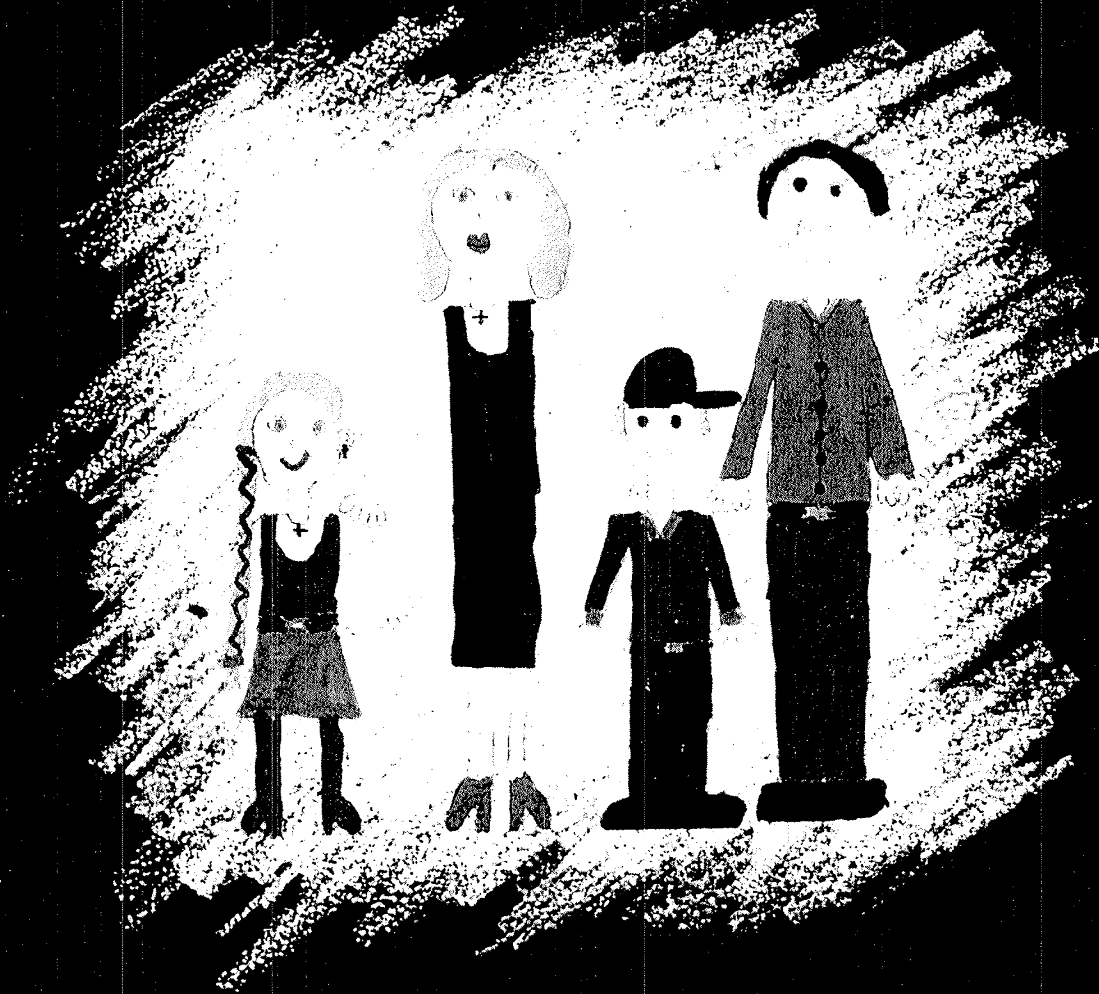
The Bar Review

Journal of the Bar of Ireland. Volume 3. Issue 4. Jan/Feb 1998

Shatter: Family Law



4th Edition

by Alan J. Shatter T.D., BA (Mod), DIP, E.I., Solicitor

Since the first edition of **Shatter: Family Law** was published almost twenty years ago, this book has become the authoritative Family Law textbook for both practitioners and students.

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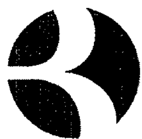
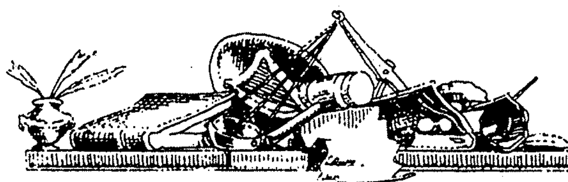


Butterworths

26 Upper Ormond Quay Dublin 7
Telephone: (01) 873 1555 Facsimile: (01) 873 1876

Publication Date: July 1997 Price: £80.00
ISBN 1 85475 124 7 Hard Cover



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Volume 3, Issue 4. Jan/Feb 1998. ISSN 1339-3426

The Bar Review is a refereed journal. Contributions published in this journal are not intended to, and do not represent, legal advice on the subject matter contained herein. This publication should not be used as a substitute for legal advice.

Subscription (October 97 to July 98 9 issues) £76.23 inclusive of VAT and air-mail post. Editorial and subscription correspondence to:
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Judicial Appointments

New Presidents of Circuit and High Courts

The Hon. Mr. Justice Diarmuid P. Sheridan has been appointed President of the Circuit Court, following the recent death of the former president, The Hon. Mr. Justice Frank Spain.

The Hon. Mr. Justice Fred Morris has been appointed President of the High Court to succeed The Hon. Mr. Justice Declan Costello who retired on the 1st January, 1998

The Hon. Mr. Justice Matthew P. Smith, previously of the Circuit Court has been appointed to the High Court

●

Appointment to European Court of Human Rights

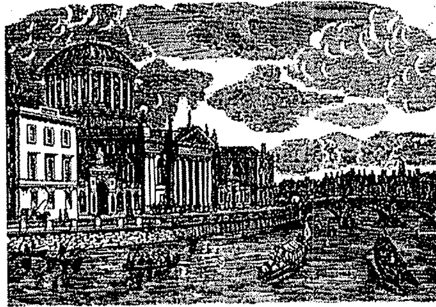
Mr. John Hedigan, SC has been elected for appointment to the European Court of Human Rights. His election takes place at an exciting period in the protection of Human Rights in Europe: the present structure of the European Commission on Human Rights and the present Court will be abolished and the new European Court of Human Rights will come into existence on the 1st November, 1998 from which date his appointment will take effect.

●

Irish Lawyers Contribute to Judicial Training in Lithuania

Since July 1997, the Scottish law firm Bishop and Robertson Chalmers, have been administering an 18 months PHARE programme in Lithuania on behalf of the European Commission. The purpose of the programme is to provide specialist assistance in the modernisation of Lithuanian basic commercial laws.

To compliment this programme a judicial training programme was



designed in conjunction with the Irish Management Institute International in Dublin as well as with the Lithuanian Judicial Training Centre and in particular Judge Volancius of the Lithuanian Appeal Court who is also the Chairman of the Lithuanian Association of Judges. The first programme took place in Vilnius in December 1997.

The four day programme was attended by 30 judges from the Supreme Court of Lithuania as well as from Court of Appeal and District Court (the equivalent to the Circuit Court in Ireland). Former Chief Justice Thomas Finlay delivered a seminar on the Separation of Powers in a Democratic State and Judicial Independence and Ethics which covered matters as diverse as potential interference from the Executive and the media and the Code of Conduct for the Judiciaries of the Baltic States which was adopted in June 1996. David Conlan Smyth, Barrrister, discussed the principles of statutory interpretation employed in common law jurisdictions and by the European Court of Justice. Jennefer Aston, Librarian, spoke on communication, training and technology in the legal system whilst Ciaran Kelly, High Court Registrar, covered the organisation and structure of the Irish Courts with particular emphasis placed on the recent reforms to the Irish legal system and the Reports of the Denham Commission.

Many parallels were found to exist between the two legal systems and the participants were particularly interested in the experience of Ireland as a small Member State of the European Community/Union. Other controversial legal issues in Lithuania at present which were the subject of discussion included contempt of court, habeas corpus, the position of the European Convention on Human Rights in the domestic legal system and prisoner's rights. All concerned considered the seminar a very useful forum for the exchange of views and ideas. A further judicial training seminar is scheduled to take place in April 1998.

●

Lawyers Required

NI-CO is a private limited company established by the Department of Economic Development in Northern Ireland 1992 to export public services abroad. The company recently drafted a proposal to assist in bringing Estonian legislation in line with EU law. If the proposal is accepted, the company will require a significant legal team to assist in its implementation.

NI-CO currently manages a portfolio of projects over a very wide variety of activities with operations concentrated in Eastern Europe, the newly independent states of the former USSR and some East African States. It is eager to establish contacts to assist in drafting and implementation of future proposals.

Barristers interested in finding out more about the company and its requirements for legal advice and expertise should contact John Dowling, Director, Bar Council

●

Irish Judiciary Celebrate with Westgate Chambers

The Chief Justice, The Honourable Mr. Justice Liam Hamilton and The Honourable Mr. Justice Paul Carney were among the invited guests at the recent 10th Anniversary celebration of Westgate Chambers in Sussex. The Head of Westgate Chambers, Mr. John Collins, was Auditor of the Law Students Debating Society of Ireland (King's Inns) in its inaugural year of 1966. Mr. Justice Paul Carney read from the minutes of that inaugural meeting at the Anniversary Dinner. The minutes which record the contributions of, among others, the then Taoiseach Mr. Sean Lemass, T.D., John A. Costello, S.C., T.D., and James Dillon, T.D. made for interesting reading and would encourage perusal through the minute book in general for interested members.

Arbitration Centre Opens in Law Library Distillery Building

A purpose built state of the art international arbitration centre, built and operated by the Bar Council, opened on Friday, 6th February, 1998, with an international conference on the theme of 'Ireland: A Centre for International Arbitration in the 21st Century'.

The Centre is housed in the Bar Council's latest extension to the Law Library based on the old Distillery Site in Church Street.

The opening of the new centre has been designed by the Bar Council's arbitration committee to coincide with the introduction of the new Arbitration (International Commercial) Bill, 1997, which is at its second stage in the Dail,. This bill, which incorporates the UNCITRAL model law on arbitration, will ensure that Ireland's laws will be conducive to the efficient conduct of international arbitrations here.

In addition to the compatibility of domestic law with international arbitration law, the Bar Council have also had regard to the availability of legal and arbitration expertise to service the Centre. In particular the young and under-employed Bar who have a wealth of qualifications and language skills are well placed to provide top class services to the international commercial market. The new professional diploma course in arbitration in UCD has been designed to assist practitioners who wish to improve their skills in this area.

Research has also shown that as a common law legal system Ireland is well placed to attract international arbitrations involving parties from the common law world, in particular from Commonwealth countries.

The perceived neutrality of Ireland as an attractive location for international business arbitration and the fact that we are an English speaking country, were also pertinent to the Bar Council's decision to invest in providing suitable facilities for the conduct of such arbitrations here.

While designed to meet the demands of the international commercial market, the Centre will also serve the domestic market for arbitration and other methods for alternative dispute resolution. It is the intention of the Bar Council that the Centre will provide a focus for the managed deployment of alternative methods of dispute resolution in the Irish legal system which will ultimately benefit the state and the wider business community.

LAW LIBRARY FOUR COURTS DUBLIN

The new centre has 20 purpose built arbitration rooms occupying just over 10,000 square feet over two floors. A key feature of the Centre is the availability of state of the art technology which will provide video-conferencing, e-mail and Internet access along with simultaneous translation facilities for two languages.

The International Arbitration market has grown considerably in recent years. The four main international bodies (the ICC's International Court of Arbitration in Paris, the American Association of Arbitration in New York, the World Bank's International Centre for Settlement of Investment Disputes and the London Court of International Arbitration), concerned with international arbitration have reported a doubling of requests for arbitration from 1990 to 1996, with indications that the upward trend will continue.

A key factor in the marketing strategy adopted by the Bar Council for the new building will be to ensure that these international bodies consider allocating relevant arbitrations to the new Centre in Ireland. A number of arbitrations have already been allocated to the Centre prior to its official opening and the target is to ensure that Ireland has 2% of the international arbitration market by the end of 1998, rising to 3.5 % after 3 years.

Carriage of Passengers and their Luggage by Sea: The Athens Convention 1974 - How will it affect Passenger Claims in Ireland?

COLM Ó HOISÍN, Barrister

Introduction:

In 1996 approximately 4.3 million passengers made a journey by sea on board a ferry into or out of this country. Inevitably some of these passengers were involved in accidents. Some suffered personal injury and others sustained damage to their luggage. Many of these incidents led to claims in the Irish courts.

Since February, 1997, the relevant applicable law in respect of most of such claims is Part III of the Merchant Shipping (Liability of Shipowners and Others) Act 1996[1] ('the 1996 Act') which implemented the Convention in relation to the Carriage of Passengers and their Luggage by Sea, 1974, ('the Athens Convention'), together with the 1976 Protocol to the Convention, into Irish domestic law. The 1996 Act was commenced in full with effect from the 6th February 1997 by Statutory Instrument No. 215 of 1997.

The Athens Convention will potentially have a significant impact on passenger claims brought in Irish Courts. Prior to the implementation of the Convention all of these claims were determined in accordance with the ordinary law of contract and of negligence. Carriers generally relied on detailed terms and conditions which were incorporated into the contract of carriage by the ticket or booking form. In many cases these terms and conditions purported to incorporate the provisions of the Athens Convention into the contract. However the courts would not always allow a carrier to rely on these conditions. At the very least the carrier would have to show that the passenger was given reasonable notice of the terms and conditions.[2] Because the 1996 Act gives the Athens Convention the 'force of law', this should no longer be a problem for carriers.

This article explains the main provisions of the Athens Convention and the principal ways in which it will change the law in Ireland relating to passenger claims. There is one serious problem with regards to its implementation however. Although the Convention has been given the force of law in the State by virtue of the 1996 Act, Ireland has not become a party to the Convention. In order to become a State Party to the Convention, it is necessary to deposit a formal instrument with the Secretary General of the International Maritime Organisation ('IMO') acceding to the Convention. To date this has not yet been done and as a result there may be some difficulties with the application of the Convention in practice.

To whom does the Convention apply?

The Convention applies to 'passengers'. The term is defined in Article 1 as:

"..any person carried in a ship,
(a) under a contract of carriage, or
(b) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods not covered by this Convention;"

It also applies to their 'luggage' which is defined as:

"..any article or vehicle carried by the carrier under a contract of carriage excluding:
(a) articles and vehicles carried under a charter party, bill of lading or other contract primarily concerned with the carriage of goods, and
(b) live animals."

The term 'ship' is confined to seagoing vessels only and hover-craft are specifically excluded. Obviously it will mostly apply to ferries but the term is capable of broader application.[3]

Article 2 of the Convention limits its scope to 'international carriage'. This will generally mean a contract of carriage where the place of departure and the place of destination are situated in two different states. Article 2 also provides that the Convention will only apply if:

"(a) the ship is flying the flag of, or is registered in, a State Party to this Convention, or
(b) the contract of carriage has been made in a State Party to this Convention, or
(c) the place of departure or destination according to the contract of carriage is in a State Party to this Convention."

As explained already, Ireland is not a State Party to the Convention. It would seem therefore that there will be a number of circumstances in which the Convention will not apply. Where a vessel flying the Irish flag is sailing between Ireland and France the Convention will not apply, as neither Ireland nor France are State Parties to the Convention. On the other hand where a U.K. registered vessel makes this journey the Convention will apply. The U.K is a State Party to the Convention and therefore all journeys between Ireland and the U.K. (and also

the Isle of Man) are covered irrespective of the flag of the ship.

Section 26 of the 1996 Act provides that the Convention is only to apply in relation to contracts of carriage for 'reward'. The purpose of this provision is, presumably, to ensure that the Convention does not affect situations where persons are on board yachts or other pleasure craft on a gratuitous basis. The term 'ship' is broad enough to include yachts and it is clearly the intention of the Convention to apply only to commercial operations. Presumably it is also intended to exclude stowaways. It is possible however that this limit will have some unintended effects. What if the carrier gives a passenger a free ticket, as a prize or perhaps as compensation for a previous unsatisfactory journey? It does not make very much sense to distinguish between such passengers and those who have paid for their tickets.

The Convention clearly does not apply to members of the crew. Their claims will continue to be governed by the common law. In some respects they will be in a more advantageous position to the passengers of a ship. In particular they will not be subject to the limit of liability discussed below. However in another respect they will be disadvantaged, as unlike passengers, they will still have the burden of establishing that the carrier was negligent.

The Convention is limited to incidents which occurred during the course of carriage. Insofar as passengers are concerned, this will include the period during which the passenger is on board the ship as well as the period during which the passenger is in the course of embarkation or disembarktion. It does not include, however, the period during which a passenger is in a marine terminal or station or on a quay or in any port installation. The practical effect of this will be to give a relatively narrow meaning to the terms 'embarking' and 'disembarking'.[4] If, for instance, a passenger slips and falls on a structure which is part of the port terminal, even though it may be attached to the ship at the relevant time, it would seem that the Convention will not apply.

The main effects of the Convention:

A. Burden of Proof:

Article 3.3 of the Convention switches the burden of proof from the passenger to the carrier. This is essentially part of the trade-off for the limit on the carrier's liability. Fault or neglect on the carrier's part is presumed unless the contrary is proved. In order to rely on the presumption of carrier's fault the passenger must demonstrate that the incident causing the loss or damage occurred during the course of the carriage. In most cases that should not be too much of a problem. Once that is established, liability is unlikely to be an issue. In practice a carrier can only expect to successfully defend a passenger claim if it has a very substantial defence. A carrier's liability may however be reduced, under the provisions of Article 6 of the Convention, if it proves contributory negligence on the part of the passenger.

B. Limit of Liability:

The concept of a limit on liability is not new to maritime law in Ireland.5 Under the Merchant Shipping Act 1894, there were limits on the liability of a shipowner in respect of claims of loss of life or personal injury and in respect of claims for damage to vessels, goods or property damage. The provisions which limited liability in that Act have now been repealed and in their place the Convention on Limitation of Liability for Maritime Claims of 1976. ("the 1976 Limitation Convention") has the force of law by virtue of Part II of the Merchant Shipping (Liability of Shipowners and Others) Act 1996.

The Athens Convention (as amended by the 1976 Protocol) provides in most cases for a limit of 46,666 units of account in the case of death or personal injury. The unit of account in question is the Special Drawing Right ('SDR') which is a unit defined by the International Monetary Fund. The value of an SDR in any particular currency will fluctuate from day to day. In order to calculate the limit of liability it is necessary to ascertain the value of the SDR in Irish currency on the day of the judgment or such other day as is agreed by the parties. If there is no value available for the day of the judgment, then one looks to the last previous day upon which the value was ascertained. Section 24, sub-section (2) of the 1996 Act provides that a certificate from the Central Bank, specifying the value in Irish currency of the SDR, is admissible evidence. By way of illustration, the latest value (that for 26th January.1998) which I have been able to obtain from the Central Bank for the SDR is 1.03815 SDR = IR£1. (For convenience I will use this rate throughout the rest of the paper.) The limit for cabin luggage is 833 SDRs; for vehicles it is 3333 SDRs; and for any other luggage it is 1200 SDRs. At this value the limit of a carriers liability to any single passenger for death or personal injury is IR£44,951.11; for cabin luggage IR£802.39; for a vehicle IR£3,210.52 and for any other luggage IR£1,155.90.

It is important to note that the limit of liability provided for in this Convention is not a global limit. The Athens Convention does not limit the number of passengers who can claim. Each claimant is entitled to recover up to the particular limit for the type of claim whether it be 46,666 SDRs or one of the other limits. The 1976 Limitation Convention on the other hand provides for a global limit in respect of passenger claims of 25 million SDR's. Although there may be some doubt, it would seem that this global limitation would take priority over the Athens Convention limits if there were a large number of claims arising out of the one distinct incident. Indeed Section 29 of the 1996 Act specifically acknowledges this by providing that nothing in Part III of the Act (that part which implements the Athens Convention) shall prejudice the operation of Part II of the Act (that part which implements the Limitation Convention). If a disaster on the scale of the 'Herald of Free Enterprise' occurred involving death or injuries to a large number of passengers it is possible that the passengers would not be entitled to recover the full amount provided for in the Athens Convention. The Limitation Fund under the 1976 Convention would be an overriding limit and awards to passengers would have to be scaled down to the extent that the aggregate of such awards exceeded the limitation fund under the 1976 Convention.

It is significant that the limit of liability provided for in passenger claims in Ireland is now considerably less than in the United Kingdom.

Following the Herald of Free Enterprise disaster the U.K. Government increased the limits of liability for U.K. carriers of passengers by sea. That limit is presently 100,000 SDRs (approximately IR£96,325.19). It would be open to the Minister for the Marine in Ireland to increase such limits in a similar manner. Section 23 of the 1996 Act empowers him to increase the limits for carriers whose principal place of business is in Ireland. At present no such Order has been made.

A further Protocol to the Athens Convention was approved in London in March of 1990 which would bring the limit for personal injury claims up to 175,000 SDRs (approximately IR£168,569.09). This Protocol has not yet come into force and is not given the force of law by the 1996 Act.

There are some circumstances where the limit for passenger claims will be calculated by reference not to Special Drawing Rights but to the 'gold franc'. Section 25 of the 1996 Act provides that where the defendant is a national of a state which is not a party to the 1976 Protocol the old limit provided for in the Convention is to apply. That limit was 700,000 francs for personal injury, 12,500 francs for cabin luggage, 50,000 francs for a vehicle and 18,000 francs for any other luggage. Again, a certificate from the Central Bank as to the value of the Gold Franc on the particular day will be admissible evidence in court.

Article 13.1 provides that in order for a carrier to lose the right to limit liability, it must be demonstrated by the passenger that the damage suffered resulted from 'an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.'[6]

The grave act or omission must be that of the carrier itself. It seems that a carrier will not be deprived of the right to limit liability on the basis of the acts or omissions of its servants or agents.[7] If the carrier is a company then one must establish that it was the fault of a person who could be said to be the 'alter ego' of that company, in other words someone in senior management.[8] A servant or agent who is actually sued will have the right to limit its liability, but under Article 13.2 that right may also be lost on identical criteria to that set out in 13.1.

It would only be in exceptional cases that one would be able to prove that the carrier acted with a degree of culpability envisaged under Article 13. One must either show an intention to cause damage or, in the alternative, a recklessness added to knowledge that damage would probably result[9]. Recklessness on its own implies a conscious disregard of a substantial and unjustifiable risk. It involves a high degree of culpability. By adding the requirement that there must be knowledge that damage would probably result, the Convention has ensured that a subjective test must be applied to the carrier. Strictly speaking it would seem that one needs to show that the carrier or its 'alter ego' knew that what it was doing would probably result in damage.

C. Two Year Time Limit:

Article 16 of the Convention provides that claims arising out of the death or personal injury of a passenger must be brought within the period of two years from either the date of disembarkation or the date upon which disembarkation should have occurred. If the injury results in death after disembarkation, then the time begins to run from the date of death (provided that it is not more than three years after the date of disembarkation).

Article 16.3 allows that there may be a suspension or interruption of the limitation period in accordance with the law of the court seized of the case but this is subject to an overriding rule that no case may be brought after the expiration of three years from the date of disembarkation or the date on which such disembarkation should have taken place. This provision will have serious implications in relation to the position of minors. Under Section 49 of the Statute of Limitations Act 1957, the period of limitation in relation to a minor or other person under a disability will not begin to run until the disability has ceased. Article 16.3 appears to supersede this provision. The provision will also limit the applicability of the Statute of Limitations (Amendment) Act 1991. This Act was brought in to deal with the problem of latent personal injuries where a plaintiff did not discover that he/she had injuries or that same were attributable to the act or omission of the defendant until after the normal period of limitation had run. The Act provides that in such cases the time will run from the date of the Plaintiff's knowledge. The overriding three year limit which is expressed in Article 16.3 however, will mean that in Athens Convention cases such plaintiffs will be time barred before they would otherwise have been under the 1991 Act.

