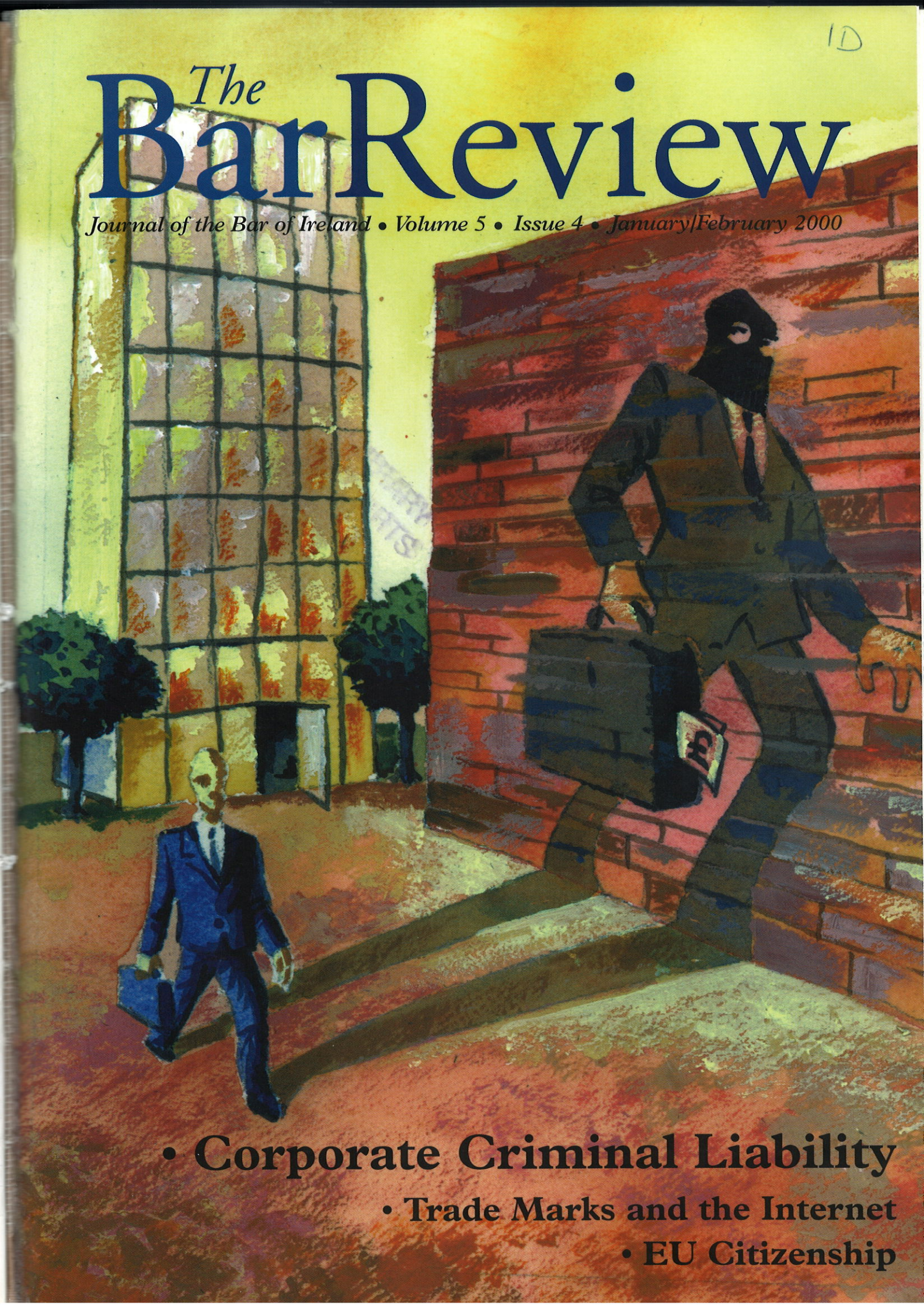
The Bar Review

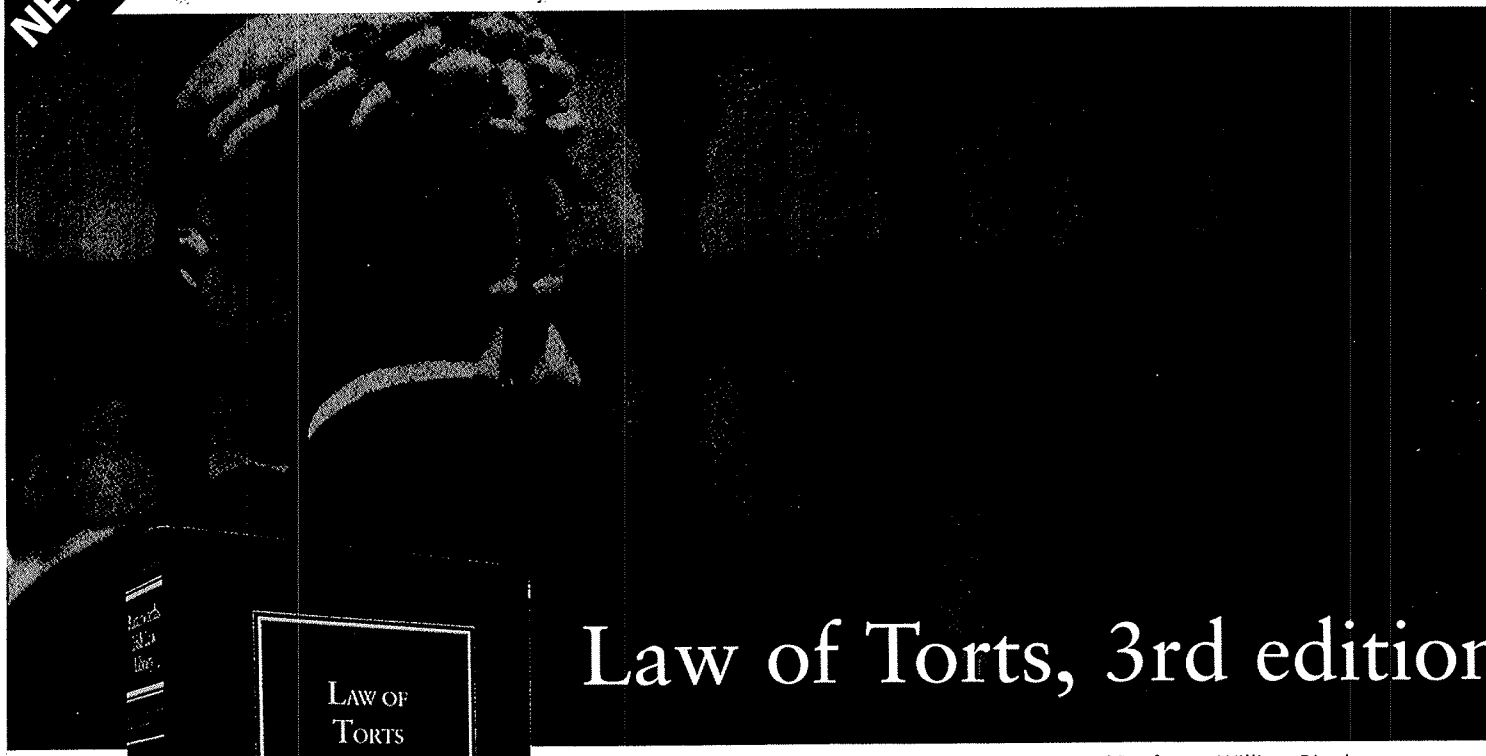
Journal of the Bar of Ireland • Volume 5 • Issue 4 • January/February 2000



- **Corporate Criminal Liability**
- **Trade Marks and the Internet**
- **EU Citizenship**

NEW EDITION

BUTTERWORTHS IRISH LAW LIBRARY - BILL



Law of Torts, 3rd edition

By Bryan McMahon, Judge of the Circuit Court and Professor William Binchy

The eagerly awaited third edition of McMahon and Binchy's Law of Torts will be the next volume in the Butterworths Irish Law Library, a series of important text books on core areas of the Law. Written by experts and handsomely bound, the series will be an essential addition to the bookshelf of the busy practitioner.

This widely used and highly acclaimed text book has been extensively revised and updated to include the numerous legislative and judicial developments which have occurred in this fundamental area of the law.

Recent important legislation examined includes:

- Civil Liability (Amendment) Act 1996
- Occupiers Liability Act 1995
- Health and Safety Regulations 1993
- Liability for Defective Products Act 1991
- Statute of Limitations (Amendment) Act 1991

Key developments are detailed and relevant and most recent cases examined in areas such as nuisance; the duty of care; product liability; nervous shock; professional negligence; employers liability and damages.

Publication date: January 2000 Price: £70
ISBN: 185 475 8314 Product code ILLT3

To order your copy contact Butterworths:

26 Upper Ormond Quay,
Dublin 7

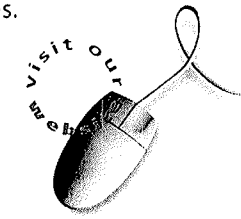
Tel (01) 873 1555

Fax (01) 873 1876

e-mail:
ircustomer@butterworths.co.uk

Personal callers: visit our bookshop at the above address, open 9.00am to 5.00pm (including lunch)

Butterworths



www.butterworthsireland.com

The Bar Review

Volume 5, Issue 4, January/February 2000 ISSN 1339 - 3426

Contents

Subscriptions: October 1999 to July 2000 - 9 issues. £90 (plus VAT) including index and binder.

Subscription and advertising queries should be directed to :
Noted Marketing and Design Limited,
The Mews,
26A Mount Eden Road,
Donnybrook, Dublin 4.

Telephone 01 2830044
Fax 01 2830955

Editorial Correspondence to:

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

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

Law Library Credit Union

The Law Library Credit Union AGM was held on the 7th December 1999. The following is a synopsis of the Chairman's Report.

This was the first AGM of the Law Library Credit Union Ltd. Prior to 1998 the Credit Union existed only as a fund and I am pleased to tell you that we were the first Credit Union to be registered under the new rules.

Everybody gives their time to the Law Library Credit Union Ltd on a voluntary basis and I would like to thank those involved.

Our thanks also to the Bar Council for all their assistance and for the facilities given to us to enable the Credit Union to operate and for meetings to take place.

The Credit Union is now fully operational with 154 members, ten of which are children. All members are within the Common Board. Savings are coming in on a regular basis and loans have been granted to cover fees, cars and home improvements.

Finally I would like to thank the two retiring members of the Board, Amry Phelan and Gerard Humphreys, for their hard work and to welcome the two incoming directors, Padraic Clarke and Barra O'Keefe.

Ercus Stewart SC
Chairman of the Board

Claire Byrne

Claire Byrne, the Administration Manager of the Bar Council, is leaving after eighteen years service to join KPMG as Group Business Manager. Nearly all members will have come into contact with Claire over the years, and her loss is immense, both for her knowledge of the Law Library and it's members, and for her excellent manner and quick service when dealing with queries.
She will be greatly missed by both members and staff alike and we wish her the best in her new position.

Tionól Gaeilge don lucht Dlí

Reachtálfar an Tionól Gaeilge blaintúil don lucht dlí Dé Sathairn an 12ú Feabhra 2000 sa Drioglann (Distillery), Sráid an Teampaill, in aice na gCeithre Chuirt, Ócáid shóisalta agus léinn atá i gceist agus leanfaidh sé óna 10.00 ar maidin do dtí'n 4.00 tráthnóna.

Ar maidin beidh Ceardlann ar Théarmaí Dlí le Gearóid Ó Casaide, Rannóg an Aistrúcháin, Teach Laighean dúinne a bhfuil Gaeilge agus dlí againn ach nach féidir obair an dlí a phlé as Gaeilge. Ar a 1.00 caithfear lón sa Dáil Bia, bialann nua de chuid Chomhdháil Náisiúnta ne Gaeilge as Sráid Chill Dara.

San iarnóin tabhairfaidh Dr Dáithí Ó hÓgain, Roinn Bhéaloideas Eireann, léacht ar lucht an dlí agus an Béaloideas agus leanfaidh an scléip ina dhiaidh sin!

Más mian leat freastal ar an Tionól dein teagmháil le Dáithí Mac Cárthaigh, Abhcóide ag (01) 817.5251. Níl de tháille ar ach £5/£10 agus tá fáilte roimh chách!

Law Library Financial Services

The Chairman of the Bar Council, Liam McKechnie SC, launched the new financial services facility on Thursday 13th January. This is a joint venture between the Bar Council, Coyle Hamilton and the Bank of Ireland and offers a range of financial services to members and banking facilities to the public. Sarah O'Toole from Coyle Hamilton and Rita Simons from Bank of Ireland manage the facility and are available to deal with any queries.

Forensic Science Conference

A conference on forensic science 'From Crime Scene to Court Room' is taking place from the 2nd - 5th May 2000. This marks the 25th anniversary of the establishment of the Forensic Science Laboratory and will be held in the Dublin Castle Conference Centre.

Among the various topics being looked at are management of major crime investigations, forensic evidence such as fingerprints, paint, bloodstains and trace evidence, crime scenes, DNA databases and drugs. This will be followed by forensic evidence within the court room with talks by Barry Scheck and Gareth Peirce.

Peter Charleton SC will be chairing the crime scene session while Eamonn Leahy SC will be talking on the subject of the legal issues surrounding a DNA database for Ireland.

THE DIRT INQUIRY: POINTING THE WAY FORWARD?

The Report of the Public Accounts Committee into the operation of DIRT was recently published to justifiable media and public acclaim. The Report was detailed and comprehensive and uncovered much important information. It was produced extremely efficiently and the inquiry on which it was based was expeditiously conducted. The success of the Public Account Committee's work creates the possibility of an alternative form of inquiry to those conducted by the Tribunals of Inquiry set up by the Oireachtas.

The success of the DIRT inquiry process has, understandably, led to calls for a more frequent deployment of the powers of Oireachtas Committees to carry out inquiries into matters of significant public interest. Such calls are invariably prompted by a comparison with what is considered to be the more cumbersome, lengthy and costly process of Tribunals of Inquiry.

There are however some unusual if not unique features of the DIRT inquiry process which mean that one is not comparing like with like when one compares this inquiry with the inquiries presently being carried by the Flood and Moriarty Tribunals. These features enabled the Public Accounts Committee to conduct an inquiry in a manner which would not be possible or appropriate in all cases and which would certainly not be possible or appropriate in the case of the Flood or Moriarty Tribunals.

There are two principal features of the DIRT inquiry which led to its successful and expeditious result. The first is the fact that all institutions, the subject of the inquiry, co-operated fully with the Comptroller and Auditor General initially and subsequently with the Sub-Committee of the Public Account Committee which actually carried out the inquiry. This co-operation enabled the Comptroller and Auditor General to compile his very detailed and extensive report which in turn formed the basis of the hearings and subsequent inquiry carried out by the Sub-Committee of the Public Accounts Committee. The existence of this detailed report by the Comptroller and Auditor General prior to the conduct of any hearings is the second important feature which contributed to the success of the Inquiry. Although there are areas of difference between the Report and the Comptroller and Auditor General's earlier report and although the hearings explored areas not explored by the Comptroller and Auditor General, the reality is that the Sub-Committee was working from a very significant base document which provided the essential information that was explored further at the public hearings.

There are lessons here for future inquiries whether conducted by Tribunals of Inquiries or by Committees of the Houses of the Oireachtas. In this regard it is hardly co-incidental that the McCracken Tribunal, which was also acclaimed as a great success, was preceded by the Buchanan Inquiry and that the Finlay Tribunal of Inquiry into the BTSB was preceded by the Hederman Report. The existence of a detailed report prior to embarking on any inquiry (whether by tribunal or Oireachtas Committee) undoubtedly facilitates the work of the inquiry and serves not only to identify relevant information but assists in focusing the scope of the inquiry.

In this regard it must be remembered that the scope of the DIRT Inquiry was limited and focused. The scope of the inquiries which the Flood and Moriarty Tribunals have been required to carry out are not. The Oireachtas has mandated these Tribunals to carry out very extensive inquiries and this must be borne in mind when comparing the efficiency and success of the different inquiries.

In recognising the importance of the fact that all parties to the DIRT Inquiry fully co-operated with that inquiry, it should not be forgotten that this is not the case with either the Flood Tribunal or the Moriarty Tribunal. Tribunals of Inquiry are most frequently used by the Oireachtas where there are very serious controversies as to the underlying facts and where co-operation from the relevant parties is not forthcoming. In such cases, the identification of the underlying facts is much more difficult and this inevitably leads to protracted hearings.

There is another aspect of inquiries in general which also must be borne in mind. Where the reputation and integrity of individuals is directly in issue, those individuals are entitled to fair procedures as prescribed by our Constitution. Fair procedures involve the entitlement of the parties to present and defend their version of events as fully as possible. This inevitably leads to an increase in the length of such inquiries and in the need for legal representation. The DIRT Inquiry did not involve the presentation of evidence by the institutions themselves and involved only very limited cross-examination. It is quite clear that the Flood and Moriarty Tribunals could not be conducted on such a basis.

The success of the DIRT Inquiry should however prompt careful consideration in the future as to which form of inquiry is appropriate in any given instance. There will undoubtedly be cases where an inquiry by an Oireachtas Committee will be the most suitable and efficient and there will be other cases where a full Tribunal of Inquiry will be required. The availability of an efficient system of Oireachtas inquiries undoubtedly contributes to democracy and to public confidence in parliamentary and public institutions. Care must, however, be taken to ensure that Oireachtas inquiries are not used in inappropriate circumstances. To do so would undermine the public confidence which is essential to their success and credibility.

Whatever form of inquiry is chosen in any given case, it is clear that careful consideration should be given to the following matters:

(a) Is a preliminary investigation by some party such as the Comptroller and Auditor General or some independent body feasible or appropriate?

(b) If so, should such an inquiry be carried out prior to the conduct of any Oireachtas Committee hearings or any hearings by a Tribunal of Inquiry?

(c) Are the objects of the inquiry clear and in particular are its terms of reference properly defined and focused?

(d) Are individuals likely to be the subject matter of findings of fact by the inquiry and, if so, how can the requirements of fair procedures best be met?

Of course costs must also be a factor in determining the most appropriate type of inquiry. In this regard, it must be noted that both the legislation relating to Tribunals of Inquiry and the legislation relating to inquiries by Oireachtas Committees both allow for the award of expenses of the parties appearing before the inquiries they regulate. To date the financial institutions have not sought their costs in respect of the DIRT Inquiry and were they to do so the costs of that inquiry would be greatly increased. In the main, however, it is fair to say that inquiries by Oireachtas Committees are likely be less costly than inquiries by Tribunals of Inquiry.

In conclusion, the Public Accounts Committee is to be congratulated on its work. It is to be hoped that the prominence given to the Report will stimulate the debate as to the most appropriate means of investigating public scandals in the future and as to the strength and weaknesses of the various methods of inquiry presently available to us. ●

DEFENCES TO CORPORATE CRIMINAL LIABILITY

Paul Anthony McDermott BL considers the emerging area of corporate criminal liability and the defences likely to be raised in cases involving criminal charges against companies and their officers.

Introduction

Last November in England two directors of a haulage firm were found guilty of corporate manslaughter after ignoring the excessive working hours of one of their drivers who fell asleep at the wheel and caused a fatal crash.[1] In a verdict that is believed to break new legal ground, a jury at the Old Bailey decided that the directors were responsible for the crash in which two people died. The directors had been accused of being grossly negligent in allowing their driver to spend more than 60 hours a week at the wheel in breach of the law on driving hours. The prosecution had described the driving habits of the driver as "an accident waiting to happen" and had alleged that the directors were grossly negligent because they knew or ought to have known the state that their driver was in. Whilst litigation following the sinking of the Herald of Free Enterprise in Zeebrugge had established that companies could in theory be convicted of corporate manslaughter[2], until recently successful prosecutions had been the exception rather than the rule.

"The prosecution of companies is likely to increase over the next few years. Where a company benefits from the crimes of its senior employees there is no good reason why it should not face a jury alongside those employees. Charging companies opens up the prospect of recovering larger fines and hence hurting shareholders who will then demand higher standards from their company."

The prosecution of companies is likely to increase over the next few years. Where a company benefits from the crimes of its senior employees there is no good reason why it should not face a jury alongside those employees. Charging companies opens up the prospect of recovering larger fines and hence hurting shareholders who will then demand higher standards from their company. The Canadian Supreme Court has explained why prosecutors have turned their attention to companies:

> "..the corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to our criminal law is as essential in the case of the corporation as in the case of the natural person."[3]

Whilst a lot has been written on the theory of corporate criminal liability, little consideration has been given to the means by which a company could attempt to defend itself from such a charge. The purpose of this article is to consider some of the defences that might be open to companies that face criminal charges. In the absence of any Irish jurisprudence on corporate criminal liability, heavy reliance will be placed on caselaw from other jurisdictions. Whilst there is no guarantee that an Irish court would follow such cases, they at least provide a starting point for the practitioner who is asked to advise a company under threat of prosecution.

The basis of corporate criminal liability

The most common method of imposing corporate criminal liability is to locate it in the conduct of the company's senior officers when acting in the course of their duties. A distinction is drawn between persons whose acts may incur liability and those whose acts will not. In practice this distinction can be difficult to draw. The question is who represents the directing mind and will of the company and controls what it does.

In *Tesco Supermarkets v Natrass*[4] the issue before the House of Lords was whether the actions of a regional manager of one of the company's supermarkets could incur criminal liability for the company. Lord Diplock stated the legal test as follows :

> "...what natural persons are to be treated as in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association

or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company."[5]The Supreme Court of Canada has explained this method of attributing criminal liability to a corporation as follows :

"The most common method of imposing corporate criminal liability is to locate it in the conduct of the company's senior officers when acting in the course of their duties. A distinction is drawn between persons whose acts may incur liability and those whose acts will not. In practice this distinction can be difficult to draw."

"The identification theory was inspired in the common law in order to find some pragmatic, acceptable middle ground which would see a corporation under the umbrella of the criminal law of the community but which would not saddle the corporation with the criminal wrongs of all its employees and agents."[6]

Lack of identification

The most obvious way to avoid corporate criminal liability is to argue that the employee whose conduct is under scrutiny cannot be identified with the company. In Canada it has been held that the key factor which distinguishes directing minds from normal employees is "the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea."[7] A good example of a case where this test was not satisfied by the prosecution is *R v Safety-Kleen*[8] The accused corporation, which operated a fleet of waste oil collection trucks, was convicted of a breach of environmental law after one of its drivers was found in possession of waste for which a manifest had not been completed. The employee responsible for this omission was a truck driver for the company. He was also the company's sole representative in a very large geographical area and was responsible for collecting waste, completing necessary documentation, maintaining the company's property in the region and responding to calls from customers and regulators. However he did not have any managerial or supervisory function and took no role in shaping the company's corporate policies. The Ontario Court of Appeal held that in the absence of evidence that the employee had authority to devise or develop corporate policy or make corporate decisions which went beyond those arising out of the transfer and transportation of waste, he could not be described as a directing mind of his corporate employer. The fact that he enjoyed a wide discretion in the exercise of his responsibilities and was equated with his company by persons who dealt with him did not alter this conclusion.

