 harmonising Member States' laws relating to trade marks[7] did not aim to bring about complete harmonisation of trade marks laws. Whereas Article 12 lists the grounds on which a trade mark is liable to revocation, Member States were left free to determine the effects of invalidity or revocation and to apply to trade marks provisions of their laws relating to unfair competition, civil liability or consumer protection.

Thus, Article 12(2)(b) of the Directive allowed for such a prohibition in circumstances where the proprietor of the trade mark had been specifically prohibited from using it in the Member State of importation because it had been held there to be liable to mislead consumers. However, the Court held that the risk of misleading consumers could not override the requirements of the free movement of goods and so justify barriers to trade unless that risk was sufficiently serious. It was for the national authorities, and in this case the Italian courts, to carry out the necessary assessment of that risk. For this purpose, the national authority or court had to have regard to all relevant factors, including the circumstances in which the products were sold, the information set out on the packaging and the clarity with which it was displayed, the presentation and content of advertising material, and the risk of error in relation to the group of consumers concerned.

On the wider front, on 20 December 1996 the World Intellectual Property Organisation adopted two new important treaties in the field of copyright protection and the protection of performers and phonogram producers updating the Berne and Rome Conventions respectively. For the first time, the EC has been accorded full contracting status in the treaties alongside Member States, in recognition of its increasing authority in the field of intellectual property. The first instrument, the WIPO Copyright Treaty, seeks to adapt the Berne Convention to the digital environment. Under its provisions, authors will enjoy protection with respect to the distribution, the commercial rental, the communication to the public and the making available to the public of their works on line. Express protection is provided for computer programmes and databases. In addition, the treaty contains obligations concerning technological measures (such as the fraudulent circumvention of anti-copy devices), rights management information (prohibiting for example the deletion of electronic information attached to works exploited on digital networks) and provisions on the enforcement of rights.

Under the second instrument, the WIPO Performances and Phonograms Treaty, performing artists and producers of phonograms will enjoy exclusive rights of reproduction, distribution, commercial rental and the making available on-line of to the public of their performances/phonograms, as

well as a right of remuneration for broadcasting and all forms of communication to the public of phonograms published for commercial purposes. Performing artists will also enjoy, for the first time in an international instrument, certain moral rights for their sound performances and those which are fixed in phonograms. As with the WIPO Copyright Treaty, provisions are also included for technological measures, rights management information and enforcement.[8]

Transfer of undertakings

On 14 November 1996 in the case of De Hertaing v J Benoidt SA, in liq.[9] the Court of Justice held that art. 3(1) of Directive 77/187 on transfers of undertakings must be interpreted as meaning that contracts of employment and employment relationships existing on the date of the transfer of an undertaking are automatically transferred from the transferor to the transferee on the date of the transfer, irrespective of any contrary intention on the part of the undertakings concerned and despite the latter's refusal to fulfil its obligations. The Court pointed out that although member States are free under the second paragraph of art. 3(1) to provide for joint liability of the transferor and transferee (an option which is not provided for in the Irish Regulations but which is redressed by the decision in Mythen v EAT [1990] 1 IR 98), to otherwise allow the undertakings concerned to choose the date upon which the contract of employment or employment relationship was transferred would defeat the protection afforded to workers by the Directive by allowing employers to derogate, albeit temporarily, from its provisions.[10]

This judgment confirms a perhaps rather obvious point, but is nonetheless significant in providing legal certainty for the calculation of breaks in service, or in continuity of service, affecting all entitlements under the employee's contract of employment, including wages/salary and seniority matters, but also statutory obligations such as service under the redundancy, minimum notice and unfair dismissals legislation.

Proposed reversal of sexual discrimination burden of proof

The Commission's proposed Directive on the burden of proof in cases of discrimination based on sex has been published in the Official Journal (OJ 1996 C332/11). In effect, it reverses the ordinary burden of proof in civil cases by providing that where a complainant establishes facts from which discrimination may be presumed to exist, the defendant will have to prove that there has been no contravention of the principle of equal treatment. In addition, where the defendant applies a system or decision lacking transparency, it will have to prove that any apparent discrimination is justified. A complainant will not have to prove fault on the part of the defendant.