There is already, of course, a two year time limit provided for in Section 46(2) of the Civil Liability Act in relation to certain maritime cases. Under Section 46(3), a Court has jurisdiction to extend that two year period 'to such extent and subject to such conditions as it thinks fit'. In some cases there may be an overlap between the cases covered by Section 46(2) and cases covered by the Athens Convention. The question is whether or not in those cases the discretion to extend the two year period under Section 46(3) is a 'suspension' or an 'interruption' within the meaning of Article 16.3. The recent English case of *Higham v. Stena Sealink Limited* [1993] 3 All E.R. 660 specifically considered Article 16.3. In that case the plaintiff was injured on a voyage from Holyhead to Dun Laoghaire on the 16th August 1991. Some two years later, on the 2nd September 1993, she issued proceedings in the Liverpool County Court claiming damages for negligence and breach of statutory duty on the part of the defendants. The defendants relied on the two year time limit in Article 16 of the Athens Convention in support of their contention that the plaintiff's action was time barred. The plaintiff, on the other hand, relied on a provision in Section 33 of the U.K. Limitation Act 1980 which gave a discretion to the Court to exclude the time limit on certain grounds. It was part of the plaintiff's case that this provision was in the nature of a law which governed the grounds of suspension or interruption of a limitation period envisaged by Article 16.3. In the Court of Appeal, Lord Justice Hirst held that the provisions in Section 33, insofar as they excluded altogether the period, could not constitute a ground of suspension or interruption which would be eligible under Article 16(3).

The wording of Section 46(3) of the Civil Liability Act is very different to that in Section 33 of the English Limitation Act 1980. Section 46(3) speaks of the time period applying to an action for which the limit in sub-section (2) applies, being extended. On a strict interpretation this is not a suspension or interpretation of a limitation period although it is obviously closer to that

concept than the exclusion of the limit provided for in the English Act.

Of course it should be noted that the Court does not very readily grant an extension under Section 46(3) as can be seen from the recent decision of Mr. Justice Barr in the case of Carleton v. O'Regan [1997] 1 ILRM 37. To obtain an extension it is necessary to show special circumstances or good reason and this is a relatively onerous task.

D. Jurisdiction:

Article 17 of the Convention provides as follows:-

"(1) An action arising under this Convention shall, at the option of the claimant, be brought before one of the courts listed below provided that the court is located in a State Party to this Convention (emphasis added):-

(a) the court of the place of permanent residence or principal place of business of the defendant or

(b) the court of the place of departure or that of the destination according to the contract of carriage or

(c) a court of the state of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that state or

(d) a court of the state where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that state.

(2) After the occurrence of the incident which has caused the damage, the parties may agree that the claim for damages shall be submitted to any jurisdiction or to arbitration."

This is, quite clearly, the most serious implication of the failure by the State to become a party to this Convention. We now have the extraordinary situation that a Convention which we have made part of our domestic law ousts the jurisdiction of the Irish Courts in relation to all claims to which the Convention applies save only with the exception of cases where the parties have agreed that the Irish Courts shall have jurisdiction.

The practical effect of this provision will be that no passenger of a vessel travelling between Ireland and the United Kingdom can bring a claim in the Irish Courts unless they can persuade the carrier to agree to Irish jurisdiction. It does not matter whether the passenger is Irish or whether the ferry company is Irish. Because Ireland is not a party to the Convention, the claimant does not have the option of proceeding in its courts. Clearly, this cannot have been intended by the legislators when enacting this piece of legislation.

Conclusion:

The Athens Convention is not the only Convention which has been implemented into Irish law without the State becoming a party to it. Ireland is not a party to the Limitation Convention, 1976, or to the Hague Visby Rules - both of which were implemented into Irish Law by the 1996 Act. This might be of little practical significance were it not for the fact that a number of provisions in the texts of both the Athens Convention and the Limitation Convention10 depend on a State being party to the Convention. The problem has been drawn to the attention of officials within the relevant Departments and I understand that the situation is to be remedied as a matter of urgency.

Apart from this 'technical hitch', the implementation of the Convention into Irish Law is to be welcomed. It succeeds in striking a balance between the interests of the carrier and the passenger. Of course, some commentators may be critical of a limit on liability. However the limit in the Convention is relatively high and scope remains for its further increase. Most claims should fall well within the limit. Furthermore, it should be borne in mind that, to compensate for the limit, the passenger is relieved of the burden of proof on liability. ●

1 The Act also gives the force of law to two other important International Maritime Conventions namely the Convention on Limitation of Liability for Maritime Claims, 1976 and the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 as amended by the 1968 and 1979 Protocols ('the Hague-Visby Rules').

2 *In Western Meats Ltd. v. National Ice and Cold Storage Co Ltd* [1982] ILRM 99 (although neither party was a consumer). Also note: the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 do not apply to contracts the terms of which reflect the provisions or principles of international conventions to which the Member States or the Community are party.

3 See also definition of ship in the 'Von Rocks', unreported, Supreme Court, 22 January 1998

4 This may be contrasted with the relatively wide meaning given to these words when used in Article 17 of the Warsaw Convention see. *Burke v. Aer Lingus plc* [1997] 1 ILRM 148

5 It is also a feature of International Transport Conventions. See for instance Warsaw Convention on Air Travel ; Convention on the Contract for the International Carriage of Goods by Road, ('C.M.R.') and the Hague-Visby Rules (Carriage of Goods by Sea)

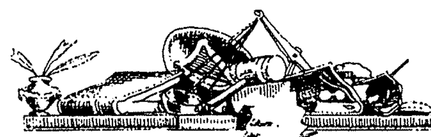
6 See Article 13.1. A similar wording is used in Art IV 5(e) of the Hague-Visby Rules and in Art. 4 of the 1976 Limitation Convention. The wording in Art 25 of the Warsaw Convention as amended by the Hague Protocol 1955 is also similar except that it specifically includes acts of the carrier's servants or agents.

7 The 'Lion' [1990] 2 Lloyd's Rep 144; and for an equivalent decision in regard to the Hague-Visby Rules see The 'European Enterprise' [1989] 2 Lloyd's Rep. 185

8 *Leonard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705

9 *Goldman v. Thai Airways International Ltd.* [1983] 3 All E.R. 693

10 Article 15 of the Limitation Convention seems to limit the scope of the Convention to the Courts of a State Party to the Convention.



New Editor for The Bar Review

Ms Jeanne McDonagh, will replace Edel Gormally as Editor of the Bar Review for future issues up to July 1998. Jeanne replaces Edel as PR Manager during Edel's forthcoming maternity leave from the office.

The Company Examinership – Looking for a Life Line After In re Springline (in Liquidation)

EAMON MARRAY, Barrister

The protective scheme of the company examinership has since its introduction into Irish law in 1990 provided a lifeline to many substantial and strategic commercial undertakings which would otherwise have suffered a premature end at the hands of a receiver or liquidator.[1] During the relatively short period since the introduction of the company examinership, the Courts have also been called upon to determine many important questions of principle and priority in securing the objective of company survival. Through a purposive and schematic process of statutory interpretation the Courts have by and large cloaked the company examinership with a supremacy which has focused on facilitating the survival of the company, and where necessary, doing so at the expense of secured creditors whose securities where hitherto sacrosanct.[2]

However the recent decision of *In re Springline Ltd (in liquidation)*[3] in resolving the question of the priority of an examiner's remuneration, costs and expenses *vis a vis* a liquidator in favour of the liquidator has dealt a significant blow to the future survival of company examinerships in Irish company law. In a comprehensive and authoritative judgment Shanley J. having considered the relevant provisions of the Companies Acts 1963 - 1990, and having noted the Court's duty to strive to give a purposive interpretation to this legislation, stated and concluded respectively

> "I am conscious that it is the duty of the Court in all cases where it can possibly do so to construe an Act in such a way as will give effect to the intention of the legislature. I am equally conscious that the legislature would not have wished to leave an examiner in the position that Mr O'Ferrall finds himself in now, namely, having done work for which he is not to receive any remuneration other than the remuneration he can recover by dividend (if any) in the course of the winding up. It does seem to me, that there is no way, without doing violence to the sub-section, whereby sub-section (3) can be construed in such a manner as to allow for the payment to Mr O'Ferrall of his remuneration ahead of that of the Liquidator's.....
>
> In my view the examiner is not entitled to his remuneration costs and expenses in priority to those of the Official Liquidator of the company"[4]

While the cogent and structured judgment of Shanley J precludes any constructive criticism of the decision, the decision has highlighted a fatal lacuna in the Companies (Amendment) (No.1) Act, 1990, ("the 1990 Act") as amended. In the absence of the introduction of amending legislation which guarantees priority to an examiner's remuneration, costs and expenses over those of a liquidator, the decision of In re Springline Ltd (in liquidation) heralds the demise of company examinerships as a feature of Irish company law. If persons qualified to act as a company examiner are not guaranteed remuneration and the recovery of the costs and expenses associated with the examination of a company, they will refuse to act, and the desirable legislative and commercial objectives under pinning the company examinership will be frustrated.

In re Springline Limited (in liquidation)

Springline Limited (in liquidation) ("the company",) was placed in examinership on the 19th February, 1996 with an examiner being appointed to the company on the 26th February, 1996. The examiner duly conducted an examination of the company following which he reported to and informed the High Court on the 8th May, 1996 that as there was no prospect of a scheme of arrangement being put in place for the company, the protection of the Court should be withdrawn. On the 8th May, 1996 the High Court made an Order withdrawing the protection of the Court from the company, thus terminating the examinership, and on the 16th May, 1996, a Petition to wind up the company was presented with a provisional liquidator being appointed to the company on the 21st May, 1996. On the 10th June, 1996 a winding up Order was made by the High Court in relation to the company.

On the 29th July, 1996 and the 9th October, 1996 the examiner in accordance with section 29 (3) of the Companies Act, 1990 applied to the High Court and obtained Orders from the Court sanctioning payments of sums amounting to IR£54,210.28. Pursuant to an application under section 280[5] of the Companies Act, 1963 ("the Principal Act"), Shanley J. was asked to determine whether section 29 (3) of the 1990 Act gives priority to the sanctioned remuneration, costs and expenses of an examiner over those of a liquidator of the company, in liquidation.

In addressing this question of priority, Shanley J. analysed the relevant statutory and procedural rules regulating the ranking of claims and expenses in a winding up. Shanley J's analysis highlighted the distinction between the "claims" and "debts" provable in a winding up, and the costs and expenses incurred subsequent to the date of the winding up of a company.[6] This distinction was to prove fatal for the priority which was being sought for the payment of the examiner's remu-

neration, costs and expenses.

Having referred to section 244 of the Principal Act which gives the Court a discretion, which is regulated by Order 74, rule 128 of the Rules of the Superior Courts, 1986 (RSC 1986), to determine the priority to apply to the payment of costs, charges and expenses of the winding up where the assets of the company, in liquidation, are insufficient to satisfy the liabilities of the company, Shanley J. went on to make the following important observation of section 244;

> "That is a provision, as appears clear, which deals expressly with the costs, charges and expenses incurred during the winding up, it is not a provision which deals with in any way the debts which are provable in a winding up".[7]

As section 29(3) of the 1990 Act limits an examiner's priority to his remuneration, costs and expenses "before any other claim, secured or unsecured" occurring, inter alia, in the "winding up of the company" to which the examiner has been appointed, Shanley J. correctly concluded that it was "necessary first to look at the provisions of the Companies Acts in so far as they relate to insolvent companies and to determine the rules which apply in relation to such companies as to the proof and ranking of claims in a winding-up of an insolvent company and the payment of the costs, charges and expenses of Liquidators of such companies". This approach led Shanley J. to a consideration of section 284 (1) of the Principal Act which prescribes that the rules which apply from time to time to, inter alia, the determination of respective rights of secured and unsecured creditors, and to debts provable under the law of bankruptcy, shall also apply to the determination of similar claims and debts being made against insolvent companies.

Shanley J. in tacitly acknowledging that section 284 (1) of the Principal Act is to be read in conjunction with section 283 (1) of that Act and Order 74, Rule 108 of the RSC 1986 which deals with the proving of debts and claims which have been incurred and which at the date of the winding up are not yet due by the insolvent company, proceeded with his analysis as follows:

> "As I have already noted, section 284 (1) of the Companies Act 1963 makes provision for the application of the rules in force for the time being under the law of bankruptcy to debts provable in the winding up of an insolvent Company. The debts which are subject to such rules in bankruptcy are those debts which are defined by section 283 (1) of the Companies Act, 1963 as:-
>
> "…..all debts payable on a contingency, and all claims against the Company, present or future, certain or contingent, ascertained or sounding only in damages…"
>
> The Debtors Act (Ireland) 1872 provides in section 4 thereof that:
>
> "In this Act, if not inconsistent with the context, the following terms shall have the meanings herein - after respectfully assigned to them; that is to say
>
> "Debt contracted after the passing of this Act" shall mean any sum of money due or payable under or in respect of any contract or obligation made or entered into or liability incurred, or cause of action, or suit arisen after the passing of this Act…".
>
> The Bankruptcy Act 1988 which repealed in its entirety the Irish Bankrupt and insolvent Act 1857 deals in section 75 with debts provable in bankruptcy and arrangement and provides in section 75 (1);-
>
> "Debts and liabilities, present or future, certain or contingent, by reason of any obligation incurred by the bankrupt or arranging debtor before the date of adjudication or Order for protection and claims in the nature of unliquidated damages for which the bankrupt or arranging debtor is liable at that date by reason of a wrong within the meaning of the Civil Liability Act, 1961, shall be provable in the bankruptcy or arrangement".
>
> Finally, the first schedule to The Bankruptcy Act, 1988 provides at Article 15 that:-
>
> "In respect of debts due after the adjudication or Order for protection, the liability for which existed at the date of such adjudication or Order for protection, a creditor may prove for the value of the debt for that date"[8]

Having considered section 228 (d) of the Principal Act, which subjects a liquidator's remuneration, costs and expenses to the control of the High Court, Shanley J concluded his analysis as follows:

> "The foregoing analysis of the provisions of the Companies Acts and of The Bankruptcy Act 1988 and its rules, makes it clear that an entirely different approach is adopted relating to the proof and ascertainment of debts and the means whereby the remuneration, costs and expenses of a Liquidator are determined. It is equally clear that the Bankruptcy code has over time given a clear and unambiguous meaning to the words "debt" and "claim".[9]

As section 29 (3) only secures payment of the examiner's remuneration, costs and expenses in priority to claims, secured or unsecured, arising, inter alia, in a winding up, the focus of the inquiry reduced to determining whether the word "claim" embraced within its statutory definition and meaning the remuneration, costs and expenses of a liquidator appointed by a Court in the winding up of an insolvent company. While Counsel on behalf of the examiner contended that section 29 (3) of the 1990 Act was so wide as to necessarily embrace the remuneration, costs and expenses of a liquidator referred to in Order 74, rule 128 of the RSC 1986, Shanley J. summarized his inquiry and conclusions by stating;-

> "The real issue in this case is whether the liquidator's costs, charges and expenses (or costs, remuneration and expenses) can under any circumstances be described as representing a debt or claim against the company. If such costs, remuneration and expenses can be regarded as a "debt" or a "claim" against the company then, section 29 (3) of the Companies

(Amendment) Act, 1990 has the effect of giving the costs, remuneration and expenses of the examiner a priority over the costs, remuneration and expenses of a liquidator, in winding-up by the Court. In my opinion, the liquidator's costs, charges and expenses cannot be regarded as constituting a "claim" or "a debt" against the company. The costs, expenses and remuneration of the Examiner, Mr O'Ferrall in this case, of course, represents a debt provable against the company in the winding up of the company under the supervision of the Court. But as I have said, the real issue of course is whether the costs, expenses and remuneration of the liquidator can be regarded as "a claim" or "a debt" against the company. Section 283 of the Companies Act, 1963 refers to the fact that all claims against the company present or future, shall be admissible on proof against the company upon a winding up of the company. Section 75 of the Bankruptcy Act, 1988 provides that debts and liabilities "present or future" shall be provable in the bankruptcy or arrangement.

I do not think that it can be argued that references to a future "claim" or a future "debt" (as appears in the Bankruptcy Act 1988 and the Companies Act 1963) can be argued to refer in any way to the cost, expenses, remuneration or charges of a liquidator in a winding up by the Court. It seems to be clear that the notion of a future debt or future claim at the date of a winding-up or at the date of an adjudication of bankruptcy relates to obligations of the company or bankrupt incurred before the date of the winding up or the date of adjudication, but in respect of which obligation its discharge follows the date of the winding up or adjudication. That this is the proper construction of "future claims" or "future debts" is reinforced by the wordings of section 75 of the Bankruptcy Act, 1980 and Article 15 of the Schedule of that Act. Because debts and claims under the Bankruptcy Rules are provable as of the date of adjudication (or in the case of a winding up as of the date of the commencement of the winding up), obligations incurred by companies after the date upon which the company was wound up cannot fall into the category of future claims or future debts. Such is the position of the liquidators costs, expenses and remuneration. They were not obligations incurred before the winding up Order was made; they were obligations which necessarily incurred after the date of the winding up Order and therefore do not fall to be proven as debts in the liquidation or as claims in the liquidation in the manner provided for in Order 74 of the Rules.

While the examiner is given a priority by section 29 (3) of the Companies (Amendment) Act 1990 it is not a priority in respect of anything other than all other claims against the company whether secured or unsecured: it does not give the examiner priority over the costs, expenses and remuneration of the Official Liquidator in this case".[10]

In short the statutory priority given to an examiner under section 29 (3) of the 1990 Act relates only to claims, secured or unsecured, which have been incurred prior to the company being wound up. In the absence of express statutory provision the priority given to an examiner under section 29 (3) of the 1990 Act cannot extend to include the payment of the examiner's remuneration, costs and expenses before those of the liquidator because the latter only arise following the winding up of a company by Order of the Court. The liquidators costs, charges and expenses are not claims or debts which arise or are incurred in the ordinary course of carrying on the business of a Company. Conscious of the adverse implications which his decision will undoubtedly have for the survival of company examinerships, Shanley J. was nonetheless prepared to justify his decision:

> "I am conscious that it is the duty of the Court in all cases where it can possibly do so to construe an act in such a way as will give effect to the intention of the legislature. I am equally conscious that the legislature would not have wished to leave an examiner in the position that Mr O'Ferrall finds himself in now, namely, having done work for which he is not to receive any remuneration other than the remuneration he can recover by dividend (if any) in the course of the winding up. It does seem to me that there is no way, without doing violence to the sub-section, whereby sub-section (3) can be construed in such a manner as to allow for the payment to Mr Ferrall of his remuneration ahead of that of the liquidator. As Mrs. Justice Denham said in the case of *Mahon and Others, Applicants v Butler and Ors, Respondents*, in a Judgment delivered on the 1st August, 1997;
>
> "It is not for the Court to legislate. If there is a lacuna in legislation then it is appropriate to indicate that gap - but not to fill it. If there is a policy decision for the legislation that is a matter for the Oireachtas"[11]

In resolving the question of priority in favour of the liquidator, Shanley J. was also of the view that Order 74 rule 128 of the RSC 1986 could not avail the examiner because while the examination of the company necessarily entails the preservation of a company's assets, the principal function of the examiner is to investigate the viability of the company and, in certain circumstances, to formulate proposals for the company's survival: the preservation of company assets in the context of an examination of a company does not result from anything done by the examiner but is a necessary consequence of the Order of the Court which extends the protection of the Court to the company during the period in which the company is in examinership.

Conclusion

The statutory lacuna identified by the decision of In re Springline Limited (in liquidation) will require immediate legislative attention if the future survival of company examinerships is to be guaranteed12. It is evident that Shanley J's analysis revealed a legislative gap in the 1990 Act which according to Shanley J 'the legislature would not have wished'. In enacting section 29 (3) of the 1990 Act, the Oireachtas recognized that the practical consideration of securing priority for the payment of an examiner's remuneration, costs and expenses is an indispensable precondition to the successful operation

and application of the protective scheme which the company examinership represents. In circumstances where the remuneration, costs and expenses of an examiner, like a liquidator, are subject to the supervision and sanction of the Court,[13] there is no reason why priority should not be given to the remuneration, costs and expenses of the examiner over those of a liquidator.[14] While there is a temporal justification for giving priority to the examiner's remuneration, costs and expenses over those of the liquidator, the examiner having acted and incurred costs and expenses prior in time to the liquidator, the more compelling justification for their priority is that it is an essential prerequisite to the future survival of the protective scheme of company examinerships which, with few exceptions, has proved a most worthwhile development in Irish company law. ●

1 *In re Goodman International Limited*, 29 August 1990. The enactment of the Companies (Amendment) Act 1990 was enacted on the 29th August, 1990 and on the same date at a specially arranged sitting in the home of the then President of the High Court, Hamilton P, a Petition was presented for the appointment of an examiner to Goodman International Limited. But for the appointment of the examiner, Goodman International Limited would almost have certainly collapsed with major adverse reverberations being felt throughout the entire Irish meat industry and agriculture sector; See, Corporate Insolvency and Rescue, Lynch, Marshall and O'Ferrall, Ch. 10 p261, cf2. See Generally Examinerships, The Companies (Amendment) Act 1990, O'Donnell, Oak Tree Press, 1994, and Courtney Company Law of Private Companies p681-688. See also *Re Holidair Limited* (1994) 1IR 416; (1994) 1ILRM 481; The Law of Company Insolvency, Forde Part (II); Company Law in the Republic of Ireland, Keane, 2nd Edition Ch.39. See Report of The Company Law Review Group 1994.

2 *Re Atlantic Magnetics Limited* (1993) 2 IR 561; *Re Holidair Limited* (1994) 1 ILR 416; 1ILRM 481 . *In re Atlantic Magnetics Limited*, the Supreme Court held that liabilities which arise in an examinership and which have been certified by the examiner in accordance with section 10 of the 1990 Act have priority to the payment of claims to be made to secured and unsecured creditors of the company, see s.29 (1) of the 1990 Act. Specifically, the Supreme Court held that certified liabilities have priority over assets which are subject to a fixed charge. Finlay CJ stated the justification for so holding as follows:

"Having regard to that legal position, it seems to me wholly consistent with the scheme of the Act that in a case such as this where the entire of the assets of the company are alleged to be secured by a fixed charge the power of the Court under sub-section (3) of section 9 to give full effect by an ancillary Order to the vesting in the examiner of the power of borrowing, would entail a clear jurisdiction to permit the examiner to use funds standing to the credit of the company, even though they be subjected to a fixed charge...any other interpretation would in my view, leave a situation where effectively a secured creditor with a charge over the entire of the assets of a Company which had become fixed could always prevent the provisions for the appointment of an examiner from being operative...."

In the later case of *In re Holidair Limited* Finlay CJ stated the importance of giving a purposive and schematic interpretation to the 1990 Act:

"I am satisfied that this identification of the purpose of the Act is correct, it is consistent with the view of the Court expressed in a Judgment which I delivered in that case concerning specific questions with regard to the powers of an examiner which were raised before the Court....With regard to the issues arising in this Appeal therefore I conclude that it is appropriate that we should approach it on the basis that the intention of the Legislature to be derived from the terms of the Act of 1990 was to provide a period of protection available for examination so as to try and ensure that if possible some scheme of arrangement might be made rather than an immediate liquidation or receivership of a company. It was also I am satisfied, part of the intention of the Legislature that if at all possible and if considered appropriate by an Examiner during the relatively short period of protection under the Court provided for in the Act of 1990 that a Company should be continued as a going concern and that where ambiguity or doubt arises concerning the construction of any sections in the Act these two objectives should be borne in mind."