A case where employees fell on the other side of the line is *R v Church of Scientology of Toronto*.[9] The defendant Church was convicted of charges that arose from activities carried out by the Intelligence Bureau within its 'Guardian's Office'. After carefully examining the corporate structure of the Church the Ontario Court of Appeal concluded that the relevant persons in the Guardian's Office could be identified as being directing minds of the Church of Scientology of Toronto:

> "It may be that the Assistant Guardian Toronto and the other senior officials in the Guardian's Office Toronto had limited discretion to set policy on matters of information-gathering. However, what executive authority did exist within the Church with respect to those matters resided with the senior officials in the Guardian's Office. The Assistant Guardian, for example, was accountable to no one within the Church. He was free from control and instruction by the board of directors and the Executive Director."

Inappropriate offences charged

There are certain offences which by their very nature are incapable of being committed by a company. Two examples of this are perjury and bigamy. In addition, a company cannot be convicted of an offence where the only punishment that the court can impose is imprisonment. The obvious example of this would be murder. However, apart from these exceptions, a company can be charged with any offence and the courts have upheld indictments against companies for crimes as diverse as manslaughter[10] and common law conspiracy to defraud.[11]

Acts done contrary to express instructions

A company may argue that actions taken by an employee contrary to express instructions cannot be attributed to the corporate employer. Were the law to recognise such a defence, a corporation might absolve itself from criminal consequences by the simple device of adopting and communicating to its staff a general instruction prohibiting illegal conduct and directing conformity at all times with the law. Because of this concern, the Canadian Supreme Court has rejected the existence of such a defence:

> "...the presence of general or specific instructions prohibiting the conduct in question is irrelevant. The corporation and its directing mind become one and the prohibition directed by the corporation to others is of no effect in law on the determination of criminal liability of either the directing mind or the corporation itself by reason of the actions of the directing mind."[12]

Similarly, in *United States v Hilton Hotels Corporation*[13] the Court balanced the general instructions given to a manager to maximise profits against directions to the manager to obey the anti-trust provisions of the Sherman Act and concluded that the former would in reality prevail.

Acts done in fraud of the company

Where the directing mind ceases completely to act, in fact or in substance, in the interests of the corporation the identification theory begins to break down. The Supreme Court of Canada has recognised this problem:

> "Where the directing mind conceives and designs a plan and then executes it whereby the corporation is intentionally defrauded, and when this is the substantial part of the regular activities of the directing mind in his office, then it is

unrealistic in the extreme to consider that the manager is the directing mind of the corporation. His entire energies are, in such a case, directed to the destruction of the undertaking of the corporation. When he crosses that line he ceases to be the directing mind and the doctrine of identification ceases to operate."[14]

Thus, in order for the identification doctrine to operate, the prosecution must demonstrate that the action taken by the directing mind:

i) was within the field of operation assigned to him;
ii) was not totally in fraud of the corporation; and
iii) was by design or result partly for the benefit of the corporation.

A couple of examples will illustrate how difficult it is in practice for a company to raise this defence. In *Canadian Dredge & Dock Co. v The Queen*[15] four companies were convicted of offences relating to public procurement after they were alleged to have made bids on a collusive basis, with the low bidders including in their costs compensation to be paid to the high bidders or non bidders. Each company had a manager who conducted the business of the company relating to the submission of bids for tender. The companies denied corporate criminal liability on the basis that these managers were acting in fraud of their respective employers. The Supreme Court of Canada rejected this defence and affirmed the convictions. It noted that as a result of the illegal machinations of their respective directing minds, all four companies had received contracts, sub-contracts or other benefits. The directing minds who committed this wrongful conduct also benefited themselves in a variety of ways including cash receipts, share positions in participating companies, and other arrangements. It was effectively a 'share the wealth' project for the benefit of all concerned except, of course, the public authorities who awarded the contracts. Thus it was impossible to come to any conclusion other than that the directing minds were acting partly for the benefit of their employer and partly for their own benefit.

Whilst all four companies were the victims of fraud practised by the respective directing minds who derived personal benefits from their activities, there was no evidence that the directing minds acted wholly for their own benefit or wholly in fraud of their employer in the sense of designing and executing a scheme to deprive their employers of all or any public contracting business or benefit therefrom. The conspiracy entered into by the directing minds was not aimed at the destruction of their respective corporate employers but rather was to ensure their existence at a level of profits sustained by fraudulently enhanced prices.

Another example of an unsuccessful attempt to raise this defence is the decision of the Quebec Court of Appeal in *R v Forges du Lac Inc.*[16] The defendant company was charged with filing false income tax returns over a five year period. The company was a small family business and the person whose conduct was under scrutiny was married to the principal shareholder of the company. The shares were divided, one to the wife, one to a third party and the rest to the principal shareholder. The wife had complete hold over the financial management of the company and diverted company money to personal bank accounts without the knowledge of her husband. In its defence, the company argued that as the wife had diverted more than $350,000 of the company's income, she should not be identified with the company for the purposes of imposing criminal liability. The Court drew a distinction between where a company is charged with fraud and where a company is charged with filing a false income tax return. In the former case the defence of fraud on the company would be available because it can hardly be said with any reality that a person designing and executing such a scheme could be, while doing so, the directing mind and the ego of the company itself. However, on the charge of filing false income tax returns, the defence would not be available because the false income tax returns did not constitute a fraud on the company itself. The Court recognised that the end result of the case was "disappointing" in that the company would face a significant fine which would come out of the assets of its principal shareholder, just because his wife had diverted company funds without his knowledge. However the Court pointed out that the company was not being fined because the wife diverted funds but rather because it filed a false or deceptive income tax return (although the Court recognised that the two events were related). It concluded by expressing the hope that the result in the case would stimulate the shareholders of companies to exercise stricter supervision and control in the selection of their directing minds. For example, in the case at bar, the Court expressed astonishment that the principal shareholder failed to notice his wife's fraudulent activities down the years.

"The basis of corporate liability is that a person who can be identified as the controlling mind of the company has committed an offence. Is it necessary that the employee be convicted of the offence before the company can be so convicted?"

Failure to convict the directing mind

The basis of corporate liability is that a person who can be identified as the controlling mind of the company has committed an offence. Is it necessary that the employee be convicted of the offence before the company can be so convicted? Such an argument has found little favour in the courts. For example, in *R v Ontario Chrysler*[17] a car dealership was convicted on several counts of fraud. The evidence established that 13 of its salesman had made misrepresentations to members of the public in relation to the purchase of cars. The two individuals who represented the controlling mind of the dealership, namely the general manager and the owner, were held to have the requisite culpable state of mind. Both were aware of the practice of misrepresenting cars and both authorised and condoned that practice. The dealership appealed its conviction on the ground that it could not be convicted of fraud absent the conviction of at least one of its directing minds. The Ontario Court of Appeal noted that there

was no authority in favour of such a defence and concluded:

"Proof of the personal culpability of a person who constitutes the directing mind of a corporate accused may be essential in order to establish the guilt of the corporation. That proposition does not, however, mean that the individual who is that directing mind must be charged and convicted."

Acts done by non-profitmaking bodies

The fact that a company is a non-profitmaking body is not a defence to corporate criminal liability. Authority for this proposition is to be found in *R v Church of Scientology of Toronto.*[18] The defendant Church was convicted on two counts of breach of trust and fined $250,000. The evidence established that it had planted persons in government agencies to obtain confidential information. The charges arose from activities carried out by the Intelligence Bureau within the 'Guardian's Office', which was a management arm of the defendant. Scientologists had gained employment in government agencies perceived to be enemies of the Church and in breach of their oaths of office then took copies of confidential documents from the agencies that employed them.

The Church was convicted and on appeal argued that corporate criminal liability had no application to a non-profit religious corporation. Rosneberg JA, for the Ontario Court of Appeal, rejected this argument as being based on a misunderstanding of how and why corporate criminal liability arises:

> "...the identification doctrine is fully applicable to non-profit organisations without share capital. The rationale for the imposition of criminal liability on corporations is not that they make a profit or are engaged in commerce, or even that they have shareholders. Rather, since corporations occupy such a central role in society, it would be unacceptable to have them operating outside the criminal law."

Whilst such a conclusion might mean that any economic penalty imposed would be borne by innocent parishioners, this was simply a risk or cost associated with the privilege of operating through the corporate vehicle. Given the proliferation of charities in Canada and the fact that Canadian taxpayers donated almost $3 billion to them, to leave such organisations outside the purview of the criminal law would be "intolerable."

Constitutional defences

When a natural person is charged with a criminal offence he enjoys the benefit of certain constitutional rights, such as the right to due process. One matter that Irish courts will have to address if companies begin to be widely prosecuted here, is the extent to which a company can rely on constitutional rights. Some guidance is provided by *R v Church of Scientology of Toronto*[19] where the Ontario Court of Appeal held that the application of the identification doctrine to a non-profit religious corporation did not infringe the Canadian Charter of Rights. In particular, the 'right to life, liberty and security of the person' under section 7 only applied to human beings. Given the close association between the Church and its parishioners, the Court suggested that the Church could rely on the religious freedom of its parishioners. However it held that the identification theory did not amount to an unconstitutional interference with freedom of religion as protected by the Charter. The Court was unable to imagine any reformulation of corporate criminal liability that would not infringe on freedom of religion in some way:

"To say that the individual managers could be prosecuted is simply not an adequate response. It fails to take into account that the acts are not for personal gain, but for the benefit of the institution...Notwithstanding the significant stigma of a criminal conviction, it is entirely appropriate that the institution be held accountable for the wrongdoing of the individuals whom it put in a position to perpetrate these crimes on its behalf."

"The experience of other jurisdictions shows that having carefully constructed a doctrine of corporate criminal liability the courts will not permit it to be dismantled agai by opening up expansive defences."

The Court noted that holding religious corporations to a lower standard than commercial corporations would simply aggravate "the mistrust that some feel towards religious organisations."

Conclusion

The experience of other jurisdictions shows that having carefully constructed a doctrine of corporate criminal liability the courts will not permit it to be dismantled again by opening up expansive defences. In the absence of any attempt to codify our criminal law, the scope of such defences in this jurisdiction will, as usual, be forged in the hard school of experience, with all the attendant risks that entails. ●

1. *The Times*, November 20, 1999.
2. *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72.
3. *Canadian Dredge & Dock Co. v The Queen* [1985] 1 SCR 662 at 692.
4. [1972] AC 153
5. Id at p 199-200.
6. *Canadian Dredge & Dock Co. v The Queen* [1985] 1 SCR 662 at 701.
7. *R v Church of Scientology of Toronto* (1997) 116 CCC (3d) 1.
8. (1997) 145 DLR (4th) 276.
9. (1997) 116 CCC (3d) 1.
10. *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72.
11. *R v ICR Haulage* [1944] 1 KB 551.
12. *Canadian Dredge & Dock Co. v The Queen* [1985] 1 SCR 662 at 699.
13. 467 F. 2d 1000 (1972)(9th CCA).
14. *Canadian Dredge & Dock Co. v The Queen* [1985] 1 SCR 662 at 713.
15. [1985] 1 SCR 662.
16. (1997) 117 CCC (3d) 71.
17. Unreported, Ontario Court of Appeal, March 7, 1994.
18. (1997) 116 CCC (3d) 1.
19. (1997) 116 CCC (3d) 1.

HE DUTY TO DISCLOSE IN CRIMINAL PROSECUTIONS

Gráinne Mullan BL outlines the present unsatisfactory state of the law in Ireland on pre-trial disclosure in criminal cases and offers some proposals for reform.

Introduction

Historically one of the hallmarks of the adversarial system of criminal justice was the production of surprise evidence at trial - neither side was under any obligation to disclose evidence in advance and the "ambush" was considered to be an entirely proper technique for both prosecution and defence. Whilst it is now settled law in this country that, in any criminal case to be tried on indictment,[1] the prosecution is under a duty to disclose in advance of the trial certain information to the defence, the precise content of that duty remains unclear. As recent events have shown, this lack of clarity can have serious adverse consequences, for the prosecution and defence alike.

"Unlike the situation which pertains in England there has been no clear statement (in either statutory or non-statutory form) as to the rules and procedure to be adopted in relation to the issue of disclosure of information (documentary or otherwise) at the pre-trial stage."

An attempt will be made in this article to set out the present Irish position in relation to pre-trial disclosure, to compare this position with English law in the area and then to suggest some proposals for reform.

The Irish Position

Unlike the situation which pertains in England there has been no clear statement (in either statutory or non-statutory form) as to the rules and procedure to be adopted in relation to the issue of disclosure of information (documentary or otherwise) at the pre-trial stage. What follows is an attempt to pull together certain strands touching upon the issue. The task is made more difficult by the lack of reported Irish decisions dealing directly with this issue. Most of the judicial dicta in this jurisdiction is contained in cases concerning appeals against conviction; thus the focus has been more on the practical question of whether disclosure would have affected the outcome of the particular case rather than on matters of pure principle.[2] It would appear however that applications for disclosure and/or discovery in criminal proceedings are on the increase, making the lack of clear guidance all the more unfortunate.

What *can* be said is that, where an offence is to be disposed of by way of trial on indictment, the prosecution is first and foremost under a *statutory* duty, pursuant to Section 6(2) of the Criminal Procedure Act, 1967, to furnish the accused with certain material setting out what might be called the bare bones of the case against him. This material will include the names of any witnesses who are to be called by the prosecution and a statement of the evidence they will give at trial.[3] The documents provided under section 6(2) are usually referred to collectively as the "book of evidence". They could however more properly be described as the "book of that evidence which the prosecution intends to adduce at trial". In other words, there may be other material of an evidentiary nature which the prosecution, for whatever reason, has decided it is not going to use at trial. It is not obliged to disclose this material under the Act. However, the *courts* have long held that the prosecution may nevertheless be required to disclose this (and other) material, pursuant to a duty rooted not in statute but rather in traditional constitutional values such as the right to fair procedures and to a trial in the due course of law (found in Articles 38.1 and 40.3 of the Constitution).

> "The constitutional right to fair procedures demands that the prosecution be conducted fairly; it is the duty of the prosecution, whether adducing such evidence or not, where possible, to make available all relevant evidence, parol or otherwise, in its possession, so that if the prosecution does not adduce such evidence, the defence may, if it wishes, do so."[4]

There are difficulties however with this apparently simple statement of principle.[5]

Duty to Disclose "where possible"

The prosecution is said to have a duty to hand over evidence "where possible". This raises the question of when it will be deemed to be "impossible" to disclose evidence, and perhaps more importantly, who is to make this decision. In relation to the first question, McCarthy J seemed to have in mind certain

practical matters, namely that: "the request [for disclosure] must be made with reasonable notice". This however appears to impose a burden on the *defence,* at some stage in the proceedings, to seek certain material from the prosecution, which presupposes that the defence knows what it is looking for. Whilst in the *Tuite* case, where ten days of evidence had been heard and the prosecution case had concluded, it may have been reasonable to expect the defence to have been aware of any further information it required, in cases still at the pre-trial stage this may not be so.

The second question which arises is whether it is proper for the prosecution alone to decide when it is possible to hand material over, or whether there should be some element of judicial monitoring of the matter.

These general questions as to the "mechanics"[6] or procedure to be applied in relation to pre-trial disclosure will be discussed later.

"Relevant" evidence

The obligation is to disclose "relevant" evidence. "The prosecution has no obligation to disclose material that is clearly irrelevant".[7] In *People (DPP) v. Meleady and Grogan*[8] Keane J refers to the "non-disclosure of material evidence to the defence". This immediately begs the question as to the meaning of "relevant" and "material" in this context. Again there is no definitive Irish answer but guidance can be gleaned from certain English cases, whose authority Keane J appeared to accept in *Meleady and Grogan.* For example, in *R. v. Keane*[9] the following test was adopted in relation to the term "material":

> "material in the realm of disclosure [is] that which can be seen...:
> (1) to be relevant or possibly relevant to an issue in the case;
> (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
> (3) to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence which goes to (1) or (2)."

This would appear to suggest that the term "material evidence" is broader in ambit than the term "relevant evidence". Insofar as this is so, it is submitted that, given the constitutional imperative that "the person accused will be afforded every opportunity to defend himself"[10] it is this wider term which is to be preferred.

In *R. v. Brown*[11] another of the cases alluded to in *Meleady and Grogan,* it was said to be "axiomatic that the duty to disclose extends to material which might arguably undermine the prosecution case or assist a defendant's case". This will include, for example, matter affecting the credibility of a prosecution witness, and material which may support a specific defence being forwarded by an accused. In *Meleady and Grogan* it was held that in a case which depended exclusively on identification evidence, "unarguably significant material" relating to that identification (which suggested a witness may have been shown photographs of the accused prior to making an informal identification) should have been disclosed to the defence.

"In its possession"

McCarthy J refers to the prosecution's duty to disclose such relevant evidence which is "in its possession". This raises two issues. First, it has been recognised by the courts, in *Murphy v. DPP*[14] that the prosecuting authorities are under a duty to preserve relevant evidence so far as is practicable until the end of the trial. The phrase "as far as is practicable" is important here. As the Supreme Court pointed out in its ex tempore judgment in *Dutton v. DPP*,[14a] there may be other conflicting rights at issue, such as an innocent person's right to property, so that there may come a point in time when material must be given back to that party. In *Dutton* the property involved, a motor vehicle, was scientifically examined on the day of the alleged offence. No evidence was found which linked the accused to the vehicle and it was returned to the owners the following day. No examination of the vehicle on behalf of the accused was carried out. The Supreme Court held:

> "It would be quite intolerable if people were deprived of their property for any appreciable length of time and especially when nothing is going to emerge from any examination of it...The State are not relying on anything that was found in the car to link Mr Dutton with the offences."

Hence an application to stop the trial going ahead on the basis the accused had been deprived an opportunity of examining the vehicle, was refused. *Dutton* is perhaps distinguishable from *Murphy* (which was not referred to in the Supreme Court's judgment in *Dutton*) in that in the latter case the prosecuting authorities were aware from an early stage that the defence wished to inspect the material (also a stolen motor car) whilst in *Dutton* an application for inspection was not made until two years after the incident. It is submitted that the general rule should be that the prosecuting authorities are under a duty to retain material as far as practicable, and that if they wish to dispose of the material the accused should be told of this and given the opportunity of an inspection beforehand. Again such a duty to preserve or allow an inspection is not set out in statute.

Secondly, there will be cases where the material sought by the defence is in the possession of a party other than the prosecution. In the absence of any power on the part of the prosecuting authorities to demand production of the material from the third party, a court application may be required.[15] Again however there is no procedure governing such applications for pre-trial discovery, and there is little reported jurisprudence on the issue, leaving all concerned unclear as to whether voluntary discovery should be sought, if so, when and how often, when a court application is appropriate,[15a] what principles should be applied,[16] the collateral use (if any) to which discovered documents may be put, and so on.

That is not to say however that the prosecution has no role to play in relation to the issue of third party discovery. Rather it may have a crucial role as the defence may only become aware of the third party material as a result of information provided by the prosecution in *its* disclosure. Conversely, the defence may not be alerted to either the existence or significance of this relevant material if the prosecution does not make adequate disclosure.

Furthermore the prosecution may become involved in the mechanics of a third party discovery application. For example, in a recent discovery application in the Circuit Criminal Court a defendant accused of sexual assault sought documents from parties other than the DPP, including the complainant. The complainant however did not wish to come to court and instead asked the DPP to state her position in court. In this way the prosecution can become involved. Similarly it is possible that a third party, rather than hand documents directly to an accused, would be willing instead to give the material to the

prosecution and entrust it with the task of passing any relevant matter on to the accused. Finally there is the important question of whether third parties are really in a position to decide what material in their possession is required by a defendant (or perhaps even the prosecution). If a court order is made this will undoubtedly clarify matters but it may still be necessary for prosecution and defence counsel to come together and draft an agreed letter setting out what is required of the third party in terms of discovery.

The English Position

The law relating to pre-trial disclosure by the prosecution in England is now governed by Parts I and II of the Criminal Procedure and Investigations Act 1996.[17] This legislation was introduced to remedy what was generally considered to be an unsatisfactory area of the law.[18] The Attorney-General had issued guidelines on the matter to prosecuting authorities in 1981[19] which called for disclosure of all "unused material" (i.e. not forming part of the book of evidence) if it had some bearing on the offences charged or the surrounding circumstances and did not fall into an exempted category.[20] Although these guidelines were largely followed, they had no statutory basis, and in 1994 it was held by the English Court of Appeal that the guidelines did "not have the force of law".[21] Whilst the guidelines had improved consistency in the decision-making of prosecutors and set minimum standards of fairness, they had been overtaken by developments in the common law which cumulatively had the effect of imposing a heavier burden on the prosecution than that set out in the guidelines. For example, the meaning of "unused material" was extended to include all material evidence the prosecution had gathered and from which it had made its own selection of evidence to be led.[22] Also the primacy of the court, rather than prosecutors, in deciding on issues of disclosure was stressed.[23] This resulted in much disquiet among prosecutors who felt that the pendulum had swung too far in favour of disclosure to the defence and that this was open to exploitation.[24] Hence the 1996 Act was designed, in part at least, to reduce the burdens of disclosure on the prosecuting authorities.

Criminal Investigations and Procedure Act 1996 (UK)[25]

The scheme introduced by the Act provides for a staged process of disclosure, in both cases to be tried on indictment and cases to be tried summarily (if the accused pleads not guilty).

First, a duty is imposed on the *investigator* of a crime to preserve material gathered or generated during the investigation and to make available to the prosecutor material in specified categories along with a schedule of other material.[26]

The prosecutor is then under a duty either to make "primary" disclosure to the defence of material which the prosecution does not intend to use but which it thinks might undermine the prosecution case, or to give the defence a written statement that there is no such material.[27] Note that the duty is to disclose material which "*in the prosecutor's opinion*" might undermine its case - the Act returns to the prosecutor the primary responsibility for deciding what material is to be disclosed.[28] One difficulty with the Act is that it does not define "undermine" and thus it remains to be seen how this phrase will be interpreted by both the prosecution and the courts. It does seem however, that the inclusion of the phrase was intended to narrow the common law test of materiality.[29] The Act then introduces a radical new obligation. Once primary prosecution disclosure occurs, an onus is placed on the accused to make a written statement setting out in general terms the nature of her defence, and the matters on which she takes issue with the prosecution.[30] This is a mandatory requirement (provided the prosecution has properly fulfilled its primary disclosure obligation), the rationale being that such a scheme will narrow and focus the issues between the parties, leading to greater efficiency in the processing of criminal trials and reducing the possibility of the prosecution failing to disclose material the defence should have.