When in force, under the proposal by 1 January 2001 at the latest, these principles will apply in litigation under the equal pay Directive, the Directive on access to employment, vocational training and promotion and working conditions, the Directives on equal treatment in social security matters and occupational social security schemes, and the pregnancy Directives.[11] The reform provides legislative confirmation of the interpretation already signalled by the European Court for the effective application of these equal treatment laws.[12]

Interim measures by national courts and failure to act by Community Institutions

In recent years, the European Court has had the opportunity to clarify the criteria which enable national courts to grant interim relief in cases before them which raise either the compatibility of national legal measures with Community law or the validity of secondary Community laws themselves pending an Article 177 Reference to the Court.[13] In an important qualification of this case-law, the Court has held in T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung[14] that, because the Treaty makes no provision for Article 177 References in respect of alleged failure to act on the part of Community institutions, national courts have no jurisdiction to order interim measures pending action on the part of the institution concerned. Instead, the appropriate interim relief must be sought directly from the Commission and, if unsuccessful, from the Court of First Instance or from the European Court under Article 186 of the Treaty in the course of subsequent annulment proceedings pursuant to either Article 175 or 173.

1 Judgment of 12 December 1996, not yet reported.
2 At paragraphs 17 and 18
3 At paragraphs 28 and 29
4 Judgment of 5 December 1996, not yet reported.
5 See Merck & Co. Inc. v Stephar BV and Petrus Stephanus Exler (1981) ECR 2063
6 Judgment of 26 November 1996, not yet reported.
7 OJ 1989 L40/1
8 Commission press release IP (96) 1244 of 20 December 1996
9 Judgment of 14 November 1996, not yet reported
*10 The full reasoning of the Court is set out at paragraphs 15 -26 of the judgment. The decision can be regarded as the flipside of the rule that employees cannot contract out of their rights under the Directive, cf. Berg v. Ivo Marten Besselsen [1989] 3 CMLR 817.
11 cf. Articles 3 and 8 of the proposed Directive
12 Enderby v. Frenchay Health Authority [1993] ECR 5535; Royal Copenhagen [1995] ECR 1275
13 Zuckerfabrik Suderdithmarschen & Zuckerfabrik Soest [1991] ECR 415; Atlanta Fruchthandelgesellschaft & others v Bundegansstalt fur Landwirthchaft [1995] ECR 3761
14 Judgment of 26 November 1996, not year recorded.

Constitutional Right to Legal Aid in Civil Matters

The Free Legal Advice Centres (FLAC) and the Coolock Community Law Centre (CCLC) recently joined forces to make oral submissions to the Oireachtas All Party Committee on the Constitution. Submissions were made by Gerry Whyte, chairperson of the CCLC and Siobhan Phelan, chairperson of FLAC to a meeting of the Committee on January 28th last.

In addressing the findings of the Constitution Review Group, took issue with the rejection by the Constitution Review Group of the argument for the express insertion into the Constitution of specific socio-economic rights like, for example, the right of access to healthcare, the right to shelter and the right to legal aid.

Whyte opened the submissions to the Group by arguing that one of the functions of the Constitution is to prescribe the values and rules in accordance with which our society should be organised. Given that social exclusion is one of the most serious problems confronting our society, both CCLC and FLAC believe that the Constitution should seek to promote social inclusion through the recognition of socio-economic rights and, in particular, the right to legal aid. He submitted that the stated view of the Review Group that personal rights to freedom from poverty and to other specific economic entitlements were political matters,[1] was a view premised on one perspective of democracy which both FLAC and the CCLC reject. In support of his arguments he referred in particular to the new Constitution of the Republic of South Africa which expressly provides for the right to adequate housing, the right of access to health care services, sufficient food and water, the right to sufficient social security and to basic education.

Addressing the Committee on the issue of the constitutional recognition of the right of effective access to the courts, Phelan said that while the two organisations had campaigned since their inception for the provision of a comprehensive scheme of legal aid in civil matters, this campaign was inspired by a more fundamental commitment to the aspiration of equal justice for everyone. FLAC and the CCLC see legal aid as being just one of many components necessary to make the legal system accessible and in focusing on the right to legal aid as an access to justice issue, the groups recognise the pervasive role of the courts in the administration of justice in this country. In their view, therefore, the provision of legal aid should also be accompanied, inter alia, by:

- improved education and research initiatives in respect of poverty issues,
- measures to simplify procedures and legal process,
- the widening of locus standi rules to give third party intervenor rights to relevant public interest groups

Phelan adopted a two-prong approach in arguing for the constitutional recognition of a right to legal aid in civil matters, as follows:

(I) Theoretical Approach

First she pointed out that our Constitution employs the language of rights. The language of rights in itself, however, has been said to distort reality because it gives the false illusion of an "abstract universalism".[2] When we rely on constitutionally protected rights we promote the fiction that the legal system has a clear perspective on the requirements of fundamental justice and has the mechanism to protect that vision of justice. In fact, there are no 'just' certainties and the legal system, as we know, is largely a political creation which reflects the dominant values of the society in which we live and is not a creature of an independent, power and politics free system of justice.