These decisions were considered by the Company Law Review Group in 1994 following which the Group recommended that the decisions be reversed and that amending legislation be introduced to provide that liabilities certified by the examiner should rank after the claims of fixed charge holders, and before holders of floating charges.

3 The High Court Unrep. 28th October, 1997

4 Pages 14 and 15 of the Judgment.

5 Section 280 of the Principal Act vests the liquidator or any contributory or creditor of the company, in liquidation, with the power to apply to the Court to have questions determined or powers exercised relating to the winding up of the company. The powers of the Court which may be invoked pursuant to s. 280 of the Principal Act are to be found in ss234-248 of the Principal Act. Applications pursuant to s. 280 of the principal Act are brought by way of an Originating Notice of Motion; RSC 1986, Order 74, rule 138 as amended by RSC (No. 4) 1991, rule 2 (4).

6 *Re Wogans (Drogheda) (No.3)*, High Court Unrep., 9 February, 1993. In this latter case, the creditors who had opposed the appointment of an examiner to the Company had sought to have their costs paid by the directors of the company or the examiner. Costello J (as he then was) held that the creditors costs did not constitute debts or other liabilities of the company within the meaning of section 297A of the Principal Act. *Re Wogan (Drogheda) (No.3) Ltd* therefore supports the distinction recognised in *Re Springline Limited*. See also *Re Don Bluth Entertainment Limited* (No.2) High Court Unrep, 24 February 1993. In the latter case Murphy J in holding that the High Court could review the certification of liabilities by the examiner as expenses under section 10 of the 1990 Act disallowed the examiner's certification of expenses to the extent that they included expenses in relation to services provided at the request of and for the benefit of the company prior to it being placed in examinership. Murphy J held that the certification of liabilities was confined to the period following the appointment of the examiner and consequently the examiner had no statutory authority to certify expenses relating to the proceedings leading to his appointment as examiner; See *In re Merrytime (Ireland) Limited*, High Court, Unrep 29 June, 1992(ex tempore), Murphy J

7 Page 3 of the Judgment, See Companies Acts; 1963-1990 MacCann, 1993,pp227-8

8 Pages 6,7 and 8 of the Judgment

9 Page 10 of the Judgment

10 Pages 11 and 12 of the Judgment

11 Page 13 of the Judgment

12 The decision has already received attention from the commercial sector and insolvency practitioners - Sunday Business Post, November 1993. It is interesting to note that the Company Law Review Group in its 1994 Report recommended that amending legislation be introduced to provide that the remuneration, costs and expenses of an examiner under section 29 (1) of the 1990 Act, being the remuneration, costs and expenses to which priority is given under section 29 (3) of the 1990 Act should rank before all claims but not expenses referred to in section 10 of the 1990 Act (e.g. those liabilities which are certified by the examiner in accordance with section 10 (2) of the 1990 Act); The Law of Company Insolvency, Forde, Part (II) p88 where the author prophetically observed as follows:

"What liabilities are not claims" in a receivership or liquidation and, accordingly, not affected by section 29 (3)'s priority? Presumably that word means any debts or claims which could be proved in a liquidation. If this is so then a liquidators remuneration and expenses would rank before the examiners expenses etc. and certified liabilities".

13 In re Wogans (Drogheda) ltd, H.C., Unrep. 9 Feb 1993; In re Don Bluth Entertainment ltd., H.C., unrep, 24 May, 1993; S.c. unrep, 13 May, 1994; In re Eden Park, Construction Ltd, H.C., unrep, 17 Dec., 1993; section 228 (d) of the Companies Act; In re Springline Ltd., (in liquidation), p. 9 of the judgment; Examinerships, The Companies Amendment Act, 1990, O'Donnell, ch. 10

14 It has been suggested that the priority given to the liquidators remuneration and expenses vis a vis those of the examiner has some practical logic in that it may be necessary to appoint a liquidator in order to realise the assets out of which all claims can be paid. In other words, but for the work of the liquidator in realizing the assets no claims against the company can be paid. - The Law of Company Insolvency, Forde, P88.

Mr. Justice Declan Costello

A VIEW FROM THE BAR

FRANK CLARKE, S.C.

Most commentaries on the careers of Senior Judges tend to focus on a somewhat academic analysis of the legacy of judgments which they leave behind them. However, I have always felt it appropriate that those aspects of a Judge's time on the Bench which leave less permanent footprints should also be recorded and marked. The view of those Barristers who practice before the Judge may not be objective, may be coloured by their own personal experiences, and may be just plain wrong. However, that is no reason why the retirement of a Judge should not be marked, at least in part, by some observations from the other side of the Bench.

Judge Costello was always regarded as something of a supporter of State power. In part, that was accurate. It is hardly surprising that one of the principal authors of the Just Society Policy of the 1960's should regard it as important that the State have significant power with which to do good. (In the interests of openness the writer should declare an interest as a sometime Constituency Chairman of Declan Costello, S.C., T.D., A.G., in the mid-70's, and an only marginally reconstructed supporter of the principles of the Just Society). However, such a view is, in my view, unduly simplistic. Precisely because he regarded it as important for the State to have extensive powers, Judge Costello was also rigorous in his requirements of those to whom such powers were entrusted. While he might have taken some persuading that powers had been abused, once that stage was reached there was little difficulty in obtaining extensive Orders to remedy any wrong perceived to have been done by the abuse of State powers. In so doing, as in so many other areas, Declan Costello could be very creative in the form and breadth of remedies which he considered to be available.

This leads neatly to a second significant characteristic. It was difficult to escape the conclusion that the primary role of an Advocate in a case before Judge Costello was to persuade him that right lay on your side. Once that was achieved, an almost joint exercise in finding an appropriate legal basis for providing a remedy was engaged in. The suggestion from the Bench which started with the words "and would you also argue Mister ..." could loosely be interpreted as "you have persuaded me that you should win. The legal basis which you put forward is idiotic. However, this a much better way of achieving your ends."

His judgments are littered with creative solutions towards providing remedies for those for whom he perceived such were needed. It would be difficult to point to any case where a Plaintiff, whom he perceived to have justice on his side, failed for legal technicality or the want of a suitable remedy.

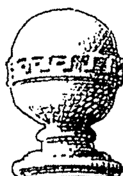
A particular difficulty frequently encountered was the Judge's regular tendency to make clear and unequivocal findings of fact frequently laced with expressions of disbelief in relation to the evidence put forward by one side. On more than one occasion, I have seen parties faced with an Appeal to the Supreme Court, where that Court seemed sympathetic to the merits of their case, but faced a very difficult task in finding any way of allowing the Appeal in the light of the facts found in the Court below. However, I am not sure that Barristers are themselves the best judges of the facts of a case. We come to the hearing with a one-sided knowledge of the facts. This does not prevent us from having strong views on the Judges' weighing of the evidence. The above reputation was so engrained at the Bar that I well recollect an ironic comment from a leading Silk, leaving Court after a judgment from the President (in which Judge Costello had stated that he felt that all the witnesses were doing their best to tell the truth) to the effect that the case should be reported on that point alone.

If the above were to be taken as suggesting an unsympathetic attitude from the Bench, it would be wholly inaccurate. In his relatively rare forays into the personal injury lists, Judge Costello showed himself to be quite sympathetic to those who had suffered severe injury (even if a little below average on the amount of damages). I will always remember a valuable lesson learned in my days as a young second Silk being led by Henry Hickey into what was, for me also, a rare venture into the mysteries of the Round Hall. The case involved very significant injuries, but was decidedly risky on liability. We were allocated to Judge Costello. Henry Hickey promptly settled the quantum of damages and allowed the case to run on liability alone. The wisdom of that tactic was demonstrated some days later with a judgment finding entirely for the Plaintiff without any contribution. Perhaps, again, the principles of the Just Society had some bearing on the imposition of significant standards on those in positions of authority or power, such as employers and the owners of commercial premises.

One final characteristic which should be mentioned from the practitioner's point of view came from the all too frequent circumstance where it became necessary to put forward an argument which the Barrister knew had little chance of persuading the Court but which, nonetheless, had to be put forward so that justice would be seen to be done. Provided the liberty wasn't abused, Judge Costello had a great ability to identify when such an argument was being put forward, and to allow the Counsel involved to make it without undue interruption. He knew that you knew that it wouldn't get you very far. However, he also knew that the public airing of the argument in Court was important from the litigant's point of view.

In his final years on the Bench as both actual and acting, President, there

can be little doubt that, from a practitioner's point of view, the preparedness of Judge Costello to bend the normal listing practices to enable urgent or important cases to be disposed of quickly and efficiently was a striking characteristic. In this, as in so much else, Judge Costello was not one to be hidebound by past practice or precedent. He was always willing to look at new ways of dealing with old problems. In that way he has had a profound effect on both the substance and practice of law in our time. I recollect that when he re-entered politics in the early 1970's (following a period of self-imposed exile) he declared, as his primary motivation, the desire not to be an applier of the law "but to be a law maker". Paradoxically, it may well have been after his final return from politics to the law that he exercised his greatest influence as a lawmaker •



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C.L.A.S.P. wishes to acknowledge and thank everyone who supported their fundraising initiatives in the past year. Membership fees of £20.00 for the coming year may now be contributed.
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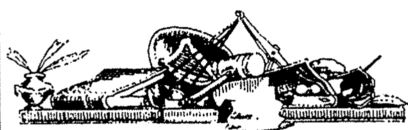

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Deportation of Refugees: Anisimova and the Safe First Country Principle

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Over four thousand people applied for refugee status in this jurisdiction in 1997, more than four times the number who sought refuge in the previous year.[1] Despite such ongoing increases, most of the Refugee Act, 1996 which sets out a relatively comprehensive machinery for the examination of refugee applications and ensures certain minimum safeguards, lies idly on the statute books, more than eighteen months after its enactment[2]. Indeed the Minister for Justice, Equality and Law Reform recently introduced a new administrative regime for the determination of applications for asylum which rolls back many of the guarantees contained in the 1996 Act. This regressive step has contributed towards the creation of a climate which is increasingly hostile to asylum seekers and refugees and which is evidenced by the emergence of groups of concerned citizens warning of cultural destabilisation and unacceptable financial cost if the number of persons seeking asylum continues at existing or larger levels.

Misconceptions about the consequences of the recent Supreme Court decision in *Anisimova v. Minister for Justice*[3] also appear to have heightened fears among asylum seekers. Reports that the decision gives authority to the Minister for Justice to deport all asylum seekers who have transited through another state *en route* to this jurisdiction fail to heed the limitations of the judgment. Despite the fact that the safe first country principle is not set out in any of the sources of domestic law and the Irish courts have yet to express an opinion upon its legal status, Mrs. Anisimova did not contest the Minister's ability to rely upon that principle. Instead, her judicial review focused upon the manner in which the Minster may apply the principle. Therefore, pending a decision by an Irish court on the legal status of the safe first country principle in Irish domestic law, doubts must persist about the legality of decisions to deport based upon the safe first country principle.

The Facts

Mrs. Anisimova is an ethnic Russian who resided in Moldova until January 1996. In the years following the demise of the Soviet Union, allegations of severe and systematic discrimination against people of such ethnic background have become increasingly frequent in Moldova. The applicant alleged that she herself had endured physical assault and, fearing for her safety and that of her ten year-old daughter, decided to seek refugee status in Ireland. Unable to obtain a visa to enter this jurisdiction, she travelled with her daughter to the United Kingdom in possession of a student visa. On arrival in Heathrow, she travelled to the Holyhead ferry terminal, spending a total of twelve hours in the United Kingdom before travelling onwards to their intended place of refuge.

Within a week of her arrival, Mrs. Anisimova applied to the Department of Justice for refugee status. Her application pre-dated the commencement in this jurisdiction of the 1990 Dublin Convention which now sets out the criteria in accordance with which responsibility is allocated among member states for examining the applications for asylum of persons who entered this state via another member state of the European Communities after the 1st September 1997. Articles 4-8 of the Dublin Conventionset out a series of criteria for the purposes of identifying the state responsible for the examination of the asylum applications of such persons. Considerations such as the presence in a member state of family members to whom refugee status has already been granted and the issuance of visa or residence permits by the authorities of a member state shall be taken into account. In the absence of such factors, responsibility may be attributed to the first member state entered by the asylum seeker[4]. The safe first country principle can also be found in the domestic legislation of many Western European states, Australia, the United States and Canada. As already noted there is no domestic legislative basis for the application of the rule in this jurisdiction in pre-Dublin Convention cases; the authorities have, nonetheless, employed this technique for over a decade.

The rule was first discussed before the High Court in *Fakih v. Minster for Justice*[5]. In this case, O'Hanlon J. considered whether undertakings given in a letter sent by the Department of Justice to the United Nations High Commissioner for Refugees regarding the procedures to be applied during the examination of asylum applications ('the *von Arnim letter*')[6] were legally binding upon the Department. The

Department submitted that if these procedures were indeed of legal effect, they should nonetheless be qualified by the application of the first safe country principle; in other words, the Minister must determine as a preliminary matter whether the application was one which should properly be considered in this jurisdiction and if, and only if, this were answered in the affirmative, should he proceed to apply the procedure for determining refugee status. The Minister based his argument upon the existence of "an international understanding that a person seeking asylum is under an obligation to seek it in the first safe country where he has an opportunity to do so having left the country where he claims he was subject to a well-founded fear of persecution or other serious threat to his personal safety."[7]. O'Hanlon J. concluded that the procedures were indeed binding, and added, without determining the matter one way or the other that "*if*[8] such an international understanding exists as is contended for by the respondent, then the [undertaking] must be read in the light of such understanding and qualified *pro tanto*".[9]

This principle was also applied by the Minister for Justice in respect of Mrs. Anisimova who, following the submission of her application for asylum, was promptly informed that the authorities of the United Kingdom were the appropriate authority for the determination of the matter. Contact with the authorities in the United Kingdom had revealed a willingness on their part to consider her application. Mrs. Anisimova conceded the existence of the international understanding, but contended that the Minster must conduct an investigation in accordance with the requirements of natural and constitutional justice and the relevant provisions of the *von Arnim* letter before disposing of this preliminary matter regarding the appropriate jurisdiction for the conduct of the substantive asylum examination.

The Judgments

Morris J., as he then was, handed down his judgment on the 18th February 1997. Although this matter was not contested, the learned trial judge endorsed O'Hanlon J.'s view in Fakih that the undertaking to adhere to the procedures set out in the von Arnim letter must be read in the light of, and qualified by, the safe first country principle. Morris J. then rejected the applicant's assertion that the authority to return to the first safe country must be exercised in the context of all of the facts of a given case and in particular, in this instance, with reference to the circumstances which brought the applicant to the United Kingdom and the reasons she had for wishing the application to be conducted and determined in this jurisdiction. The learned trial judge also rejected Mrs. Anisimova's assertion that when determining this preliminary matter of the appropriate situs for the consideration of her application, the Minister should have borne the "status of the country and its right to be regarded as a host third country" in mind.

Murphy J. delivered judgment on behalf of the Supreme Court on the 28th November 1997. The Court accepted Mrs. Anisimova's contention that the Minister's decision to transfer her application to the United Kingdom should have been preceded by an investigation into all the facts of the case, which investigation should have been conducted in accordance with the rules of natural and constitutional justice and the provisions of the *von Arnim* letter in so far as they were relevant to the conduct of the inquiry. The Court found, however, that such an investigation had in fact been carried out. Murphy J. adverted to the fact that, following two interviews between the applicant and an official at the Department of Justice, an examination of the material documentation produced by the applicant, telephone conversations with immigration officials in London and the United Nations High Commission for Refugees, a department official wrote to Mrs. Anisimova informing her that her application would not be processed in this jurisdiction in view of the "internationally accepted practice that asylum seekers must apply for asylum in the first safe country." The letter was also transmitted to the Minister. The applicant was then informed that she could make written representations to the Minister stating why her asylum application should not be transferred to the United Kingdom. Counsel for the applicant alleged that the terminology employed in the letter revealed that a decision to return had already been taken prior to the invitation to the applicant to submit written representations. The Court rejected this argument as an "over-refined and somewhat artificial interpretation of the relevant events and the terminology used to describe them" and concluded that the facts did not support the contention that the Minister failed to investigate the preliminary matter in accordance with the requirements of natural and constitutional justice and the pertinent provisions of the *von Arnim* letter.

As the legal status of the safe first country principle was not contested, and the preliminary decision to transfer the applicant to the United Kingdom had, in the court's opinion, been conducted in accordance with the dictates of constitutional and natural justice, deportation seemed to be the next step for Mrs. Anisimova and her daughter. They are still awaiting such events.

The Application of Customary International Law in the Domestic Legal Order

Customary international law is defined as "evidence of a general [state] practice accepted as law"[10]; the practice of states in this context is evidenced by domestic legislation, judicial decisions, internal governmental memoranda, ministerial statements in parliament and so on, on the one hand, and pertinent international conventions, on the other.

The *Fakih* and *Anisimova* cases clearly reveal that the Department of Justice regards the safe first country principle as a rule of international customary law. To date, the courts have not expressed any opinion in this regard, although they have accepted that if the principle does enjoy such normative status, it should also have legal effect in the domestic legal order. O'Hanlon J. made an *obiter* statement to that effect in *Fakih*, Morris J., as he then was, adopted that statement in *Anisimova*; neither judge, however, expanded in any manner on the questions at issue, namely the relation between international customary law and domestic Irish law, nor offered any guidance on the interpretation of Article 29.3 which provides that "Ireland accepts the generally recognised principles of international law as its rule of conduct in

its relations with other states." It is interesting, therefore, to refer to perhaps the most in-depth judicial analysis of these issues, which was undertaken by Barr J. in *The M.V. Toledo: ACT Shipping (PTE) Ltd. v. Minister for the Marine, Ireland and the Attorney General*[11]. Following a review of the relevant Irish authorities, Barr J. concluded that

> "Where there is a long-standing, generally accepted practice or custom in international law, then, subject to established limitations thereon... it is part of Irish domestic law, provided that it is not in conflict with the Constitution or with any enactment of the legislature or a rule of the common law.

"The learned trial judge added that when a customary international norm is a part of the domestic legal order "any issue arising on foot of it is justiciable in the Irish domestic courts."

It is proposed, therefore, to consider whether the safe first country principle satisfies the criteria set out in the dictum of Barr. J., quoted above. The first requirement corresponds, albeit in a somewhat more loosely-stated manner, with the requirement of "constant and uniform usage" imposed by the International Court of Justice[12]. If the principle does in fact meet the required level of general and uniform usage, it may, of course, nonetheless fail to find its way into the domestic legal order if it conflicts with the requirements of the Constitution, of legislation or of decisions of the courts.

The Safe First Country Principle as a Rule of International Customary Law

In the past twenty years, there has been a discernible shift towards restrictionism in the asylum policies adopted by many European states. One manifestation of this trend is the increasing use of the safe first country principle by states intent upon avoiding responsibility for the protection of asylum seekers. The rule, however, takes many different forms and possesses so many different nuances that it would be difficult to identify its exact parameters for the purposes of international customary law.

One fundamental uncertainty relates to the meaning of the word "safe" in this context. Many states have returned asylum seekers to the country in which they first arrived, without ensuring that the state is in fact safe for the asylum seeker in question. States ostensibly safe in themselves, in the sense that the asylum seeker will not face a threat of persecution while within its territorial confines, may nonetheless prove fundamentally unsafe for an asylum seeker who is returned by that first country to the state from which he originally fled, to face consequent persecution. Thus, for example, a number of European States have enacted laws providing for the use of "white lists" which set out countries allegedly free from persecution[13]. Asylum seekers from these countries are automatically returned to the state from which they fled without consideration of their application. The greatest concern about the use of such lists lies in the fact that inclusion of states therein often appears to be motivated by a desire to maintain or to cultivate friendly diplomatic relations with the country listed, and not because of their satisfactory human rights record. European countries endorsing such white lists may clearly therefore be unsafe for nationals of listed states.[14] This practice is merely one example of many which attests to the prevailing desire to curtail the protection afforded in Europe to asylum seekers and refugees. Such practices provide clear evidence of the unduly lax definition of "safety" often employed. In other respects, however, states have adopted a much stricter definition of this vital term. The non-refoulement principle, the core norm of both international customary and convention refugee law, is particularly pertinent in this regard. It asserts that a state may not return a person in any manner whatever to a state in which he or she will face persecution or other threat to life or liberty. The fact that states are thereby prohibited from returning applicants "in any manner whatever" to countries in which they will face such dangers means, in effect, that they cannot simply return asylum seekers to states which although ostensibly safe in themselves may, foreseeably start a process of chain deportation of the asylum seeker back to the locus of persecution. If an asylum seeker is in fact "refouled", all parties in the chain will be in breach of their obligations under this most central norm of international refugee law. States considering the transfer of an application to another jurisdiction are, therefore, required by this rule, to take reasonable steps to ensure that it will in fact prove to be a safe haven for the applicant in question. Viewed in this light, the prefix "safe" acquires real significance. It should be noted in this regard, that although many members of the international community have in recent years resorted to the safe first country principle, they have simultaneously re-affirmed their commitment to the principle of non-refoulement and consequently to the broader understanding of "safety".[15] In view, therefore, of the vast disparities which exist between the meanings attributed to such a vital component of the safe first country principle, it is difficult to assert with nay confidence that the principle possesses the uniformity which is a pre-recondition to the acquisition of customary international status.

Other important differences are to be found in the practice of the various states in question. Thus, in Belgium and the Netherlands, the principle is not triggered unless an asylum seeker has spent at least three months in the relevant first country. In Norway and Denmark, on the other hand, this aspect of the principle is interpreted with such strictness that very brief periods spent in the first country, such as time passed in a transit lounge, may result in the removal of the seeker in question from the latter states[16]. There is yet another variable in the formula. Although Morris J., (as he then was), asserted in an *obiter* comment that the Minister was precluded from considering the application because Mrs. Anisimova had transited through the United Kingdom, the principle as expressed in various instruments does not oblige a state to return the asylum seeker to the first safe country, howsoever defined; states are often granted the discretion to consider an application themselves, even though responsibility has been bestowed upon the first safe country.

The above examples, read together, clearly give cause to doubt whether the safe first country principle, although found in the statute books of a considerable number of states, is employed in a manner which is

sufficiently consistent or uniform to attract the status of customary international law. If, however, these reservations prove unfounded, the transfer of this rule into the domestic legal order turns upon its compatibility with the requirements of the Constitution, Acts of the Oireachtas and the common law.

Conformity with Various Sources of Irish Domestic Law

a) The Constitution

A line of Supreme Court decisions, of which *Russell v. Fanning*[17] is the first example, appears to lend support to the general proposition that it is constitutionally impermissible to deport a person from the state if there is a real risk that the constitutional rights of the person in question would be violated as a result. Although this sentiment was expressed in the context of applications to extradite, the considerations are clearly analogous. Furthermore, no significance should be attached to the fact that the parties in the above matters were Irish citizens; the courts have, by and large, adopted the view that non-political constitutional rights apply equally in respect of citizen and non-citizen[18]. In these cases, the Irish Courts took it upon themselves to examine the conditions pertaining in other jurisdictions for the purpose of monitoring compliance with the conditions required by Irish constitutional standards. Thus it is arguable that Irish constitutional law obliges a Minster to ensure that asylum seekers shall not be returned to the first country through which they travelled, if there is a real risk to their safety (including a real likelihood of chain deportation, resulting in return to a place of persecution) or, if the applicant will not obtain a fair hearing therein. Morris J., as he then was, may have rejected such an approach when he refused to accept the applicant's contention that "the status of the country and its right to be considered as a host third country" ought to have been taken into account by the Minister before any decision was taken on Mrs. Anisimova's transfer to the United Kingdom.