This is seen from the next stage of the process which imposes a duty on the prosecutor to make "secondary" disclosure of any material not previously disclosed, which in the light of the accused's disclosure "might be reasonably expected to assist" her defence.[31]

Finally, if there is *at this stage* any dispute over the adequacy of disclosure the accused may apply to court for an order requiring further disclosure.[32] In other words, the accused can only apply to the court *after* she has made a defence statement and the prosecution has made secondary disclosure (or failed to do so). Court monitoring of the disclosure procedure is therefore significantly reduced. It is however specifically stated that the prosecution's duty to disclose is a continuing one: the issue must be kept under review until the trial is over, and the prosecutor must disclose any material which comes to his attention which would undermine the prosecution case (as it stands at any given time) or assist the defence disclosed by the accused.[33]

Reform

The difficulties which have arisen in this area of the law are attributable in large measure to the fact that no one person or body has overall control of the pre-trial process. There is no equivalent here, for example, to the French juge d'instruction.[34] Rather, in our adversarial system, there is a multiplicity of parties involved in the investigation and prosecution of crime; the police, the DPP, the Chief State Solicitor's Office, prosecuting counsel. This perhaps makes it inevitable that mistakes and confusion will occur.[35] However, the fact that the police and prosecution control the pre-trial process highlights again that an accused's right to fair disclosure is an inseparable part of his right to a fair trial (something which has also been recognised by the European Court of Human Rights). Some reform of the law here is clearly necessary, and although certain elements of the English law in relation to pre-trial disclosure are unsatisfactory from an Irish perspective, it at least provides a starting-point for discussion of reform here.

First, it is submitted that we learn from the English experience and introduce a statutory framework rather than non-statutory guidelines. The constitutional rights of the accused to fair procedures and to be tried in the due course of law, together with the public interest in the *successful* prosecution of crime, mandate that the issue should be regulated in the clearest fashion.

As to the content of this statutory regulation, the following suggestions are made:

(i) there should be a clear statement of the obligation of the investigating authorities to record and retain material evidence as far as practicable, or allow an inspection. In this way the problems of lost, mislaid or inadvertently destroyed material will be mitigated.[37]

(ii) a statutory duty should be imposed on the prosecution to disclose all unused (i.e. not already contained in the book of evidence) material evidence. The definition of "material" as set out in the *Keane* case above should be included as an aid to the prosecuting authorities in identifying that which they are required to disclose. (This definition should also apply in relation to the obligation at (i) above).

(iii) the prosecution disclosure should not take the form simply of a bundle of documents sent to the accused. Rather it is submitted that accompanying disclosure there should be a letter from the prosecution listing the documents disclosed, scheduling any material over which privilege is being claimed, and setting out what it believes to be the issues in the case and inviting defence to respond if this is not accepted. This would have the benefit of enabling the defence to identify more quickly whether there is or may be further material it requires from the prosecution. If so, this should be requested from the prosecution.

(iv) it is not suggested that the accused be obliged to reveal the general nature of her defence, as is required under the UK Act, or even that she should be obliged to give reasons to the prosecution as to why further material is requested. Even less so should it be permissible to draw adverse inferences from an accused's failure to make such revelations at this stage. The inequality of arms which continues to exist as between the prosecution and defence requires this. However, the statute should provide that if there is a continuing dispute between the parties as to whether certain material should be disclosed, the court will decide the matter. The role of the court at this point is vital. As O'Flaherty J said in *DPP v. Special Criminal Court; Ward v. Special Criminal Court*[38]:

"...when it comes to a stage when there is any doubt on the matter, it will be essential to get the ruling of the...judge."

The court may take the view that the public interest is such that it need not even examine the documents before allowing the claim of privilege, but it must at least hear argument on the matter first.

It is at the hearing of any such application that the accused may have to give some explanation as to why she seeks the material concerned. Note that while it is envisaged that court applications will not occur until after stages (ii) and (iii) are complete, there may be exceptional cases where an earlier application is required.

(v) the prosecution's duty to disclose should, as a general rule, be operative from the date the book of evidence is served. However, it should be provided that this will not prevent the earlier disclosure of material. In the UK it has been held that although (in relation to an indictable offence) the Act does not apply until after committal, the obligation on the prosecutor to make primary disclosure clearly envisages that some disclosure may be required and take place before then.[39] Likewise prosecutors in this country should be aware that any disclosure statute would impose minimum obligations and that a court may hold that, in certain circumstances, earlier disclosure is constitutionally required. Furthermore, it should be stated that the duty to disclose is a continuing obligation.

By adopting a statutory scheme of this or similar nature the legislature will be providing the basis for an improvement in the consistency of prosecution disclosure, and more certainty among all parties as to their respective roles. Minimum standards of fairness will be observed and safer convictions will be obtained. ●

"It is submitted that we learn from the English experience and introduce a statutory framework rather than non-statutory guidelines. The constitutional rights of the accused to fair procedures and to be tried in the due course of law, together with the public interest in the successful prosecution of crime, mandate that the issue should be regulated in the clearest fashion.

1. This article deals only with cases that are to be tried on indictment. For a general discussion of the duty to disclose, including issues in relation to cases which are to be tried summarily, see Dwyer, *The Duty of Disclosure in Criminal Proceedings* (1993) 3 ICLJ 66. See also Charleton, McDermott and Bolger, *Criminal Law* (Butterworths, 1999), pp.158-164.
2. In this regard see the comments of Glidewell LJ in *R. v. Ward* [1993] 1 WLR 619 at 642:
"Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence."
3. It will also include a list of any exhibits which are to be produced at trial and the accused is entitled, under s.6(3), to inspect all such exhibits.
4. *People (DPP) v. Tuite* (1983) 2 Frewen 175 at 180-181, *per* McCarthy J.
5. McCarthy J himself recognised that: "There is, however, a limit on the duty of the prosecution" (ibid. at 181).
6. *per* Carney J in *DPP v. Special Criminal Court; Ward v. Special Criminal Court* [1999] 1 IR 60 at 71.
7. *ibid.* at 83, *per* O'Flaherty J.
8. [1995] 2 I.R. 517 at 539.
9. (1994) 99 Cr App R 1.
10. *State (Healy) v. Donoghue* [1976] I.R. 325 at 349, *per* O'Higgins CJ.
11. 1995) 1 Cr App R 191, confirmed on an appeal on a point of law of general public importance by the House of Lords, [1998] A.C. 367. In this case it was held that the prosecution was not under an obligation to disclose material which was only relevant to the credibility of defence witnesses, not least because of the practical difficulties involved given that, in most cases, the prosecution itself would have very little, if any, advance knowledge of the identities of defence witnesses.
12. English cases on this issue include *R v. Paraskeva* (1983) 76 Cr App R 162 and *Berry v. R.* [1992] 3 W.L.R. 153.
13. See, e.g. *R. v. Ward* [1993] 1 W.L.R. 619 where it was held that the prosecution was under a duty to disclose documentation (including statements by the accused herself, witness statements and medical reports) which tended to support a defence argument that any alleged admission by the accused was unreliable, or which would indicate to the defence that it required the assistance of psychiatric advice.
14. [1989] I.R. 71. See Dwyer, *op.cit.*, n.1, pp.69-70.
14a Unreported, 14th July 1998.
15. For an example of these increasingly common applications, see *K. v. DPP and Ors*, unreported, Circuit Court, Dunne J, 14th December 1999. The applicant was awaiting trial on sexual assault charges and sought discovery of certain material from first, the complainant, secondly, a psychotherapist whom the complainant had attended, and thirdly an institute at which the complainant had been a student. The material consisted essentially of all notes, records, etc., of the

complainant's attendance upon and treatment by the second named respondent, and all papers, etc., arising out of the complainant's participation in a course run by the third named respondent. Voluntary discovery was sought from the respondents but was not forthcoming. The DPP was a notice party to the application and stated that the prosecution had made available all documents in its possession which would be required by the accused; it had not handed over any statement from the psychotherapist as it had not taken any. However the DPP had also been asked to state the position of the complainant, who objected to discovery being made in the terms sought by the defence, in that the relevance of all documents sought had not been set out. The second named respondent (who appeared in person) objected strongly to discovery, principally on the ground that the confidentially central to the psychotherapeutic relationship would be breached by discovery being made. This would have detrimental effects not only for the individual relationship involved but for clients and the profession as a whole. The third named respondent also objected that no attempt had been made by the defence to indicate the relevance of the material sought from it. Judge Dunne held that the court should only order the discovery of documentation that "may be relevant to an issue to be determined in the course of the proceedings". Here the psychiatric history of the complainant and her previous history of sexual abuse (which the complainant had referred to in her statement in the book of evidence) "is or could be of relevance to the issues" in the case. Although the court was aware of the importance of the confidential nature of the psychotherapeutic relationship, it was satisfied "that it is more important to ensure full disclosure of relevant material in criminal proceedings if necessary to ensure that an innocent person is not convicted of a criminal offence". Hence the court would order discovery against all the respondents but limited only to that material containing references to the sexual abuse previously suffered by the complainant. The court also stipulated that any documentation discovered was to be used solely for the purpose of criminal proceedings and was to be returned to the party from whom it came on completion of such proceedings.

15a. In *People (DPP) v. Flynn* [1996] 1 ILRM 317, for example, it was held that there had been excessive delay by the second named defendant in bringing the application for discovery. The trial date was only a few weeks away and the first named defendant had not joined in the application but rather was ready to proceed on the date set down.

16. The principles traditionally used in applications for discovery in civil proceedings (as per *Compagnie Financiere v. Peruvian Guano Co.* (1882) 11 QBD 55) are often cited as a guide, but it is submitted that these must constitute a minimum standard: in other words, material which would pass the civil test of relevance would be the minimum material discoverable in criminal proceedings. As Judge Moriarty said in *People (DPP) v. Flynn* [1996] 1 ILRM 317: " ...the reasoning of the English Court of Appeal in *Compagnie Financiere v. Peruvian Guano Co.* (1882) 11 QBD 55 is less applicable to proceedings having the adversarial characteristics of a criminal prosecution. The *ratio decidendi* of that case was that the party applying for discovery was entitled to discovery of any document that might enhance his own case or destroy that of his adversary. In a criminal case, on the other hand, the entire burden of proof rests on the prosecution and the accused does not have to prove anything." Certainly any move towards a test of "necessity" as predicted for civil cases (see Brady 1999 (5) *Bar Review* 58) would not be constitutionally permissible in the context of criminal proceedings.

For an interesting example of a civil case in which matters of a criminal nature were alleged, see *WW v. PB.*, unreported, High Court, Barr J, 18th March 1999. The plaintiff's claim was for damages in respect of sexual abuse allegedly perpetrated on him by the defendant. The defendant filed a full defence and sought discovery of any medical or psychiatric reports of the plaintiff relating to the matters alleged by him. Barr J held that the defendant was entitled "to full information about the allegations against him and as to all relevant matters relating thereto." He found that: "All or some of the documents may contain information which is helpful to the defendant in making his defence to the plaintiff's allegations. In my opinion it would be unjust to deprive him of that potential advantage."

17. Plus accompanying regulations and Code of Practice, all operative from April 1, 1997. Note that the statutory rules do not apply to third party discovery so that the common law in relation to this issue continues to apply.
18. See, e.g., the comments of Steyn LJ in *R. v. Brown* (1995) 1 Cr App R 191 at 194.
19. *Attorney-General's Guidelines: Disclosure of Information to the Defence in cases to be tried on indictment* (1982) 74 Cr App R 301.
20. For example, the prosecution was permitted not to disclose if this was necessary to protect the identity of an informant, an exemption which had long been recognised at common law. The validity of this common law "informer's privilege" was recently confirmed in this country in *Ward v. Special Criminal Court; DPP v. Special Criminal Court* [1999] 1 IR 60.
21. *R. v. Brown* (1995) 1 Cr App R 191. The court found to be "plainly wrong" the view of the Royal Commission on Criminal Justice (Cm.2263, 1993) that: "The guidelines, although not statutory, to all intents and purposes have the force of law".
22. *R. v. Ward* [1993] 1 WLR 619.
23. ibid. See also R. v. Brown (1995) 1 Cr App R 191.
24. Home Office Consultation Paper *Disclosure* (Cm. 2864, 1995), ch.1.
25. For a brief overview of the operation of the Act see *Cross and Tapper on Evidence* (9th ed., Butterworths, 1999), pp.250-254. See also Sharpe, *Article 6 and the Disclosure of Evidence in Criminal Trials* [1990] Crim LR 273.
26. Ss 23-25.
27. S.3.
28. Sharpe argues that this provision as it stands, in failing to provide for any element of formal judicial control over primary prosecution disclosure, potentially infringes Art.6 of the ECHR (*op.cit.*, n.25, pp. 280-281.
29. *Hansard*, H.L. Vol.567, cols 1437-1438.
30. S.5.
31. S.7.
32. S.8. Note that the prosecution is entitled to apply to court for a direction that it would not be in the public interest to disclose certain material, and if the court makes such a finding the material must not be disclosed (subs.5).
33. S.9.
34. Although the role of the juge d'instruction has been limited in recent years, so that he or she will only be appointed now in the most serious cases. See, e.g., West, *The French Legal System*, ch.5.
35. For an example of "a conscious and deliberate policy to suppress and conceal...information" by the police, see *DPP v. Flannery*, unreported, Central Criminal Court, Barr J, 25th June 1996. First, numerous statements from eyewitnesses alleging they had seen the deceased after a crucial date were never sent forward to the DPP by the police. They were however sent to the solicitor for the defendant but only after he had written to the State solicitor specifically requesting all relevant documents in the possession of the police. Second, *neither* the DPP nor the defence solicitor were ever furnished with statements relevant to the evidence of a key prosecution witness. Thirdly, during the course of the trial a further document came to light revealing that the police had interviewed a youth who claimed that this key prosecution witness had told him certain things about the events in question. No attempt was made to take a statement from the youth. This document was only furnished after the trial judge specifically asked the investigating officers whether there were any other relevant documents in their possession which had not been made available to the DPP. Barr J found that the police team involved had: "deliberately resorted to a policy the objective of which, as the officers must well have known and appreciated, was to deprive the accused of his constitutional right to a fair trial in accordance with the law."

    He found that "[a] grievous wrong which goes to the heart of the prosecution case" had been committed and that in those circumstances "the interests of constitutional justice" required him to impose a permanent stay on the indictment against the accused.

    For examples of deliberate concealment of information by the prosecuting authorities in another jurisdiction see Ley, *Don't Let Them Have It* (1995) 145 NLJ 1124.
36. In *Edwards v. UK* (1992) 15 EHRR 417 the Court held that disclosure of all material evidence to an accused was a requirement of a fair trial pursuant to Art.6 of the European Convention of Human Rights.
37. See, e.g. *People (DPP) v. Pringle* [1995] 2 IR 547. In some cases the loss of material evidence will not be fatal, for example because independent evidence is available from another source on the same point (as for example in People *(DPP) v. Farrell*, unreported, Court of Criminal Appeal, 13th July 1998).
38. [1999] 1 IR 60 at 87.
39. *R. v. DPP, ex parte Lee* [1999] 2 All ER 737.

UNION CITIZENSHIP THE FREE MOVEMENT OF PERSONS

Anthony Whelan, Référendaire, Court of Justice of the European Communities[1] analyses significant recent European case law on the concept of citizenship of the European Union.

Introduction

In this article, I discuss three major recent cases which have fleshed out the concept of Union citizenship in the last eighteen months. The Court has made massive, if not always very logically coherent, strides towards securing comprehensive equality of treatment for Union citizens who are lawfully resident in other Member States. It has, however, avoided pronouncing on the much more controversial question of the conditions for such lawful residence. It has also responded timidly to the yet more controversial question whether passport controls at the Community's internal borders constitute a disproportionate restriction on citizens' freedom of movement.

Citizens and Equal Treatment: *Martínez Sala* [2] and *Bickel and Franz* [3]

Martínez Sala v Freistaat Bayern is the first substantive pronouncement on the part of the Court of Justice on the citizenship provisions of the EC Treaty since that new status was created by the Maastricht Treaty. The case related to a Spanish national, Mrs. Martínez Sala, who had resided in Germany since 1968, when she was 12 years old, and who worked there intermittently between 1976 and 1989. Since then, she received social welfare assistance. Until 1984, she was in almost uninterrupted possession of a residence permit, after which she obtained only documents certifying that she had applied for an extension of her residence permit. It appears that she was protected from deportation by the terms of the European Convention on Social and Medical Assistance of 11 December 1953, to which both Germany and Spain are parties, Article 6(a) of which states that "a Contracting Party in whose territory a national of another Contracting Party is lawfully resident shall not repatriate that national on the sole ground that he is in need of assistance". In January 1993, upon the birth of her child, Mrs. Martínez Sala applied to the Bavarian authorities for a child-raising allowance, a non-contributory benefit available to any resident in Germany without full-time employment who brings up a dependent child in his household. However, non-nationals were required to be in possession of a residence entitlement or residence permit in order to be granted the allowance. Certification that a residence permit had been applied for was not sufficient and Mrs. Martínez Sala's application was rejected.

"The Court has made massive, if not always very logically coherent, strides towards securing comprehensive equality of treatment for Union citizens who are lawfully resident in other Member States.

Mrs. Martínez Sala instituted proceedings against the State of Bavaria before the German social courts, resulting in a reference by the Social Court of the Region of Bavaria to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EC Treaty (now Article 234). In addition to questions regarding the possible application to the case of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [4] or of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to member of their families, [5] it also asked if it was compatible with Community law for the German law to require possession of formal residence documents for the grant of the allowance to nationals of another Member State who were in fact permitted to reside in Germany.

The Court first held that the allowance was both a family benefit for the purposes of Regulation No 1408/71 and a social advantage within the meaning of the more generally applicable

Regulation No 1612/68. However, the Court had insufficient information about her social insurance arrangements to determine whether Mrs. Martinez Sala came within the personal scope of Regulation No 1408/71. As regards the definition of a worker for the purposes of Article 48 EC (now Article 39) and Regulation No 1612/68, the status of a worker derived from an employment relationship in which remuneration was provided in return for the performance of services for and under the direction of another person. However, it stated that a person who is genuinely seeking work must also be classified as a worker. [6] It was for the national court to determine whether Mrs. Martínez Sala could be so classified by reason, for example, of the fact that she was seeking employment.

The Court appears to have considerably enhanced the position of job-seekers, by stating that a person who is genuinely seeking work must also be classified as a worker. The Court had previously stated, in *Centre public d'aide sociale de Courcelles v Lebon,* [7] that persons who moved in search of employment were not workers and qualified for equal treatment only as regards access to employment in accordance with Article 48 EC and Articles 2 and 5 of Regulation No 1612/68. Article 7(2) of that Regulation did not apply to them. The Court held in Antonissen [8] that Community nationals derived from Article 48 the right to move freely and to stay in the Member State for the purpose of seeking employment, without expressly stating that they were, therefore, to be deemed to be workers who would, consequently, benefit from provisions such as Article 7(2) of Regulation No 1612/68. Such an entitlement emerges clearly from the judgment in the present case, in so far as the Court sought to determine Mrs. Martínez Sala's status with the sole purpose of determining if she could benefit from that provision. Furthermore, the conditions under which job-seekers must be deemed to be workers seem to have been relaxed. In *Antonissen*, the Court stated that a Member State was, in principle, entitled to deport a Community national seeking employment after six months, unless the person concerned provided evidence that he was continuing to seek employment and that he had genuine chances of being engaged. [9] Although it was, at the time the reference was made in this case, some seven years since Mrs. Martínez Sala had last been briefly employed, the Court was, none the less, willing to deem her to be a worker if the national court found that she had continued to seek employment, without making any reference to her chances of success. This constitutes a considerable broadening of the rights of free movement of the unemployed, which, combined with Regulation No 1612/68, could substantially reduce the effect of the restrictive conditions for residence rights under Council Directive 90/364/EEC of 28 June 1990 on the right of residence[10] by enabling those who are genuinely, if fruitlessly, seeking work to have recourse in the host State to social advantages such as a minimum subsistence allowance[11] without fear of deportation.

"The Court appears to have considerably enhanced the position of job-seekers, by stating that a person who is genuinely seeking work must also be classified as a worker."

As the Court was unable to state with certainty whether a person such as Mrs. Martínez Sala came within the scope *ratione personae* of Article 48 and of Regulation 1612/68 or of Regulation 1408/71, it also examined the final question regarding the requirement of production of formal residence documents in order to receive a child-raising allowance. It stated that the question was based on the assumption that Mrs. Martínez Sala had been authorised to reside in Germany.[12] It observed that one of the conditions for grant of the allowance was that the claimant be permanently or ordinarily resident in Germany and added that a national of another Member State who was authorised to reside in Germany and did reside there met this condition.[13] Member States were free to require nationals of other Member States lawfully resident in their territory to carry a document certifying their right of residence if its own nationals were subject to an identical obligation regarding their identity cards.[14] However, such a residence permit could only have declaratory and probative force in respect of the underlying right of residence,[15] whereas, for the purposes of the grant of a child-raising allowance, possession of a residence permit was constitutive of the right to the benefit. As German nationals were not required to produce a document of any kind, this amounted to unequal treatment.

In the absence of any justification, such unequal treatment would constitute discrimination prohibited by Article 6 EC (now Article 12) if it fell within the sphere of application of the Treaty. The Court held, in the light of its answers to the previous questions, that the allowance indisputably fell within the scope ratione materiae of Community law. The case would fall within the scope ratione personae of Community law if Mrs. Martínez Sala were found by the national court to be a worker or employed person within the meaning of the Treaty provisions and the provisions of secondary legislation discussed above.[16]

In the alternative, the Court stated that a national of a Member State lawfully residing in the territory of another Member State would also come within the scope ratione personae of the Treaty provisions on Union citizenship.[17] It held this condition to have been satisfied by Mrs. Martínez Sala, without it being necessary to examine whether she had a right to reside in Germany by virtue of Article 8a EC (now Article 18), since it was common ground that she had already been authorised to reside there, even though she had been refused a residence permit. [18]

Article 8(2) EC (now Article 17(2)) states that citizens shall enjoy the rights conferred by the Treaty. The Court stated that these included the right, laid down in Article 6 EC, of Union citizens lawfully resident in a host Member State, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty,

"including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State."[19]

The Court concluded by observing that, since the unequal treatment in question came within the scope of the Treaty, it could not be considered to be justified: it was discrimination directly based on Mrs. Martínez Sala's nationality and, in any event, nothing to justify such unequal treatment had been put before the Court.[20]

The Court (and Advocate General La Pergola before it, whose analysis was similar) thereby succeeded in avoiding the question whether Mrs. Martínez Sala could have derived a right of residence directly from Article 8a EC. For example, one could argue that the position of a Union citizen who has spent a long period in a host Member State, including possibly his childhood or adolescence, and who is forced to have recourse to social assistance should be treated more favourably under Article 8a EC than would be the case under Directive 90/364/EEC. This is important because, in bypassing this issue, the Court left open the question whether Member States will be able to negate the effects of the guarantee of non-discrimination in social security and other fields for Union citizens lawfully resident in their territory by restricting their rights of residence, in so far as these do not derive from Community law as developed to date.[21] However, it also meant, more usefully, that the Court had to address directly the question whether the new status of Union citizenship created by Article 8(1) EC gave rise, as such, to distinct rights under Community law, through a combined reading of Article 8(2) EC and of provisions such as Article 6 EC, in a situation where none of the concomitant rights expressly conferred in Articles 8a to 8d EC (now Articles 18 to 21) had necessarily been exercised.