As a result the language of rights, Phelan submitted, often serves to disguise the structural exclusivism of the legal system. So why is it important to have an effective right of access to the courts? Such a right is only important if it can be enforced or used by the individual or group to give a just solution to a particular problem having regard to the applicable law. Yet the law itself, like the notion of a 'right', is a social construction. It is created and shaped by individuals and therefore is ill-equipped to respond to marginal inter-

ests. Those individuals who continue to be influential in the law-making process have a perspective on the social world (as we all do) in which they live and a socially determined understanding of how that world should be. Groups excluded from the law making process are often the poorest. Constitutionally protecting a right to legal aid ensures that they can have an input into the law making. In this way one can seek to legitimise the Constitution as a document which represents the values of Irish society and not just those members of society who traditionally have been active in developing the law. Our Constitution expresses its commitment to the equality of all persons under the law and the personal rights of all. To give any reality to these fundamental principles for poor people, the Constitution must also provide the means for furthering equality and for vindicating personal rights using the law.

The recognition of a constitutional right of effective access to the courts and the corresponding right to legal aid would help to create opportunities for marginalised groups to confront the legal system and in time this would lead to a heightened understanding of the position of the marginalised and in turn to an improved response to that position.

(II) Practical Approach

Turning to the second prong of her argument, Phelan said that a right of recourse to the courts to defend and vindicate a legal right has long been regarded as a personal right of the citizen.[3] Much of the debate concerning the existence of a right to legal aid hinges on the courts' interpretation of constitutional due process and equality clauses. In Canada, for example, the right to legal aid is said to inhere in the individual because of notions of fundamental fairness, fair procedures and the right not to be deprived of one's liberty, except by due process of law.[4] In this jurisdiction it has been claimed by some authors that the concept of natural justice and the wider substantive and procedural guarantees of basic fair procedures afforded by the Constitution, provide the citizen with a guarantee of basic procedural fairness which incorporates, in some circumstances, the right to legal representation.[5] A further common argument advanced elsewhere and one actually canvassed by the Constitution Review Group is that entitlement to legal aid springs from the notion that individuals are entitled to effective access to the law. This is a weighty argument in this country given that the right of access to the courts is already recognised and protected in the Constitution.[6] In the Supreme Court decision in Murphy v. Greene the right of access to the court was identified as being one of the unenumerated rights derived from Article 40.2.1 and its interaction with Article 34.3.1.[7]

Despite the common reliance in all Western legal systems upon variations of principles of due process and equality to ground a right to legal aid in criminal cases, there is a general and common reluctance to extend these principles to justify the free provision of legal representation in non-criminal cases. This refusal to extend these general principles to non-criminal cases is arbitrary and unjustified and can only be defended by reference to a narrow and artificial understanding of concepts such as personal liberty and fairness.

Explicit constitutional recognition of a right to effective access to the courts is necessary to give the democratic right of all to participate in the law making process due recognition. A right to legal aid would enable poor people to use the legal system to tackle poverty by vindicating income generating rights, like their employment and social welfare rights (currently excluded under the legal aid scheme), to allow for the further enumeration of substantive rights which would redress power balance and systemic inequities for marginalised people e.g. the enumeration of rights to fair procedures in alien cases. FLAC/Coolock also argue that civil legal aid is a necessary tool to ensure that other constitutional and statutory rights are not merely aspirational e.g. the right to a good name,[8] the right to a redundancy payment,[9] the enforcement of social rights under international law as evidenced in the arrears in social welfare recently paid to Irish women under the EC Equality Directives. As the Supreme Court said in McDonald v. Feely, a case involving the housing rights of itinerants in the context of the duties imposed on a local authority to develop a housing scheme under the Housing Act, 1966, the duty to prepare such a scheme would seem to involve a corresponding duty to operate such scheme.[10] The existence and recognition of legal rights and obligations also implies that they should be respected in reality. Often these substantive rights can only be enforced by recourse to legal action, but there is no entitlement to legal aid to do so. Thus, in many cases, there is no reality to these so-called rights.