If applicable in this context, *Russell v. Fanning* represents the domestic embodiment of the non-refoulement principle. Thus, if it is in the future established that the safe first country principle is in fact a rule of customary international law and that rule is understood in the sense employed by many states, i.e., without the requisite attention to the "safety" component, then it may be argued that the rule is nonetheless not part of Irish domestic law, because of the conflict with the *Russell v. Fanning* principle.

b) Legislation

Differences of judicial opinion have emerged in the past in relation to the relative positions occupied by customary international law and of domestic legislation in the hierarchy of the Irish legal order[19]; the dictum of Barr J., however, by passes this problem, by denying customary international rules the status of domestic law at all if they conflict with, *inter alia*, domestic legislation. It is not always easy to identify situations of conflict; do they, for example, arise when a rule of customary rule refers to a topic which is already exhaustively regulated by an Act of the Oireachtas? More specifically, does the fact that Article 13 of the Aliens Order 1946, adopted pursuant to the Aliens Act, 1935, which states that deportation can only be executed where the alien's presence in the state "is not conducive to the public good", preclude reliance upon the safe first country principle as a basis for procuring the deportation of persons in situations akin to Mrs. Anisimova's. On the one hand, it would clearly be contrary to the intention of the Oireachtas and of the Minister, as stated in the Aliens Act and Order respectively, to introduce a new basis for deportation. Such an interpretation would, however, clearly severely curtail the application of customary international law in domestic Irish law, in a manner which appears to be at odds with the approach adopted by the courts in earlier cases.[20]

Conclusion

As long as the Refugee Act, 1996 remains unimplemented, Irish refugee law will remain a clumsy amalgam of immigration law and administrative procedure, under the supervision of the requirements of constitutional and natural justice. It is an area of the law which lacks precision and clarity, a deficit which is particularly unfortunate in view of the significant impact which it can have upon the lives of asylum seekers and refugees. From the point of view of achieving certainty in relation to one aspect of refugee law, therefore, it is in a sense unfortunate that Mrs. Anisimova did not contest the assertion by the Minister for Justice that the safe first country principle had the force of law in this jurisdiction. It is, thus, hoped that the courts will soon be presented with the task of determining whether the safe first country principle is in fact a rule of customary international law and, if so, whether that rule conforms with the requirements of the Constitution and of other domestic provisions, if pertinent. If this question in turn receives an affirmative response, the matter of the consequences of the application of the rule in this state, particularly for those living under the threat of deportation, will remain to be teased out. ●

1 Figures presented by Mr. John O'Donoghue, Minister for Justice, Equality and Law Reform to the Dail; The Irish Times, 8 January 1998.
2 6 of the 30 sections in the Act have in fact come into force; none of these sections, however, relate to the new procedure for the determination of refugee status. Section 1 sets out the definitions of the various terms used throughout the Act, while Section 2 defines the term "refugee" itself. Section 24(1) provides a definition of "programme refugees". Section 5 relates to the principle of *non-refoulement*, discussed *op cit*.., and section 22 refers to the Dublin Convention, also discussed, *op cit*.. Firstly, section 25 provides that the provisions of the Act shall not reclude the extradition of persons pursuant to the Extraditions Act, 1965 to 1994. Statutory Instrument 359 of 1997 brought section 1, 2, 5, 22 and 25 into force. Statutory Instrument 290 of 1996 brought section 24(1) into force.
3 Unreported, Supreme Court, 28th November 1998.
4 Article 7(1). This article, however, provides that where none of the conditions regarding family ties, visas or residence permits apply, the state of first entry shall be responsible for the determination of the application if and only if it does not require an entrance visa and the state in which the application is lodged does. If neither the state of first entry nor the state in which the application is lodged require visas, then the state in which the application is lodged shall retain responsibility.
5 [1990] 2 IR 406.
6 So called after the representative of the United Nations High Commission for Refugees to whom it was addressed. The text of the letter is set out in the judgment of Murphy J..
7 Supra, f.n. at 424.
8 Italic inserted.
9 Supra, f.n. at 425.

10 Per Article 38 of the Statute of the International Court of Justice.

11 [1995] 2 ILRM 30. A detailed analysis of this decision may be found in Gaffney, John P., The Status of International Customary Law in Irish Domestic Law: A Review of the 'Toledo' Case, Irish Law Times, August 1996, 192.

12 The Asylum Case; Colombia v. Peru, ICJ Reports (1950) 276.

13 This concept was, for example, introduced into English law by the Immigration and Asylum Act, 1996.

14 There is also an increasing tendency in many European states to resort to 'fast-track' or accelerated procedures for the examination of asylum applications where it is alleged that the application in question is without merit or, more worryingly, merely procedurally defective; in this regard, see Section 12 of the Refugee Act, 1996 and Paragraph 12 of the new administrative procedure introduced by the Minister for Justice, Equality and Law Reform with immediate effect on 10th December (referred to as the Hope Hanlan letter, Ms. Hanlan being the relevant representative of the United Nations High Commission for Refugees to whom the letter was addressed.

15 Thus, for example, in the Preamble to the Dublin Convention, the Member States of the European Communities re-affirmed their commitment to the provision of adequate protection for refugees in accordance with the 1951 Geneva Convention Relating to the Status of Refugees, of which the guarantee of non-refoulement is one of the most important examples. Similar statements are to be found in various inter-governmental resolutions adopted by the Member States pursuant to the Maastricht Treaty, although those resolutions invariably seek to curtail the rights and protection afforded to asylum seekers and refugees.

16 For a review of the asylum laws in operation in various European states, see The Minority Rights Group, Asylum in Europe: A Hostile Agenda (Minority Rights Group, 1997).

17 [1988] IR 505. Finucan v. McMahon [1990] 1 IR 165 and Clarke v. McMahon [1990] 1 IR are also of interest in this regard.

18 In this regard, see Northamptonshire County Council v. A.B.F [1982] ILRM 164, Finn v. Attorney General [1983] IR 154, and Wong v. Minister for Justice, Unreported, High Court, 30 July 1992. The courts have not, always, however, adopted this approach; see, for example, the decision of Henchy J. in The State (Nicolaou) v. An Bord Uchtala [1966] IR 567 and Fajujonu v. Minister for Justice [1990] 2 IR 151.

19 See The Government of Canada v. Employment Appeals Tribunal and Burke [1992] 2 IR 484.

20 See The State (Duggan) v. Tapley [1952] IR 62; The State (Somers Jennings) v. Furlong [1966] IR 183.

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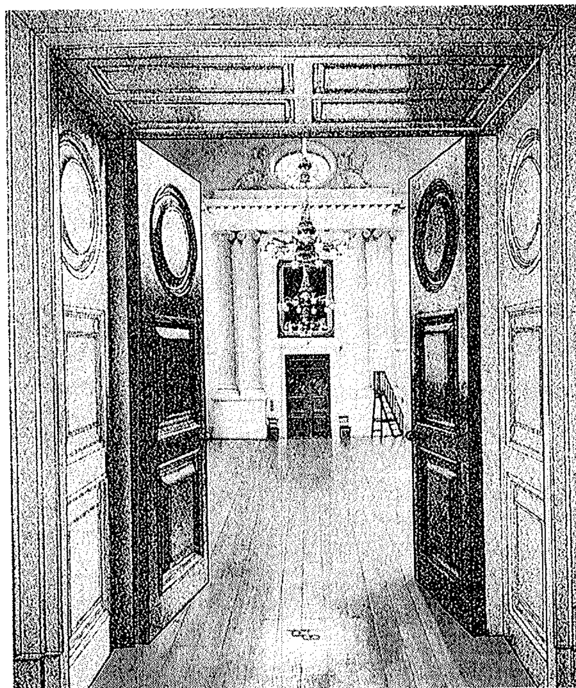

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Volume 3, Issue 4. Jan/Feb 1998. ISSN 1339-3426

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High Court: **Costello P.**
14/11/1997

Constitutional validity of the 15th Amendment to the Constitution Act, 1995; Constitutional validity of the Family Law (Divorce) Act, 1996; challenge to the appointment of a Minister by a retired Government; challenge to the appointment of a Judge as chairperson of a committee; constitutional validity of appointment of a Judge as sole member of a Tribunal established under the provisions of the Tribunals of Enquiries (Evidence) Act 1921; constitutional validity of the establishment by a retired Government of the office of Tanaiste and the appointment of Minister of State to that office; Interpretation of Articles 15.2.1, 15.4.1, 34.3.2, 35.3 of the Constitution
Held : All claims dismissed

Contract

Persson v. Storme

Supreme Court: O'Flaherty J., Barrington J., **Barron J.**
28/11/1997

Recission; agency; sale of goods; merchantability; purchase of horse which was unfit for showjumping; whether plaintiffs entitled to rescind contract on grounds of horse's injury; whether condition of horse material; whether plaintiffs aware at time of purchase that the first named defendant was acting as principal and not as agent; whether contract can be rescinded as a result of misrepresentation
Held: Plaintiffs entitled to rescind contract

Copyright, Designs And Patents

Universal City Studios Inc. v. Mulligan

High Court: **Laffoy J.**
28/11/1997

Copyright; alleged infringement; construction of statute; sale of pirate videos; whether lacuna in copyright legislation; whether video tapes come within statutory definition of cinematograph films in s.18(10), Copyright Act, 1963; whether possibility of updating construction
Held: A videotape is a cinematograph film within the statutory definition

Article

Is there a liability for playing music to telephone callers "on hold" - an alternative view
Sheehy, Helen
1997 CLP 222

Criminal

Quinlivan v. Governor of Portlaoise

High Court: **McGuinness J.**
09/12/1997

Constitutionality of legislation; retrospectivity; statutory interpretation; applicant charged with common law offence of false imprisonment; alleged offence occurred prior to enactment of Non-Fatal Offences Against the Person Act, 1997; s.15 created statutory offence of false imprisonment; s.28 abolished common law offence of false imprisonment; no saving provision; no legislative provision covering abolition of common law offences; applicant sought order for release; whether pre-1997 offence of false imprisonment really statutory or hybrid offence; whether legislature intended elimination of pending prosecutions for common law false imprisonment; whether court obliged to infer intention to include transitional provisions; whether in absence express provisions to contrary criminal proceedings pending when legislation enacted should be determined according to law at commencement of proceedings; whether statute should be construed as prospective only; whether statute constitutes legislative interference in judicial process
Held: Where two statutory interpretations are possible the court must adopt the most Constitutional; the court must presume legislation intended to operate prospectively only; reliefs refused

P.W. v. D.P.P.

High Court: **Flood J.**
27/11/1997

Due process; delay; reasonable expedition; prosecution for alleged indecent assaults; order sought

prohibiting prosecution; twelve years between last alleged offence and complaint; whether delay due to applicant's dominance in complainant's life; whether death of defence witness constituted prejudice due to delay; whether Constitutional right to fair trial prejudiced due to delay
Held: Order granted

D.C. v. D.P.P.

High Court: **Geoghegan J.**
31/10/1997

Due process; delay; alleged indecent assaults; order sought prohibiting prosecution; thirteen years since last alleged offence; whether delay frustrated recollection of movements and production of alibis; whether delay consequence of applicant's alleged activities; whether difficulties in producing alibis constituted prejudice due to delay; whether health of applicant a consideration
Held: Order refused; given extent of allegations, no evidence applicant's defence prejudiced; health not serious consideration

Statutory Instruments

Criminal justice act, 1994 (section 46(1)) (no.2) order, 1997
SI 366/1997
Commencement Date: 2/9/1997

Criminal justice act, 1994 (section 47 (1)) (no. 2) order, 1997
SI 367/1997
Commencement Date: 2/9/1997

Criminal justice act, 1994 (section 55 (1))
SI 368/1997

Criminal justice (miscellaneous provisions) act, 1997 (section 6) regulations, 1997
SI 345/1997
Commencement Date: 8/9/1997

Article

Money laundering - industry guidelines for the financial sector
Criminal Law and Procedure
Reid, Paula
1996 CLP 67

Defence Forces

Library Acquisition

Military law : Ireland
Humphreys, Gerard, Craven, Ciaran
Military law in Ireland, Gerard Humphreys and Ciaran Craven
Dublin Round Hall S & M 1997

Education

Statutory Instrument

Education (alteration of name of department and title of minister) order, 1997
SI 430/1997
Commencement Date: 1/10/1997

Employment

Denny & Sons (Irl) Ltd. v. Minister for Social Welfare
Supreme Court: **Hamilton C.J., Keane J., Murphy J.**
01/12/1997

Employment relationship; contract of service; contract for services; findings of fact; role of High Court on case stated; decision of appeals officer that plaintiff was employed under a contract of service; whether supermarket demonstrators are employed under a contract of service or contract for services; whether employment is insurable employment; whether description in contract conclusive; factors to be taken into account in determining employment relationship; whether High Court judge correct in holding that findings of fact of appeals officer could not be interfered with; whether appeals officer erred in law; s.5(1)(a) Social Welfare (Consolidation) Act, 1981
Held: Plaintiff employed under a contract of service; High Court judge correct in upholding decision of appeals officer

Crampton v. Building and Allied Trade Union

High Court : **Laffoy J.**
20/11/1997

Interlocutory injunction; industrial action; construction site; injunction sought to prevent industrial action; defendant objection to plaintiff practice of sub-contracting available work on the construction site; whether defendants protected by s.11 of the Industrial Relations Act 1990; whether the Court is precluded from granting the relief sought by virtue of s.19 of the Industrial Relations Act 1990
Held : Interlocutory injunction granted

Statutory Instruments

Employment regulation order (catering joint labour committee), 1997
SI 341/1997
Commencement Date: 19/8/1997

Employment regulation order (hotels joint labour committee), 1997
SI 342/1997
Commencement Date: 19/8/1997

Industrial training levy (food, drink and tobacco industry, 1998 scheme) order, 1997
SI 450/1997
Commencement Date: 1/1/1998

Industrial training levy (chemical and allied products industry, 1998 scheme) order, 1997
SI 451/1997
Commencement Date: 1/1/1998

Organisation of working time act, 1997 (commencement) order, 1997
SI 392/1997
Commencement Date: 30/9/1997, 30/11/1997, 1/3/1997

Enterprise and employment (alteration of name of department and title of minister) order, 1997
SI 305/1997
Commencement Date: 12/7/1997

Enterprise, trade and employment (delegation of ministerial functions) order, 1997
SI 329/1997
Commencement Date: 28/7/1997

Enterprise, trade and employment (delegation of ministerial functions) (no 2) order, 1997
SI 330/1997
Commencement Date: 28/7/1997

Environmental Law

Statutory Instruments

Air pollution act, 1987 (petroleum vapour emissions) regulations, 1997
SI 375/1997
Commencement Date: 1/10/1997

Air pollution act, 1987 (petroleum vapour emissions) regulations, 1997
SI 375/1997
Commencement Date: 1/10/1997

Environment and local government (delegation of ministerial functions) order, 1997
SI 427/1997
Commencement Date: 7/10/1997

Environmental protection agency act, 1992 (control of volatile organic compound emmissions resulting from petrol storage and distribution) regulations, 1997
SI 374/1997
Commencement Date: 1/10/1997

Environment and local government (delegation of ministerial functions) (no 2) order, 1997
SI 428/1997
Commencement Date: 7/10/1997

Equity

Articles

Equity and the pursuit of hot money - warning to banks
Ashe, Michael
1997 CLP 188

Once a mortgage, not necessarily always a mortgage
Chandran, Ravi
1997 CLP 258

European Law

Statutory Instrument

European Communities (suspension of imports of pistachios and certain products derived from pistachios originating in or consigned from Iran) regulations, 1997
SI 432/1997
Commencement Date: 15/10/1997

Article

Freedom of establishment for professionals
O'Mara, Ciaran
1997 CLP 251

Evidence

Article

Explaining the unexpected
Reid, John
1997(Nov) GILSI 30

Family

O'D. v. O'D.

Supreme Court: **Keane J.,** Lynch J., Barron J.
18/12/1997

Property adjustment; judicial separation; deed of separation; whether property adjustment order res judicata; whether decree of judicial separation can be granted where a deed of separation exists; whether estopped from granting decree of judicial separation; whether claim frivolous and vexatious; s.12 Married Women's Status Act, 1957; Judicial Separation and Family Law Reform Act, 1989
Held: No jurisdiction to grant a decree of judicial separation where deed of separation exists

A.S. v. E.H.

High Court: **Geoghegan J.**
20/11/1997

Child abduction; wrongful retention; plaintiff seeking recognition of an Order made by the English High Court granting the plaintiff interim care and control of the minor and sought to compel the defendant to return the child to England; habitual residence of the child was England; mother deceased; child removed from the father by the defendants; whether the defendant had rights of custody under the Hague Convention; child born out of wedlock; whether as and from the time that the defendants had notification of the English Order, the retention of the child in Ireland was wrongful; Luxembourg Convention; Hague Convention;
Held: Order granted

A.S. v. P.S.

High Court: **Geoghegan J.**
20/11/1997

Child abduction; wrongful retention; application for return of children to England; whether grave risk that return of children would expose them to psychological harm of a serious nature; whether the respondent was guilty of acquiescence; interpretation of Arts. 12 & 13 of the Hague Convention
Held : Application refused

Fisheries

Statutory Instruments

Celtic Sea (prohibition on herring fishing) (revocation) order, 1997
SI 415/1997
Commencement Date: 5/10/1997

Cod (restriction on fishing) (no 7) order, 1997
SI 352/1997
Commencement Date: 1/8/1997 to 31/8/1997

Cod (restriction on fishing) (no 8) order, 1997
SI 384/1997
Commencement Date: 1/9/1997 to 30/9/1997

Cod (restriction on fishing) (no 9) order, 1997
SI 412/1997
Commencement Date: 1/10/1997 to 31/10/1997

Common Sole (restriction on fishing in the Irish Sea) (no 2) order, 1997
SI 387/1997
SI 153/1997
Commencement Date: 28/9/1997

Haddock (restriction on fishing) (no 5) order, 1997
SI 349/1997
Commencement Date: 1/8/1997 to 31/8/1997

Haddock (restriction on fishing) (no 6) order, 1997
SI 385/1997
Commencement Date: 1/9/1997 to 30/9/1997

Hake (restriction on fishing) (no 4) order, 1997
SI 353/1997
Commencement Date: 1/8/1997 to 31/8/1997

Hake (restriction on fishing) (no 5) order, 1997
SI 386/1997
Commencement Date: 1/9/1997 to 30/9/1997

Hake (restriction on fishing) (no 6) order, 1997
SI 413/1997
Commencement Date: 1/10/1997 to 30/11/1997

Monkfish (restriction on fishing) (no 7) order, 1997
SI 350/1997
Commencement Date: 1/8/1997 to 30/9/1997

Monkfish (restriction on fishing) (no 8) order, 1997
SI 351/1997
Commencement Date: 1/8/1997 to 30/9/1997

Monkfish (restriction on fishing) (no 9) order, 1997
SI 411/1997
Commencement Date: 1/10/1997 to 30/11/1997

Food & Drugs

Statutory Instrument

Importation of pathogenic agents order, 1997
SI 373/1997
Commencement Date: 22/9/1997

Garda Siochana

Statutory Instrument

Garda Siochana (admissions and appointments) (amendment) regulations, 1997
SI 470/1997
Commencement Date: 8/5/1997

Information Technology

Article

Cyberlaw: ten recent Internet cases
Davis, Dai
1997(Dec) GILSI 14

Chips with everything
Kinahan, Peter
1997(Nov) GILSI 22

Teleworkers of the world unite
Rothery, Grainne
1997(Dec) GILSI 28

Legal Aid

Article

No foal, no fee in the UK
Connelly, Sinead
1997(Dec) GILSI 18

Legal Profession

Maher, In re

High Court : **Costello P.**
12/11/1997

Professional misconduct; solicitor and client relationship; whether the solicitor was guilty of professional misconduct in that he gave an undertaking on behalf of his client as security for a loan to the client; whether his failure to obtain the Land Certificate required as security amounted to professional misconduct; whether the solicitor was guilty of professional misconduct in that he allegedly acted in conflict with the interests of his client
Held : Solicitor not found to be guilty of professional misconduct

Article

O'Halloran, Barry
Working on quality street
1997(Dec) GILSI 23

Licensing

Devlin v. The Minister for Arts, Culture and the Gaeltacht

High Court : **McGuinness J.**
30/10/1997

Renewal of Falconry and Possession Licences; refusal to grant renewal; whether applicant complied with the requirements of the Wildlife Act 1976(Birds of Prey) Regulations; whether the refusal to renew licences unreasonable or irrational;whether procedures adopted by the respondent were unfair
Held : Relief refused

Medical

Statutory Instruments

Health and children (delegation of ministerial functions) order, 1997
SI 401/1997
Commencement Date: 16.9.1997

Health (alteration of name of department and title of minister) order, 1997
SI 308/1997
Commencement Date: 12/7/1997

Health boards (tenure of office of chief executive officers) order, 1997
SI 391/1997
Commencement Date: 16/9/1997

Hepatitis C Compensation Tribunal regulations, 1997
SI 440/1997
Commencement Date: 30/10/1997

Hepatitis C Compensation Tribunal act (number of ordinary members of tribunal) regulations, 1997
SI 441/1997
Commencement Date: 30/10/1997

Nuisance

Clifford v. The Drug Treatment Centre Board

High Court : **Mc Cracken J.**
07/11/1997

Interlocutory injunction; nuisance; Out-patient drug treatment care; plaintiffs business adjacent to drug treatment centre; injunction sought to prevent defendants from increasing the service ; whether the defendants negligent in accepting more patients; whether defendants guilty of public nuisance; whether alleged nuisance is actionable
Held : Interlocutory injunction granted

Planning

Wicklow County Council v. Child

Supreme Court: **Barrington J.,** Keane J., Barron J.
03/12/1997

Planning permission; default; notification; injunction; planning permission refused for two-storey house; respondents restrained from erecting two storey house but granted liberty to complete roof on first storey; whether plaintiffs had received planning permission by default
Held: Appeal dismissed; order of High Court affirmed

Practice & Procedure

Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.

Supreme Court: **Murphy J.,** Lynch J., **Barron J.**
19/12/1997

Third party joinder; company formation; separate legal personality; parent company; wholly owned subsidiary; locus standi; additional evidence; whether parent company should be joined; whether wholly owned subsidiary together with parent company forms a single economic entity; whether parent should be joined so as to render its assets available to meet liability of subsidiary; whether additional evidence admissible; O.15 r.13 Rules of the Superior Courts
Held: Application to join parent company refused; liberty to introduce new evidence refused

Commissioners of Irish Lights v. Maxwell, Weldon & Darley Solicitors

Supreme Court: O'Flaherty J., Barrington J., **Keane J.,**
01/12/1997

Costs; taxation; level of fees; brief fee; counsel's fees allowed in full by Taxing Master; objections raised; whether fees reasonable; whether a reasonable careful and prudent solicitor would have agreed fee; test of appropriateness
Held: Objection allowed; fee reduced

Kennedy v. Law Society of Ireland

Supreme Court ; Hamilton C. J., **Keane J., Murphy J.** (ex-tempore)
28/11/1997

Discovery; purported invalidity of a report of a third named party; subsequent invalidity of a decision based on that report; whether certain documents were relevant to proceedings; whether third party is in possession of records or memorandem of verbal discussions which might advance the cause of the plaintiff
Held: Appeal allowed for limited discovery only, third party to be indemnified against any expense incurred in connection with making the discovery.