Having determined that Mrs. Martínez Sala was a person whose situation came within the scope of the Treaty and who could, therefore, benefit from the guarantee of non-discrimination on grounds of nationality in Article 6 EC, it was necessary to establish the material scope of this guarantee. In this regard, there already existed two contrasting lines of authority in the Court's case-law. On the one hand, in *Lair* [22] and *Brown*, [23] the Court excluded the application of Article 7 of the EEC Treaty (later Article 6 and now Article 12 of the EC Treaty) to assistance given to students for maintenance and training in the context of university studies, even though the applicants in both cases were deemed to be workers, because such assistance was a matter of educational and social policy not covered by Community law. In this part of its analysis in these two cases, the Court did not attempt to identify any possible links between such areas of national competence and workers' complete enjoyment of freedom of movement. [24] None the less, the Court classified such assistance as a social advantage to which workers would be entitled under Article 7(2) of Regulation No 1612/68, provided that the studies in question were linked with the previous occupational activity and that this employment was not itself merely ancillary to the subsequent course of study.

On the other hand, in *Cowan*[25] and in Case C-334/94 *Commission v France,*[26] the Court was much more liberal about extending the prohibition of discrimination on grounds of nationality to fields which are ordinarily within national competence but which it deemed to have some connection with the enjoyment of Community-law rights. In *Cowan*, the Court stated that, although criminal legislation and the rules of criminal procedure, including those on compensation for criminal injuries, were, in principle, matters for which the Member States were responsible, they could be subject to the prohibition of discrimination in Article 7 EEC.[27] The freedom of movement of Community nationals to receive services entailed, as a corollary, their protection from harm and, thus, an equal right to publicly funded compensation when they were subjected to such harm.[28] The Court went even further in *Commission v France.* It stated that access to leisure activities available in a Member State was a corollary of the freedom to move there in order to pursue employed or self-employed activity, so that national rules on the registration of leisure boats fell within the scope of Community law and were subject to the prohibition of discrimination on grounds of nationality in Articles 6, 48 and 52 (now 43) of the EC Treaty.[29]What may be considered to be a third approach, going somewhat further than *Cowan,* or taking it to its logical conclusion (depending on one's point of view) had been urged on the Court by Advocate General Jacobs in his Opinion in *Konstantinidis.*[30] He argued that a person who goes to another Member State in the exercise of the rights conferred upon him by the free movement provisions of the Treaty is in a situation governed by Community law and as such must be placed on a completely equal footing with nationals of the host Member State.[31] Advocate General Jacobs cited the judgment in *Cowan* to this effect, although he appears to have discountenanced any attempt to establish any more specific link between the substantive fields in which equality could be claimed and the exercise of the Community-law rights in question. In contrast,

"The Court, however, adopted an entirely novel approach in *Martínez Sala.* It seems to have implicitly overruled *Lair and Brown* by holding that a social welfare benefit, the conditions for the grant of which are a matter for the competent Member State, could be subject to the prohibition on discrimination in Article 6 EC because it was affected by and thus fell within the scope *ratione materiae* of certain Community legislation."

the Court insisted on such a link, stating that national rules governing the transcription of Greek names in Roman characters were to be regarded as incompatible with the prohibition of discrimination on grounds of nationality in Article 52 EC "only in so far as their application causes a Greek national such a degree of inconvenience as in fact to interfere with his freedom to exercise the right of establishment enshrined in that article." [32]

The central case on this point is now *Bickel and Franz*. The case related to the right of German-speaking citizens of the Italian province of Bolzano to have criminal proceedings concerning them conducted in German, a right denied by Italian law to German-speaking residents of other Member States when they were subject to criminal investigation or prosecution in that province. The preliminary reference in the case arose from criminal proceedings against an Austrian lorry driver and a German tourist, both of whom were arrested while temporarily in the province and who wished to be tried in German. Advocate General Jacobs reiterated the approach he had derived from *Cowan* in *Konstantinidis* and stated that it seemed all the more compelling in the light of the intervening insertion of Article 8a(1) into the EC Treaty. [33] He went on to suggest that the creation of Union citizenship gave rise to a general right to equality of treatment even in cases where rights of movement and residence had not been exercised. [34]

In *Martínez Sala*, Advocate General La Pergola appears to have adopted the same view of *Cowan* as did Advocate General Jacobs in *Konstantinidis*, regarding the very fact of having exercised Community-law rights of free movement, or of being a person who enjoys the status of a Union citizen who is lawfully resident in another Member State, [35] as being a sufficient basis for an essentially unrestricted application of Article 6 EC. [36]

The Court, however, adopted an entirely novel approach in *Martínez Sala*. It seems to have implicitly overruled *Lair and Brown* by holding that a social welfare benefit, the conditions for the grant of which are a matter for the competent Member State, could be subject to the prohibition on discrimination in Article 6 EC because it was affected by and thus fell within the scope *ratione materiae* of certain Community legislation. It will be recalled that in those cases, the Court refused to apply the identical prohibition in Article 7 EEC to maintenance grants which fell within the scope of Article 7(2) of Regulation No 1612/68, which provision was also applicable in the present case. However, the Court did not choose either to attempt to identify an actual or potential link between the social welfare benefit claimed by Mrs. Martínez Sala and her enjoyment of the status of a Union citizen resident in another Member State (who fell, thereby, within the scope *ratione personae* of Community law), as the *Cowan* and *Commission v France* judgments might have suggested, or to adopt the approach of Advocates General Jacobs and La Pergola by deriving a general right to non-discrimination from that status alone.

The Court chose, instead, what appears at first sight to be a *via media*, by making the application of Article 6 EC dependent on both the claimant and the benefit in respect of which equal treatment was claimed coming within the scope of Community law, without there being any apparent link between these two facts. This is, in purely logical terms, an unsatisfactory compromise because of its essentially arbitrary and uncertain effects, linked to the application of the rule of equal treatment to persons in quite different circumstances. For example, Mrs. Martínez Sala is entitled, *qua* Union citizen resident in Germany, to equal treatment regarding the child-raising allowance simply because secondary Community rules exist regarding the conditions for the grant of such family benefits and social advantages to classes of Community nationals to which she (probably) does not belong. By the same token, she could presumably claim a maintenance grant if she wished to take up a course of study.

If Mrs. Martínez Sala were also deemed to be entitled to equal treatment in respect of matters which fall within the material scope of Community law solely through the application to others - workers, self-employed persons, service providers or recipients - of primary rules such as that prohibiting discrimination in Article 6 EC, this would complete the disguised, but vicarious, application of the *Cowan* approach to the scope of the prohibition of discrimination in the Treaty which is implicit in the *Martínez Sala* judgment.

"The fact that a general right to equal treatment has been effectively, though not formally, established by the Court in *Bickel and Franz* in the case of persons exercising rights of free movement and residence in the Community (including those exercising a right of residence *qua* Union citizens) entails a correspondingly radical extension of the materially contingent right to equal treatment, by virtue of that status alone, of all Union citizens lawfully resident in a Member State other than their own."

In its "original" form, such use of *Cowan* might have been calculated by the Court to reassure interested parties (principally the Member States) because of the linkage drawn between the matters in respect of which equal treatment can be claimed and the exercise of Community economic rights. Citizens would only be entitled to freedom from discrimination in those areas in which equal treatment is judged necessary to freedom of movement and residence by their brethren who wish to engage in some form of economic activity.

However, this relatively unthreatening outcome has been put in doubt and the likely scope of citizens' right to equal treatment greatly widened by the Court's decision, only six months later, to endorse a "new, improved" version of the *Cowan* approach. A plenary formation of the Court, all but one of whose members had sat in *Martínez Sala,* [37] issued a judgment in *Bickel and Franz* which went a long way, at least in its practical effects, towards adopting Advocate General Jacobs' approach in that case to the *Cowan* judgment. The Court remarked that German-speaking citizens of other Member States enjoyed freedom of movement to avail of services, as well as deriving a right of free movement and residence from Article 8a EC. [38] It then stated that "the exercise of the right to move and reside freely in another Member State is *enhanced* if the citizens of the Union are able to use a given language to communicate with the administrative and judicial authorities of a State on the same footing as its nationals", with the result that the Union citizens concerned were, in principle, entitled to equal treatment in that regard pursuant to Article 6 EC. [39] This right to equality applied even though rules of criminal procedure are matters for which the Member States are responsible. [40] The Court concluded as follows:

> "Consequently, in so far as it may compromise the right of nationals of other Member States to equal treatment in the exercise of their right to move *and reside* freely in another Member State, national rules concerning the language to be used in criminal proceedings in the host State must comply with Article 6 of the Treaty." [41]

Three points may be noted regarding the judgment in *Bickel and Franz.* First, the reference to the right of residence in the above-quoted paragraph, combined with the earlier reference to Article 8a EC, indicates clearly that Article 6 EC applies in the same way to the exercise of citizenship rights as it does to the other freedoms. [42] Secondly, the criterion of whether equal access to a particular entitlement reserved to the nationals of a Member State would enhance the exercise of rights of movement of residence, or whether its denial would compromise such exercise, establishes a test which, while perhaps no more permissive in fact than the approach which might have been deduced from the rather laconic judgment in *Commission v France,* has the virtue of being expressly stated in general terms.Thirdly, the Court's test retains a formal requirement that there be some kind of association, however slight, between the exercise of movement and residence rights and the matter in respect of which equal treatment is sought. By maintaining this requirement, the Court rejected Advocate General Jacobs' call for unconditional equality of treatment (outside areas essential to national citizenship), [43] but the approach it endorsed will probably lead almost invariably to the same result.

The circumstances in *Martínez Sala* differ from those in *Bickel and Franz* because the Court declined, in the former case, to determine whether Mrs. Martínez Sala had in fact exercised, or was eligible to exercise, *qua* Union citizen, Community-law rights of free movement or residence. As a result, the Court was obliged to build a right of equal treatment on the simple *status* of Union citizenship -- on the fact that Union citizens came as such within the scope *ratione personae* of the Treaty, at least when lawfully resident in a Member State other than their own.[44] Although the Court has been concerned on many occasions in the past with identifying whether claimants of rights have a particular Community-law status, that status (of worker, provider or recipient of services, recipient of vocational training, etc.) always derived from an (economic) activity and the scope of their rights could be determined by reference to the requirements of that activity. [45] In the case of Union citizenship, a particular Community-law status is acquired automatically.

"*Wijsenbeek* is probably the most important case for many years on the topic of the free movement of persons."

However, by linking the right of Union citizens resident abroad to equal treatment to the prior application in the field in question of Community rules for the benefit of differently defined classes of persons, the Court fails to acknowledge the essentially new, constitutional character of that citizenship status in Community law. In its citizenship provisions, the Treaty for the first time expressly confers a status and rights on individuals, which Community nationals enjoy automatically rather than on a contingent, functional basis. [46] It is an implicit denial of the autonomy and automaticity of this constitutional status that the material scope of the concomitant right of Union citizens to freedom from discrimination should be made entirely dependent on the scope of Community rules applied to persons who exercise different concrete rights. None the less, the fact that a general right to equal treatment has been effectively, though not formally, established by the Court in *Bickel and Franz* in the case of persons exercising rights of free movement and residence in the Community (including those exercising a right of residence *qua* Union citizens) entails a correspondingly radical extension of the materially contingent right to equal treatment, by virtue of that status alone, of *all* Union citizens lawfully resident in a Member State other than their own. This conclusion leaves open, however, the unanswered question at the heart of the *Martínez Sala* judgment, regarding the right of residence in other Member States of Union citizens who are dependent on social assistance.

Citizens and Free Movement: *Wijsenbeek* [47]

Wijsenbeek is probably the most important case for many years on the topic of the free movement of persons. The case prompted sufficient interest for five Member States, including Ireland, to submit observations to the Court. Mr. Wijsenbeek is a Dutch MEP. He disembarked at Rotterdam airport in the Netherlands from a scheduled flight from Strasbourg on 17 December 1993 (shortly after the entry into force of the Maastricht Treaty) and he refused to establish his nationality by presenting his passport to the police officer at the border control there or by any other means, as required by Dutch law. He was convicted of an offence and was sentenced to pay a fine or to one day's imprisonment. Upon appeal, a reference was

made for a preliminary ruling as to whether Article 7a EC (now, after amendment, Article 14), on the establishment of an internal market without frontiers in which the free movement of persons is assured, or Article 8a EC, regarding the right of Union citizens to move freely, precluded the application of such national legislation to persons arriving from another Member State.

Mr. Wijsenbeek argued that Article 7a EC had become directly effective on 1 January 1993, at the end of the period set out in that provision for the completion of the 1992 internal market programme. As every person who crosses a border is, at the very least, a tourist and thus a service recipient, the right to free movement was general and should be subjected to the minimum of controls, with necessary controls being applied at the Community's external borders. The Commission and the various governments responded that the abolition of border controls required accompanying measures, particularly as regards third-country nationals, so that Article 7a could not be directly effective. Necessary measures at the external borders would include an equivalent level of surveillance, harmonisation of conditions of access, a common visa policy, rules regarding applications for asylum, police and judicial cooperation and a system of computerised information exchange. They also invoked declarations accompanying the Single European Act that the date of 31 December 1992 did not create an automatic legal effect and that nothing in its provisions would affect Member States' right to control third-country immigration and to combat various types of crime to show that Article 7a EC could not be directly effective. In any event, the Treaty only confers free-movement rights on Community nationals, so that checks on the movement of third-country nationals remained necessary, and could not avoid affecting Community nationals as well.

"The Court's analysis is, for the most part, consistent with its normal approach to restrictions on the exercise of the fundamental freedoms under the Treaty. However, in one vital respect, it represents a lost opportunity and a deplorable departure from its usual standard, to the extent that it conceives only of a Community-level response to the security and other problems posed by the crossing of internal borders."

The Commission submitted, on the other hand, that Article 8a(1) EC was directly effective, giving rise to a substantive right of free movement which should be subject to a minimum of restrictions. However, the restrictions entailed by the Netherlands requirement that a passport be shown at its borders were not excessive, given the lack of specific Community rules concerning controls at the external borders. The various governments contended that the provision was not directly effective, or did not add anything to pre-existing rights under Community law.

The Court agreed that Article 7a EC could not be directly effective regarding the free movement of persons, as its application presupposed the harmonisation of Member State rules on the lines outlined above. [48] Furthermore, in the absence of such harmonised measures regarding the Community's external borders and so on, the enjoyment of rights under Article 8a EC presupposed that Union citizens should be able to prove their nationality. [49] At the time of the events in question in the main proceedings, there were no common rules or harmonised laws of the Member States of this type, with the result that the Member States retained the right to carry out identity checks at the internal frontiers of the Community in order to distinguish between Union citizens and others, and were competent to impose proportionate penalties for non-compliance. A term of imprisonment would constitute a penalty so disproportionate as to create an obstacle to the free movement of persons. [50]

The Court's analysis is, for the most part, consistent with its normal approach to restrictions on the exercise of the fundamental freedoms under the Treaty. However, in one vital respect, it represents a lost opportunity and a deplorable departure from its usual standard, to the extent that it conceives only of a Community-level response to the security and other problems posed by the crossing of internal borders. The assessment of proportionality normally involves taking into account all relevant matters, including the possible existence of less restrictive alternatives. The Opinion of Advocate General Cosmas points to an alternative conclusion. [51] He also admitted that the right of free movement under Article 8a EC could be subjected to necessary and proportionate restrictions in the general interest. However, he suggested that the Court should not permit the current imperfections of Community law to dictate the outcome of the case to the national judge when it was possible that other harmonised rules, adopted in the framework of international intergovernmental cooperation, provided adequately for the general-interest concerns to which the Dutch border-control rules were a response. The mechanisms of the Schengen agreement, for example, also formed part of the context in which the necessity and proportionality of such national restrictions were to be assessed. One might add, in a different context, the control-free travel arrangements that exist in the Benelux area and between Ireland and the United Kingdom. This approach appears to me to be correct. It would not, if it had been accepted, have permitted control-free travel throughout the Community, because a number of Member States were not parties to Schengen at the time, but it would have reduced to the minimum the need for such internal controls, that is, to border crossings between Schengen and non-Schengen countries. It will be interesting to see, if an appropriate case arises, how the Court now responds to the partial communitarisation of the Schengen agreement (which had already occurred, in principle, when its judgment in *Wijsenbeek* was issued), given that it remains a merely partial guarantee of free movement in the light of the continuing opt-out of the United Kingdom and Ireland. ●

1. All views expressed are exclusively personal.
2. Case C-85/96 [1998] ECR I-2691.
3. Case C-275/96 [1998] ECR I-7637.
4. OJ, English Special Edition 1968 (II), p. 475.
5. As amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, OJ 1983 L 230, p. 6, as further amended by Council Regulation (EEC) No 3427/89 of 30 October 1989, OJ 1989 L 331, p. 1.
6. Op. cit., paragraph 32; see, e.g., Case C-292/89 *Antonissen* [1991] ECR I-745, paragraphs 12 and 13.
7. Case 316/85 [1987] ECR 2811, paragraphs 26 and 27.
8. Op. cit., especially paragraphs 13 and 21.
9. Ibid., paragraph 21.
10. OJ 1990 L 180, p. 26.
11. It is clear from the judgment in Case 249/83 *Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn Kalmthout* [1985] ECR 973, paragraph 22, that such social assistance can constitute a social advantage for workers, once it is determined that job-seekers are members of this class.
12. Op. cit., paragraph 47.
13. Ibid., paragraphs 48 and 49.
14. Ibid., paragraph 52; see Case 321/87 *Commission v Belgium* [1989] ECR 997, paragraph 12; Case C-24/97 *Commission v Germany* [1998] ECR I-2133, paragraph 13.
15. See Case 48/75 *Royer* [1976] ECR 497, paragraph 50.
16. *Martínez Sala*, loc. cit., paragraphs 55 to 58.
17. Ibid., paragraph 61.
18. Ibid., paragraph 60.
19. Ibid., paragraph 63.
20. Ibid., paragraph 64.
21. See e.g. S. Fries & J. Shaw, "Citizenship of the Union: First steps in the European Court of Justice" (1998) 4 European Public Law 533 at p. 553.
22. Case 39/86 [1988] ECR 3161, paragraph 15.
23. Case 197/86 [1988] ECR 3205, paragraph 18.
24. Cf. the conclusion in Case 9/74 *Casagrande v Landeshauptstadt München* [1974] ECR 773 that general measures to facilitate educational attendance, such as a monthly grant, were part of the conditions of admission to educational courses in respect of which the children of migrant workers were entitled to equal treatment under Article 12 of Regulation No 1612/68.
25. Case 186/87 [1989] ECR 195.
26. [1996] ECR I-1310.
27. Op. cit., paragraph 19.
28. Ibid., paragraphs 17 and 20.
29. Op. cit., paragraphs 21 to 23; see also paragraph 42 of the Opinion of Advocate General Fennelly.
30. Case C-168/91 [1993] ECR I-1191.
31. Op. cit,, paragraph 21 of his Opinion.
32. Ibid., paragraph 15.
33. Op. cit., paragraphs 19 to 21 of the Opinion. His Opinion postdates the Opinion of Advocate General La Pergola in *Martínez Sala* but predates the judgment.
34. Ibid., paragraphs 22 to 27 of the Opinion.
35. It is difficult to say whether this situation, which is, of course, that of Mrs. Martínez Sala, is one involving the exercise or the non-exercise of rights of freedom of movement and residence, given both Advocate General La Pergola's and the Court's refusal directly to address Article 8a EC in the present case.
36. It may be noted that, at paragraph 27 of his Opinion in *Bickel and Franz*, Advocate General Jacobs expressed reservations similar to those of Advocate General La Pergola in the present case regarding extending equality of treatment to the essential characteristics of nationality, such as the exercise of certain political rights.
37. The reporting judge in *Martínez Sala* did not sit in *Bickel and Franz*.
38. Op. cit., paragraph 15. It is noteworthy that the Court chose to mention Article 8a EC, given that the situation of both defendants also fell under the Treaty rules on travel to provide or receive services. It thereby made plain that the test it set out also applied to the exercise of rights derived exclusively from the status of Union citizen.
39. Ibid., paragraph 16, emphasis added.
40. Ibid., paragraph 17. The Court cited *Cowan*, op. cit., paragraph 19.
41. Op. cit., paragraph 18, emphasis added.
42. The freedom to receive services can only be exercised on a temporary basis and is, therefore, inconsistent with a right of residence: see Case 196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159, paragraph 17; Case C-70/95 *Sodemare and Others v Regione Lombardia* [1997] ECR I-3395, paragraph 38.
43. For other examples of cases in which the Court appears to have insisted on some link with the exercise of Community-law rights before according equal-treatment rights, see Joined Cases C-92/92 and C-362/92 *Phil Collins and Others* [1993] ECR I-5145; Case C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661; Case C-323/95 *Hayes v Kronenberger* [1997] ECR I-1711.
44. *Quaere* whether residence in another Member State was essential to the Court's approach, or whether this arose simply because of the residence condition in the German law on child-raising allowance. Of course, mere lawful presence in another Member State could be conveniently dealt with as a case of the exercise of the freedom to move to receive services, as in *Cowan* and *Bickel and Franz*, but there remains the case of a person who, for example, engages in litigation of a non-commercial character in another Member State without going there: see the Opinion of Advocate Jacobs in *Bickel and Franz*, op. cit., paragraph 22; *Data Delecta*, op. cit.; and *Hayes*, op. cit. See further the questions referred by the Supreme Court of Ireland in Case C-60/99 *Proetta v Neil*. It might be possible to classify such a person as a recipient of legal services, but it will not be feasible in all cases to squeeze such a sedentary citizen into one of the traditional categories of economic activity, as was seen, for example, in Joined Cases C-64/96 and C-65/96 *Uecker & Jacquet* [1997] ECR I-3171, paragraph 16.
45. This is a feature common to the two lines of case-law identified above: *Lair and Brown*, on the one hand, and *Cowan, Commission v France, Konstantinidis and Bickel and Franz* on the other.
46. See, in this regard, the perceptive comments of Advocate General Cosmas at paragraphs 81 to 85 of his Opinion of 16 March 1999 in Case C-378/97 *Wijsenbeek*.
47. Case C-378/97, judgment of 21 September 1999, not yet reported.
48. Ibid., paragraph 40.
49. Ibid., paragraph 43.
50. Ibid., paragraphs 43 and 44.
51. Op. cit., paragraphs 105 to 109 of the Opinion.

LEXIS·NEXIS®

A member of the Reed Elsevier plc group

AT WORK...

UNLIMITED ACCESS FOR BARRISTERS TO

AT HOME...

Irish Case Law

Irish Reports from 1950; Irish Law Reports Monthly from 1980; Irish Law Times (1950-80); Judgments of The Court of Criminal Appeal (Frewen) 1950-83. ***UNREPORTED CASES*** from July 1986.

Northern Ireland Case Law

Northern Ireland Law Reports from 1945; ***UNREPORTED CASES*** from 1984.

English Case Law

The All England Law Reports from 1936; reported cases from 35 other leading law reports; Tax cases from 1875; ***UNREPORTED CASES*** from 1980.

European Law

Reported and ***UNREPORTED*** decisions of the Court of Justice since 1954; European Commercial cases from 1978; European Human Rights Reports from 1960; European legislation (Celex).

Commonwealth Case Law

Cases from Australia, Canada, New Zealand, Scotland, South Africa, Hong Kong, Singapore, Malaysia and Brunei.

United Kingdom Legislation

All current Public General Acts of England & Wales, fully amended; Annotated. Current Statutory Rules, Regulations and Orders of England & Wales published in the Statutory Instruments series.

Legal Journals/Reviews (UK and US)

Inc. The Law Society Gazette, New Law Journal, The Lawyer etc also a wealth of US Law Reviews.