The relevant progression in Irish constitutional jurisprudence

A constitutional right to legal aid is already implicit in existing constitutional principles, such as the Courts' obligation under Article 34.1 to administer justice; the right of every citizen under Article 40.1 to be held equal before the law; and, the protection of the unenumerated personal rights of the citizen under Article 40.3. As early as 1966 the High Court decided that having regard to the provisions of Arts. 34.3.1 and 40.3 of the Constitution, citizens have a right to have recourse to that court to question the constitutional validity of any law or to assert or defend a right given by the Constitution.[11] It would seem to follow that persons should not be deprived of their rights by virtue of their socio-economic class. To apply the oft quoted phrase of the European Court of Human Rights in the Airey Case[12] to the Constitution, it must surely be intended that the constitutional guarantee of certain personal rights be not merely "theoretical or illusory", but be "practical or effective".[13] Civil and political rights expressly protected by the Constitution cannot be divorced from socio-economic rights. Despite this incontestable fact, most attempts to establish that the State has a constitutional duty to assist the civil litigant who is denied real access to the courts because of poverty have traditionally failed.

Yet if one looks to the decision of

the Supreme Court in the State (Healy) v. Donoghue,[14] albeit a decision made in the criminal law context, where the then Chief Justice stated that the requirements of fairness and justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him, one finds that the courts have already accepted the basic tenet of the argument for a constitutional right of the civil litigant to legal aid, that is, due regard to the requirements of fairness and justice in the given case.[15] The Healy decision was based upon an interpretation of Article 38.1 of the Constitution involving the right to trial in due course of law. However, if one has regard to other rights guaranteed by the Constitution, for example, the right to bodily integrity, the right to religious freedom, the right to education, the rights of the family, the guarantee of freedom of association, the right to a good name, surely the requirements of fairness and justice in many circumstances involving these rights must also require that the impecunious individual be financially aided in presenting their case. If one has regard to the consequences for the persons or people concerned if denied the ability to enforce any of these substantive rights, it would seem that legal aid must be readily available and implicitly guaranteed by the Constitution in all such cases. Lardner J. went some distance towards recognising this implicit constitutional requirement in wardship proceedings in the case of Stevenson v. Landy.[16] In that case Lardner J. found that the dicta of the Chief Justice in Healy applied to wardship proceedings. He concluded that where the welfare of a child is concerned it is necessary, having regard to the requirements of the Constitution and the administration of justice, that any persons with a worthwhile contribution to make to the decision making process should be heard. Having reached that conclusion, he quashed the decision of the Legal Aid Board to refuse a legal aid certificate to the child's natural mother.[17]

The Irish courts have recognised a constitutional right to legal aid where a defendant is at risk of losing his liberty in the sense of incarceration following conviction. It is no great leap therefore to extend that constitutional protection to cases where one's liberty may be curtailed, for example, under mental treatment legislation or in immigration cases - and to cases where the liberty and security of the person is affected as in cases involving the rights of members of the travelling community or cases involving one's right to social security payments or to resist eviction.

Conclusion

Within existing frameworks for the treatment of poverty, it is fair to say that legal aid is perceived of as a 'benefit' rather than as an 'entitlement' and this evaluation, reflected in the failure of the Constitution Review Group to recommend the inclusion of a separate provision in the Constitution for a right of effective access to the courts, impacts upon the potential use of legal aid as a tool to facilitate a more equal society. The Civil Legal Aid Act, 1995 puts on a statutory footing the Scheme of Civil Legal Aid in place since 1980. The Constitution Review Group anticipated that the Act, which specifies the criteria governing the grant of legal aid, will in time be judicially interpreted as giving certain enforceable legal rights to legal aid.[18] It is the view of FLAC and the CCLC, however, that the new Act is incapable of providing meaningful 'access to justice' because it dictates narrowly the form and category of person and case for which legal aid is available and therefore does not adequately vindicate the constitutional right of access to the courts. A statutory entitlement to legal aid can not be readily used to challenge existing social injustices because many such injustices are not perceived as being injustices at all when measured by the narrow terms of reference of the state administrators of the 'benefit' of legal aid under the Act. A more dynamic and pro-active protection of the human rights of the poor in Irish society is required and FLAC and the CCLC believe that an important first step in this process is the express recognition in the Constitution of a right to legal aid in civil matters. ❑