Statutory Instruments

District Court (fees) order, 1997
SI 369/1997
Commencement Date: 1/10/1997

District Court districts and areas (amendment) (no 2) order, 1997
SI 377/1997
SI 5/1961
Commencement Date: 10/9/1997

District Court districts and areas (amendment) and variation of days (no 3) order, 1997
SI 382/1997
Commencement Date: 14/10/1997

Rules of the superior court (no.3) 1997
SI 343/1997
Commencement Date: 1/9/1997

Rules of the Superior Courts (no 6), 1997 [transfer of sentenced persons]
SI 347/1997
1/9/1997

Rules of the Superior Courts (no 8) (disclosure and admission of reports and statements) (amendment), 1997
SI 471/1997
Commencement Date: 1/9/1997

Article

Implied undertakings - valuable safeguard or unnecessary obstacle
Floinn, Benedict
1997 CLP 200

Road Traffic

Article

Explaining the unexpected
Reid, John
1997(Nov) GILSI 30

Sea & Seashore

Statutory Instrument

Marine and natural resources (delegation of ministerial functions) order, 1997
SI 383/1997
Commencement Date: 2/9/1997

Social Welfare

Statutory Instruments

Social welfare (consolidated supplementary welfare allowance) (amendment) regulations, 1997
SI 334/1997
Commencement Date: 21/7/1997

Social welfare (consolidated payments provisions) (amendment) (no 6) (carer's allowance) regulations, 1997
SI 333/1997
Commencement Date: 21/7/1997

Social welfare (consolidated payments provisions) (amendment) (no 7) (treatment benefit) regulations, 1997
SI 390/1997
Commencement Date: 30/7/1997

Social welfare (consolidated payments provisions) (amendment) (no 8) regulations, 1997

LAW LIBRARY
FOURCOURTS
DUBLIN 7.

SI 436/1997
Commencement Date: 16/10/1997

Social welfare (consolidated payments provisions) (amendment) (no 9) (widow's and widower's (non-contributory) pension) regulations, 1997
SI 438/1997
Commencement Date: 17/10/1997

Social welfare act, 1997 (sections 25, 26(1)(c) and 26(1)(d)) (commencement) order, 1997
SI 435/1997
Commencement Date: 17/10/1997

Social welfare act, 1997 (part V) (commencement) order, 1997
SI 437/1997
Commencement Date: 17/10/1997

Social welfare (alteration of name of department and title of minister) order, 1997
SI 307/1997
Commencement Date: 12/7/1997

Taxation

Statutory Instrument

Control of excisable products (amendment) regulations, 1997
SI 389/1997
Commencement Date: 1/10/1997

Library Acquisitions

Tiley and Collison's UK Tax Guide
Tiley, John
London Butterworths 1997
M335

Revenue Law
Collison, David
Butterworths

Telecommunications

Statutory Instruments

European Communities (telecommunications infrastructure) regulations, 1997
SI 338/1997
Telecommunications (amendment) (no 6) scheme, 1997

SI 378/1997
Commencement Date: 1/6/1997 and 9/9/1997

Telecommunications (amendment) (no 7) scheme, 1997
SI 379/1997
Commencement Date: 1/7/1997 and 9/9/1997

Wireless telegraphy act, 1926 (section 3) (exemption of mobile telephones) order, 1997
SI 409/1997
Commencement Date: 1/10/1997

Wireless telegraphy act, 1926 (section 3) (exemption of cordless telephones) order, 1997
SI 410/1997
Commencement Date: 1/10/1997

Tort

Radio Limerick One Ltd. v. Treaty Radio Ltd.ort

High Court: **Costello P.**
13/11/1997

Passing off; order sought preventing broadcasting; plaintiff's broadcasting contract terminated for serious breaches; defendant subsequently obtained contract to broadcast on same wavelength in same area; whether use of similar radio call signs constituted passing off; whether signs merely referring to same wavelength and area; whether plaintiff had goodwill to protect since licence lost; whether on balance of convenience relief should be granted
Held: No tort established; no goodwill to protect; relief refused

Wills

Article

Where there's a will
Mongey, Eamon
1997(Nov) GILSI 12

At a Glance

European provisions implemented into Irish Law up to 23/01/98.

Information compiled by Mary Smartt, Law Library, Four Courts, Dublin 7.

European Communities (trade with Iraq regulations, 1997
SI 215/1990, SI 262/1990, SI 52/1991, SI 100/1991
Commencement Date: 3/9/1997
(REG 2465/96)

Postal and telecommunications services act, 1983 s111 as amended
31/7/1997
(DIR 95/51, 90/388, 96/19)

European Communities (satellite telecommunications services) regulations, 1997
SI 372/1997
Commencement Date: 8/9/1997
(DIR 94/46)

Court Rules

District Court (fees) order, 1997
SI 369/1997
Commencement Date: 1/10/1997

District Court districts and areas (amendment) (no 2) order, 1997
SI 377/1997
SI 5/1961
Commencement Date: 10/9/1997

District Court districts and areas (amendment) and variation of days (no 3) order, 1997
SI 382/1997
Commencement Date: 14/10/1997

Rules of the Superior Court (no.3) 199
SI 343/1997
Commencement Date: 1/9/1997
Rules of the Superior Courts (no 6), 1997 [transfer of sentenced persons]
SI 347/1997
1/9/1997

Rules of the Superior Courts (no 8) (disclosure and admission of reports and statements) (amendment), 1997

SI 471/1997
Commencement Date: 1/9/1997

Acts of the Oireachtas 1997

Information Compiled by Sharon Byrne, Law Library, Four Courts, Dublin 7.

1/1997 - Fisheries (commission) Act, 1997
signed 12/02/1997
commencement on signing

2/1997 - European Parliament Elections Act, 1997
signed 24/02/1997
commenced 21/04/1997 by S.I. 163/1997

3/1997 - Decommissioning Act, 1997
signed 26/02/1997

4/1997 - Criminal Justice (miscellaneous provisions) Act, 1997
commenced in part on 04/04/1997

5/1997 - Irish Takeover Panel Act, 1997
commences in part 14/04/1997by S.I. 158/1997
remainder commences 01/07/1997 by S.I. 255/1997

6/1997 - Courts Act, 1997
commenced on signing 20/03/1997

7/1997 - Dublin Docklands Development Authority Act, 1997
commences in part 27/03/1997
remainder commences 01/05/1997 by S.I 135/1997.

8/1997 - Central Bank act, 1997
commences 09/04/1997 by S.I.150/1997

9/1997 - Health (provision of information) Act, 1997
commenced 01/04/1997

10/1997 - Social Welfare Act 1997
commenced in part in act
commenced in part by S.I. 161/1997 (08/04/1997)
commenced in part by S.I. 250/1997 (04/06/1997)
commenced in part by S.I. 248/1997 (09/06/1997)

11/1997 - National Cultural Institutions Act, 1997
commenced in part by S.I. 222/1997 (02/06/1997 & 01/01/1998)

12/1997 - Litter Pollution Act, 1997
commenced 01/07/1997 by S.I. 213/1997

13/1997 - Freedom of Information Act
signed 21/04/97

14/1997 - Criminal Law Act, 1997
commences 22/08/1997

15/1997 - Credit Union Act
commenced in part by S.I. 403/1997

16/1997 - Bail Act
to be commenced by.S.I.

17/1997 - Committees of the Houses of the Oireachtas (compellability, privileges and immunities of witnesses) Act
signed 5/05/97

18/1997 - Family Law (miscellaneous provisions) Act,
signed 05 05 97

19/1997 - International Development Association (amendment) Act, 1997
signed 07.05.97

20/1997 - Organisation of Working Time Act
sub-section 3 to be commenced by S.I.
remainder to commence 21/04/1998

21/1997 - Housing (miscellaneous provisions) Act
commenced 01/07/1997 by S.I. 247/1997

22/1997 - Finance Act
commenced in part by S.I. 313/1997

23/1997 - Fisheries (amendment) Act
to be commenced by S.I.

24/1997 - Universities Act
commenced by S.I. 254/1997

25/1997 - Electoral Act
commenced by S.I.245/1997 & 233/1997

26/1997 - Non - Fatal Offences Against the Person Act
signed 19.05.97

27/1997 - Public Service Management (no.2) Act
commenced by S.I. 339/1997

28/1997 - Chemical Weapons Act
commenced 01/07/1997 by S.I. 269/1997

29/1997 - Local Government (financial provisions) Act
commenced by S.I. 263/1997 (apart from s7)

30/1997 - Youth Work Act
commenced 19/06/1997 by S.I. 260/1997

31/1997 - Prompt Payment of Accounts Act
commences 02/01/1998 by S.I. 239/1997

32/1997 - ICC Bank Act
commenced 21/05/97

33/1997 - Licensing (combating of drug abuse) Act
commenced 21/06/1997

34/1997 - Hepatitis C Compensation Tribunal Act
to be commenced by S.I.

35/1997 - Registration of Title (amendment) Act, 1997
signed 16/07/1997

36/1997 - Interperation (amendment) Act, 1997
signed 04/11/1997

37/1997 - Merchant shipping (commissioners of Irish lights) Act, 1997
commenced 18/11/1997

38/1997 - Europol Act, 1997
signed 24/11/1997
to be commenced by S.I.

39/1997 - Taxes consolidation Act, 1997
signed 30/11/1997

40/1990 - Children act, 1997

signed 09/12/1997

41/1997 - Transfer of Sentenced Persons (amendment) Act, 1997
signed 17/12/1997

42/1997 - Tribunals of Inquiry (evidence)(amendment) Act, 1998
signed 18/12/1997

43/1997 - Courts (no.2) Act, 1997
signed 18/12/1997

44/1997 - Irish Film Board (amendment) Act, 1997
signed18/12/1997

45/1997 - Appropriation Act, 1997
signed 19/12/1997

46/1997 - Scientific and Technological Education (investment) Fund Act, 1997
signed 24/12/1997

Seventeenth Amendment of the Constitution Act, 1997
signed 18/11/1997

Government Bills in Progress

Information Compiled by Sharon Byrne, Law Library, Four Courts, Dublin 7.

Air Navigation and Transport (amendment) Bill, 1997
Committee - Dail

*Arbitration (international committee) Bill, 1997
Committee - Dail

*Child Trafficking & Pornography Bill, 1997
1st Stage - Dail

*Courts Service Bill, 1997
1st stage - Dail

*Court Services (no2) Bill, 1997
1st Stage - Seanad

*Criminal Justice (no.2) Bill, 1997
Committee - seanad

*Education (no.2) Bill, 1997
1st stage - Dail

*Electoral (amendment) Bill, 1997
1st stage - Dail

Employment Equality Bill, 1997
1st stage - Seanad

*Employment Rights Protection Bill, 1997
1st stage - Dail

International War Crimes Tribunals Bills, 1997
1st stage - Dail

*Local Government (planning and development) Bill, 1997
1st stage - Dail

*Local Government (planning and development)(amendment)(no.2) Bill, 1997
1st stage - Seanad

* Minister for Arts, Heritage, Gaeltacht & the Islands (powers & functions) Bill, 1997
Committee - Dail

*Plant Varieties (proprietary rights)(amendment) Bill, 1997
1st stage - Dail

*Protection of Workers (shops) Bill, 1997
2nd Stage - Dail

*Protection of Workers (shops)(no.2) Bill, 1997
2nd stage - Seanad

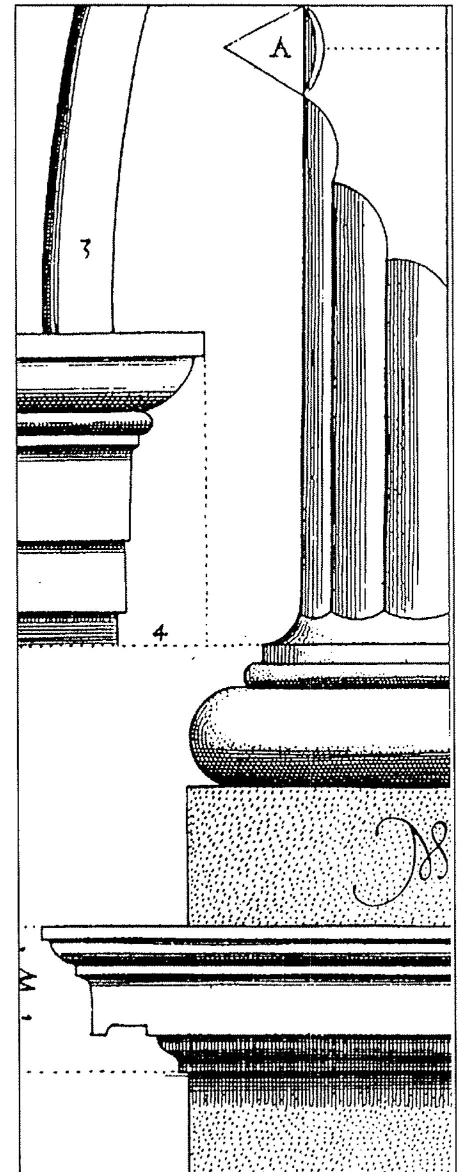
*Turf Development Bill, 1997
Committee - Dail

Private Members Bills in progress

Information Compiled by Sharon Byrne, Law Library, Four Courts, Dublin 7.

*Eighteenth Amendment of the Constitution Bill, 1997
Committee - Dail

*Door Supervisors Bill, 1997
1st stage - Dail



Abbreviations

BR = Bar Review
CLP =Commercial Law pratitioner
CPLJ = Conveyancer & Property Law Journal
DULJ =Dublin University Law Journal
GILSI =Gazette of the Incorporated Law Society of Ireland
ICLR = Irish Competition Law Reports
IFLR = Irish Family Law Reports
ILT =Irish Law Times
IPELJ =Irish Planning and Environmental Law Journal
ITR =Irish Tax Review
JISLL = Journal of Irish Society of Labour Law
MLJI = Medico Legal Journal of Ireland
P & P = Practice & Procedure

New Focus on Professional Secrecy Of Lawyers

HARRY WHELEHAN, SC, Bar Council representative to the CCBE (the Council of the Bars and Law Societies of the E.C.) reports.

It is not only in this jurisdiction that there is a new concern about the principle of professional secrecy afforded to lawyers. The issue has also been raised in the context of legislation which is also being adopted or considered in a number of other European countries with a view to counteracting well organised and highly sophisticated breaches of the criminal law and with a means of defeating systems used by persons engaged in illegal drug dealing and other such activities.

In this country the activities of The Criminal Assets Bureau in exercising their powers and, more particularly, the manner in which their activities came to light in the Hanahoe case, have been the subject matter of comment at meetings of the CCBE. The issue is one with which our colleagues in the CCBE are concerned, and there is a considerable ongoing discussion about how best to preserve the principle of professional secrecy while, at the same time, ensuring that lawyers do not become instruments in the perpetration of offences, while at the same time remain capable and competent to advise and represent clients who have been charged with breaches of the criminal or tax code.

The Plenary Session of the CCBE in November issued a policy statement on the professional secrecy of lawyers, and legislation on money laundering which is set out below in full. It is self-explanatory and, I think merits consideration and perhaps discussion by our Bar Council and the members of The Bar.

Introduction

Lately, the European countries have, in conjunction with many other countries, made a great effort in fighting criminal activities related to money laundering. While the CCBE has a great respect for the important aims of that effort, which has, amongst other things lead to much legislation, CCBE is at the same time concerned with some of the consequences.

Some such legislation represents a threat to the protection of the professional secrecy of lawyers, obliging them or proposing to oblige them to report suspicious activities related to money laundering. CCBE sees that as a typical example of where the reference to important aims of our societies has been used to reduce the scope of the fundamental professional secrecy of lawyers.

The principle of professional secrecy

The CCBE would like to emphasise the fact that the professional secrecy of lawyers is not a privilege for the lawyer or the client but is necessary for the functioning of a free and democratic society.

A citizen, an organisation or a company must be sure that what is confided in the lawyer by his client remains a secret with the lawyer. Otherwise the client cannot trust the lawyer and will often refrain from taking professional advice when it is most needed. The client must be able to discuss freely with his lawyer whether a certain activity is legal or not. This free and open discussion prevents the commission of illegal activities on a daily basis, which might otherwise have been committed had the client not dared to seek the lawyer's advice out of fear that he could not trust the total professional secrecy of the lawyer.

A free democratic society can be measured in how far it protects this important feature of such society. The right to have a lawyer defending your interest and only having your interests in mind, is one of the fundamental human rights of such a society.

It is therefore of fundamental importance that the lawyer's professional secrecy is protected, not only as it concerns lawyers who act in criminal cases, but in respect of all professional services provided by lawyers both in and out of court.

The infringements of the principle

Traditionally, professional secrecy may be broken by the lawyer only when necessary to avoid a serious crime directly endangering a person's life.

For a number of years now, however, legislation in different European countries has infringed or tried to infringe upon the protection of this secrecy. Each time it has been done with reference to crimes that everyone agrees should be fought, like incest, serious tax frauds and money laundering. While not at all opposed to the object or promoting such good causes, CCBE is concerned as to the consequences of such legislation on the lawyer's professional secrecy.

CCBE would emphasise that it does not in any way seek to protect the criminal activities of any lawyer behind the shield of professional secrecy. All lawyers are bound not to enter into any criminal activities. CCBE has therefore nothing against actions against lawyers who are suspected themselves of partaking in criminal activities, provided, however, that the legislation does not make ordinary advice given by the lawyer a criminal activity.

What the CCBE does feel, however, is that there is a lack of understanding of the consequences of some piecemeal legislation on the professional secrecy of lawyers.

Internal rules of the legal profession

CCBE does not see any danger of weakening the fight against money laundering or other criminal activities by upholding the widest possible protection of the lawyer's professional secrecy.

One must distinguish between where the lawyer participates in a suspicious legal operation, from which he must withdraw and abstain, and the situation where the lawyer does not participate in such an operation, but defends individuals charged with money laundering. In the latter situation it is his duty to ensure and maintain the defence of the accused while respecting strictly his ethical rules.

The problems concerning money laundering have led to a new rule being proposed in the revision of the CCBE Code of Conduct. The new rule obliges the lawyer to identify his client or the person for whom his immediate client is working.

Practical devices

The protection of the professional secrecy of the lawyer must also extend to his files. The lawyers are in need of a certain minimum protection when required by the police or other authorities to afford access to their files.

There should be no possibility for even requiring access unless the suspicion is described in precise and - above all - specific terms. No "fishing expedition" should be allowed in any manner, however indirectly.

If the files are required on such basis, it is of paramount importance that a neutral person is present to be the judge of whether any document required is protected by professional secrecy. Such person may in certain legal systems preferably be a judge other than the judge in charge of the criminal investigation. In other legal systems the neutral person may be a local bar leader, his deputy or an independent lawyer.

The present legislative state shows that there are great variations between the European countries concerning how this situation should be tackled. A common European legislation on such general basis would be of great help.

Recommendation

CCBE aims to work for a harmonised policy regarding professional secrecy amongst its member organisations. It therefore recommends that national lawyer's organisations of the CCBE member States to include, if not already included, in their codes of conduct the following obligations:

1) In every case submitted to a lawyer, he or she should check the identity of the client or the intermediary of the client for which the lawyer is acting;
2) To prohibit, when lawyers are asked to handle funds, any lawyer to receive or handle any funds which do not strictly correspond to a file known by name.
3) For lawyers participating in a legal transaction to withdraw if they seriously suspect that the planned operation will result in money laundering and the client is not prepared to abstain from this operation.

CCBE also aims at including these provisions in its own Code of Conduct for transnational legal business.

Conclusion

The CCBE emphasises that the protection of the lawyer's professional secrecy is of fundamental importance in a free and democratic society. It is also a principle of EU law; indeed the confidentiality requires that every person subject to trial must be entitled to talk freely (cfr. AMES decision of 18.05. 1982).

There is therefore a clear need for a far more careful analysis and focus on this aspect of the legislation. For this reason the lawyers' profession should not have to be submitted to the provisions of Directive 91/308/CEE of the Council of 10.6.1991, in particular article 12 of this directive.

The CCBE warns the legislators against sweeping legislative actions against money laundering. Such legislative actions often prove counter productive to the goals they try to achieve.

Finally the CCBE emphasises strongly the importance of a common European legislation protecting the professional secrecy in an appropriate way commensurate to its social importance.

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International Mutual Assistance in Criminal Matters

(PART VII OF THE CRIMINAL JUSTICE ACT 1994)

BY PATRICK O'REILLY, Barrister

With a minimum of fanfare, on the 15th of November 1996, the Government brought into effect the provisions of Part VII of the Criminal Justice Act 1994[1]. In essence Part VII contains a range of provisions designed to further international adminstrative and judicial co-operation in the gathering of evidence and the prosecution of offenders within and outside this jurisdiction.

Essentially, the provisions allow each participating country to ask another for help in gathering evidence and the taking of provisional measures in a criminal investigation or criminal Trial. The provisions also allow for the recognition and enforcement in Ireland of foreign confiscation and forfeiture orders.

The new provisions reflect the international nature of modern criminal activity. In particular, in drugs related crime the provisions recognise that in any given offence the evidence, commission and proceeds may be found in separate jurisdictions.

The first working example in this State of the mutual assistance provisions can be found in the evidence given to the English Crown Court by the prosecution as against Thomas Mullen "The Boxer". In January of this year Mr Mullen was convicted and sentenced to 18 years in prison for the importation of heroin. Prior to the trial and at the request of the prosecution, application was made under the provisions of the Act of 1994 to compel certain persons to attend and give evidence in Ireland in respect of Mr Mullen's financial affairs in Ireland. This procedure found that several hundred thousand pounds had travelled through Mr Mullen's bank and building society accounts in a short period and it further discovered the methods by which Mr Mullen purchased houses, and financed holidays etc. The evidence was then transferred to England and was admitted to the Court hearing Mr Mullen's prosecution.

The genesis of the provisions of Part VII of the Act of 1994 is the European Convention on Mutual Assistance in Criminal Matters, 1959. However, Part VII also contains provisions reflecting the more recent Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (the "Laundering Convention") and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Phystropic Substances 1988 (the "Vienna Convention").

The principal provisions of Part VII of the Act are as follows:

1. The recognition and enforcement of foreign confiscation orders (Section 46)[2]
2. The recognition and enforcement of foreign forfeiture orders (Section 47)[3]
3. Leave to permit service in this State of a summons or witness Summons issued in a foreign jurisdiction. (Section 49)
4. Leave to permit service of Summons issued within the State on an individual resident outside the State. (Section 50)
5. The procedure for the taking of evidence in Ireland in respect of criminal investigations or prosecutions in a foreign State. (Section 51)
6. The procedure for the issue of a letter of request of letter rogatory to a foreign State for the purpose of having evidence taken in the foreign State in relation to a criminal investigation or prosecution in this State. (Section 52)
7. The procedure, on the request of a foreign State, for search and entry of a premises in this State for the purpose of gathering evidence to assist a prosecution in that foreign State. (Section 55)[4]

In this Article it is intended to deal only with numbers 1, 2 and 5 above

FOREIGN CONFISCATION AND FORFEITURE ORDERS.

CONFISCATION (SECTION 46):

Article 5 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Phystropic Substances 1988 (the Vienna Convention) is the origin of the introduction into Irish law of the concept of the "confiscation order" which is fully defined at Article 5 of the Convention.

Sections 4 and 9 of the Act of 1994 each set out what is meant by "Confiscation" in both drug and non-drug trafficking offences respectively. Essentially, where an individual has been convicted and it is established that the individual has derived a pecuniary advantage from the crime of which he is convicted, the Court may assess the value of the pecuniary advantage and thereafter make an order for the confiscation of the convicted person's assets in that amount or such amount as is realisable.

In respect of non-drug trafficking offences, the conduct underpinning the foreign confiscation order must be such as would amount to an offence under Irish Law. However where the original conduct was drug trafficking there is no such express requirement of dual criminality.