International Legal Sources

US Federal and State case law; Continuously updated statutes of all 50 states; State and Federal Regulations and Public Records from major US states. Selected files on Russian, Chinese, Swiss and Argentinian law are also available.

With Prices relating to individual length of service as follows:

A: For Barristers of less than 3 years' standing - £750.00 +vat per annum
B: For Barristers of 4 and five years' standing - £1200.00 +vat per annum
C: For Barristers of more than 5 years' standing - £1500.00 +vat per annum
£295.00+vat ONCE ONLY SIGN-UP FEE (including access and training)

HOME INSTALLATIONS ARRANGED TO SUIT YOU

TO GET CONNECTED

Tel: Dublin 6717035 or Belfast 0801232247007

Email: ghouston@irish-times.com

YOUR 'ONE-STOP SHOP'...

LEXIS·NEXIS®

A member of the Reed Elsevier plc group

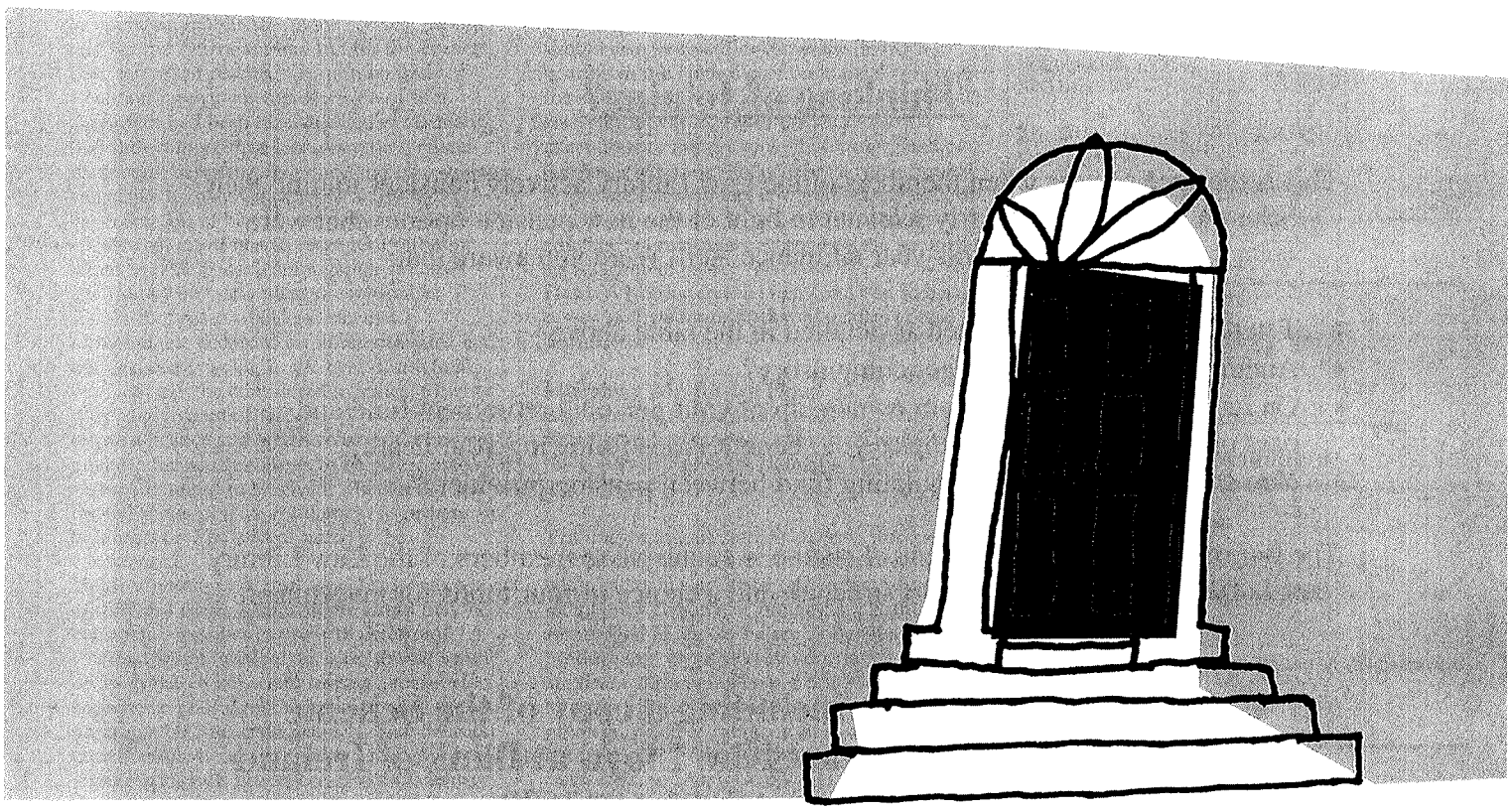
...FOR LEGAL RESEARCH

Round Hall Ltd
Sweet & Maxwell Group

Round Hall
Professional Publishing

43 Fitzwilliam Place
Dublin 2
Ireland
Tel: (01) 662 5301
Fax: (01) 662 5302
DX: 109032 Fitzwilliam
Email: info@roundhall.ie

We have moved



43 Fitzwilliam Place, Dublin 2

BAR OF IRELAND RETIREMENT TRUST SCHEME

Contribution Deadline

Reminder to Scheme Members

The deadline for making contributions to your Scheme if you wish to claim tax relief for 1998/1999 is 31st January 2000.

From 6th April, 1999, you may claim full tax relief on your relevant earnings (i.e. from self-employment or non-pensionable employment after deducting any losses or capital allowances) on an age-related basis as follows:

Under 30 years of age	15%
30 to 39 years of age	20%
40 to 49 years of age	25%
50 years & over	30%

Subject to an earnings cap of Ir£200,000

A representative from Bank of Ireland Trust Services (the Scheme Trustee & Administrator) will be in attendance at the Law Library on 28th & 31st January next to receive your contributions.

Thinking of Joining?

This is the time of year when members of the Law Library actively consider joining their Scheme. This is particularly relevant in light of the new pension options that were introduced in this year's Finance Act. Were you aware that:

- Tax relief has been increased as detailed in the table above?
- Annuity purchase is no longer compulsory?
- On retirement, you may retain ownership of your personal retirement fund and can pass on any balance remaining to your beneficiaries following your death?
- You can transfer your accumulating fund between pension providers?

The Bar of Ireland Retirement Trust Scheme is exclusive to members of the Law Library and offers flexibility, a low cost structure and a choice of four funds for investment.

For more information, including a copy of the Scheme Explanatory Booklet, contact Kim Lloyd at Bank of Ireland Trust Services, tel. 01-6043629

Legal Update

The BarReview
Journal of the Bar of Ireland. Volume 5, Issue 4

A directory of legislation, articles and written judgments from 18th November 1999 to 10th January 2000.

Judgment information compiled by the Legal Researchers, Judges Library, Four Courts.

Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative

Orange Communications Ltd v. Director of Telecommunications
High Court: Macken J.
04/10/1999

Bias; reasonableness; duty to provide reasons; appeal by plaintiff under s.111, Postal and Telecommunications Act, 1983 as amended by European Communities (Mobile and Personal Communications) Regulations, 1996 from decision of first defendant to refuse it a licence to operate a mobile telephone service; plaintiff and second defendant had bid for the licence; first defendant reached decision on basis of evalution report; whether decision of first defendant had been biased; whether claimant had shown more than legitimate preference; distinction between preference and bias; whether subjective bias shown; whether reasonable apprehension of bias shown; whether reasonable apprehensions of bias in respect of different issues may be considered together; whether decision of first defendant unreasonable; standard of reasonableness; whether unreasonable decisions on different issues, each not necessarily going to the core of the final decision, may be considered together; whether duty to give reasons under s.111 for proposal to refuse a licence and actual refusal of a licence; purpose for which reasons to be given; extent of reasons required to be given; whether parties had limited scope of their entitlement to reasons by bidding where bids were stated to be confidential.
Held: Where bias or unreasonableness in respect of different issues is shown, the issues may be considered together in order to determine whether or not the final decision should stand; decision biased in certain respects; reasonable apprehension of significant bias shown; decision unreasonable in certain respects; final decision unreasonable because of either bias or unreasonableness in respect of various issues; duty to give reasons exists with regard both to proposal to refuse a licence and actual refusal of a licence; reasons required to allow recipient to make representations to first defendant; reasons should be proper, intelligible and adequate; first defendant failed to discharge duty to provide reasons; the right to reasons was conferred by statute and confidential information could be protected by less drastic means; matter remitted to first defendant.

De Gortari v. Judge Smithwick
Supreme Court: Hamilton C.J., Denham J., Barrington J., Keane J., Murphy J.
25/06/1999

Administrative; judicial review; in camera application; respondent required appellant to answer questions pursuant to a request from French prosecuting authorities; such proceedings obliged to be heard in camera in France; whether judicial review proceedings in this jurisdiction should also be heard in camera; whether a hearing in the High Court on judicial review is the administration of justice; whether appellant's case comes within any of the statutory exceptions to the principle that justice shall be administered in public; whether a rule of public or private international law requires the judicial review proceedings to be heard in camera; whether the matter is governed by the lex fori; s.51, Criminal Justice Act, 1994.
Held: A hearing in the High Court on judicial review is the administration of justice; appeal dismissed.

Murphy v. Mr. Justice Flood
Supreme Court: Hamilton C.J.*, Denham J., Barrington J., Keane J., Lynch J. (*Decision of the Court delivered by Hamilton C.J.)
22/07/1999

Tribunal of inquiry; judicial review; discovery; jurisdiction; natural and constitutional justice; nemo iudex in causa sua; respondent was sole member of Tribunal of Inquiry; applicant was summoned to appear before Tribunal and to produce and furnish certain documents; applicant challenging respondent's decision that he had jurisdiction to rule on question of privilege; whether ruling on privilege constituted administration of justice that could only be carried out in courts established under the Constitution; whether adjudication by respondent on this matter constituted him a judge in his own cause; s.1 Tribunals of Inquiry Act, 1921 and s.4 Tribunals of Inquiry (Evidence) Act, 1979
Held: Respondent has jurisdiction to rule on question of privilege; respondent had not been a judge in his own cause.

Article

The valuation tribunal
Mooney, Kilda
1999 (3) P & P 52

Statutory Instruments

Agriculture and Food (Alteration of Name of Department and Title of Minister) Order, 1999
S.I. 307/1999

Electoral Act, 1997 (Limitation of Election Expenses at Dail Eireann) Order, 1999
SI 317/1999

Electoral Regulations, 1992 (Amendment) Regulations, 1999
SI 314/1999

Local Government Act, 1998 (Commencement) Order, 1999
SI 221/1999

Adoption

Statutory Instrument

Adoption Rules, 1999
SI 315/1999

Agriculture

Statutory Instrument

Agriculture and Food (Alteration of Name of Department and Title of Minister) Order, 1999
S.I. 307/1999

Bovine Tuberculosis (Attestation of the State and General Provisions) Order, 1999
S.I. 277/1999

Animals

Statutory Instruments

Abattoirs Act, 1988 (Abattoir) (Amendment) Regulations, 1999
S.I. 328/1999

Abattoirs Act, 1988 (Veterinary Examination) (Amendment) Regulations, 1999
S.I. 327/1999

Arbitration

Sheehan v. FBD Insurance PLC
Supreme Court: Barrington J., **Keane J.**, Lynch J.
20/07/1999

Arbitration; contract of insurance; defendant had resisted claim under insurance contract on ground that damage had not been caused by an insured peril; matter referred to arbitrator pursuant to contract; arbitrator had made awards in respect of property damage and consequential loss suffered by plaintiff; High Court had dismissed plaintiff's challenges to the awards; whether arbitrator's awards revealed an error on the face of the record; whether matter should be remitted to arbitrator; Arbitration Acts, 1954 and 1980.
Held: Appeal dismissed; although freedom to alter standard terms of insurance policy is restricted, policy of the courts should be to make an arbitration award final; High Court has no jurisdiction to interfere with arbitrator's conclusions unless award carried on its face an error of law so fundamental that it should be set aside.

Library Acquisition

Cato, D Mark
The expert in litigation and arbitration
London LLP 1999
M604.9

Building & Construction

Statutory Instrument

Building Regulations Advisory Body Order, 1998 (Amendment) Order, 1999
SI 318/1999

Charities

Library Acquisition

Charities directory 1999
Round Hall Sweet and Maxwell
N215.C5

Civil Liberties

Article

Freedom of information the European dimension
McIntyre, T J
5(1) 1999 BR 41

The right to silence
MacEntee, Paddy & Breen, Faye
5(1) 1999 BR 6

Company Law

O'Doherty v. West Limerick Resources Limited
Supreme Court: (O'Flaherty J.*), **Lynch J.**, Barron J.
(*Parties accepted decision of two members of the Court.)
14/05/99

Declaratory relief; injunction; equitable relief; interpretation of the Articles of Association of the respondent company; appellant seeks to have his nomination and election as a Director of the respondent company declared valid, or to have his candidature accepted for the re-run election; whether Article 17 of the Articles of Association means that the appellant's nomination and election are valid; whether Article 41(g) of the Articles of Association permits the respondent company to refuse to accept the appellant's candidature for a re-run election; whether convictions disqualified appellant from being a candidate.
Held: Relief refused on the basis that equitable relief will only be granted to those who "come with clean hands".

Article

The role of the company secretary
O'Dwyer, Tony
1999 CLP 249

Library Acquisition

Feeney, Michael
The taxation of companies 1999-2000
Dublin Butterworth Ireland Ltd 1999
M337.2.C5

Competition

Article

The essential facilities doctrine in the community courts
Flynn, Leo
1999 CLP 245

The road from Genoa - direct causal links and the case of Raso
Breen, Oonagh
1999 CLP 239

Constitutional Law

Laurentiu v. Minister for Justice, Equality and Law Reform
Supreme Court: Hamilton C.J., **Denham J.**, **Barrington J.***, **Keane J.**, **Lynch J.***
(*dissenting)
20/05/99

Aliens; constitutional validity of Aliens Act, 1935; interpretation of Article 15.2 of the Constitution; power of legislature to delegate; executive powers; legislative powers; a deportation order was made against the plaintiff under the Aliens Order, 1946; appeal against finding of unconstitutionality; whether s.5(1)(e) of the 1935 Act infringes Article 15.2; whether s.5(1)(e) sets out the policies and principles which are to be given effect to by the respondent; whether the legislature could delegate to the respondent the power to deport aliens; whether the provision for annulment would save an enactment otherwise in breach of Article 15.2.
Held: S. 5(1)(e) is inconsistent with Article 15.2 of the Constitution.

An Blascaod Mór Teoranta v. Commissioners of Public Works in Ireland
Supreme Court: Hamilton C.J., Denham J., **Barrington J.***, Keane J., Lynch J. (*Decision of the Court delivered by Barrington J.)
27/07/1999

Constitutional; validity of Act of Oireachtas; appeal by State of High Court decision that An Blascaod Mór National Park Act, 1989, is invalid having regard to provisions of the Constitution; respondents had acquired land on Great Blasket Island since it became uninhabited; 1989 Act provides for the establishment and maintenance of a National Park on An Blascaod Mór and confers powers on Commissioners of Public Works in Ireland; under the 1989 Act the Commissioners can compulsorily acquire lands belonging to respondents but cannot so acquire lands owned or occupied by any person who was ordinarily resident on the Island before 17th November, 1953, or land owned or occupied by a relative of such a person; whether this distinction serves a legitimate legislative purpose; whether 1989 Act is unconstitutional; s.4, An Blascaod Mór National Park Act, 1989.
Held: Distinction serves no legitimate purpose; as distinction drawn is central to the Act, the Act must fall in its entirety; appeal dismissed.

Contract

Carroll v. Carroll
Supreme Court: **Denham J.**, Lynch J., **Barron J**
21/07/1999

Undue influence; conveyance; presumption of undue influence arising from the relationship between the donor and donee; whether on the facts and circumstances of the case the donee has rebutted presumption; issue not whether donor exploited; rather whether care should have been taken not to take advantage of donor's position; whether transfer improvident; whether donor received independent legal advice; whether solicitor who acts for both parties can give independent advice; whether respondents acquiesced.
Held: Conveyance set aside in light of the evidence.

Copyright, Patents & Designs

Library Acquisition

Reid, Brian C
Sweet & Maxwell's guide to European patent litigation handbook
London Sweet and Maxwell 1999
W142.1

Criminal Law

McBrearty v. Judge O'Donnell
Supreme Court: **Hamilton C.J.**, Denham J., Barron J. (ex tempore)
22/11/1999

Criminal; judicial review; appeal against order of High Court refusing to grant liberty to seek relief by way of judicial review for an order of prohibition and an injunction; applicant had raised number of unusual issues and allegations; application for adjournment had been refused by respondent; whether respondent acted within jurisdiction.

Held: Appeal dismissed.

Mulligan v. Judges of the Dublin Circuit Criminal Court
Supreme Court: Barrington J., Keane J., Murphy J., Lynch J. and Barron J.
19/05/1999

Criminal law; judicial review; applicants charged on three counts in Circuit Criminal Court in respect of offences alleged to have occurred on 11th December, 1993; case came on for trial on 20th January, 1996; victim had died in the interim of causes unrelated to alleged offences; prosecution unable at trial to prove victim's death for purpose of admitting his deposition; prosecution served notice of additional evidence of District Court clerk in July, 1996, with a view to proving deposition; applicants applied for leave to bring judicial review proceedings, which was granted by the High Court; Order of Prohibition preventing applicants' trial granted by High Court; further delay in bringing appeal to Supreme Court; whether High Court was wrong to extend the three month time limit for applications for judicial review; whether it was open to the prosecution to adduce additional evidence which was available at the time of trial; whether order of prohibition ought to have been granted; S 15 (1), Criminal Procedure Act, 1967; O. 84, r. 21, Rules of the Superior Courts.
Held: Appeal dismissed; delay since January, 1996, solely the fault of the prosecution; case was stale; to put applicants on trial again would constitute an unfair procedure.

F v. D.P.P.
Supreme Court: Hamilton C.J., Denham J., Keane J., Murphy J., Lynch J.
30/06/1999

Fair trial; delay; sexual abuse; applicant charged with offences; judicial review of decision of District Court judge to send the applicant forward for trial; High Court granted relief in respect of offences alleged by one complainant; appeal by applicant and cross-appeal against so much of order as restrained DPP from proceeding with all charges; whether time lapse between complainant telling a second priest and complainant reporting matter to Gardai constituted a novus actus interveniens; whether delay attributable to continuing psychological damage; whether delay capable of being attributed to some fault or free and deliberate decision of complainant; whether applicant prejudiced by delay.
Held: DPP's cross appeal allowed.

O'Regan v. DPP
Supreme Court: Barrington J., Murphy J., Barron J.
20/07/1999

Criminal; road traffic; appellant charged with road traffic offences; second named respondent trial judge refused to require the first named respondent to call as a witness a representative from the Medical Bureau of Road Safety; appellant sought an Order of Prohibition in High Court to prevent respondent from proceeding further with trial; High Court affirmed right of appellant to call such a witness in proceedings in District Court but refused Order of Prohibition; appellant appeals refusal of application for prohibition; respondent cross-appeals award of costs made against them other than those incurred in relation to ex parte application; whether, to reveal the whole truth on matters in issue, such a witness must be called by the prosecution, thereby facilitating his cross-examination by the defence; whether by completing prescribed form under s.18, Road Traffic Act, 1994, such a witness became a witness for the prosecution and thus liable for cross-examination by the defence; whether is a rule of law that persons from whom statements of evidence had been made should be called as witnesses to facilitate cross-examination by the defence; whether trial is fundamentally flawed; whether High Court erred in ruling that trial should continue before second named respondent.
Held: Appeal and cross-appeal dismissed.

Article

The right to silence
MacEntee, Paddy & Breen, Faye
5(1) 1999 BR 6

Library Acquisition

Charleton, McDermott, Bolger
Criminal law
Dublin Butterworth Ireland Ltd 1999
M500.C5

Statutory Instrument

Criminal Justice Act, 1999 (Parts IV and V) (Commencement) Order, 1999
S.I. 302/1999

Damages

McHugh (A Minor) v. Cunningham
High Court: Laffoy J.
12/05/1999

Assessment of damages; road traffic accident; personal injury; leg, facial and dental injuries; special damages; pain and suffering to date and in the future.
Held: Award exceeding £100,000.

Lopes v. Walker
Supreme Court: Hamilton C.J., Lynch J., Barron J.
19/07/1999
Damages; personal injury; professional negligence; respondent solicitor failed to transfer appellant's personal injury action from Circuit Court to High Court; appellant dissatisfied with assessment of damages made by High Court; whether punitive damages should be awarded; whether appeal should be judged solely on basis of evidence adduced before the High Court without regard to appellant's post-trial affidavit; whether Court should interfere with award of damages; whether case should be remitted to High Court for reassessment of damages.
Held: No basis in law for awarding punitive damages in this case; appeal judged solely on the basis of evidence adduced before the High Court; award of damages for past pain and suffering is not of itself so low as to justify the Court interfering with it; award of damages for future pain and suffering, including loss of earning capacity, set aside; award of damages reassessed by the Court at £155,000.

Kealy v. Minister for Health
High Court : Morris P.
19/04/99

Personal injury; assessment of damages; appeal from Hepatitis C Compensation Tribunal; appellant challenges an award of £150,000 for general damages for personal injuries and £15,000 for special damages; whether caselaw of the Supreme Court mandated a maximum award of £150,000 for personal injuries; whether this caselaw applies to an award of this type.
Held : Appeal allowed in respect of general damages for personal injuries. Award was amended to £265,000.

Employment

Library Acquisition

Meenan, Frances
Working within the law a practical guide for employers and employees
2nd ed
Dublin Oak Tree Press 1999
N192.C5

Statutory Instruments

Employment Equality Act, 1998 (Commencement) Order, 1999
S.I. 320/1999

Employment Equality Act, 1998 (Section 76 - Right to Information) Regulations, 1999
S.I. 321/1999

Employment Regulation Order (Hotels Joint Labour Committee), 1999
SI 283/1999

Environmental Law

Jackson Way Properties Ltd v. Minister for the Environment and Local Government
High Court: Geoghegan J.
02/07/99

Judicial review; leave to apply for judicial review; proposed motorway would bisect applicant's lands; applicant arguing that access proposed to be granted inadequate; meaning of "substantial grounds" in s.55A Roads Act, 1993 as inserted by s.6 Roads (Amendment) Act, 1998; whether term "substantial grounds" bears different meanings under Planning Acts and Road Acts; whether substantial grounds for impugning defendant's decision; whether respondent obliged to take potential future uses into account; whether basis for challenging ss.49 and 51, Roads Act, 1993 on constitutional grounds.
Held: Leave to apply for judicial review refused; the term "substantial grounds" means the same thing in the Planning Acts as it does in the Road Acts, but may be applied differently, having regard to proportionality issues; grounds must be reasonable, arguable and weighty, and not trivial or tenuous; no substantial grounds for impugning respondent's decision; respondent not obliged to take all possible uses of affected land into account; no basis for constitutional argument.