1 Constitution Review Report, p. 235

2 Minow, "Partial Justice", in The Fate of Law, (eds. Sarat A. & Kearns T.R.)University of Michigan Press, 1991

3 See generally Hogan & Whyte, Kelly: The Irish Constitution (3rd ed.: Butterworths, 1994)

4 See Mossman M.J., "The Charter and the Right to Legal Aid", (1985) Journal of Law and Social Policy 21

5 See generally Delaney H., "Administrative Law - Legal Representation in Administrative Proceeedings: A Matter of Right or Discretion?", (1992) 14 DULJ 88

6 See, for example, the decisions in State (Quinn) v. Ryan [1965] I:R. 70 and Chambers v. An Bord Pleanala [1992] 1 I.R. 134. See generally Hogan & Whyte, Kelly: The Irish Constitution (Butterworths, 1994) p. 385-390.

7 [1990] 2 I.R. 566

8 Defamation proceedings remain excluded under the current provision of legal aid scheme.

9 There is still no right to legal aid for Employment Appeals Tribunal cases.

10 O'Higgins C.J. , Supreme Court, July 23rd, 1980

11 Macauley v. the Minister for Posts and Telegraphs, [1966] IR 345

12 Airey v. Ireland. [1979] 2 EHRR 305

13 ibid. para. 24

14 [1976] IR 325

15 O'Higgins C.J. infra at p.774

16 High Court, February 10th, 1993

17 See further Hogan & Whyte, Kelly: The Irish Constitution (3rd ed.: Butterworths, 1994) p. 774-775

18 Report of the Constitution Review Group, Government Publications, 1996 at p. 236.

MEDICO-LEGAL SOCIETY OF IRELAND - Forthcoming Lectures

Lecture: 'A Judge's View' by Judge Frank O'Donnell
Date: Thursday, 27th February, 1997
Venue: United Service Club, St. Stephen's Green
Time: 6.30 pm

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Lecture: 'Confessions in Custody' by Dr. James McKeigh, Consultant Psychiatrist, Denis Hill Secure Unit, London
Date: Thursday, 3rd April, 1997
Venue: United Service Club, St. Stephen's Green
Time: 6.30 pm

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Those wishing to dine at the Club after the lectures should give advance notice to Mary MacMurrough Murphy.

THE BAR COUNCIL OF IRELAND

in association with

THE FAMILY LAWYERS' ASSOCIATION

Present a conference to mark the introduction of divorce in Ireland
"The Irish Law on Divorce - Substance and Procedure"

On Saturday, 1st March 1997 (registration at 9.30 a.m)
In the King's Inns, Henrietta Street, Dublin 1

10.00 - 10.30 The Family Law (Divorce) Act, 1996 - A Critique, Pat Horgan B.L.

10.30 - 12.00 Substantive Aspects of Divorce

Speakers: Dervla Browne B.L.,
Ingc Clissman S.C. (Succession Rights and Causes of Action Against The Estate of A Deceased Spouse) Cormac Corrigan B.L. (Pensions)

12.0 - 12.30 Property Adjustment Orders & Judicial Discretion, Gerard Durcan S.C.

12.30 - 1.00 Separating By Agreement in a Post-Divorce Society
Catherine Forde B.L.

1.00 - 2.00 Lunch

2.00 - 3.00 Procedural Aspects of Divorce

Speakers: Mary O'Toole B.L.,
Meliosa Dooge B.L. (High Court Procedures)
Raghnal O'Riordan B.L. (Forms and Precedents)
Nuala E. Jaclcson B.L. (Lnterlocutoqy Applications)

3.30-4.00 Questions and Answers. Chairperson: Anne Dunne S.C.

A DOUBLE LIFE
by T.F. O'Higgins
Townhouse Press Dublin

Tom O'Higgins has written a delightful and most interesting book dealing with his life and times spanning the last eighty years.