Under Section 46 of the Act of 1994 the application by the Foreign Sate for the enforcement of the Foreign Enforcement Order can only be made with the prior consent of the Minster for Justice. Statutory Instrument 344 of 1996 designates the countries which can make such an Application. Section 46

envisages application for foreign confiscation co-operation orders being made to the High Court

In a manner similar to the protections afforded to a judgment debtor in the provisions of the Brussels Convention the court in making the foreign confiscation co-operation order must be satisfied that the foreign confiscation order and the conviction underpinning the Order are not under appeal. The High court must also be satisfied that the making of the order would "not be contrary to the interests of justice"

Section 46(6) of the Act empowered the Governement by Regulation to make such ancillary provisions as were necessary to deal with the issues of the taking of provisional measures to prevent transferral or disposal of and to secure the property. These provisions are contained at S.I. 343 of 1996

The confiscation provisions of the Criminal Justice Act are broadly similar to U.K. provisions contained in the Drug Trafficking Offences Act 1986 and the Criminal Justice Act 1988. A large body of jurisprudence has developed in England surrounding these provisions

As regards enforcement, a national confiscation order operates in personam and not in rem, it seems however that Section 46(5) of the Act allows a foreign confiscation order to act in rem where the foreign order itself was for the confiscation of specified property.

FORFEITURE (SECTION 47)

SECTION 61(1) OF THE ACT OF 1994 CONTAINS THE DEFINITION OF A NATIONAL FORFEITURE ORDER;

It permits the Court in sentencing an individual to make an order for the forfeiture of property in his possession or under his control at the time when he was aprehended or when a summons issued and the property was used or was intended to be used for the purpose of the commission of, or the facilitating of the commission of, any offence. One of the offences of which the court has considered in determining sentence must include the unlawful possession of property

Section 61 also provides some limited protection for bona fide purchasers for value of the property in question and makes some amendments to the Police Property Act 1897.

In so far as a foreign forfeiture order is concerned, an application for the enforcement of same may only be made by the Foreign State on the consent of the Minister for Justice. Once the Minister's consent is forthcoming application is made to the High Court for the forfeiture co-operation order. The same conditions as regards appeal in the originating state as apply in Section 46 apply to foreign forfeiture orders (under Section 47 of the Act).

Section 47 of the Act does not limit to drug trafficking the type of offences which the court must be satisfied the property was used or intended to be used for; Section 47(5)(c) provides that the Section will apply to any offence in respect of which a confiscation order could have been made under section 9 of the Act.This imports wide possibilities into the foreign forfeiture order regime in that there is a very broad range of offences in respect of which a Section 47 order could be made.

There is some argument as to the type of property (real or personal) which could be affected by such an order. The wording of the Section is clear and unambiguous: it refers to "any property". It could be understood to include real property; land and premises The English Court of Criminal Appeal has held in a case involving a forfeiture order made in respect of a drug dealer's flat that only property which was tangible and of which physical possession should be included in forfeiture.[5]

Lastly, Section 47 specifically provides that no foreign forfeiture order shall be made if the person claiming to be the true owner of the property in question applies to be heard unless an opportunity has been given to him to show cause why the order should not be made (it seems that this prior opportunity to show cause would have been made in the State whence the Forfeiture order came).

SERVICE IN THE STATE OF SUMMONS ISSUED OUTSIDE THE STATE: (SECTION 49)

This is a procedure whereby the Minister may act as agent for the onward transmission of a summons to appear as a defendant, a summons to appear as a witness in foreign criminal proceedings and documents issued by a foreign court recording its decision.

By reason of Section 49(3) of the Act the Minister is under no obligation to cause the summons to be served within the State. However if the Minister agrees to allow the service of the summons he must direct the Commissioner of the Garda Siochana to cause it to be served "personally" on the person in question.

The Rule of Specialty is incorporated in Section 49 in that both where a person is summonsed as a witness and as a defendant and when he returns to the originating State he cannot be proceeded against in respect of any offences committed before his departure from the State other than the offences specified in the summons. He may be proceeded against in respect of different charges in the limited circumstances set out at at sub-paras (4)(a) and (b) and (5)(a) and (b).

Section 49 also stipulates that the Summons shall be accompanied by a notice setting out :

(1) the effect of the safeguards provided by Section 49;
(2) the fact that the summonsed person may seek legal advice;
(3) an indication that under the law of the Summoning State he may not be accorded the same rights and privileges as he would in this State.

SERVICE IN FOREIGN STATE OF SUMMONS ISSUED IN THIS STATE (SECTION 50)

This Section creates the statutory authority for the external service of an Irish Summons. It should be noted that failure to comply with the summons is not an offence and no contempt will lie for such failure.

Section 50 contains similar safeguards arising from the Specialty rule as Section 49.

PROCEDURE FOR OBTAINING EVIDENCE IN IRELAND FOR USE OUTSIDE THE STATE (SECTION 51)

This is the cornerstone provision of the European Convention on Mutual Assistance in Criminal Matters. The "Mutual Assistance Convention" sets out in some detail many of the concepts contained in Section 51 of the Act and is

thereore a useful tool in its interpretation.

The Act of 1994 repeals the limited procedure for letters rogatory in the Extradition Acts 1879 and 1873. An important aspect of the procedure of the Act of 1994 is that it extends to offences of a political nature

THE PROCEDURE

Section 51 of the Act establishes a procedure whereby on receipt of a letter of request or letter rogatory from a foreign court or a foreign prosecuting authority, in connection with either criminal proceedings or a criminal investigation in the foreign state, the Minister for Justice may "by notice in writing" nominate a District Justice to receive such evidence to which the request relates.

Section 51 thus envisages that a District Justice duly appointed should carry out some form of investigation in that "he may receive such evidence to which the request relates as may appear to the judge as appropriate for the purpose of giving effect to the request". It seems that the statutory scheme envisages that the District Justice of his own motion may decide the substance and form of evidence necessary for the purpose of answering the request. In this regard and in a limited way the District Judge is given a role akin to that of the "juge d'instruction" in civil law jurisdictions.

It is important to note here that where the requesting State requires that the evidence garnered in Ireland be accompanied on its return to the foreign state by a certificate or affidavit, such certificates must be specified in the notice nominating the relevant District Justice

Before the Minister nominates the District Justice, he must be satisfied either that an offence has been committed in the foreign state or that there are reasonable grounds for so suspecting and that a prosecution or an investigation has been instituted. The Minister may however treat as conclusive a certificate from the requesting authority that the above conditions are complied with.

There is no requirement of dual criminality (despite the fact that the Mutual Assistance Convention left this option available to the State). However there is a restricted version of the Specialty rule incorporated into the Act of 1994; the Minister must be satisfied that either by the law of the requesting State or by arrangement with it that the evidence garnered in Ireland cannot be used for any purpose other than that stated in the request.

In practice the State will receive a letter of request/letter rogatory from either a Court or a prosecuting authority of a foreign State containing the following matters (these are stipulated at Article 14 of the Convention;)

(1) the authority making the request;
(2) the reason(s) for the request;
(3) where possible, the identity and nationality of the person concerned and
(4) where necessary, the name and address of the person to be served;
(5) In most circumstances the offence in the foreign state must be stated and a summary of the facts given;
(6) The evidence which is sought in Ireland

In order to commence the District Court Hearing a preliminary ex-parte application is made to the nominated District Justice. In the said application the matters listed at Numbers 1-6 above would be opened to the court.The District Justice would then be asked to issue the necessary witness summons or such other orders for the production of evidence as he may deem appropriate.

A return date for the hearing of the evidence sought is given by the court and on that date a full hearing in respect of the evidence sought is held.

The Second Schedule to the Act provides some guidance as to the procedure before the District Justice and sets out certain rules in relation to securing the attendance of witnesses, the privilege of witnesses and the onward transmission of the evidence received by the District Justice. The Schedule also provides for the avoidance of doubt that the Bankers Books Evidence 1879 applies to the proceedings.

COMPELLABILITY OF WITNESSES AND ATTENDANCE OF SUSPECT/ACCUSED IN THE SECTION 51 PROCEDURE.

Of note here is that a person cannot be forced to give evidence which he could not be compelled to give in criminal proceedings in this State. In the alternative a person cannot be forced to give evidence which he would not have to give in criminal proceedings in the country whence the request came. However the person will be so compelled in the event that the foreign authority or court does not concede that the person is exempt from giving evidence.

The witnesses most often heard at the hearing before the District Justice are bank officials who attend to prove the existence and movement of funds in the accused's bank account in this country. However the evidence of a wide range of persons may be sought; accountants, company formation individuals, Land registry officials, Revenue officials, solicitors etc.

It has not as yet been decided whether or not the person(s) in respect of whose activities the request for assistance is made, would be allowed to attend at the full hearing before the District Justice. This question assumes importance when such person wishes to assert a privilege over the evidence to be adduced at the hearing; firstly, there is no provision that such person be notified of the existence of the hearing before the nominated District Justice. Thus, in reality, the person may not even get the opportunity to assert the privilege in question.

Secondly, more often than not, the person in question is in custody in the foreign state; Article 11 of the Mutual Assistance Convention allows for transfer to another State of certain persons in custody and this was incorporated into Irish law by Sections 53 and 54 of the Act. However the transfer is wholly at the discretion of the Minister for Justice and does not appear to contemplate the person in respect of whom a request for assistance is made. Nevertheless the hearing before the District Justice will be governed by the rules of natural and constitutional justice and in the event that a right to attend and be represented is actually asserted by the person in respect of whom the request for evidence is made, it is thought that the rule of audi alterem partem would allow that person to attend and be heard. This right to be heard is likely to be upheld as without it the person accused in the foreign State may have no opportunity to challenge the evidence (given in Ireland) which may ultimately be adduced as against him in the foreign court.

It is interesting to note here the safeguards on the admission of evidence

in an Irish Court in the reverse procedure, that is in respect of evidence garnered in a foreign court pursuant to a letter of request issued from Ireland under the procedure at Section 52(10). (See infra)

Officers and Servants of the State are exempted from giving evidence in their official capacity. Furthermore a person (whether or not an officer of the state) shall not be obliged to give evidence where the giving of such evidence "would be prejudicial to the interests of the State". The essential proof here is a Certificate signed by the Minister as to the said prejudicial effect.

TRANSMISSION OF EVIDENCE

As regards the actual transmission and its format on transmission, the evidence is transmitted by the District Justice to the Minister for Justice for onward transmission to the foreign requesting authority. Where oral evidence is given and the requesting authority does not request any particular format, it is thought that a transcript signed by both the District Justice and the witness in each others presence will, in most cases, be admissible in the requesting state. Where evidence consists of a document or article the Second Schedule of the Act provides that either the original or a copy/ description/photograph of each may be transmitted to the requesting authority.

COSTS:

The Second Schedule to the Act provides that no Order for costs shall be made in the proceedings. It is not clear whether an order could be made in respect of witness expenses simpliciter.

As regards the overall cost of replying to the letter of request, Article 7 of the Vienna Convention provides that it shall be borne by the requested party save where the costs are extraordinary and in that event special arrangements may be reached between the two countries.

REFUSAL BY IRELAND TO ACCEDE TO A REQUEST FOR ASSISTANCE FROM A FOREIGN STATE.

The Vienna Conventiona and the Mutual Assistance Convention provide that, should the requested State decline to provide assistance to the foreign State, it must give reasons for its refusal.

OBTAINING EVIDENCE OUTSIDE STATE FOR USE IN IRELAND(SECTION 52)

Essentially, this is the reverse of the Section 51 procedure.In this case it is Ireland that makes the request for assistance to a foreign State in gathering evidence for use in an investigation/prosecution in this State.

The Section 52 procedure envisages that a formal application be made to any court by the Director of Public Prosecutions for the issue from Ireland of a letter of request where a criminal investigation is being undertaken or a prosecution is under way.Thus,unlike many of its foreign counterparts the office of the Director of Public Prosecutions cannot, without leave of the court, issue a letter of request for assistance to a foreign prosecuting/judicial authority.

Once the evidence is returned to Ireland the question arises as to its admissibility in an Irish Court. The common law position is that in the absence of specific statutory approval no foreign deposition is admissible.The reason for this is simple enough; an important element in any accused's right to trial in due course of law is his entitlement to have witnesses give oral evidence and to have them cross-examined if he so wishes. Where a foreign deposition is taken and the evidence so garnered is to be used against the accused in an Irish Court the "foreign" evidence so transmitted may have been unchallenged by cross-examination or otherwise and may therefore be viewed as unreliable in an Irish court.

To counteract this difficulty Section 52(7) provides the Court, in considering evidence garnered abroad pursuant to the request for assistance, with a discretion to decide whether or not to admit the evidence. The subsection provides that in the exercise of its discretion the Court shall consider; whether it was possible to challenge the statement by questioning the person who made it, and(b) whether the law of the country in which the statement was taken allowed the parties to be legally represented.

There is no statutory provision or procedure for informing a suspect /accused of the taking of evidence in a foreign State which may be used against him. On the grounds that it would not be "possible" to challenge a statement when one is unaware as to where and when it is to be made, it is submitted where foreign evidence of a controversial nature is sought in respect of a prosecution/investigation in Ireland that consideration should be given to informing the accused/suspect that prejudicial evidence may be given in a foreign court. After that, it is a matter for the law of the foreign court as to whether the accused can cross-examine the witness and be legally represented.

Conclusion:

In view of the growing extra-territorial nature of crime and the reduction in transport barriers in particular throughout the European Union, Mutual Assistance in Criminal matters will assume a much greater importance in the next few years.The sanctions of forfeiture and confiscation are in their geneses and there are many issues in respect of both which will have to be judicially clarified.

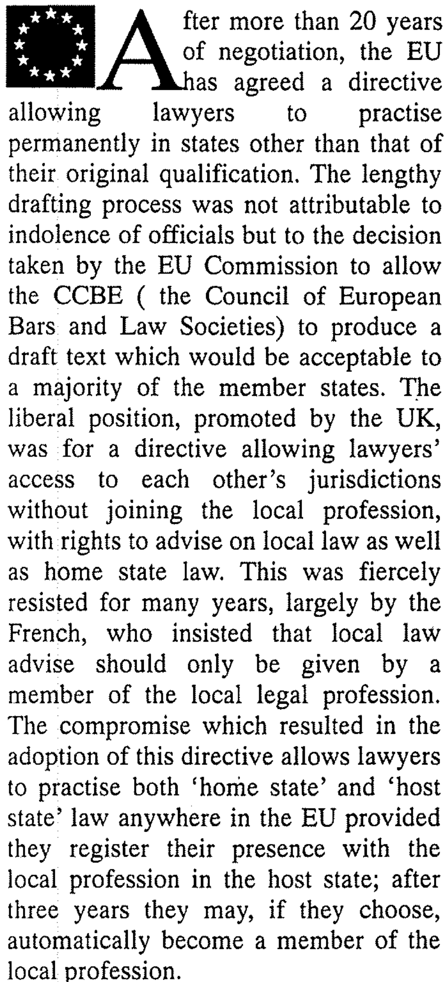
As regards the procedure for the gathering of evidence in Ireland for use abroad, this procedure is novel in that unlike a trial, it appears to be a judicial investigation in which the District Justice may of his own motion decide what is necessary for the purpose of gathering the evidence sought.

The admission into evidence in Ireland of foreign controversial evidence will depend very much upon whether the Irish Court feels the accused ought to have had or did have an opportunity to properly challenge the evidence when given in the foreign court. ●

1 CRIMINAL JUSTICE ACT 1994 (COMMENCEMENT) ORDER 1996 (S.I. No 333)
2 (Note here S.I. 343 and 344 1996)
3 (Note here S.I. 324 1996)
4 (Note here S.I.341 1996)
5 R -v- Khan (1983) 76 Cr.App 29

The New Directive Governing the Rights of EU Lawyers to Practise in Other Member States

COLM MACEOCHAIDH, Barrister



After more than 20 years of negotiation, the EU has agreed a directive allowing lawyers to practise permanently in states other than that of their original qualification. The lengthy drafting process was not attributable to indolence of officials but to the decision taken by the EU Commission to allow the CCBE (the Council of European Bars and Law Societies) to produce a draft text which would be acceptable to a majority of the member states. The liberal position, promoted by the UK, was for a directive allowing lawyers' access to each other's jurisdictions without joining the local profession, with rights to advise on local law as well as home state law. This was fiercely resisted for many years, largely by the French, who insisted that local law advise should only be given by a member of the local legal profession. The compromise which resulted in the adoption of this directive allows lawyers to practise both 'home state' and 'host state' law anywhere in the EU provided they register their presence with the local profession in the host state; after three years they may, if they choose, automatically become a member of the local profession.

Prior to the adoption of the Establishment Directive, a number of other efforts had been made to remove barriers to the provision of legal services across frontiers.

The Services Directive

The 1977 Services Directive (77/249/-EEC) lays down the principles governing the provision of legal professional activities in a state other that of one's professional qualification where the activities are carried out on a temporary or non permanent basis. For example, English lawyers acting for certain defendants charged in Belgium with criminal offences, after the Heysel stadium disaster had rights of audience in the Belgian Courts under this Directive. The Directive permitted services to be provided on a temporary basis but where court appearances were involved, the member states could require the visiting lawyer to be accompanied by a local lawyer. It appears that this directive is availed of from time to time by English barristers in the Irish courts. A recent judicial review application concerning the restriction of a mid-wife from assisting in home births was in part presented by a London based barrister with experience of the issue. Certain QC's from specialist chambers in London appear in commercial matters in the Irish courts. Conversely some members of the bar are door tenants at sets in London though the writer does not know to what degree they appear in court in England. It is assumed that these barristers are also admitted in the UK. Irish barristers may be admitted to the Bar of England and Wales after three years practice without examination and on payment of a fee.

The Diplomas Directive

The Mutual Recognition of Diplomas Directive (89/48/EEC) provided a mechanism for lawyers to join the legal profession in another member state. The Directive permitted the members states to choose to admit lawyers from other states based on a comparison between the qualification requirements in the two states. The migrant lawyer could be required to sit examinations or to undergo a period of adaptation. Most states choose to require migrants to sit examinations. As between the jurisdiction of England and Wales and of Ireland, it was agreed that our legal systems and professions were so similar that neither examination nor adaptation period would be required. Many Irish solicitors were automatically admitted to the roll of solicitors in England and Wales after the adoption of this directive. The last piece of the jig saw was put in place with the adoption of the Establishment Directive on the 27th of November 1997. (The Directive has not yet been published in the Official Journal and does not bear a reference number yet.)

The Establishment Directive

The Establishment Directive facilitates the full time practice of law in a host state, using their home state title, without the need to become a member of the legal profession in the host state. This means that Irish barristers and solicitors may establish a permanent office in Berlin to advise clients on German law using the title 'barrister' or 'solicitor' provided the requirements of the Directive and of the home state code of conduct are complied with. As to the latter, the Code of Conduct for the Bar of Ireland provides that "it is the duty of every barrister....... to be competent in all his professional activities" (Rule 1.5). An Irish barrister advising on German law without being competent to do so would be in breach of the Code.

Use of Home Title in a Host State

A lawyer qualified in one member state is entitled to give legal advice and carry out legal professional activities in another member state using his home state title (e.g. avocat, barrister, solicitor etc.). In the host state,

the lawyer may advise on the law of his home state, international law and EU law as well as the law of the host state.[1]

Advocacy, Conveyancing and Probate

Most member states have reserved certain legal activities to nominated legal professions. In Ireland and in the UK, for example, advocacy, probate and conveyancing may only be carried out on behalf of a client by barristers and solicitors in the case of advocacy, and by solicitors in the case of the probate and conveyancing. The Directive permits member states to operate controls on the extent to which the migrant lawyer may become active in these reserved areas of practice.

Where advocacy is reserved to a nominated profession in a member state, that state may require a migrant lawyer to be accompanied by a local lawyer when appearing at its courts or tribunals. Under this provision and depending upon how Ireland chooses to implement the provision, a French avocat who establishes his presence here could have full rights of audience in the Irish Courts.[2] The avocat, as will be seen, has the choice of registering with either the solicitors' or the barristers' profession. If the avocat registers with the Law Society of Ireland, it will be open to the state to require him to appear with either a barrister or a solicitor when presenting a matter in Court. If he registers with the Bar Council, it is presumed that the implementing regulations combined with the bar's own rules will require him to be instructed by a solicitor. Member States are entitled to make special rules on rights of audience in supreme courts.[3] This provision reflects the practice in some states of a separate class of lawyer having exclusive rights of audience in supreme or constitutional courts.

Registration in the Host State

A lawyer wishing to practise law on a permanent basis under his home title in a host state must register with the authority regulating the practice of law in that state,[4] (As indicated, registration with the Bar Council or the Law Society will be required.5) The authority is entitled to charge a registration fee. Ironically, the directive thereby introduces a new obstacle to the free movement of lawyers in the EU. Prior to the its adoption, lawyers from other states were entitled to establish a professional presence in Ireland to practise in any area of law, except advocacy, probate and conveyancing, without the need to register with, and pay a fee to, either the Bar Council or the Law Society.

Use of Home Title

The migrant lawyer must be clear in any usage of the home title and must not cause any confusion between it and the professional title used by lawyers in the host state.[6] It would be forbidden, for example, for an Italian Avocato in Dublin exercising rights under the Directive to describe herself as 'Italian Barrister'. Such a wording describes the nationality of the barrister and fails to indicate that she is a member of an Italian bar and not admitted to the bar in Ireland. The host state may require the migrant lawyer to use the name of the professional body to which she belongs or the courts in front of which she is entitled to practice in association with her home title.[7]

Home Rules and Host Rules

The migrant lawyer will be governed in the host state by the professional rules of the authority with which he has registered.[8] In any case where home rules and host rules conflict, the provisions of the host rules shall prevail. For example, though the Solicitors Code of Conduct permits advertising, an Irish solicitor registering with the Paris Bar would be bound by its prohibition on advertising for lawyers.

Lawyers who register with a foreign bar or law society under the Directive are entitled to representation in the authority with which they have registered. The Directive provides that this must include the right to a vote in any elections for its governing body.[9]

Professional Indemnity Insurance

A migrant lawyer may be required by the host state to carry professional indemnity insurance on terms equal to those applying to its indigenous lawyers. However, proof of adequate insurance carried in the home state will exempt the lawyer from re-insuring in the host state.[10]

Disciplinary Matters

Where a migrant lawyer is sought to be disciplined under host state professional rules, the host state must inform the home state authority of the fact before initiating the disciplinary procedure and must cooperate with the home state authority permitting it to make submissions at all times during the procedure. Any disciplinary action against the migrant lawyer by his home state authority must also be made known to the host state authority.[11]

The Directive permits the migrant lawyer to employ the name of the grouping to which she may belong in the home state whatever the manner of practice in the host state. It is not envisaged that this would create any difficulty once registration in Ireland is with the Law Society. However it is difficult to see how a member of 'One Chancery Chambers' from London could employ the identity of the London chambers while registered at the Bar Council in Dublin. It should be noted that the Directive would permit an Irish Barrister to practice in partnership in England even though it is prohibited to do so here.[12] The Law Society of England and Wales permit lawyers from other jurisdictions to practise in partnership with their solicitors provided they register with the Law Society. The firm then becomes known as a Multi-National Partnership under the regulation of the Law Society.

Becoming a member of the Local Profession

Apart from permitting lawyers to practise in other member states under their home title, the Directive also provides a mechanism for entry to the local legal profession where migrant lawyers are actually exercising rights under the Establishment Directive. The Mutual Recognition Directive[13] already provides a means of re-qualification for lawyers professionally qualified in a member state of the EU as indicated

above. However where a migrant lawyer has been exercising rights under the Establishment Directive by "effectively and regularly" pursuing an activity in the law of the host state for a period of at least three years, that lawyer is entitled to apply to become a member of the local legal profession without undergoing any oral or written examination in host state law.[14] The onus is on the migrant lawyer to establish to the satisfaction of the admitting authority that the lawyer has been effectively and regularly engaged in local law issues in a professional capacity. This provision is arguably the most controversial aspect of the Directive. It is understood that its inclusion was at the insistence of the French bar who feared being swamped by large firms of English solicitors practising law in Paris according to the norms of the English legal system. The provision will encourage migrant lawyers to integrate fully into the local legal scene. The English solicitors, and there are many of them, who have been practising in Paris for over three years are effectively invited by this provision to become avocats without further process.