Articles

Freedom of information act 1997: implications for access to information on the environment -

Part 1
Ryall, Aine
1999 IPELJ 99

Primary and secondary legislation relevant to planning and environmental law
Oakes, Ciaran
1999 IPELJ 112

Recent developments in conveyancing practice - the European Communities (environmental impact assessment) (amendment) regulations 1999
Sweetman, Patrick
1999 IPELJ 110

Statutory Instrument

Environmental Protection Agency Act, 1992 (Urban Waste Water Treatment) (Amendment) Regulations, 1999
SI 208/1999
DIR 91/271, 98/15

Equity & Trusts

Fitzpatrick v. Criminal Assets Bureau
Supreme Court: Hamilton C.J., Denham J., Barrington J., Keane J., **Barron J.**
28/07/1999

Property; interpleader proceedings; applicant seized a car on the instructions of the first-named respondent; whether car was the property of the second-named respondent or the third-named respondent; purchase-price of car provided by third-named respondent but car placed in name of second-named respondent; whether car had been tranferred to second-named respondent by way of gift or advancement; whether beneficial interest of third-named respondent ought to have been registered vis-à-vis second-named respondent pursuant to s.99, Companies Act, 1963.
Held: Appeal refused; no evidence of gift or advancement; second-named respondent had at best bare legal title to the car; a trust is not a charge and need not be registered under s.99.

European Union

Articles

European judicial architecture: back to the drawing board
Cooke, John
5(1) 1999 BR 14

Freedom of information-the European dimension
McIntyre, T J
5(1) 1999 BR 41

The essential facilities doctrine in the community courts
Flynn, Leo
1999 CLP 245

The road from Genoa - direct causal links and the case of Raso
Breen, Oonagh
1999 CLP 239

Library Acquisitions

Craig & De Burca
EU law text, cases, and materials
2nd ed
Oxford University Press 1998
W71

Hancher, Leigh
EC State aids
2nd ed
London Sweet & Maxwell 1999
W110.1

Hartley, Trevor C
The foundations of European Community law
4th ed
New York Oxford University Press 1999
W71

Reid, Brian C
Sweet & Maxwell's guide to European patent litigation handbook
London Sweet and Maxwell 1999
W142.1

Shaw, Jo
Law of the European Union
2nd ed
Hampshire Macmillan Press 1996
W86

Weatherill & Beaumont
EU law: the essential guide to the workings of the European Union
3rd ed
London Penguin 1999
W86

Statutory Instrument

European Communities (Licensing of Railway Undertakings) Regulations, 1999
S.I. 238/1999

Evidence

Logue v. Redmond
High Court: **Macken J.**
04/03/1999

Discovery; public interest immunity; legal professional privilege; plaintiff claiming damages for wrongful arrest; whether all documents passing between Gardai and DPP privileged; whether documents passing internally between Gardai relating to proceedings privileged; whether court should inspect documents.
Held: Court should inspect documents; documents containing legal advice are privileged; in relation to other documents the likely assistance of documents to plaintiff's claim should
be balanced against the public interest.

Library Acquisition

Cato, D Mark
The expert in litigation and arbitration
London LLP 1999
M604.9

Family Law

C.M. v. Delegacion Provincial de Malaga Consejeria de Trabajo y Asuntos Sociales
High Court : **McGuinness J.**
24/03/99

Custody; child abduction; conflict of laws; jurisdiction of Irish courts; first plaintiff, born in Spain of Irish parents, taken into custody by Spanish authorities; second plaintiff seeks to have first plaintiff returned to her custody in this jurisdiction; whether the retention of the first plaintiff is a wrongful retention within the terms of the Hague Convention; whether Ireland is the state in which the first plaintiff is habitually resident; whether the court has jurisdiction to consider the rights and welfare of the first plaintiff; whether it is appropriate or proper in the circumstances for the court to assume jurisdiction; Hague Convention on the Civil Aspects of International Child Abduction; s. 15, Child Abduction and Enforcement of Custody Orders Act, 1991.
Held: Relief refused. Proceedings dismissed.

O'B. v. R.,
High Court: **Kinlen J.**
20/07/1999
Nullity; criminal; bigamy; canon law; an annulment had been granted to the parties; petitioner had remarried after annulment; remarriage was prior to the passing of the Criminal Law Act, 1997; whether the petitioner and respondent were in such a state of mind that at the date of their purported marriage neither was able fully to understand the nature of the marriage contract and was, therefore, unable to give a full, free and informed consent, thereby rendering the purported marriage void; whether the petitioner was induced by duress to enter into the marriage, in this way rendering the purported marriage void; whether there was a voluntary consent on the part of the petitioner; whether the petitioner and the respondent were unable to enter into and sustain a normal marital relationship; whether there was unreasonable delay on the part of the petitioner in seeking to obtain an annulment; whether the petitioner had approbated the marriage by seeking a Church annulment, by seeking maintenance and by seeking social welfare payments on the ground of being a deserted spouse; whether the petitioner's second marriage was bigamous; whether the court should support a civil claim where there is evidence of a felony when the mattter has neither been reported to the gardai nor prosecuted; whether s.3, Criminal Law Act, 1997 which abolishes the distinction between felonies and misdemeanours, is retrospective.
Held: Petition granted; petitioner was not capable of making a full, free and informed decision; applying for social welfare does not amount to approbation; s.3 not retrospective; the issue of reporting to the gardaí did not arise as there was no question of material loss.

P. v. Judge Ballagh
High Court: **Smith J.**
31/07/1999

Application for maintenance order; notice requirements; paternity; certiorari; applicant and notice party were married to each other at all relevant times; notice party made applications to District Court for inter alia maintenance; respondent was a third party claimed by the notice party to be the father of her daughter; respondent made the orders sought; applicant seeking judicial review on ground that he should have been put on notice of the applications; s.46(1), Status of Children Act, 1987; s.5(a), Family Law (Maintenance of Spouses and Children) Act, 1975.
Held: Under s.46(1) the applicant was presumed in law to be the father of the notice party's daughter; the applicant should have been put on notice; certiorari granted

Article

The presence of McKenzie friends in in camera proceedings
Noctor, Cathleen
1999 ILT 214

Library Acquisition

Kennedy & Maguire
Irish family law handbook
Dublin Butterworths 1999
N170.C5

Walls, Muriel
Irish family legislation handbook
Bristol Jordan Publishing Ltd 1999
N170.C5.Z14

Statutory Instrument

Adoption Rules, 1999
SI 315/1999

Fisheries

Statutory Instruments

Celtic Sea (Prohibition on Herring Fishing) (Revocation) Order, 1999
S.I. 308/1999

Cod (Restriction on Fishing) (No.8) Order, 1999
S.I. 297/1999

Common Sole (Restriction of Fishing in the Irish Sea) (No.2) Order, 1999
S.I. 312/1999

Mackeral (Licensing) Order, 1999
S.I. 311/1999

Monkfish (Restriction on Fishing) (No. 4) Order, 1999
S.I. 118/1999

Monkfish (Restriction on Fishing) (No.9) Order, 1999
S.I. 296/1999

Housing

Article

Dublin: increasing housing densities - the path to sustainability
Gribbin, Eugene
1999 IPELJ 87

Information Technology

Article

Can anyone stop the techno-pirates?
Kelleher, Denis
1999 (October) GLSI 14

Library Acquisitions

Campbell, Dennis
The law of international on-line business
London Sweet and Maxwell
L157.2

Pollaud-Dulian, Frederic
The Internet and author rights
London Sweet & Maxwell 1999
L157.1

Venables, Delia
Guide to the internet for lawyers-what a lawyer needs to know about the internet
Sussex Delia Venables 1999
includes a set of on-line internet tutorials in separate binder
L157

Immigration

Article

The immigration act, 1999
Mulcahy, Rory
5(1) 1999 BR 35

Intellectual Property

Library Acquisition

Pollaud-Dulian, Frederic
The Internet and author' rights
London Sweet & Maxwell 1999
L157.1

International Law

Library Acquisition

Campbell, Dennis
The law of international on-line business
London Sweet and Maxwell
L157.2

Legal Systems

Article

The valuation tribunal
Mooney, Kilda
1999 (3) P & P 52

Library Acquisition

Hartley, Trevor C
The foundations of European Community law
4th ed
New York Oxford University Press 1999
W71

Licensing

Royal Dublin Society v. The Revenue Commissioners
Supreme Court: Hamilton C.J., Denham J., Barrington J., **Keane J.**, Lynch J.
19/05/1999

Licensing; statutory interpretation; appellants seek 'theatre licence' in order to sell intoxicating liquor on premises; grant of said 'theatre licence' refused by respondents; whether appellants' premises are a "theatre or other place of public entertainment"; whether decision of respondents was erroneous in point of law; whether interpretation of "theatre or other place of public entertainment" is governed by the ejusdem generis rule; whether relief by way of judicial review available to appellants; whether respondents were entitled to err within jurisdiction; whether the error of law, if such it was, was apparent on the face of the record; whether once the District Court had found the premises to be a place of public entertainment, the respondents were obliged to grant the 'theatre licence' sought; s.7, Excise Act, 1835.
Held: Order of certiorari granted; interpretation of "theatre or other place of public entertainment" is not governed by the ejusdem generis rule; jurisdiction of respondents as to whether the premises are a "place of public entertainment" is not pre-empted by decision of the District Court.

Local Government

Statutory Instruments

Electoral Act, 1997 (Limitation of Election Expenses at Dail Eireann) Order, 1999
SI 317/1999

Electoral Regulations, 1992 (Amendment) Regulations, 1999
SI 314/1999

Local Government Act, 1998 (Commencement) Order, 1999
SI 221/1999

Local Authorities (Declaration of Offices) Order, 1999
SI 222/1999

Local Government Act, 1991 (Regional Authorities) (Establishment) Order, 1999
S.I. 226/1999

Medical Law

Statutory Instrument

Eastern Regional Health Authority (Area Health Boards) Regulations, 1999
S.I. 269/1999

Health Board (Election of Members) (Amendment) Regulations, 1999
S.I. 251/1999

Saint Luke's and Saint Anne's Hospital Board (Revocation) Order, 1999
S.I. 252/1999
Shall come into operation immediately after the commencement of the Saint Luke's Hospital Board (Establishment) Order, 1999

Saint Luke's hospital board (establishment) order, 1999
S.I. 253/1999

Negligence

Cooke v. Cronin
Supreme Court: **Denham J., Keane J., Lynch J.**
14/07/1999

Professional negligence; personal injury; damages; plaintiff had given birth to a healthy child; during childbirth, an episiotomy cut had been required; cut was stitched after birth using eight soluble stitches (internally) and four non-

soluble stitches (inserted in the outer skin); three non-soluble stitches fell out before they were due to be removed; plaintiff seeking damages for personal injury due to the alleged professional negligence of the defendants; High Court had dismissed plaintiff's claims; whether defendant had sewn stitches too tightly; whether defendant had been shown to be negligent.

Held: Appeal dismissed; High Court finding manifestly supported by the evidence.
Per curiam: commencement of professional negligence proceedings is irresponsible and an abuse of the process of the Court unless the persons advising such proceedings have reasonable grounds for so doing; greater care should be taken when drafting Notice of Appeal carefully to identify the parties.

Article

Proofs in product liability cases: some aspects of practice and procedure in burn injuries claims
Schuster, Alex
1999 (3) P & P 60

Library Acquisition

Law Reform Commission
Consultation paper on section 2 of the Civil Liability (Amendment) Act, 1964: the deductibility of collateral benefits from awards of damages
Dublin Law Reform Commission 1999
L160.C5

Planning

Ragget v Athy UDC
High Court: **Carroll J.**
04/06/1999

Draft development plan; amendment; whether respondent must take into consideration submissions which criticise proposed amendment; whether respondent must also take into account submissions which propose further amendment; whether amendment to draft plan can take place once only; s. 21A Local Government (Planning and Development) Act, 1963.
Held: Planning authority have to take into account all representations including those which suggest amendments did not go far enough; draft plan can be amended more than once

Article

Dublin: increasing housing densities - the path to sustainability
Gribbin, Eugene
1999 IPELJ 87

Primary and secondary legislation relevant to planning and environmental law
Oakes, Ciaran
1999 IPELJ 112

Select review of recent an Bord Pleanala decisions
Phillips, Tom R
1999 IPELJ 115

Practice & Procedure

Orange Communications Ltd v. Director of Telecommunications
High Court: **Macken J.**
18/03/1999

Appeal to High Court; nature of appeal; scope of appeal; first named defendant refused to grant a mobile telephone service licence to plaintiff and proposed to grant a licence to the second named defendant; plaintiff appealed against this refusal under s.111, Postal and Telecommunications Services Act, 1983, as amended by European Communities (Mobile and Personal Communications) Regulations, 1996; whether appeal to High Court required a de novo hearing; whether fact that appeal brought by way of special summons meant that materials additional to those before the first named defendant could be adduced in evidence; whether power of High Court to confirm a decision to refuse a licence implied a power to annul such a decision; alternative to confirmation of decision by High Court; whether failure of first named defendant to provide reasons gave rise to a right in the plaintiff to an appeal by way of rehearing; Commission Directive 90/338/EC of 28 June 1990.
Held: Appeal is of a review type, slightly wider than judicial review simpliciter; appeal based only on materials that were before the first named defendant; that appeal brought by way of special summons did not give rise to right to adduce new materials in evidence; scope of appeal strictly limited by Oireachtas; only persons notified of a decision to refuse to grant or to revoke or suspend a licence may appeal; power of High Court to confirm a decision did not imply a power to annul such a decision; if the High Court chooses not to confirm the decision of the first named respondent, it may in the alternative direct the first named respondent to perform specified actions in respect of a licence proposed to be granted to someone else, such as the second named defendant; absence of reasons does not give rise to a wider review.

Aegon Insurance Company Limited v. Lysaght
High Court: **Macken J.**
06/08/1999

Bill of costs; delay; defendant solicitor commenced proceedings for satisfaction of bill of costs; plaintiff anxious to have bill of costs submitted to taxation; whether bill of costs should be submitted to taxation nothwithstanding period within which statutory entitlement to submit has elapsed; whether bill should be referred on basis of court's inherent jurisdiction; whether bill of costs queried; whether bill of costs was valid in accordance with act; whether good and valid reason for delay; whether v.a.t payable; whether interest accruing on bill payable; whether fees queried by plaintiff at any time after furnishing of bill; whether bill complies with Act of 1849 since not signed as required by Act; s. 2 Attorneys and solicitors (Ireland) Act, 1849.
Held: Bill of costs remitted to taxation; v.a.t and interest matters to be resolved by taxing master; statutory time limit should not be capable of being invoked to shut a party off from taxation if circumstances such that taxation warranted; bona fide delay; inefficient and undesirable for court to measure costs; signature on covering letter sufficient to validate bill; in any event plaintiff having acted on basis that bill valid cannot now impugn it; both parties granted liberty to re-enter the question of interest and question of v.a.t.

Trent v. Commissioner of An Garda Siochana
Supreme Court: **Barrington J.**, Murphy J., Lynch J. (ex tempore)
13/10/1999

Grounds of appeal; plaintiff unhappy with manner in which complaint dealt with by Commissioner of Gardai; whether plaintiff can challenge trial judges' assessment of evidence; whether plaintiff prejudiced by alleged defects in discovery.
Held: Appeal dismissed.

Lough Neagh Exploration Limited v. Morrice
Supreme Court: **Hamilton C.J.**, Murphy J., Barron J.
17/05/1999

Security for costs; striking out; inherent jurisdiction of the Court; discretion; failure to provide security within time provided; proceedings struck out in High Court on this ground; adjournment granted by Supreme Court to raise security; failure to provide required security; whether order of High Court should be set aside and time for lodging security extended; whether more appropriate for proceedings to be stayed unless and until security furnished; whether party in whose favour the order made prejudiced by the stayed proceedings.
Held: Appeal dismissed.

Martin v. Moy Contractors Ltd
Supreme Court: O'Flaherty J., Murphy J., **Lynch J.**
11/02/1999

Delay; striking out of claim; renewal of plenary summons; accident at work in August 1988; plenary summons issued in July 1991, eleven days before expiry of limitation period; statement of claim delivered over 18 months later; reply to notice for particulars of January 1994 made after almost four years in December 1997; managing partner of first defendant had died in May 1997; whether High Court correct in striking out claim against first defendant; eighth defendant had received a preliminary letter of claim but was not served with the plenary summons; whether High Court correct to refuse to set aside earlier order of the High Court renewing the plenary summons so that it could be served; O.8 rr.1 and 2, Rules of the Superior Courts.
Held: Inordinate and inexcusable delay had prejudiced first defendant; not having had any witnesses to the accident, the eighth defendant had not shown any specific prejudice; High Court enjoys a measure of discretion in both types of matter; both appeals dismissed.

Articles

Contempt in the face of court
Gearty, Mary Rose
1999 (3) P & P 66

Proofs in product liability cases: some aspects of practice and procedure
in burn injuries claims
Schuster, Alex
1999 (3) P & P 60

The mis-joinder and non-joinder of parties - rectifying pleadings part 1:
order 15
Dunleavy, Bernard
1999 (3) P & P 50

Library Acquisition

Thompson, Peter K J
The civil court practice 1999
London Reed Elsevier 1999
CD-Rom at Information Desk in LRC
N365

Statutory Instrument

Circuit Court (Fees) Order, 1999
S.I. 292/1999

District Court (Affidavits) Rules, 1998
S.I. 286/1999

District Court (Attachment and Committal) Rules, 1998
S.I. 124/1999

District Court (Costs) Rules, 1998
S.I. 126/1999

District Court (Discovery of Documents) Rules, 1998
S.I. 285/1999

District Court Districts and Areas (Amendment) and Variation of Days (No.6) Order, 1999
S.I. 322/1999

District Court (Taxes Consolidation Act 1997) Rules, 1999
S.I. 234/1999

Records & Statistics

Statutory Instrument

Registration of Births and Deaths (Ireland) Act, 1863 (Section 17 and Section 18) (Limerick and Clare) Order, 1999
S.I. 282/1999

Registration of Births and Deaths (Ireland) Act, 1863 (Section 17 and Section 18) (North Western) Order, 1999
S.I. 293/1999

Road Traffic

D.P.P. (O'Brien) v. Cormack
Supreme Court: O'Flaherty J. (ex tempore), Barrington J, Murphy J.
22/01/1999

Drunk driving; case stated; gardaí came to scene of accident in which one car was involved; car was in ditch; defendant was present; defendant admitted to driving the car and stated that the accident had happened ten minutes earlier; gardaí formed opinion that defendant was drunk; whether District Judge correct to dismiss charge on ground of insufficient evidence to show that vehicle had been driven in a public place within three hours; whether admission admissible in evidence.
Held: The evidence was conclusive that the defendant had been driving the car within three hours; case remitted to District Court.

D.P.P. (O'Driscoll) v. O'Connor
Supreme Court: O'Flaherty J., Barrington J., Keane J., Murphy J., Barron J.
09/03/1999

Drunk driving; urine sample; respondent had been arrested on suspicion of drunk driving and brought to a Garda station; respondent elected to provide a urine sample rather than a blood sample; respondent was unable to provide a urine sample within 15 minutes and was informed by the prosecutor that he would therefore have to provide a blood sample; the District Judge had dismissed the case against the respondent on the ground that he should have been allowed at least 30 minutes to provide a urine sample; whether District Judge had been correct; s.13(1)(b)(ii), Road Traffic Act, 1994.
Held: Election to provide a urine sample is exercised not by agreeing to the provision of such a sample but by the actual provision of it; requirement to provide a urine sample is coterminous with obligation to permit extraction of a blood specimen; no entitlement to any period of time within which to provide urine sample.

Statutory Instrument

Road Traffic (Public Service Vehicles) (Amendment) (No 2) Regulations, 1999
SI 316/1999

Sea & Seashore

Statutory Instrument

Harbour Authorities (Miscellaneous) (Non-Holding of Elections) Order, 1999
S.I. 306/1999

Taxation

Article

Capital gains tax: procedure for obtaining CGT clearance certificates (CG 50As)
McDonald, Simon
1999 CPLJI 67

Library Acquisitions

Feeney, Michael
The taxation of companies 1999-2000
Dublin Butterworth Ireland Ltd 1999
M337.2.C5

Gammie, Malcolm
Butterworths orange tax handbook 1999-2000
25th ed
London Butterworths 1999
M335

Gammie, Malcolm
Butterworths yellow tax handbook 1999 - 2000
39th ed
London Butterworths 1999
M335

Killen, Desmond M
Journal of Valuation Tribunal judgments September 1988 to June 1994
Dublin IPA 1996 selected judgments from September 1988 to June 1994 available on CD-ROM at the information desk in LRC
M337.65.C5

Tiley, John
Tiley and Collinson's UK tax guide 1999-2000
17th ed
London Butterworths 1999
M335

Wareham, Robert
Tolley's value added tax 1999-2000
2nd ed
Croydon Tolley Publishing 1999
M337.45

Statutory Instruments

District Court (Taxes Consolidation Act 1997) Rules, 1999
S.I. 234/1999

Taxes Consolidation Act,1997 (Designation of Airport Enterprise Area) Order, 1999
S.I. 278/1999

Telecommunications

Statutory Instrument

Wireless Telegraphy (Fixed Wireless Point to Multi-Point Access Licence) Regulations, 1999
S.I. 287/1999

Torts

Article

Proofs in product liability cases: some aspects of practice and procedure in burn injuries claims
Schuster, Alex
1999 (3) P & P 60

Library Acquisition

Law Reform Commission
Consultation paper on section 2 of the Civil Liability (Amendment) Act, 1964: the deductibility of collateral benefits from awards of damages
Dublin Law Reform Commission 1999
L160.C5

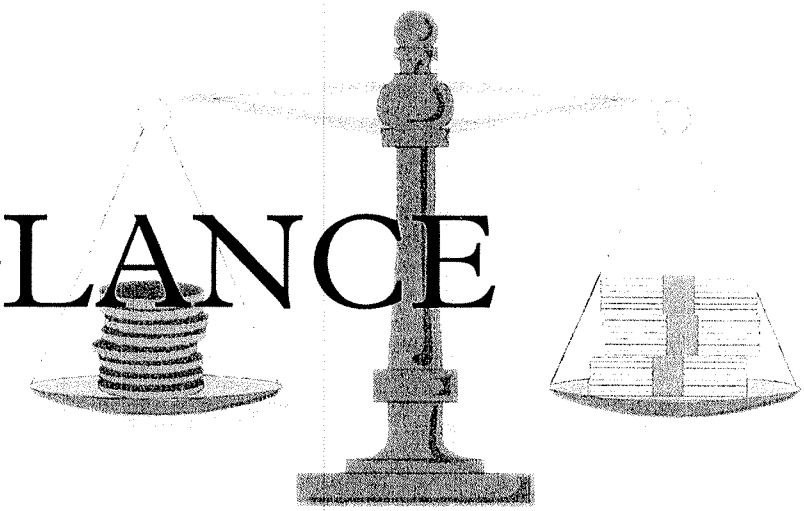
Transport

Statutory Instruments

European Communities (Licensing of Railway Undertakings) Regulations, 1999
S.I. 238/1999

Transport (Dublin Light Rail) Act, 1996 (Line B - St Stephen's Green to Sandyford Industrial Estate Light Railway) Order, 1999
S.I. 280/1999

AT A GLANCE



Court Rules

Circuit Court (Fees) Order, 1999
S.I. 292/1999

District Court (Affidavits) Rules, 1998
S.I. 286/1999

District Court (Attachment and Committal) Rules, 1998
S.I. 124/1999

District Court (Costs) Rules, 1998
S.I. 126/1999

District Court (Discovery of Documents) Rules, 1998
S.I. 285/1999

District Court Districts and Areas (Amendment) and Variation of Days (No.3) Order, 1999
S.I. 145/1999

District Court Districts and Areas (Amendment) and Variation of Days (No.6) Order, 1999
S.I. 322/1999

District Court (Taxes Consolidation Act 1997) Rules, 1999
S.I. 234/1999

European Directives implemented into Irish Law up to 10th January 2000

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

Environmental Protection Agency Act, 1992 (Urban Waste Water Treatment) (Amendment) Regulations, 1999
SI 208/1999
DIR 91/271, 98/15

European Communities (Identification and Registration of Bovine Animals) Regulations, 1999
S.I. 276/1999
(DIR 97/12) (REG 820/97, 2628/97, 2629/97, 2630/97, 494/98, 1678/98)

European Communities (Food Additives other than Colours and Sweeteners) Regulations, 1999
S.I. 288/1999
(DIR 95/2, 96/85, 98/72)

European Communities (Feeding Stuffs) (Methods of Sampling and Analysis) Regulations
S.I. 289/1999
(DIR 70/373, 71/250, 71/393, 72/199, 73/46, 73/47, 76/371, 78/633, 81/680, 81/715, 84/4, 84/425, 92/89, 92/95, 93/28, 93/70, 93/117, 94/14, 98/54, 98/64, 98/88, 99/27, 99/76, 99/79)

European Communities (Animals and Animal Products from Belgium) Regulations, 1999
S.I. 290/1999
(DEC 99/449, 99/551)

European Communities (Good Laboratory Practice) (Amendment) Regulations, 1999
SI 294/1999
(DIR 99/11, 99/12)

European Communities (Television Broadcasting) Regulations, 1999
S.I. 313/1999
(DIR 89/552, 97/36)

European Caselaw received in the Law Library up to 10th January 2000.