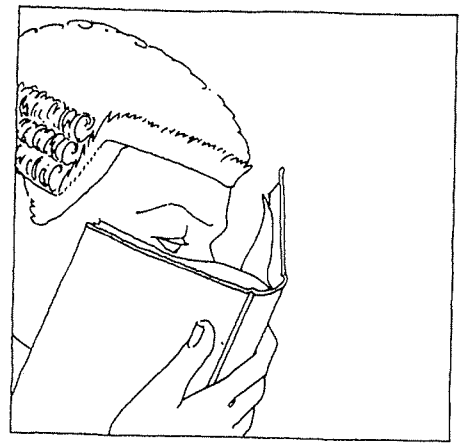
When dining in the Kings Inns last year Tom unexpectedly arrived to dine at the Benchers table and told me that he had just handed in the first draft of his book to the publishers. He had begun writing some years before, intending to leave an account of his life for his children and grandchildren but, as he warmed to the task, what might have been an essay developed into a book.

Considering the extraordinary family from which he comes and his early memories of life shortly after the foundation of the State, his school days in Clongowes, his career in the FCA, his distinguished career at the Bar and as a politician and his career as a Judge in three different Courts in two different jurisdictions, I enthusiastically awaited publication of the book. Though I was apprehensive that it might be difficult for such a diverse life and so many careers to be summarised in any lucid or interesting way (with all due respects to the author).

When the book was launched before Christmas I had intended reading it over the Christmas vacation. However, like so many books published nowadays it has a very fine index and I began to "nibble" at the book by reference to certain periods in the author's life and certain persons about which I was anxious to read his views. I quickly became enthralled by the book and managed to read it within a very short space of time, notwithstanding the usual end of term/end of year pressure of work.

As one of the author's former colleagues who had the pleasure of working with him and later of appearing before him in each Court in which he sat I derived great pleasure from reading his account of events which I remember. But more captivating is his account of the earlier part of his life, the people he met, the issues with which he dealt both at the Bar and in politics, of his family life, his life on Circuit and his many acquaintances and his observations on the great political events and issues of the last fifty or sixty years, his very modest account of how close he came to being President of Ireland and many other insights into his life.

It is a book which those who knew him and worked with him in any walk of life



will greatly enjoy reading, for it reflects very much the person we all know and admire. For those presently at the Bar who did not have the pleasure of knowing him or working with him or appearing before him they will marvel at the diversity of the life which he led while carrying on one of the busiest practices at the Bar. His reminiscences of life on Circuit and those who practised with him on Circuit will be of particular interest.

Anybody who picks up this book will read it from cover to cover and will be the wiser and the better informed. At the same time the reader will develop a sense of warmth towards an extraordinary colleague from an extraordinary family who played a leading role in so many aspects of Irish life over a long and distinguished career to date.

The book is modestly called "A Double Life". It could just as easily and perhaps more appropriately have been entitled "An Octagonal Life". I strongly recommend it.

– Harry Whelehan, S.C.

INDEX TO STATUTORY INSTRUMENTS 1987-95

Finding Irish legislation is a task which has bedevilled Judges, lawyers, civil servants and librarians among others, for many years. It is clearly a fundamental task for lawyers and vital for the provision of access to justice for the citizen. Our complicated history is only too keenly shown in the variety of legislation which must be searched. The lack of current indexes was a serious impediment to research until recently with the launch by the Office of the Attorney General of a programme to make the laws more accessible.

This programme has as its centrepiece the publication "as in force" in electronic form of the entire body of legislation in force in Ireland whether passed by Parliaments which were: Irish; English; British; United Kingdom or Irish. This ambitious project goes to tender in the very near future. On completion, the project will result in a revolution in Irish legal research and will make the identification of all relevant legislation possible.

In the meantime the Office has resumed the printing of indexes which had ceased to appear regularly. The latest of their publications is the index to Statutory Instruments 1987-95. Available in December 1996 it is the tenth in the series of official indexes covering the period from 1922-1995. Published in hardback at the very reasonable price of £12 the index is a welcome up-date of an essential research tool. The index follows the layout of others in the set providing

1) an alphabetical list of Statutory provisions showing SIs made thereunder
2) an alphabetical list of SIs showing the statutory authority under which each was made
3) an appendix listing instruments which have been the subject of directions under S2 of the 1947 Act.

This publication is another step in the process undertaken by the Attorney's Office to make legislation more accessible. Earlier last year the Office published the Index to the Statutes 1922-95 at a cost of £25. That index gives details of the effect of legislation enacted since 1922 on all statutes enacted before and after 1922. The index will now be produced on an annual basis thereby ensuring its continued currency.

The lack of indexes in the past resulted in the publication of commercial indexes - Humphreys Index to Statutory Instruments 1922-86 and more recently the Legislation Update in Irish Current Law Statutes Annotated. These services have proved very useful over the years but the publication of official current indexes at a reasonable cost are an essential part of making the laws of the State accessible.