A lawyer is not prevented by the operation of the Establishment Directive from applying at any time for admission to another legal profession under the terms of the Mutual Recognition Directive.[15] In the Irish context this means that Irish qualified lawyers wishing to join one of the British professions will not have to wait for three years of practice in Britain before being admitted there but may immediately avail of the Mutual Recognition Directive to re- qualify.

Where a migrant lawyer exercising rights under the Establishment Directive has been engaged for at least three years in a practice involving the law of the host state as well as other areas of law(home state law, international law, Community Law), he can apply for admission to the local profession notwithstanding the fact that he has not been dealing exclusively with host state legal issues for the three year period. The Directive provides that in these circumstances, the admitting authority shall take into account any knowledge and experience of local law gained by the migrant (including attendance at lectures and seminars on local law) as well as other legal professional activities pursued by the migrant during the period in question.[16]

Once dually or multiply qualified, the lawyer is entitled to use both (or all) legal professional titles. The controversy surrounding the right of migrant lawyers with three years experience of local law to join the host state profession is, in my view, somewhat exaggerated. The mark of lawyer is not the amount of law known but the skill in researching and deploying a legal argument. The prospect of an experienced Spanish abogado gaining admission to the Irish Bar after three years 'effective and regular practice' of Irish law in the Irish courts is not in the least disconcerting and is to be welcomed.

Joint Practice

Where joint practice by lawyers is permitted under home title, migrant lawyers are entitled to pursue their professional activities in a branch or agency of that joint practice in a host state except where joint practice of law is incompatible with legal norms in the host state.[17] Thus a solicitor who is an employee or partner in a partnership of solicitors may operate from a branch of the partnership established in another member state unless partnerships for lawyers is forbidden in that state. Barristers operating from Chambers regulated by the Bar Council of England and Wales, for example, would not be permitted to establish and operate from chambers in Dublin because members of the Irish Bar are not permitted to practice with others.

Host states are obliged to facilitate forms of joint practice between lawyers from the same group or home state, subject to the foregoing paragraph, as well as facilitating joint practice between lawyers from various member states in the host state, including joint practice with members of the legal profession in the host state.[18]

Nothing in the particular rules governing joint practice obliges host states to facilitate the establishment of a branch of a multi disciplinary professional practice of which a migrant lawyer may be an associate.[19]

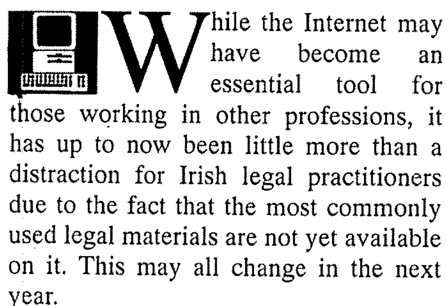
A migrant lawyer being part of a joint practice in her home state may employ the name of that grouping in the host state but the host state may require that the name of the lawyer actually practising in the host state be used in conjunction with the group name. The group may also be required to identify its legal form in association with the use of its name.[20] ●

1 Art. 5(1) A lawyer from a member state reserving probate and conveyancing practice to a class profession not covered by the Directive is not entitled to advise on such matters in a host state unless the bar or law society or other authority expressly waives its objection.c.f. Art. 5(2)
2 Thus, Ireland could require an English solicitor to be accompanied by an Irish barrister or Irish solicitor when appearing in any Irish Court
3 c.f. Art. 5(3), second paragraph
4 c.f. Art 3(1)
5 The relevant authority in the host state must register the migrant lawyer on being presented with proof of home state registration and must inform the home state authority of the fact of registration. Art. 3(2).
6 Art.4(1)
7 Art.4(2)
8 Art.6(1)
9 Art 6(2)
10 Art.6(3)
11 Art. 7
12 Art 8
13 Council Directive 89/48/EEC
14 Art. 10(1)
15 Art. 10(2)
16 Art10(3)
17 Art 11 and 11(1)
18 Art 11(2) and (3)
19 Art 11(5)
20 Art 12

Legal Materials and the Internet

The legal materials currently available to practitioners on the Internet and likely future developments.

CIAN FERRITER, Special Projects Manager, Bar Council



While the Internet may have become an essential tool for those working in other professions, it has up to now been little more than a distraction for Irish legal practitioners due to the fact that the most commonly used legal materials are not yet available on it. This may all change in the next year.

The provision of materials on the Internet would appear to be a two-stage process for most legal publishers: there is the initial decision to supply a product in electronic form which usually results in the release of a CD-ROM (there is now a large range of legal products available on CD-ROM); the more adventurous step of providing access to the product over the Internet (on a subscription or pay-per-use basis) is taken at a later stage, if at all. Legal publishers have been tardy about entering the Internet market for fear of the uncertain revenue flow from Internet services and the impact of supplying materials over the Internet on their existing revenue from CD-ROM and paper products. However, the trend in the US is now towards commercial Internet publication of legal materials. It is likely that the economics of electronic publishing coupled with the increasing prevalence of the Internet will result in legal materials on this side of the Atlantic being increasingly supplied via the Internet within the next two to three years.

This article takes a look at the principal Irish, English and European legal materials available, or shortly to be available, on the Internet. Given the nature of the Internet, it does not purport to be an exhaustive trawl of all relevant legal sites.

Irish Materials

The Attorney General's office is well underway with an ambitious project to make the full text of all statutes in force available in electronic format. They plan to launch the service next November. It will be initially available in CD-ROM. A decision has not yet been taken on whether or when the service will be made available on the Internet. The sheer size of the database is a factor here. However the Australasian Legal Information Institute have shown how such a service can be made very accessible over the internet: see the large collection of Australian statutes and case-law at *www.austlii.edu.au.*

The launch of the statutes service will mark the electronic watershed for Irish legal practitioners: a legal practice will simply not be able to do without it. An Internet version would render the service all the more accessible and usable for practitioners and citizens alike.

The Courts Division of the Department of Justice does not yet provide the text of Irish judgments on the Internet or in any other electronic format. However it is understood that there are plans to make judgments available on the Internet within the foreseeable future.

The Law Reporting Council also has plans to make the Irish Reports available in an electronic format, initially on CD-ROM. It is hoped that the Law Reporting Council will see fit to publish their reports on the Internet in the medium term.

The Law Library through its Dial-In service is providing access via the Internet to a number of databases including an upgraded version of JILL, the Library's own database of unreported judgments, the electronic Law Reports, the All England Reports, the CELEX European database and others. Members of the Law Library will be able to access this service over the Internet for a yearly fee. This service is now available.

The Law Library's own Web site, which contains a large set of links to legal resources on the Internet, can be found at *www.lawlibrary.ie/barcouncil.*

There are some other useful Irish legal sites at present.

Darius Whelan, a lecturer in law in UCC, manages the Irish Law Web site which collates links to various Irish law-related sites on the Web and contains useful links to general Legal Resources on the Internet, see: *nis.tallaght-rtc.ie/sig/law.home/irlaw.*

There are selected Competition Authority decisions on the Competition Online site at www.clubi.ie/competition/decisions along with what it claims is the world's biggest collection of links to Competition, Anti-trust and Utilities Regulation sites.

Many solicitors firms have their own Web pages some of which contain legal updates. A list of Irish solicitor and legal adviser links is available through the Irish Law page. The University Law Faculties each have a Web site and most legal academics are contactable via e-mail. Again, see the Irish Law page.

The International Centre for Commercial Law hosts a home page which contains updates on aspects of Irish commercial law provided by leading solicitors: see *www.icclaw.com /devs/irlaw.*

English Materials

By comparison with Ireland, the position with English primary materials on the Internet is somewhat more advanced at present.

Judgments of the House of Lords are made immediately available on the Internet at *www.parliament.the-stationary-office.co.uk/pa/ld199797 /ldjudgmt.* This service has been running since mid-November 1996.

The HMSO provide the full text of Statutes since the start of 1996 and SIs since the start of 1997 on their web site at *www.hmso.gov.uk.*

There are a number of good legal reference sites eg *www.swarb.co.uk /swarbrick* and *www.ukc.ac.uk/library /netinfo/intnsubg/lawlinks.* See also the

University of Warwick's Law faculty at *ltc.warwick.ac.uk.*

European Materials

The European institutions have also been catching up on the Internet phenomenon. Since June 1997, the Court of Justice has been publishing its judgments within days of delivery on the Court's Web site at *www.curia.eu.int.* Proceedings are also speedily published. In addition, the Court's diary is published for the week to come. The Commission is now looking at proposals to put the CELEX database on the Internet, although this is likely to be a longer-term project, given the huge size of that database.

The European Court of Human Rights has been publishing its judgments since October 1996 at *www.dhcour.coe.fr/eng/judgments.*

New Legal Services on the Internet

The Internet will facilitate new kinds of legal information service. For example, Electronic Law Journals are likely to become more popular as they are cheaper to publish (only one copy is needed on the host machine which can be accessed by anyone on the Internet) and easier to update than printed ones. An electronic journal essentially consists of the text of articles which can be printed out or downloaded onto the local PC. Electronic journals worth checking out include JILT (Journal of Information, Law and Technology) at *ltc.warwick.ac.uk/jilt.* The Bar Review's contents pages is available on the Law Library's Web site as an advertisement to potential subscribers of the legal information published in the Review on a monthly basis.

Delivery of customised legal updates will develop involving services that will collate all the information on the Internet in relation to a particular subject matter and deliver it down the line. Straightforward document delivery will also be provided, ie an article, case or Inter-Library loan can be requested and sent via e-mail. Many Law Library catalogues are now also searchable over the Internet eg the Institute of Advanced Legal Studies in London *www.sas.ac.uk/ials/library.* The emerging structure is one of a large web of legal information which, with judicious searching and a knowledge of how the Internet works, can yield a large range of relevant legal material quickly. Not all of this information will be free. As a rule, government supplied information tends to be free (witness the statutes sites of the HMSO or the case law site of the European Court of Justice) while commercial publishers will charge for information they supply, most likely on a pay-per-use basis.

Conclusion

The long-term impact of the Internet as a medium for supplying legal materials is likely to be significant. Once Irish judgments and legislation are available in full text, access to the Internet will become a must for every practitioner. The prudent practitioner will thus be arming himself or herself with Internet access as soon as possible, to have time to get familiar with the medium and the resources available. While the availability of legal materials on the Internet is not going to do away with the need for paper materials it is likely to alter the pattern of use, in that the Internet (and CD-ROMs) will become the first port of call for any legal research and the paper versions will then be used for copying or detailed reading. The medium will bring the great benefits of providing access to legal materials at any time of the day or week and, particularly if you have a laptop, access to materials whatever your location. The Internet is thus likely to become a "direct from source" service that cuts out the time (if not the expense) of the middleman. It would seem that we are not, after all, too far from the vision of a "library at our fingertips". ●

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The Legal Implications of the Single Currency

PAUL MCGARRY, Barrister

In just under one year from now, from 1st January 1998, Ireland will join nine or ten other States at the official launch of the "euro" and the Irish Pound as we know it will cease to exist as a currency in its own right. This article considers the legal framework and legal implications surrounding the introduction of the new currency.

The Legal Framework

Two European measures are at the core of the move to a single currency. Council Regulation No. 1103/97 (which is now in force) provides for the replacement of the ECU with the euro at the rate of 1:1 from 1st January 1999, and lays down technical rules for the operation of the conversion rates, including provisions relating to rounding. As a Regulation, this is binding on Member States without the need for specific national implementation.

This Regulation makes clear that the introduction of the euro will not alter, excuse or discharge performance under any legal instrument. Interestingly, 'legal instrument' is widely defined so as to include legislative and statutory provisions, contracts, payment instruments (other than coins and banknotes), unilateral legal acts, and so on.

Despite the fact that the substantial terms have been finalised, the second relevant Regulation can only be formally adopted after the decision is taken in May 1998 as to which States will participate. It provides for a definition of the legal framework for the introduction of the euro and allows for decisions to be taken by the Council during the changeover period. It is this draft regulation which attempts to allay some early concerns about the effects EMU will have on pre-existing contracts.

National legislative and other changes

In accordance with EU rules, the government has published a Changeover Plan which sets out in substance what will happen between 1999 and 2002 - when the transition to EMU is formally completed. Although commitments given in this document would appear to be voluntary, it does mark a significant statement of policy which has implications for business and the relationship of the private sector with the organs of State (eg. the Revenue Commissioners, Companies Registration Office, etc.)

In addition, the government has introduced a bill to alter the administrative status of the Central Bank of Ireland so as to bring it into line with the provisions establishing the European Central Bank. Other national legislative changes may be necessary to deal with specific problems anticipated in the areas of company law and consumer protection.

Effects on commercial transactions

Most of the concerns of legal advisors in relation to the Single Currency will be those of commercial lawyers. What is probably most important is the position with regard to the continuity of contracts. EU law provides that no contract will be frustrated merely by virtue of the required changeover in monetary denominations (and these regulations apply equally to those EU States which do not participate in EMU), unless the parties so agree.

However, there may be problems in dealing with non-EU states whose law may be at issue under the contract. Under Irish (and EU) law the rights and obligations under the contract are not extinguished, but it is possible if a non-EU law applies to the contract that under the law of that State the conversion might be used as an argument for the frustration of the agreement.

Public International Law requires that every state has sovereignty over its own currency and other states are obliged to recognise this, and the laws of most jurisdictions which have significant financial services sectors expressly so provide. However, moves are afoot in some countries to introduce legislation to provide for this recognition in respect of the euro so as to remove any doubts. It may be worth bearing this in mind when advising clients in relation to the negotiation of terms which appoint a jurisdiction for disputes under the contract.

Loan agreements often allow the lender to unilaterally alter the interest rate so as to incorporate variations in its own costs as a result of market changes outside its control, such as changes in the base rate or the cost of complying with the Central Bank's rules on mandatory liquid assets. Such costs may change by virtue of references to the European Central Bank, and contractual provisions may have to be reviewed or modified to allow for this.

Finally, rounding and redenomination rules will also have an effect on Company law, because these will affect nominal share capital amounts. Since it is regarded as undesirable to have this unit expressed in denominations which run to several decimal places, companies may be forced to recapitalise, and to decide whether to round their nominal share capital units up or down (bearing in mind the Court sanction procedure in Section 72 of the Companies Act, 1963). This may yet be the subject of a change in national legislation.

Other elements of the changeover which touch on legal issues include the possibility that there may be major changes in interest rates in the future under long-term fixed rate borrowings (it might be advisable to examine the terms of such loan agreements), the

question as to the effects on ECU borrowings and whether the replacement of the ECU with the euro will invoke 'alternative currency mechanism terms' in some contracts. It has also been pointed out that not all contracts currently stipulate that the ECU be calculated in a manner consistent with the 'official ECU', and this may have a bearing on the continuation of contracts which contain this stipulation.

Conclusions

In summary therefore, the private sector will participate in the Single Currency between 1999 and 2002 on the basis of the "no compulsion - no obligation" principle. However, it is expected that some business will be transacted in the new money from an early date. On the other hand, the state has put in place mechanisms for the handling of the euro right from the start. These mean that - in common with a number of other Member States - businesses and individuals can choose which unit to use in their transactions with public administrations.

Two important points are worth repeating: the EU Regulations specifically entrench the concept of freedom of contract, and these rules apply uniformly throughout the EU regardless of whether the State is a participant in EMU or not (e.g. Greece). ●

Timetable

2/5/1998:	Decision at European Council as to which Member States will take part, and at what rates.
Date unspecified	Enactment of legislation to alter the status of the Central bank so as to bring it into conformity with the Statute establishing the European Central Bank. Enactment of Draft regulation on technical rules for continuity of contracts, and the fixing of conversion rates.
1/1/1999	Start of EMU Changeover period, pound now only exists as a component of the Euro.
1/1/2002	Introduction of notes and coins: period of dual circulation of cash begins.
1/7/2002 (at the latest)	End of period of dual circulation, Irish pound ceases to exist in any form.

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Fair Procedures and the Granting of Category Licences by the Competition Authority

Declan Cronin v. The Competition Authority, The Minister for Enterprise and Employment, Ireland and The Attorney General, and Texaco Ireland Limited.

EILEEN BARRINGTON, Barrister

The Supreme Court, in its recent decision in Cronin -v- The Competition Authority,[1] clarified the nature of the procedures adopted by the Competition Authority ("the Authority") and upheld the constitutionality of the power afforded to the Authority to grant category licences pursuant to Section 4(2) of the Competition Act, 1991 ("the Act"). Such a power does not amount to an unconstitutional delegation of legislative power.

Facts:

The Applicant/Appellant ("the Appellant") operated a petrol filling station under licence from the Notice Party, Texaco (Ireland) Limited ("Texaco"). He instituted judicial review proceedings against the Respondents, both on his own behalf and on behalf of the members of the Texaco Retailers Association, seeking an order of certiorari quashing Decision No. 25 of the Competition Authority by which a category licence for motor fuel agreements was granted, pursuant to Section 4(2)(a) of the Competition Act, 1991.

In March 1992, Texaco had notified to the Authority a number of existing agreements for the supply of motor fuel, pursuant to Section 7(2) of the Act. The Appellant himself benefitted from a licence agreement such as was notified by Texaco. In November 1992, the Authority published a notification of the fact that it had received from Texaco a new version of the agreement to which the Appellant was a party. The Appellant was clearly interested in this new version as he hoped that the new agreement would be proposed to him upon the expiry of his existing agreement. Consequently, the Appellant's Solicitor wrote to the Authority and to Texaco requesting a copy of the notification made by Texaco. Both refused to provide him with a copy.

The Authority stated that details of the notification were confidential. A summary of the facts of the notification would be published at a later stage, referred to as the "Notice of Intention" stage. At that point, interested parties would be invited to make submissions.

As it transpired, however, no summary of the notification was ever published. Instead, in December, 1992, the Authority advertised its intention to grant a category licence for motor fuel agreements. A draft of the category licence was made available to interested parties, including the Appellant. The Authority indicated that, in drafting the category licence, it had taken account of not only the agreements notified by Texaco but some 57 different types of motor fuel distribution agreements notified by 11 different oil companies. The Appellant availed of the opportunity to make detailed written submissions on the draft category licence. In July 1993, the category licence was formally adopted by Decision No. 25 of the Authority.

The High Court:

In the High Court, the principal argument made on behalf of the Appellant was that the Authority had a duty to adopt fair procedures and had failed in that duty. The Authority accepted that it had a duty to adopt fair procedures. It argued, however, that all procedures adopted by it were fair and reasonable. Costello P. agreed and found that there had been no breach on the part of the Authority of the rules of fair procedures.

Submissions made by the Appellant in the Supreme Court:

On appeal to the Supreme Court, it was again argued on behalf of the Appellant that the Authority's procedures constituted a breach of the rules of fair procedures. The Appellant argued:

a) that it was entitled to get copies of the new version of the licence agreement notified by Texaco to the Authority in November of 1992;
b) that it was entitled to get a copy of Texaco's notification of that agreement or a summary of that notification; and
c) that it should have been given an opportunity to respond to the submissions made by Texaco in respect of the notified agreement.

The Appellant submitted that it was at a disadvantage in presenting its arguments on the category licence since it had seen neither a copy of the agreement notified by Texaco nor was it aware of the arguments put forward by Texaco in its notification in support of its agreement. The agreement was taken into account by the Authority in drawing up the category licence. The mere possibility of commenting on the draft category licence was not therefore sufficient to guarantee fair procedures to the Appellant. Texaco had had an opportunity to effect the thrust of the category licence and the Appellant was

afforded no opportunity to make its point of view known at that stage.

Secondly, the Appellant submitted that there was no power under the Act to notify draft agreements or for the Authority to grant a certificate of a licence in respect of draft agreements. Section 7(1) refers to "parties" to an "agreement". Since there could only be "parties" to a concluded agreement, draft agreements were consequently excluded. This, it was argued, was clearly a matter which had troubled the Legislature as Section 12 of the Competition (Amendment) Act, 1996 was adopted to deal with this issue. This Section provides that:

> "references to "parties" to an agreement... include, and shall be deemed always to have included, references to one or more of the parties to such an agreement. An agreement which a person proposes to conclude... with one or more persons may be notified to the Authority under Section 7 and shall be deemed always to have been capable of being so notified."

However, at the time of notification of Texaco's agreement, this provision was not yet in force.

Thirdly, it was argued that the power granted by Section 4(2) of the Act to grant licenses in respect of agreement violating the prohibition on anti-competitive agreements set out at Section 4(1) amounted to an unconstitutional delegation of a legislative function by the Oireachtas to the Authority. The Appellant argued that the power to grant licenses was in fact a power to amend an Act of the legislature.

Lastly, it was argued that the Minister had failed in his duty to draw up regulations to provide for any matter referred to in the Act, as envisaged by Section 23.

Submissions of the Respondents:

The Respondents submitted that the Appellant's arguments were based on the assumption that the procedures adopted by the Authority were adversarial in nature. This constituted a misconception as to the true nature of the jurisdiction of the Authority and the purpose of the grant of category licence. A category licence applies to all agreements coming within the relevant category, whether those agreements were already notified to the Authority or not. In relation to agreements coming into existence after the adoption of the category licence, these would not be required to be notified if they came within the terms of the licence. There was no necessity for the Authority to have regard to any particular agreement when reaching its decision. The requirements of fair procedures had been fully complied with since the Appellant had had an opportunity to respond in a comprehensive manner to the notice of an intention to grant the category licence. The Appellant was not entitled to receive a copy of the agreement notified by Texaco in November. If he were entitled to receive a copy of Texaco's notification then he would also be entitled to receive the other 57 types of agreement which were notified by the 11 other oil companies.

It was further submitted that the Appellant sought to have the information contained in Texaco's notification for the purposes of future contractual negotiations with Texaco. However, this was very different from considering that the Appellant was disadvantaged in making its submissions on the category licence since it was unaware of the nature of the notification made by Texaco. The issue of the Appellant's contractual negotiations with Texaco in the future was not a matter which should concern the Authority. If the Appellant were entitled to an oral hearing to deal with issues raised in the draft category licence relevant to its own situation vis-à-vis Texaco, then all other retailers of fuels would also be entitled to an oral hearing.

The Respondents denied that the adoption of the category licence constituted an unconstitutional delegation of legislative authority. The decision adopting the category licence was clearly within the ambit of the type of decision which an administrative body could have power to adopt.

Lastly, the Respondents submitted that the terms of Section 23 empowering the Minister to adopt regulations were purely permissive. In the absence of regulations made under the Act, the Authority was entitled to exercise its jurisdiction in accordance with the procedures it had adopted itself, provided such procedures were fair.

Decision of the Supreme Court:

Barrington J., delivering the judgment of the Supreme Court, firstly set out the legislative framework within which the Authority operated. Article 85 of the EC Treaty allowed the European Commission a wide discretion to maintain what the European Court of Justice has described as "workable competition"[2]. Consequently, the European Court allowed the Commission a wide discretion to declare the provisions of Article 85(1) inapplicable to certain agreements or categories of agreements in accordance with the provisions of Article 85(3).

The Act allowed the Authority a similar discretion to grant licenses to certain agreements or categories of agreements in accordance with the common good. Before granting a licence, the Authority would have to form the opinion, having regard to all relevant market conditions, that the agreements complied with the two positive conditions set out at Section 4(2) without falling foul of the two negative conditions set out at Section 4(2)(i) and (ii). Thus, the Authority, acting within the parameters and policy laid down for it, had to make extremely complex decisions in the light of its opinion as to how the objectives of the Act could be attained and the common good promoted in view of prevailing market conditions.