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

C-49/92 P Commission of the European Communities V Anic Partecipazioni SpA
Judgment delivered: 08/07/99
Appeal - Commission's Rules of Procedure - Procedure for the adoption of a decision by the College of Members of the Commission - Competition rules applicable to undertakings - Concepts of agreement and concerted practice - Responsibility of an undertaking for an infringement as a whole - Attachment of liability for the infringement - Fine

C-235/92 Monttecatini SPA v DSM NV
Judgment delivered 8/7/99
Appeal -commission's Rules of procedure - Procedure for the adoption of a decision by the College of Members of the commission -Competition rules applicable to undertakings -Concepts of agreement and concerted practice -Limitation rules - Fine

C-397/96 Caisse de Pension des Employes Prives v Dieter Kordel, Rainer Kordel and Frankfurter Allianz Versicherungs AG
Judgment delivered: 21/09/99
Social security - Institution responsible for benefits - Right of action against liable third party - Subrogation

C-124/97 Markku Juhani Laara, Cotswold Microsystems Ltd, Oy Transatlantic Software Ltd v Kihlakunnansyyttaja (Jyvaskyla) and Suomen Valtio (Finnish State)
Judgment delivered: 21/09/99
Freedom to provide services - Exclusive operating rights - Slot machines

C140/97 Walter Rechberger and Renate Griendl Hermann Hof meister and others v Republic of Austria
Judgment delivered 15/06/99
Directive 90/314 on package travel, package holidays and package tours -Travel offered at a price to the subscribers of a daily newspaper - Transposition of the Directive -Liability of the Member State

C-231/97 A.M.L. van Rooij v Dagelijks bestuur van het waterschap de Dommel and Gebr. Van Aarle BV
Judgment delivered: 29/09/99
Environment - Directive 76/464/EEC - 'Discharge' - Possibility for a Member State to adopt a wider definition of 'discharge' than that in the directive

C-232/97 L. nederhoff & Zn v Dijkgraaf en hoogheemraden van het Hoogheermraadschap Rijnland
Judgment delivered: 29/09/99
Environment - Directives 76/464/EEC, 76/769/EEC and 86/280/EEC - 'Discharge' - Possibility for a Member State to adopt more stringent measures than those provided for in Directive 76/464/EEC - Effect of Directive 76/769/EEC on such a measure

C-249/97 Gabriele Gruber and Silhouette International Schmied Gmbh & Co.
TG Gabriele Gruber and Silhouette International Schmied Gmbh & Co.
Judgment delivered: 14/09/99
Equal pay for men and women - Payments on termination of employment - Indirect discrimination

C257/97 DE & ES Bauunternehmung GmbH v Finanzamt Bergheim
Judgment delivered 14/5/99
Directive 78/660/EEC -Annual accounts - Principle of a true and fair view-
Principle that valuations must be made on a prudent basis- Principle that valuations must be made separately-Global provisions for a number of potential liabilities-conditions governing the making of provisions

C-260/97 Unibank A/S v Flemming G. Christensen
Judgment delivered: 17/06/99
Brussels Convention - Interpretation of Article 50 - Meaning of document
which has been formally drawn up or registered as an authentic instrument
and is enforceable in one Contracting State - Document drawn up without
any involvement of a public officer - Articles 32 and 36

C-281/97 Andrea Kruger v Kreiskrankenhaus Ebersberg
Judgment delivered 9/5/99
Equal treatment for men and women- End of year bonus -Conditions for granting.

C-295/97 Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v International Factors Italia Sp/a - (IFITALIA), Dornier Luftfahrt GmbH, Ministero della Difesa
Judgment delivered: 17/06/99
State aid - Article 92 of the EC Treaty (now, after amendment, Article 87EC) - New aid - Prior notification

C-307/97 Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt
Judgment delivered: 21/09/99
Freedom of establishment - Taxes on companies income - Tax concessions

C-310/97 Commission of the European Communities v AssiDoman Kraft Products
Judgment delivered: 14/09/99
Appeal - Effects in relation to third parties of a judgment annulling a measure

C-321/97 Ulla-Brith Andersson and Susanne Wakeras-andersson and Svenska Staten (Swedish State)
Judgment delivered: 15/06/99
Article 234 EC (ex-article 177) -EEA Agreement - Jurisdiction of the Court of Justice - Accession to the European Union - Directive 80/987/EEC - Liability of a State

C-355/97 Landesgrundverkehrsreferent der Tiroler Landdesregierund and Beck Liegenschaftsverwaltungsgesellschaft mbH Bergdorf Wohnbau Gmbh Karl Hacker
Judgment delivered : 7/09/99
Article 70 of the Act of Accession of Austria - Secondary residences - Procedure relating to the acquisition of immovable property in the Tyrol - Concept of 'existing legislation'

C-378/97 Florus Ariel Wijsenbeek
Judgment delivered: 21/09/99
Freedom of movement for persons - Right of citizens of the European Union
to move and reside freely - Border controls - National legislation requiring persons coming from another Member State to present a passport.

C-394/97 Sami Heinonen
Judgment delivered 15/6/99
Goods contained in travellers' personal luggage- Travellers arriving from
non member countries -Duty free allowances - Prohibition on imports linked to minimum period spent abroad.

C-414/97 Commission of the European Communities v Kingdom of Spain
Judgment delivered 16/5/99
Failure of a/member of State to fulfill obligations - Imports and acquisitions of armaments -Sixth VAT Directive - National legislation not complying therewith.

C-417/97 Commission of the European Communities v Grand Duchy of Luxembourg
Judgment delivered: 03/06/99
Failure of a member state to fulfil its obligations - Transferable securities - Investment services - Directive 93/22/EEC - Partial implementation

C-433/97 IPK-Munchen GmbH v Commission of the European Communities
Judgment delivered: 05/10/99
Appeal - annulment of a decision of the Commission to refuse to pay the balance of financial assistance.

C-440/97 GIE Groupe Concorde and Others v The Master of the vessel Suhadiwarno Panjan
Judgment delivered: 28/09/99
Brussels Convention - Jurisdiction in contractual matters - Place of performance of the obligation

C-14/98 Battital Srl and Regione Piemonte
Judgment delivered: 01/07/99
Plant health protection - Directive 77/93/EEC - Directive 92/76/EEC - Ban
on the introduction into Italy of plants of the Citrus genus from non-member countries - Limitation in time.

C-22/98 Jean Claude Becu, Annie Verweire, NV Smeg, NV Adia Interim
Judgment delivered: 16/09/99
Competition - National legislation allowing only 'recognised dockers' to
perform certain dock duties - Meaning of 'undertaking' - Special or exclusive rights

C-27/98 Metalmeccanica fracasso SpA Leitschutz Handels - und Montage GmbH v Amt der salzburger Landesregierung fur den Bundesminister fur wirtschaftliche Angelegenheiten.
Judgment delivered 16/5/99
Public works contract -contract awarded to sole tenderer judged to be suitable

C-44/98 BASF Ag v Prasident des Deutschen Patentamts
Judgment delivered: 21/09/99
Free movement of goods - Measures having equivalent effect - European patent ruled void ab initio for failure to file a transaction

C-56/98 Modelo SGPS SA v Director-Geral dos Registos e Notariado and Ministerio Publico
Judgment delivered: 29/09/99
Directive 69/335/EEC - Indirect taxes on the raising of capital - Charge
for drawing up a notarially attested act recording an increase in share capital and a change in a company's name and registered office

C-60/98 Butterfly Music Srl v Carosello Edizioni Musicali e Discografiche Srl (CEMED) and Federazione Industria Musicale Italiana (FIMI)
Judgment delivered: 29/06/99
Copyright and related rights - Directive 93/98/EEC - Harmonisation of the
term of protection

C-64/98 P Odette nicos Petrides Co.Inc. v Commision of the European Communities.
Judgment delivered 9/5/99
Appeal- Action for compensation- Common organisation of the market in raw
tobacco-Commission decisions rejecting bids in tendering procedures in respect of tobacco held by intervention agencies- Inadequate statement of
reasons, principles of proportionality, equal treatment, and the right to a fair hearing.

C108/98 RI.SAN. srl v Comune di ishia, Italia Lavora SpA, formerly GEPI SPA, Ishia Ambiente SPA.
Judgment delivered 9/5/99
Freedom of establishment-Freedom to provide services -Organisation of urban waste collection service.

C-155/98 Spyridoula Celia Alexopoulou v Commision of the European Communities
Judgment delivered 1/07/99
Appeal -Action declared manifestly unfounded or manifestly inadmissable -Officials - Classification in grade

C-166/98 Societe Critourienne De Distribution(Socridis) v Receveur Principle Des Douanes.
Judgment delivered: 17/6/99
Internal taxation- Article 95 of the EC treaty (now and after amendment , Article 90 EC) -Directives 92/83 EEC and 92/84/EEC- Different taxation of wine and beer)

C-203/98 Commission of the European Communities v Kingdom of Belgium
Judgment delivered: 08/07/99
Failure by a member state to fulfil its obligations - Articles 6 and 52 of the EC treaty (now, after amendment, Articles 12 EC and 43 EC) - Air traffic - Registration of aircraft

C-218/98 Oumar Dabo Abdoulaye and Others v Regie Nationale des Usines Renault SA
Judgment delivered 16/5/99
Interpretation of Article 119 of the EC Treaty Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC and of Directives 75/117/EEC and 76/207/EEC- Collective agreement providing for an allowance for pregnant women going on maternity leave

C-223/98 Adidas AG
Judgment delivered: 14/10/99
Free movement of goods - Regulation (EC) No 3295/94 - Prohibition of release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods - Provision of national law requiring the names of consignees of consignments detained by the customs authorities pursuant to the regulation to be kept confidential - Compatibility of the provision with Regulation (EC) No 3295/94

T-176/95 Accinauto SA, Commission of the European Communities
Judgment delivered: 19/05/99
Competition - Article 81(1) EC (ex-Article 85(1) - Exclusive distribution agreement - Parallel imports

Library Acquisitions

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

Law Reform Commission
Consultation paper on section 2 of the Civil Liability (Amendment) Act, 1964: the deductibility of collateral benefits from awards of damages
Dublin Law Reform Commission 1999
L160.C5

Review Body on Higher Remuneration in the Public sector report No. 30 to the Minister for Finance on the levels of remuneration appropriate to higher posts in the public sector 30 November 1987
Dublin Stationery Office 1987

Campbell, Dennis
The law of international on-line business
London Sweet and Maxwell
L157.2

Cato, D Mark
The expert in litigation and arbitration
London LLP 1999
M604.9

Charities directory 1999
Round Hall Sweet and Maxwell
N215.C5

Charleton, McDermott, Bolger
Criminal law
Dublin Butterworth Ireland Ltd 1999
M500.C5

Craig & De Burca
EU law text, cases, and materials
2nd ed
Oxford University Press 1998
W71

Feeney, Michael
The taxation of companies 1999-2000
Dublin Butterworth Ireland Ltd 1999
M337.2.C5

Gammie Malcolm
Butterworths orange tax handbook 1999-2000
25th ed
London Butterworths 1999
M335

Gammie, Malcolm
Butterworths yellow tax handbook 1900-2000
39th ed
London Butterworths 1999
M335

Hancher, Leigh
EC State aids
2nd ed
London Sweet & Maxwell 1999
W110.1

Hartley, Trevor C
The foundations of European Community law
4th ed
New York Oxford University Press 1999
W71

Kennedy & Maguire
Irish family law handbook
Dublin Butterworths 1999
N170.C5

Killen, Desmond M
Journal of Valuation Tribunal judgments September 1988 to June 1994
Dublin IPA 1996 selected judgments from September 1988 to June 1994 available on CD-ROM at the information desk in LRC
M337.65.C5

Meenan, Frances
Working within the law a practical guide for employers and employees
2nd ed
Dublin Oak Tree Press 1999
N192.C5

O Cuinneagain, Mel
Tax guide 1999-2000
Dublin Butterworths Irreland 1999
M335.C5

Pollaud-Dulian, Frederic
The Internet and author' rights
London Sweet & Maxwell 1999
L157.1

Reid, Brian C
Sweet & Maxwell's guide to European patent litigation handbook
London Sweet and Maxwell 1999
Sweet & Maxwell
W142.1

Shaw, Jo
Law of the European Union
2nd ed
Hampshire Macmillan Press 1996
W86

Thompson, Peter K J
The civil court practice 1999
London Reed Elsevier 1999
CD-Rom at Information Desk in LRC
N365

Tiley, John
Tiley and Collinson's UK tax guide 1999-2000
17th ed
London Butterworths 1999
M335

Venables, Delia
Guide to the internet for lawyers-what a lawyer needs to know about the internet
Sussex Delia Venables 1999
includes a set of on-line internet tutorials in separate binder
L157

Walls, Muriel
Irish family legislation handbook
Bristol Jordan Publishing Ltd 1999
N170.C5.Z14

Wareham, Robert
Tolley's value added tax 1999-2000
2nd ed
Croydon Tolley Publishing 1999
M337.45

Weatherill & Beaumont
EU law: the essential guide to the workings of the European Union
3rd ed
London Penguin 1999
W86

Bills in progress up to 10th January 2000.

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

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

Broadcasting bill, 1999
Committee - Dail

Cement (repeal of enactments) bill, 1999
2nd stage - Dail (Initiated in Seanad)

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

Children bill, 1999
1st stage - Dail

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

Comhairle bill, 1999
Committee - Dail

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

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

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

Copyright & related rights bill, 1999
Committee - Dail (Initiated in Seanad)

Criminal justice (united nations convention against torture) bill, 1998
Committee - Dail (Initiated in Seanad)

Criminal justice (safety of united nations workers) bill, 1999
Committee - Seanad

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

Education (welfare) bill, 1999
Committee - Dail (Initiated in Seanad)

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

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

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

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

Equal status bill, 1999
Report - Dail

Family law bill, 1998
2nd Stage - Seanad

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

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

Human rights commission bill, 1999
2nd stage - Dail

Illegal immigrants (trafficking) bill, 1999
Committee - Dail

Insurance bill, 1999
1st stage - Dail

International development association (amendment) bill, 1999
1st stage - Dail

Irish nationality and citizenship bill, 1999
Committee - Seanad

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

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

Local Government (planning and development) (amendment) (No.2) bill, 1999
2nd stage - Seanad

Mental health bill, 1999
1st stage - Dail

Merchant shipping (investigation of marine casualties) bill 1999
1st stage - Dail

Multilateral investment guarantee agency (amendment) bill, 1999
1st stage - Dail

National beef assurance scheme bill,1999
2nd stage - Dail (Initiated in Seanad)

Planning and Development bill, 1999
2nd stage - Dail (Initiated in Seanad)

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

Prevention of corruption (amendment) bill, 1999
2nd stage - Dail

Prevention of corruption (amendment) bill, 2000
1st stage - Dail

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

Proceeds of crime (amendment) bill, 1999
1st stage - Dail

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

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

Protection of children (hague convention) bill, 1998
Committee - Dail

Protection of patients and doctors in training bill, 1999
1st stage - Dail

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

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

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

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

Registration of lobbyists bill, 1999
1st stage - Seanad

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

Road traffic reduction bill, 1998
2nd stage - Dail [p.m.b.]

Safety health and welfare at work (amendment) bill, 1998
2nd stage - Dail [p.m.b.]

Safety of united nations personnel & punishment of offenders bill, 1999
2nd stage - Dail [p.m.b.]

Seanad electoral (higher education) bill, 1997
1st stage - Dail [p.m.b.]

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

Sea pollution (amendment) bill, 1998
Committee - Dail

Sex offenders bill, 2000
1st stage - Dail

Shannon river council bill, 1998
2nd stage - Seanad

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

Statute of limitations (amendment) bill, 1998
Committee - Dail [p.m.b.]

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

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

Tobacco (health promotion and protection) (amendment) bill, 1999
2nd stage -Dail [p.m.b.]

Trade union recognition bill, 1999
1st stage - Seanad

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

Twentieth amendment of the Constitution bill, 1999
2nd stage - Dail [p.m.b.]

Twenty- first amendment of the constitution bill, 1999
2nd stage - Dail [p.m.b.]

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

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

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

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

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

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

Whistleblowers protection bill, 1999
Committee - Dail

Wildlife (amendment) bill, 1999
1st stage - Dail

Acts of the Oireachtas 1999

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

1/1999 The British - Irish Agreement Act, 1999

2/1999 Finance Act, 1999

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

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

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

6/1999 Irish Sports Council Act, 1999

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

8/1999 Companies Amendment Act, 1999

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

10/1999 Criminal Justice Act, 1999
Signed 26/05/1999
(S.I. 302/1999 Commences Parts Iv & V On 01/10/1999)
(S.I. 154/1999 Commences I & Ii On 26/05/1999)

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

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

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

14/1999 National Disability Authority Act, 1999

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

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

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

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

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

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

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

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

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

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

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

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

27/1999 Udaras Na Gaeltachta (Amendment) (No.2) Act, 1999
Signed26/10/1999

28/1999 Broadcasting (Major Events Television Coverage) Act
Act, 1999
Signed 13/11/1999

29/1999 Icc Bank Act, 1999
Signed 15/12/1999

30/1999 Companies (Amendment) (No.2) Act, 1999
Signed 15/12/1999
Commencement Date : 21/12/1999 By S.I.
406/1999)

31/1999 Stamp Duties Consolidation Act, 1999
Signed 15/12/1999

32/1999 Intoxicating Liquor Act, 1999
Signed 15/12/1999

33/1999 Temporary Holding Fund For Superannuation
Liabilities Act, 1999
Signed 16/12/1999

34/1999 Appropriation Act, 1999
Signed 16/12/1999

35/1999 Fisheries (Amendment) Act, 1999
Signed 17/12/1999

Amendments Of The Constitution:

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

ABBREVIATIONS

BR	= Bar Review
CIILP	= Contemporary Issues in Irish Law & Politics
CLP	= Commercial Law Practitioner
DULJ	= Dublin University Law Journal
GLSI	= Gazette Law Society of Ireland
IBL	= Irish Business Law
ICLJ	= Irish Criminal Law Journal
ICLR	= Irish Competition Law Reports
ICPLJ	= Irish Conveyancing & Property Law Journal
IFLR	= Irish Family Law Reports
IILR	= Irish Insurance Law Review
IIPR	= Irish Intellectual Property Review
IJEL	= Irish Journal of European Law
ILTR	= Irish Law Times Reports
IPELJ	= Irish Planning & Environmental Law Journal
ITR	= Irish Tax Review
JISLL	= Journal Irish Society Labour Law
MLJI	= Medico Legal Journal of Ireland
P & P	= Practice & Procedure

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

COURTS SERVICE
An tSeirbhís Chúirteanna

The Courts Service Website

http:\\www.courts.ie

The Courts Service was established on the 9th November 1999 and has taken over responsibility for the funding, management and administration of all court services in the State.

As part of the Courts Service's objective to provide an enhanced level of information to both legal professionals and the public the Courts Service launched the first phase of its Website on the 29th November 1999.

The Website can be accessed at **http:\\www.courts.ie**

The Website is an ongoing process and will comprise of several development phases.

Content for initial phase of the Website includes:

- Home Page incorporating our new Corporate Identity
- "Towards a new Courts Service" Section
- Courts Service News Magazine
- Legal Diary
- Description of Jurisdiction of each Court
- Narrative on various Administrative Offices
- Interactive Map of Four Courts
- Geographic 'drill down' map showing Courts nationwide
- Staff Directory
- Links to other related Sites
- User Feedback Section
- Search Facility
- Help Guides
- Judgments - it is hoped to have judgments available on the Website in the near future

Legal Diary

The Legal Diary is available online after 7.00 p.m. on the evening preceding the relevant date. The Legal Diary can be accessed on the Home Page by clicking on the "Legal Diary" option.

As the development of the Website will be an ongoing precess the Courts Service would very much welcome comments, feedback and suggestions for additional content for the Site.

Please forward any suggestions to: Webmaster, Courts Service, Green Street Courthouse, Dublin 7 or through the Feedback Section on the Website.

Phone 01 8886426 Fax 01 8735242

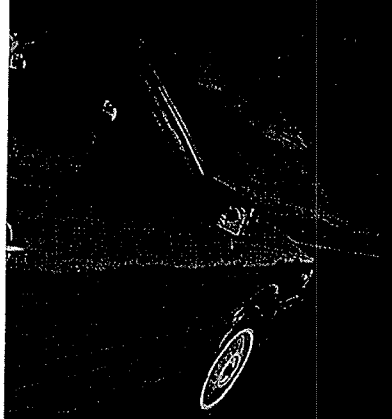
Law Library

financial services

With the opening of our new office, we are pleased to announce an extended range of products and services for the members of the Bar of Ireland. This includes:

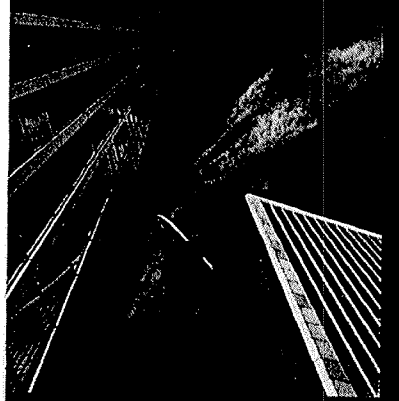
Banking Services

- ATM facility (24 hours)
- Express Lodgement facility
- Motor Loans
- Personal Loans
- Mortgages
- Savings & Investments
- Cheque book & Account facility



Insurance Services

- Life Cover
- Serious Illness Cover
- Pensions
- Personal Loans
- Annual Travel Insurance
- Professional Indemnity
- Motor Insurance
- Office Insurance



Call in to see us in our new office located close to the Crier's Desk in the Four Courts.