An Irish legal database was first given serious consideration in the early 1980's when the National Board for Science and Technology did a feasibility study and hosted a seminar on the topic for interested parties. For those who have been waiting since then, this index is a welcome assurance of the commitment in the Attorney's Office to making legislation accessible to all. The Attorney and his Office must be congratulated, both for that commitment, and for the work which has been done to date.

– Jennefer Aston

PRACTICE AND PROCEDURE IN THE SUPERIOR COURTS, by Benedict O Floinn, *(Consultant Editor Sean Gannon):* Butterworths (1996). £ 95.00.

There was a time when it was simply not decent to greet a text book on Irish law with anything other than gratitude and criticism would have appeared churlish in the extreme. Irish legal text books were out of print, out of date and usually obtainable only by bidding for them at an auction of the library of a deceased colleague. The first flower in this publishing desert in recent times blossomed with the publication of Professor John Wylie's monumental work on Irish Land Law in 1975 (where, like the book now under review, the consultant editor was a judge of the High Court, Mr. Justice Kenny). Gratitude for Professor Wylie's book was exceeded only by admiration for its scope, quality and usefulness.

In the years that followed, more text books began to appear on Irish law such as (to name only a few) Professor John Kelly's book on the Irish Constitution (1980), Mr. Justice Ronan Keane's book on Company Law in the Republic of Ireland (1985), Patrick Ussher's book on a similar subject (1986), David Morgan's and Gerard Hogan's book on Administrative Law (1986) and so on. The rate of publication of text books on Irish law began to increase at an exponential rate in the mid 1980s and has continued ever since. Whereas once there was incredulity that a few text books on Irish law were published at all, there is now incredulity at the range and extent of the books published, many of them competing in the market for the core topics such as contract, land law, criminal law and so forth and many of them exploring relatively obscure and even esoteric corners of the legal and forensic landscape. No longer does the practitioner automatically buy every new text book published on Irish law. On the contrary, he or she now approaches new works with a certain casual nonchalance and enquires whether an expenditure of another £50.00 or £70.00 is really worthwhile

Let it therefore be said at once that it must now be something approaching professional negligence for a litigation practitioner not to either own or to have ready access to Benedict O Floinn's magnificent new work on practice and procedure. If the book were nothing more than the gathering together and consolidation of the many and varied changes, additions and amendments which have been made to the Rules of the Superior Courts since the last consolidation in 1986, it would on that account alone be invaluable. For example, the necessity to amend Order 11 and to introduce a new Order 11A following the enactment of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988 meant that the practitioner had to constantly scurry between the basic 1986 volume of the rules and Statutory Instrument No. 14/1989 (and Statutory Instrument No. 101/1994 following the insertion of Order 11B covering service under the Hague Convention). That inconvenience, fraught as it was with the risk of overlooking or misinterpreting the rules in their amended form was repeated as the flow of amendments to the rules continued throughout the late 1980s and 1990s, a product and reflection of the increasing torrent of legislation. Aside from the revised rules on service out of the jurisdiction, protective measures and enforcement of judgments all pursuant to the 1988 Act, new rules were introduced in areas as varied as bankruptcy (The Bankruptcy Act, 1988), company law and examinership (The Companies (Amendment) Act, 1990 and the Companies Act, 1990), admiralty (The Jurisdiction of Courts (Maritime Conventions) Act 1989), family law (the Judicial Separation and Family Law Reform Act, 1989 and the Family Law Act 1995), procedure (Courts and Court Officers Act, 1995), nurses (The Nurses Act 1985), patents (The Patents (Amendment) Act 1992), solicitors (The Solicitors (Amendment) Act 1994) and so on.

But Mr. O Floinn's book is far more than a mere consolidation of the rules, however useful that in itself would be. Instead, he has engaged in a painstaking annotation of the rules in which he provides not only helpful cross-references to other rules or the appropriate statutory instruments, but also to (mainly Irish) case law and academic writing dealing with the rule or a particular phrase in the rule in question.