Addressing the issue of natural justice, Barrington J. held that there was a fallacy underlying the Appellant's submission. The adoption of a category licence could not be assimilated to litigation inter-partes with the Authority acting as arbitrator. Rather, the Authority was an administrative body formulating competition policy. To carry out its role properly it required access to information. Undertakings had to be free to inform it of their business secrets in the knowledge that same would not be divulged by the Authority. Here, the Authority was not merely considering the draft agreements notified by Texaco but also all the other types of agreements notified to it. In the circumstances of the adoption of what was essentially a policy matter, the opportunity given to the Appellant to make submissions was sufficient to comply with the rules of fair procedures.

On the issue of whether or not the Act

applied to draft agreements, Barrington J. held that as this was a point which had not been raised in the High Court, it should not be entertained by the Supreme Court.

As regards the argument to the effect that Section 4(2) constituted an unconstitutional delegation of legislative functions, Barrington J. held that Section 4 was quite clear. Section 4(1) opened with the words "Subject to the provisions of this Section". Sub-Section 2 was clearly one of the provisions of the Section. While the powers afforded to the Authority were indeed extensive, the legislative bounds within which the powers were to be exercised were clearly laid down. They constituted no more than the implementation of principles and policies contained in the Act itself. They fell within the scope of what constitutes permissible delegation, as set out by O'Higgins C.J. in Cityview Press -v- An Comhairle Oiliúna[3]. There it was held that if what was in issue was merely the giving of effect to principles and policies laid down in statute, then this could not constitute an unauthorised delegation of powers.

Lastly, Barrington J. held that Section 23 of the Act was merely permissive. In the long-run, it might be desirable in the interests of legal certainty that the Minister should by regulation prescribe the manner in which the functions of the Authority were to be exercised. However, on the other hand, the Minister might not see any necessity to interfere by means of regulation or might prefer to see how matters worked in practice before making any such regulations.

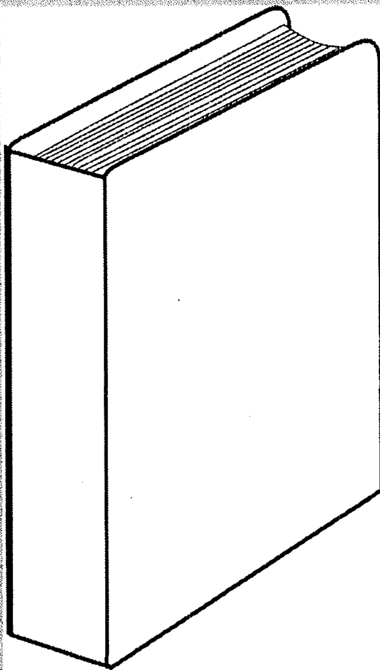
The appeal was consequently dismissed.

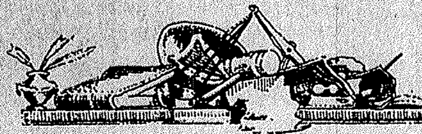
Had the Court come to any other decision, the Authority would have found itself in a difficult position, rendering the adoption of category licences extremely complex. It is clear that the category licence ought not to be assimilated to a bundle of individual decisions. Section 7(3) of the Act provides that "a licence under Section 4(2) shall not be granted until an agreement has been notified to the Authority". This means that the Authority requires a particular type of agreement to be notified to it before it has jurisdiction to adopt a category licence. However, once a category licence is adopted, no notification is required of agreements which fall within its scope. Similarly, individual deciosions in respect of notified agreements are rendered redundant. Thus, whilst the notification by Texaco could theoretically have constituted the trigger which gave the Authority its jurisdiction to grant a category licence, the category licence did not constitute an individual decision on the notification.

It would therefore have been inappropriate for the adoption of the category licence to attract the more rigorous rules of natural justice that an individual decision might attract. In addition, the rights that the Appellant claimed in respect of the Texaco notification could, logically, have extended to agreements notified by any other motor fuel company, where such an agreement had been considered by the Authority in drafting the category licence. The fact that a notified agreement might subsequently be proposed as a basis for commercial relations to a person such as the Appellant should not result in a specific duty of fair procedures being imposed in respect of that agreement simply because the agreement is considered by the Authority for the purpose of devising a category licence.

Despite the fact that Section 23 was found to be permissive, it might be useful for practitioners if the Minister were to regulate procedures.

1 Declan Cronin v. The Competition Authority, The Minister for Enterprise and Employment, Ireland and The Attorney General, and Texaco Ireland Limited (Hamilton C.J., O'Flaherty J., Barrington J., Murphy J. and Barron J. Judgment delivered by Barrington J.), November 27th, 1997.
2 in Metro No. (1) -v- EC Commission [1977] ECR 1875 at p.1904
3 [1980] IR 381, p.399.





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A Unique Computer Room

In February 1998, the final year students at King's Inns will receive training in the use of computer based legal research. The training will take place in the new computer room situated in the Library Building on Henrietta Street. Those who have seen the room believe it to be quite unique in the world of modern technology. Its refurbishment has been the source of much interest and a lot of painstaking work.

When the Council of King's Inns decided in January 1997 to move forward on the computerisation project, it was agreed that a bookstore at ground level would be the ideal location. It appeared to be a reasonably straightforward project - remove the books and redecorate the room.

This is a large room measuring 22ft by 15ft. Books and bookshelves lined all the walls to ceiling height as well as bays in the heart of the room. Finding a home for approximately 15,000 volumes was forbidding but a solution was found by providing mobile shelves in the basement of the building. As the books were removed, curious patterns emerged on the walls. These were barely visible but it was decided that they should be examined by an expert before redecoration.

The services of the wallpaper conservationist, David Skinner, were retained. On examination, he found the room to be papered with a complex paper scheme in imitation of timber panelling. Underneath this paper was the original wallcovering from round about 1834 when the building was completed. This presented a dilemma. Two significant schemes. Which to conserve?

A section of the earlier paper and border was removed from the wall. The width of the paper (19 inches) suggests that it is French as the standard width for Irish and English wallpaper was 21 inches. It is an exquisite pattern with classical motifs and is very much in keeping with a building which, architecturally, is termed Greek Revival. The stamp on the back of this wallpaper bears the name of *Richard Boylan, house-painter, decorator, gilder, manufacturer of stained paper and floorcloth" of 102 Grafton Street and 49 Lower Baggot Street.* From the King's Inns records, it has been established that he supplied the wallpaper in 1834. This date and the fact that there was no evidence that the plaster had ever been painted, suggested that the wallpaper was the earliest wall finish used in the room. Unfortunately, this first wallpaper was painted all over with a thin coat of white paint, presumably as preparation for hanging the faux-bois paper on top of it. This white paint has proved extremely difficult to remove without damaging the pigments beneath. As a result a decision was made to limit our conservation effort to the sample removed. The conservation work on this sample is still in progress. When it has been completed, a section of the wallpaper will be sent to the Architectural Archive for safekeeping. A further section will be stored with King's Inns records.

All our efforts were then concentrated on the 21 inch wide sheets of *faux bois* wallpaper. Given that there appeared to be large areas of the scheme intact, it was decided to restore the entire room to what it would have looked like in, we believe, the 1850s, when *faux bois* was a fashionable way of decorating a reception room in Ireland. Unfortunately, much of the scheme had been covered with a thick dark varnish which had become even darker with time. It is believed that the bookshelves were put in place in the 1870s. Between the 1870s and the late 1950s, the exposed areas had been painted with layers of cream emulsion paint. Removal of the white emulsion paint and varnish proceeded slowly but successfully. Certain areas of the wall were found to have suffered mould damage in the past causing loss of pigment and weakening of the paper structure. The shelves had also damaged the walls. To restore the visual integrity of the scheme, a certain amount of restoration and reproduction was necessary. The combed and block print paper was copied and used to cover the worst of the mould damaged areas. The borders imitate decorative carving with rich scarlet highlights and are further embellished by the use of highly decorative motifs. Paint scrapes were then taken from the ceiling and woodwork by David Skinner. He found that the original colours on the windows and doors were faux-oak graining, and faux-mahogany on the skirting. The ceiling had been a slightly lighter colour to the colour of wallpaper and the cornice had been brush-grained, also in a similar shade. After restoration the overall effect is one of rich gold with the colouring of sheets not quite consistent, probably an intentional effect suggestive of the natural variation in genuine timber.

The support and enthusiasm of King's Inns Council for this project was encouraging at all times for those involved. The result is that we now have conserved and restored an important and significant scheme for appreciation by future generations.

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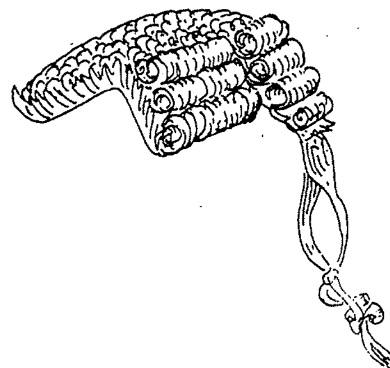

New Chairman for King's Inns Council

Frank Clarke SC was elected as the new chairman of the Council of the Honorable Society of King's Inns in early January. A graduate of University College Dublin, he was called to the Bar in 1973. He took silk in 1985. He comes to King's Inns with appropriate experience having been a lecturer there in Practice and Procedure between 1977 and 1985. He was chairman of the Bar Council from 1989-1991.

QUANTUM OF DAMAGES FOR PERSONAL INJURIES, by Robert Pierse, Round Hall Sweet & Maxwell, £58.00

The author of this book is to be commended and congratulated on adding to the corpus of available text books with an Irish dimension, in this particular field of law, in a situation where as little as fifteen years ago, little or no published text book material was available, and in a situation where now almost every major area of law is covered by an appropriate publication.

The stated object of the author is to provide an understanding of the range of damages applicable to a particular physical or non-physical injury, in the context of the book being presented in a highly practicable and clear format enabling easy digestion of factual material. Case references are to cases in courts of limited and unlimited jurisdiction and of all appellate courts. Quite correctly, in the introduction, the author states that the volume will give the reader nothing more than a "feel" for the amount of damages that a particular type of injury is likely to attract and where to go for more information. One must fairly anticipate that if this publication is a success, further publications for subsequent years may be contemplated.

The book layout follows a foreword by the Honourable Mr. Justice Kevin C. O'Higgins, a brief preface and introduction by the author, a table of abbreviations, a comprehensive diagram of the human body and its components, followed by case summaries under seventeen separate anatomical headings in the first section of the book, dealing with injuries from skull to chin. In the second section of the book, brain and catastrophic injuries are dealt with, and naturally the reports in this area concentrate on the decisions of the High Court and Supreme Court. In the following section, injuries in the shoulder to finger area are dealt with under seven separate headings, in the next following section neck to sexual organs injuries are dealt with, in the next following section hip to toe injuries, with the final section of the book dealing with non-physical injuries such as depression, nervous shock, post traumatic stress disorder, psychiatric injury and psychological injury. Case summaries are presented precis and compendium style (in the manner of the

Garda compensation booklet style), using the abbreviations, summarising the injuries and, where appropriate, breaking down the damages award between past pain and suffering, future pain and suffering and special damages. Where contributory negligence is a factor in the calculation of the award, that also is noted. Thus, probably for the first time in Ireland, a reference book is available in the manner as described, for a wide variety of injuries, dealt with in the various courts of first instance, and in the Supreme Court on appeal, dealing with hundreds of cases in all. Such is the clear and unpretentious nature of the work, that members of professions related to the legal profession and/or indeed members of the public, with some application, may find interest in and benefit from this work.

In his foreword to the work, Mr. Justice O'Higgins quite correctly notes that personal injuries actions constitute a major part of the business of our courts with the situation unlikely to change significantly into the foreseeable future. He goes on to point out that the assessment of damages is an inexact science with many diverse factors coming into play in different ways to arrive at a result in a particular case and expressing conviction that careful and skilful presentation (by the advocate) has a vast effect on the outcome of personal injuries actions:

"A good Solicitor and a good Barrister can make a huge difference to the result of litigation:
so too, alas, can a poor professional team."

However, more importantly, he goes on to state:

"The book is not a ready reckoner, such as the book used in the motor industry and I believe it should be used with care and should carry a warning along the following lines: "DANGER, use only with the direction of a qualified legal practitioner".

Those legal practitioners experienced in the conduct of personal injuries litigation, be it in negotiation or in the conduct of court trials will be acutely aware of factors separate to the bare facts of the case, which often constitute separately, or in combination, the reasons leading to an outcome of a case being deemed successful or unsuccessful from the Plaintiff's or the Defendant's point of view. These include, most importantly, the opening of the case before the trial Judge (considered by many experienced practitioners to be the most important element of any case in that it presents the broad canvas upon which detail will subsequently be applied), the degree of preparedness of the entire legal team, the quality of the Plaintiff as a witness, his presentation, the quality of the legal team in terms of examination, cross examination and re-examination, the quality of other professional witnesses, the trial Judge hearing the case, and the sheer chemistry that ensues at a court hearing given the aforesaid constituents, chemistry which can never be accurately predicted, but hopefully anticipated. The work under review does not pretend to take these factors into account, and thereby, the danger is that by not taking such matters into account, other than superficially or in passing reference, readers of the book, of whatever profession, or whether they be members of the public or otherwise, might be led to conclude that one could predict with a considerable degree of accuracy, the likely outcome of a case on the basis of the injuries (be they mental or physical or financial) sustained, alone. As experienced practitioners realise, this is not the case.

To assess the value of the book, members of the legal profession, be they student, practitioner, arbiter, or academic, and applying the acid test of a book only being of value when it is not available, may likely conclude that alternative traditional sources of reference, principally the sounding out of views between colleagues, and taking into other factors referred to above, will be more reliable, and more sensitive to the peculiarities of each particular case. That is not to state that this work does not have value, but to those to whom it does or would have value, it should be treated with extreme caution. The book

however, does provide a ready reckoning of values of cases and a fair statement of the law and of the range of values, subject to the criticisms described.

Finally, one very practical criticism which may be made, is in relation to the lack of emphasis on the fact that special damages as such are not constrained by virtue of judicial decision, in the same way as general damages are. The very high awards made by courts of all jurisdictions in personal injuries cases, usually comprise in much greater proportion the element of special damages, constituting such areas as loss of earnings to date, loss of earnings into the future, nursing care, special needs and so forth. Accepting the truism referred to by Mr. Justice O'Higgins in the foreword that "people dealing with really serious injury cases know how inadequate money is to compensate the severed spinal colds or shattered spirits", and recognising the legal practitioner's duty to attempt to restore the Plaintiff, in so far as money can do so, to the same position as if the injury had not occurred, and moreover, noting the fair mindedness of Judges, greater emphasis should be placed in terms of this work and of other works dealing with personal injuries, on systematic and thorough preparation of the special damages aspect of a Plaintiff's case, to achieve the optimum result in terms of damages recovery on the Plaintiff's behalf. In this way, and conversely, from a Defendant's point of view, in seeking to meet such a well prepared and presented case, the quality of practitioner in the personal injuries area of litigation is likely to improve, but only with the emphasis being placed on the necessity to do so in, inter alia, published works on the subject.

Overall, this work creates a precedent in terms of Irish legal publication, reflects the skill and diligence of the author, and no doubt will form the basis of further works in this area over the coming years.

– Richard McDonnell, Barrister

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MILITARY LAW IN IRELAND, Ciaran Craven and Gerard Humphries,Round Hall, Sweet & Maxwell, £78,

In the preface of the book the authors state the intention of writing the book so as to give the civilian legal practitioner an insight into the military system and also to assist military personnel including unit and formation commanders and representative bodies, understand in a practical way the relationship between military life and civilian law. They state that it was not their intention that the text should be a detailed jurisprudential analysis of the nature or morality of, or necessity for, armed forces, in Ireland in particular or in general.

This, the first textbook on military law in Ireland is well timed and should prove of invaluable assistance to all legal practitioners who are called upon to represent serving or retired members of the Defence Forces. It will also be of considerable benefit to serving members of the Defence Forces and it can be anticipated that it will become a standard textbook in the military college and on all courses for Officers and NCOs, where matters in relation to military law form part of the syllabus. Furthermore, since military law is applied and implemented by Army Officers this book should be an essential reference for them.

The book is laid out in seven chapters with an appendix which lists cases heard by the Court Martial Appeal Court. The authors undertook considerable research and quote cases from other jurisdictions and also draw comparisons with the procedure in other armies for compensation for injuries sustained by soldiers in service.

Chapter One provides an introduction to military law in Ireland. It gives the historical background and origins of the formation of the Defence Forces. It outlines the constitutional and legislative basis of the Defence Forces and then describes the organisation. It goes on to list the ministerial powers in relation to defence. It defines the nature of command and deals with the issue of superior orders. The chapter also describes the meaning of "aid to the civil power" and "active service".

Chapter Two relates to service in the Defence Forces. The engagement of soldiers and the criterion for enlistment are described. Of particular interest to practitioners is the criterion of ineligibility for enlistment. The reader is referred by the authors to the case of the State (Gleeson) -vMinister for Defence, Ireland and the Attorney General, 1976 where the fact that, the dismissal of the applicant from the Defence Forces rendered him ineligible for enlistment again was a major consideration by the court.

The above case is also quoted,as the authority in defining the legal relationship between soldiers of the Defence Forces and the State. The Supreme Court held that a soldier is an office holder "in the eyes of the law (the soldier) was not a servant...he was the holder of an office, no less so than the member of the police force in Ridge -v- Baldwin, 1964 A.C. 40, in the capacity of an office holder in the legal sense - although not an officer in terms of military rank...."

The terms and conditions of service of soldiers are outlined and of particular importance from the practitioners' viewpoint are the grounds for discharge from the Permanent Defence Force of the soldier. The judicial interpretation of discharge procedures is outlined with comprehensive notes from the principal cases wherein discharge was considered.

The chapter deals with the engagement of officers in the Defence Forces and the legal relationship between officers of the Defence Forces and the State. The decision of Mr. Justice Barr in Egan -v- The Minister for Defence, unreported High Court November 24th 1988, is quoted in part, wherein it was held that all members of the Permanent Defence Forces of whatever rank, serve on foot of statutory contracts, the terms of which are set out in the Act and Regulations made thereunder. The authors suggest that although the contractual model is undoubtedly correct in the context of soldiers who enlist for fixed periods, the nature of the relationship between a commissioned officer and the State hardly sustain such analysis, either historically or legally. They indicate that the relationships sui generis, arises from a voluntary offering of the officer's fidelity to Ireland and loyalty to the Constitution, the acceptance of which is signified, upon the taking of an oath of loyalty, by the granting of a commission to the officer by the President, on the advice of the Government. The authors suggest that such statutory contract is void for uncertainty.

The decision in Egan -v- Minister for Defence remains a precedent and should circumstances arise again at some date in the future such as occurred, at the time that the application for judicial review was brought by Commdt. Egan, then officers wishing to retire or resign

from the Defence Forces may be precluded from doing so. Under the terms of service of officers in the Defence Forces the issue of promotion, eligibility criteria and rules governing promotion boards is addressed. This was an area which did give rise to a number of judicial review applications within the reviewers' knowledge and will be of help to the practitioner.

The conditions attaching to service in the Defence Forces are outlined, in particular the deductions which may be made in respect of court orders from pay and allowances.

Medical administration in the Defence Forces is addressed and this will be of interest to practitioners involved in personal injury litigation, disability pension claims or reviews of judicial review applications in relation to medical discharges. Of benefit is the chart at page 67 outlining the various medical categories.

The military reader will find treatment of Courts of Inquiry and other administrative tribunals of considerable assistance in the performance of their duties. The practitioner's attention is drawn to the fact that the findings and recommendations of all Courts of Inquiry are treated as confidential and their disclosure is prohibited except for the circumstances outlined at page 92.

Chapter Three deals with offences against military law and it is anticipated that this is the chapter to which the practitioner will find himself most frequently referring. Essentially the chapter deals with the summary trial of offences and the trial of offences against military law by court martial. The chapter outlines the sentencing by court martials and then describes the court martial appeals procedure. The facility for petition against sentence by court martial which existed prior to the introduction of the Court Martials' Appeal Court is also outlined, and the provision for legal aid for court martial and court martials' appeals is described.

The civilian practitioner will be interested in realising that an accused soldier is not entitled to legal representation at the summary trial of an offence against military law. The reader's attention is directed to page 113 of the text where the decision of Scariff -v- Taylor, 1996 is outlined. The foot note 121 indicates that the case is distinguished from Dunford and O'Neill -v Minister for Defence and Others, unreported, judgment of Ms. Justice Laffoy, December 15th 1995, in that the Scariff case was not capable of summary disposal.

The Dunford and O'Neill case is outlined at page 121. The decision was not appealed and nolle prosequies were entered against the applicants Dunford and O'Neill at their subsequent court martial. This reviewer would suggest that there is a lacuna in this area. The Supreme Court in Scariff has found that when the soldier appears before his commanding officer, this is deemed to be an informal investigation of charges. The commanding officer may dismiss the charges and/or if he considers that the charge should be proceeded with, in the case of soldiers, deal with the case summarily himself and/or in the case of serious offences, remand the accused for trial by court martial. In the case of a matter which he may dispose of summarily he indicates to the accused the penalty he will impose and the soldier has twenty four hours to consider same. As outlined in the Dunford and O'Neill case at page 121, the commanding officer indicated that in the event of his disposing of the charge, he proposed to impose a fine of £75. It is to be borne in mind that the commanding officer has considered the evidence at this point in time and has indicated to the soldier that he proposes fining him or awarding another penalty. The Supreme Court has described this as an informal investigation. If however the soldier, rather than electing for trial by court martial accepts the fine and/or other penalty, then it is submitted that what was heretofore described as an informal investigation now retrospectively becomes a summary trial. It is to be borne in mind that there is no appeal in relation to a summary trial.

Chapter Four deals with compensation, negligence and breach of statutory duty. The authors indicate that there is no scheme of compensation available to members of the Defence Forces similar to that available to members of the Garda Siochana. There is a very comprehensive outline of the Army Pension Scheme as relates to wound pensions, wound gratuities and disability pensions. The legal practitioner acting on behalf of a soldier plaintiff must bear in mind that the Minister has a statutory entitlement to offset a court award as against a disability pension or award. The case authorities confirming the Minister's entitlement are outlined.

Chapter Five deals with grievances, representation and inter-personal relationships. In the report of the Commission on Remuneration and Conditions of Services in the Defence Forces dated 31st July 1990, "The Gleeson Report" at page 115, the Commission outlined the NCOs' teams submissions as follows, "the procedure (Under S. 114 of the Defence Act) is now held to be a meaningless ritual with little or no hope of actual redress at the end. There is also the perception that if a person applies for redress he may become the subject of "special treatment" or some form of victimisation. The procedure has now lost all credibility and is now more or less ignored by NCOs. This has led to a good deal of pent up frustration on the part of personnel with grievances of one sort or another and a more effective system of redress urgently needs to be put into effect".

Subsequent to the Gleeson Commission a new procedure was outlined as is addressed at page 239. This procedure appears to have addressed the complaints concerning the "old" procedure. The legal practitioner may still be asked to advise on these procedures, however the military reader will certainly find reference to this chapter of considerable benefit.

Inter personal conduct is addressed and categories of unacceptable behaviour are outlined. This will help to explain to the non-military reader considerations that are implicit in military administration and law, which considerations may not be readily apparent to a military person.

Chapters Six and Seven deal with international humanitarian law and overseas service by members of the Defence Forces. These chapters will be of greater interest to the military reader.

In conclusion, this text is a timely and welcome book. The authors are to be congratulated on their very comprehensive treatment of this subject. As a retired army officer, and barrister, respectively, they are eminently suited to bring their military professional knowledge and legal expertise to bear in the research and writing of the book. I anticipate that this text will be found on the shelves of all legal practitioners who have any soldier clients and will also be found in every officer's knapsack and briefcase.

–Rory de Bruir, Barrister

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