For example, Order 31 Rule 20(2) contains the innocuous sounding rule that where privilege is claimed for a document, the court may inspect the document for the purpose of deciding as to the validity of the claim for privilege. Set out in the annotation is a concise summary of the rules governing privilege and a reference to virtually every Irish case of note on the topic ranging from Kerry County Council -v- Liverpool Salvage Association (1905) 2IR 38 to Greencore Group Plc -v- Murphy (1996) 1 ILRM 210. If your problem is that somebody is seeking inspection of "business books" under Order 31 Rule 20(1), you will learn from the annotation to this rule that the relevant definitions of "business books" are contained in section 9 of the Bankers Books Evidence Act, 1879 and 1959 but that in O'C -v- D (1985) IR 265, the definition was deemed not to extend to correspondence.

One of the difficulties facing any writer on the subject of practice and procedure is that many of the decisions which are made are not reserved judgments and are delivered *ex tempore* in respect of which there may be no note or an inadequate note of the judgment. For example, from time to time orders have been made by the High Court whereby letters of request (or letters rogatory) have been issued directed to a court in a foreign jurisdiction requesting that court to summon before it a person subject to the jurisdiction of that court for examination and cross-examination (and if necessary the production of documents) for the purpose of litigation which is taking place in Ireland. Such an order can be applied for under Order 39 Rule 5 as was done in the Banco Ambrosiano litigation and (more recently) in the not yet concluded case of Crofter Properties Limited -v- Genport Limited. The decision in Crofter -v- Genport is the subject of a written judgment of McCracken J. but may have been delivered too late for inclusion in Mr. O Floinn's book. There is however no reference to the use of this procedure in the Banco Ambrosiano litigation which took place in the late 1980s. This is not a criticism of the book as such but rather an expression of sympathy for the difficulty which an author tackling the subject of practice and procedure faces because so many of the decisions are not reduced to a more permanent form. It is a measure of the worth and value of Mr. O Floinn's book that he has managed to gather together so many diverse references where points under the rules have been decided.

At first sight, it may seem astonishing that given the flood of Irish legal text books, it has taken this long for an annotated and consolidated version of the rules to appear in a book such as this. However, even a cursory inspection of the book will demonstrate the enormous amount of work which has gone into the preparation of this book before the thought of which other potential authors must have quailed in the past. The browser in the book shop cannot skip idly past this book and it takes its place immediately as a core addition to any barrister's library.

– Michael M. Collins S.C.

ADVISORY GROUP ON CRIMINAL LAW AND PROCEDURE

The Minister for Justice, Mrs. Nora Owen, T.D., has established this Advisory Group with terms of reference to review the existing criminal law and procedure as they currently operate and to advise the Minister on any changes that would enhance the operational efficiency of criminal law and procedure with emphasis on identified or emerging difficulties susceptible to early resolution through the mechanism of periodic Criminal Justice (Miscellaneous Provisions) Bills.

The Advisory Group invites submissions on issues relevant to the above terms of reference. Submissions should be made in writing to:

The Secretary to the Advisory Group on Criminal Law and Procedure
Room 420
Department of Justice
72-76 St. Stephen's Green, Dublin 2.

CRIMINAL LEGAL AID REVIEW COMMITTEE

The Minister for Justice, Mrs. Nora Owen, T.D., has established a Committee, under the chairmanship of His Honour Judge John Gerard Buchanan, to review the operation of the Criminal Legal Aid Scheme under the Criminal Justice (Legal Aid) Act, 1962 and to make recommendations as to the manner in which the Scheme might be improved so that it operates effectively and provides value for money. The terms of reference of the Review Committee also include, inter alia:

(i) a review of the levels of fees paid to solicitors and barristers, including any claims for changes to the Scheme made by the Law Society and the Bar Council in relation to fees payable under the Scheme;

(ii) an examination of the possibility of introducing an alternative system for providing criminal legal aid, specifically the introduction of a Public Defender Scheme;

(iii) an examination of the experience of the Legal Aid Board in relation to the delivery of the Civil Legal Aid Scheme;

(iv) a review of the current practices within the Public Service for determining a person's means with particular reference to proposals being drawn up by the Department of Social Welfare Committee examining the development of an integrated Social Service System.

The Review Committee invites submissions from interested groups and individuals on issues relevant to the above terms of reference. Submissions, in writing, should be addressed to:

Secretary to the Criminal Legal Aid Review Committee
Room 429
Dept. of Justice, 72-76 St. Stephen's Green, Dublin 2

Submissions to reach the Secretary no later than Friday, 21st February, 1997

Any person requiring further information or clarification may contact the Secretary at 01 6028331.

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