Law Library Financial Services, Law Library, Four Courts, Dublin 7.
Tel: (01) 817 5016 Fax: (01) 817 5152 E-mail: llfs@coylehamilton.com

TRADE MARKS THE INTERNET

Anne Bateman BL, F.R. Kelly & Co considers the substantive legal and jurisdictional issues involved in taking action against infringements of trade mark rights on the Internet, in particular where a trade mark-registered name is incorporated in an internet domain name without the authorisation of the owner of the trade mark.

"The Internet cannot be regulated. It's not that laws aren't relevant, it's that the nation state is not relevant. Cyberspace is by nature global and we're not very good at global law" (Nick Negroponte - MIT, Boston)

Introduction

The above quotation reflects a popular opinion with regard to the applicability of substantive national or international law to the new jurisdictional phenomenon that is the World Wide Web. It also highlights the difficulties perceived in the ability of the aggrieved plaintiff to take effective legal action against a breach of their rights where that breach has occurred on the web. This article deals specifically with these issues in relation to the rights of a trade mark owner.

Trade marks are adopted as a valuable identification tool by a trader in the marketplace. They also act as an important indicator to the public of the consistent quality of the product which bears that Mark and, in the increasingly brand-conscious world, can serve as a potential sales and advertising mechanism of themselves (witness the popularity of such names as NIKE and TOMMY HILFINGER). The Internet acts as a global electronic marketplace and its increased commercialization has led to the widespread appearance of trade marks on the medium. This, in turn, has led to several disputes between the owners of trade marks (registered or unregistered) in given jurisdictions and users of those trade marks on the Internet. One cause of such disputes is the adoption of second level domain names which are identical or closely similar to the trade mark of another entity. The question arises as to what legal rights inure in the proprietor of a trade mark in order to prevent a third party using that trade mark as a domain name. Another source of controversy is the use of an identical or similar Mark on the Internet by a third party where that third party has a domicile in another jurisdiction. The posting of the trade mark on the third party's website instantly makes it accessible world-wide and exposes that person to a potential multiplicity of claims at the suit of national trade mark owners.

"One cause of such disputes is the adoption of second level domain names which are identical or closely similar to the trademark of another entity. The question arises as to what legal rights inure in the proprietor of a trademark in order to prevent a third party using that trademark as a domain name."

Infringement And Irish Law

To take Irish law as an example, the Irish Trade Marks Act, 1996 provides that it is an infringement of a registered trade mark to use in the course of trade:-

* an identical mark in relation to identical goods or services
* an identical or similar mark in relation to identical or similar goods or services where a likelihood of confusion exists ("likelihood of confusion analysis").
* an identical or similar mark in relation to non-similar goods or services where the registered trade mark has a reputation in Ireland and the use of the offending Mark takes unfair advantage of or is detrimental to the distinctive character or repute of the registered trade mark ("dilution analysis").

"Use" of a registered trade mark in this context is broadly defined in the Act. It includes not only the affixing of the mark on goods or services but also includes the advertising of the mark. If a person does not have the benefit of a registered trade mark, they may be still be able to prevent unauthorized use of an identical or similar mark via the common law action for passing-off. The aggrieved owner must demonstrate that he has a sufficient goodwill or reputation in the mark in question and that the unauthorized use of that name is likely to case confusion in the public's mind in connection with the goods or services in question. The trade mark owner must also prove that he has suffered or is likely to suffer, loss or damage to his business or goodwill as a result of this actual or potential confusion. It is also useful to note at this point that most common law and civil law jurisdictions have similar registered trade mark infringement and unfair competition standards to those pertaining in Ireland.

In relation to the unauthorized adoption of an Irish registered trade mark on the Internet by an Irish domiciled person, the legislative provisions will clearly apply without difficulty. Infringement may be determined under the confusion or dilution analyses and the question of the medium adopted to facilitate the infringement will be irrelevant. This is similarly the case in a claim for passing-off by the Irish owner of the goodwill in the mark if the requisite criteria of reputation, confusion and damage are met.

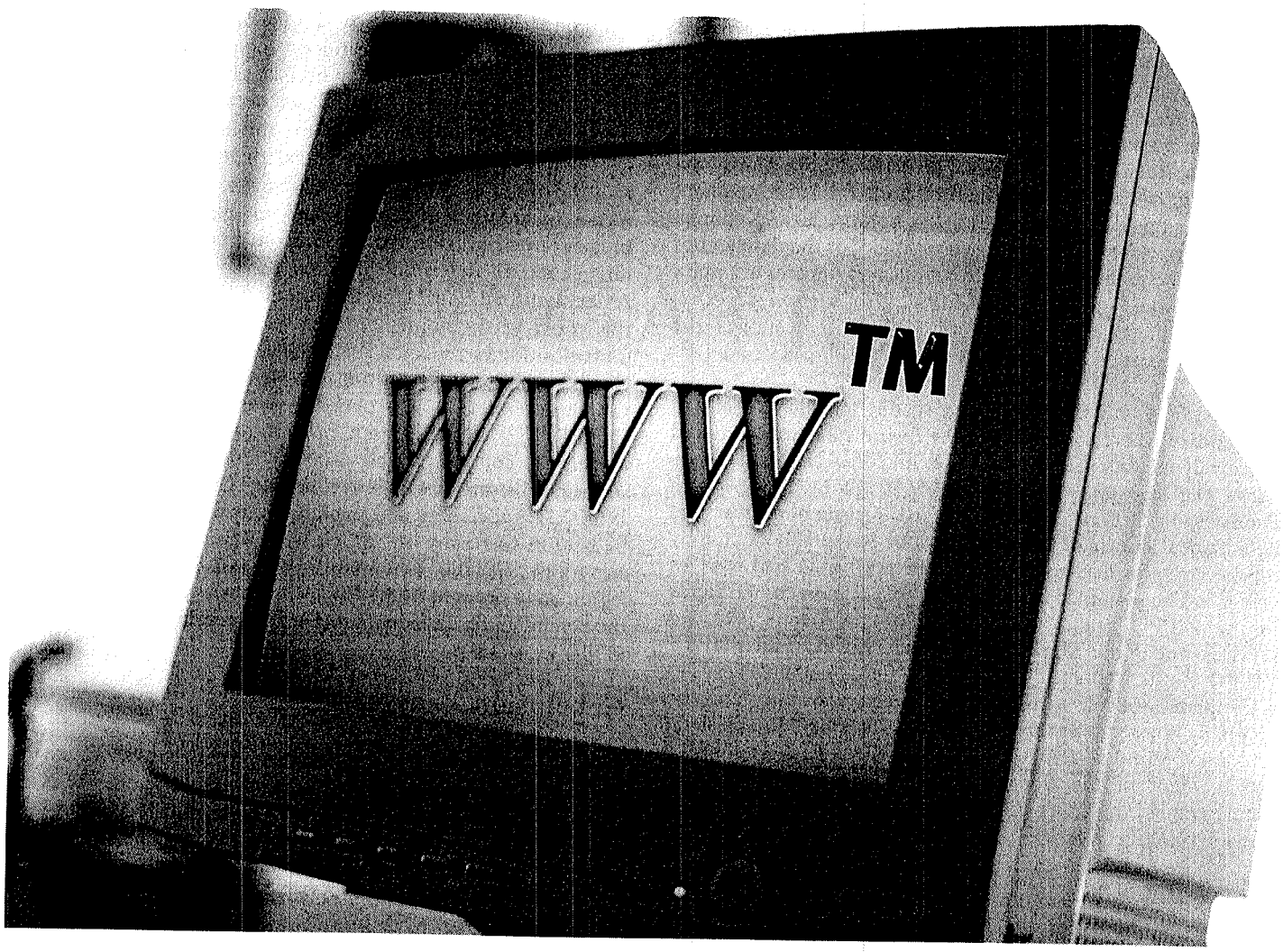
The trend in litigation in relation to domain names has similarly been to adopt the standard confusion or dilution analysis as is applicable to trade marks. Domain names are increasingly used to serve an identifying function in connection with the website owner's goods or services and have therefore developed into valuable intellectual property of themselves. The registration of a trade mark as a domain name by an unauthorized individual may impact adversely on the rights of the true owner a number of ways: the true owner may be denied registration of the trade mark as a domain name in their own right, the use of the trade mark on the Internet by an unauthorized individual may lead to confusion as to the source of the products or services offered on-line, this confusion could result in actual damage to the true owner's business in the form of misdirected inquiries and lost sales and, in turn, may also lead to the dilution of the unique selling power of the mark. More ominously, the unauthorized person may deliberately attempt to mislead the public as to the true source of the product. Although no cases have been litigated in the Irish courts to date on this issue, precedents are slowly beginning to build in the UK based on similar law.

"The trend in litigation in relation to domain names has similarly been to adopt the standard confusion or dilution analysis applicable to trade marks. Domain names are increasingly used to serve an identifying function in connection with the website owner's goods or services and have therefore developed into valuable intellectual property of themselves."

The UK Position

In *British Telecom Plc and others v One in a Million and others*[1], the plaintiffs were the proprietors of various well-known trade marks, rights which were possessed either by virtue of registrations or by a substantial reputation and goodwill held in the relevant marks through use. The defendants had registered various domain names such as "marksandspencer.co.uk" and "bt.co.uk" without the plaintiffs' consent. Initial offers to sell these domain names to the plaintiffs were refused, whereupon the defendants threatened either to use the domain names themselves or to sell them off to companies or individuals who were not the true owners of the marks. Summary judgment was granted to the plaintiffs on foot of claims for passing-off and registered trade mark infringement and the defendants were ordered to assign the offending domain names to the rightful owners. On appeal to the Court of Appeal, it was held that registration of a third party's distinctive name can amount to passing-off. It was clear to the court that the defendants had adopted a policy of systematic registration of well known trade names under threat to sell them to others and that the primary purpose of such registrations was to block registration by the true owner of the goodwill and to extract money from those owners. The ability of the appellants to do so was dependant upon the threat, express or implied, that the appellants would exploit the goodwill by either trading under the name or equipping another with the name so that they might do so. The respondents had thereby satisfied the court as to the required elements for passing-off, i.e. ownership of goodwill in the relevant name, a likelihood of confusion in the minds of the public regarding the ownership of the relevant domain name and a threat of damage to the goodwill or business of the appellants as a result of this confusion. The domain names were of no use to the appellants other than as a means of threatening unlawful acts. Further, with regard to the "Marks & Spencer" case, it was accepted that the name denoted Marks & Spencer Plc exclusively. It followed that the registration of a domain name including "Marks & Spencer" by the appellants made a false representation that they were associated or connected with Marks & Spencer Plc. In relation to registered trade mark infringement, the court held that the registration of the domain names was designed to take advantage of the distinctive character or reputation of the trade marks in an unfair or detrimental way and granted the respondents relief on the dilution ground. As no actual trading had been undertaken by the appellants under the names, the question of infringement in relation to identical or similar services did not arise. The most significant aspect of the *One in a Million* case is the recognition by the court that domain names can perform a trade mark function because they may indicate origin. This facilitates the protection of domain names by trade mark law and, conversely, allows the owners of trade marks to protect themselves against the unauthorized use of their marks as domain names by virtue of a passing-off or registered trade mark infringement action. The willingness of the UK courts to embrace this analysis had already been evident in *Harrods Limited v UK Network Services Limited & others* [High Court, Chancery Division, 9 Dec. 1996]. The owners of the famous Knightsbridge department store succeeded at interlocutory stage in a claim for passing off and trade mark infringement against the defendant registrants of the domain name "harrods.com" and against the domain name registration body who has granted the offending registration. The domain name registry were ordered to take all steps within their power to relinquish the domain name to the plaintiff.

It is submitted that an Irish court is well equipped with precedent to deal with the problems presented before the English courts. In reaching its decision in the *One in a Million* case, the Court of Appeal drew a parallel with the case of *Glaxo Plc and another v Glaxo Wellcome and others*[2]. In that case, the defendants registered the company name "Glaxo Wellcome" shortly before the merger of Glaxo Plc and Wellcome Plc and demanded £10,000 for the relinquishing of the name to its true owners. The court granted an injunction to the plaintiff requiring that it change its name. In a similar case in Ireland, *Rittal Werk Rudolf Loh GmbH v Rittal (Ireland) Ltd and* others



[unreported, High Court, 11 July, 1991], the defendant company was incorporated adopting a similar name to the well known trade mark of the plaintiffs. Despite the fact that the defendant company had not yet commenced trading and that, if trading were to commence, it would be in relation to a different field of activity to the plaintiff, the High Court found that there has been passing-off. Carroll J. found that the company had been incorporated with the purpose of gaining an advantage from the use of the word RITTAL. This would give the impression that it was a subsidiary or branch or was associated or connected in some way with the plaintiff. The High Court has also confirmed in the *Kilkenny Brewing Company* case[3] case that is possible in certain circumstances for the mere incorporation of a company name to constitute passing off.

Therefore, the existing causes of action and remedies for trade mark infringement are sufficient to handle disputes regarding domain names (and traditional infringement cases where the Internet is merely the medium of sale of goods or provision of services). When pushing out the boundaries of the old law to meet the changing circumstances of electronic commerce, the courts have been able to analogize the registration of a domain name with the act of incorporation of a company name and attach liability to the cyber-infringer.

Jurisdiction

The essence of the problem in relation to the use of trade marks on the Internet, therefore, is not that the substantive laws of the nation state are inadequate. The issue is rather one of jurisdiction. The Internet is a truly global medium, accessible from virtually anywhere simultaneously. The previously mentioned cases involved the suits between litigants having the same domicile and the tricky question of the court's ability to exercise judgement over the defendant was not therefore addressed. In the Harrods case, a preliminary argument was raised as to jurisdiction on the basis that NSI (the defendant Internet service provider) is an American corporation. NSI eventually agreed to comply with the ruling of the English court, however, and the court considered this as sufficient to found jurisdiction. The issue will not always be so easily resolved.

Early disputes in the USA are instructive in relation to the uncertainty which may face the users of trade marks on the Internet and the exposition of such users to a potential multiplicity of lawsuits. Because each of the fifty one States of the Union operate under their own trade mark statutes, long-arm statutes have also been enacted to enable each state to deal with inter-jurisdictional conflicts. The courts are only slowly beginning to evolve a jurisprudence in relation to the exercise of personal jurisdiction over a defendant where the only

contact that defendant has made with the subject state is through the mechanism of the Internet. A trend has emerged for state courts to deny jurisdiction where contacts with the state are limited to a "passive" web site that acts primarily as an advertisement and does not allow consumers to interact with it. In *Cybersell Inc. v Cybersell Inc*[4] a federal appellate court affirmed the denial of jurisdiction in a trade mark infringement suit where the defendant Florida corporation's sole contact with the Arizona forum was the accessibility of the defendant's web site. The mere placement of an allegedly infringing mark on a web site (and in the absence of solicitation or other contacts with the forum) was not sufficient to subject the Florida corporation to the jurisdiction of the Florida court.

On the other hand, the courts have readily attached liability to a defendant where consumers in the forum state are permitted to actively interact with the web site. In *Zippo Manufacturing v Zippo Dot Com Inc.* 9[5]2 F. Supp 1119 (W.D. Pa. 1997], a Pennsylvania federal court exercised jurisdiction over the defendant Californian web site operator based almost entirely on the contacts that consumers in Pennsylvania had with its web site. The plaintiff Pennsylvanian corporation owned rights in the ZIPPO brand of lighters. The defendant provided services under the Marks ORIGINAL ZIPPO and SUPER ZIPPO via its web site "zippo.com". The defendant's services were made available to the Pennsylvanian consumer and the company boasted over three thousand subscribers in that state. The court found no difficulty in finding the defendant guilty of infringement of the trade mark rights of the plaintiff in Pennsylvania. The court summarised the position taken in the previous cases as follows:-

> "At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involves the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper ... At the opposite end are situations where a defendant has simply posted information on an Internet web site which is accessible to users in a foreign jurisdiction. A passive web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction ... The middle ground is occupied by interactive web sites where a user can exchange information with a host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the web site".

The general rule which emerges from these and other cases is that the mere availability of information from a web site will not support, of itself, the exercise of jurisdiction by the courts of a distant forum over the web site operator. Something more than accessibility is required, namely the active solicitation of business from consumers in the forum state or the active inaction of those consumers with the defendant's web site. It must be noted, however, that no decisive ruling has been given by a federal court in relation to this issue and the state courts continue to accept jurisdiction over a non-resident defendant in circumstances where the defendant's contacts with the state forum are "passive" only[5].

In Ireland, the Brussels Convention 1968 and the Lugano Convention 1989 provide rules on the forum for disputes between parties of different member states. Relevant rules in the context of the Internet are that a defendant must be sued in the country of his or her domicile. In relation to tort proceedings an act (other than a breach of contract) for which a civil claim for damages may be brought may be sued for in the country where the harmful act occurred, e.g. where the damage was suffered or where the infringing act took place. Proceedings concerning the validity of domestic trade marks must be brought in the country of registration. Therefore, if the owner of an Irish trade mark suffers damage as a result of breach of its rights on the Internet, an Irish court would have jurisdiction to determine the issue, even if the defendant is resident abroad. With regard to the domicile of the defendant, this could be the domicile of his server or his own domicile. This position is reflected in the interlocutory decision of the English Chancery Division in *Mecklermedia Corporation v DC Congress GmbH*. The plaintiff was the owner of the INTERNET WORLD trade mark in the UK. The defendant, a German company (who used a German web server) was restrained from passing off in the UK its INTERNET WORLD trade show and exhibitions which were intended to be held in Germany but which were advertised in the United Kingdom via the defendant's web site. The action was legitimately brought in the English courts as the on-line acts of the defendant resulted in damage to the goodwill of the plaintiff in that jurisdiction.

Conclusion

Historically, the trade mark litigant has been able to determine the extent of their rights or liabilities in relation to the use of trade marks in commerce. The advent of trade on the Internet has meant that trade mark owners must cast a wider net in policing infringement of their rights. The difficulty is not that the potential plaintiff will be unable to assess whether an infringement has occurred - the courts have shown themselves to be more than willing to fashion remedies based on traditional trade mark infringement grounds - but that rules as to conflicts of laws in relation to Internet infringement are yet to be definitively addressed by the courts. For the web sit operator, there is the concern that a business conducted with few or no contacts with a forum may nevertheless expose that operator to the jurisdiction of a distant court. It is perhaps not the case that we are not very good at global law, but rather that the unique phenomenon of the web leaves us with a jurisdictional tangle to unravel. ●

1 *[1999] FSR 1 [The full name for the case is British Telecommunications Plc v. One in a Million Ltd and others, Virgin Enterprises Ltd v. One in a Million Ltd, J. Sainsbury Plc v. One in a Million Ltd, Marks & Spencer Plc v. One in a Million Ltd, Ladbroke Group Plc v. One in a Million Ltd]*

2 *[1996] FSR 388*

3 *Guinness Ireland Group, E. Smithwick & Sons Limited and by order Irish Ale Breweries Limited v. Kilkenny Brewing Company Limited* [unreported, High Court., Feb 10, 1999]

4 130 F.3rd 414 [9th Cir. 1997]: See also *Bensusan Restaurant Corp. v. King* F3rd 25 [2nd Cir. 1997] for a decision on similar grounds

5 For an example, see the decision of *Inset Systems Inc. v. Instruction Set Inc.* 937 F. Supp. 161 [D. Conn. 1996]

6 [1998] Ch. 40.

UBLIC PROCUREMENT LITIGATION

Eileen Barrington BL outlines the regulations governing procurements of public contracts under European and Irish law and explains the provisions of the new "Order 84A" procedures in relation to challenges to awards of public procurement contracts.

Background

Unlike most major continental member states of the EC, Ireland has no binding domestic public procurement code. However, in the 1970's, through its membership of the EC, Ireland benefited from the adoption of what has become known as "the first generation" of EC public procurement rules.[1] These rules regulate the award of public contracts above certain levels. In the case of public supply and works contracts, these levels are fixed at E5,000,000. In the case of services contracts, E200,000 is the threshold. It was not until the early 1990's that these EC public procurement directives were transposed into Irish law by way of Regulations. Prior to then, the procurement directives were implemented solely by way of administrative circular. The combination of lack of familiarity with the principles of public procurement and lack of awareness of the existence of the administrative circulars meant that the procurement rules went largely unnoticed in this country for many years.

"The main objectives of the EC's public procurement policy are the creation of the conditions of competition necessary for the non-discriminatory award of public contracts, the rational allocation of public money through the choice of the best offer presented, suppliers' access to a truly single market with significant business opportunities, and the reinforcement of competition among European enterprises."

The main objectives of the EC's public procurement policy are the creation of the conditions of competition necessary for the non-discriminatory award of public contracts, the rational allocation of public money through the choice of the best offer presented, suppliers' access to a truly single market with significant business opportunities, and the reinforcement of competition among European enterprises. Obviously, a public procurement règime based on the principles of fair, transparent and non-discriminatory award procedures has the knock-on effect of limiting the risks of fraud and corruption in administration. Despite the ambitious aims of the EC's procurement policy, the system put in place of the first generation of directives was deficient. The directives themselves did not contain any specific provisions ensuring their effective application. No rules existed regulating the manner in which a tenderer prejudiced by a breach of the procurement rules could seek to assert its rights before the national courts.

The Remedies Directive

With a view to putting in place a mechanism for effective and rapid remedies in the event of breaches of the procurement rules, Council Directive 89/665/EEC was adopted.[2] [3] This directive, now known as the "Remedies Directive", obliged the member states to take the relevant steps to put in place a system of adequate remedies. Article 1(3) of the Remedies Directive obliges the member states to ensure that any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement should be able to have recourse to review procedures. The remedies available should include an order suspending the procedure for the award of a public contract (Article 2(1)(a)), an order setting aside unlawful decisions, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender or contract documents (Article 2(1)(b)) and an order for damages (Article 2(1)(c)).

In addition to the domestic procedures envisaged, Article 3 of the Remedies Directive also puts in place an EC level supervisory system. Where the Commission is of the view, prior to a contract being concluded, that a clear and manifest infringement of the procurement rules has taken place, it may notify the infringement to the member state concerned and require correction of the infringement. Within twenty one days of receipt of such a notification, the member state must communicate to the Commission the manner in which the infringement has been corrected or reasons why no action has been taken.

The Remedies Directive in Irish Law

The Remedies Directive is transposed into Irish law by way of the European Communities (Review Procedures for the Award of Public Supply, Public Works and Public Services Contracts) (No. 2) Regulations, 1994 ("the Regulations").[4] The Regulations provide that the Irish High Court will carry out the review envisaged by the Remedies Directive. The option provided for by Article 1(3) of the Remedies Directive, whereby a member state may require person alleging an infringement to notify the contracting authority of his claim and of his intention to seek review, is taken up by Article [5] of the Regulations. This is doubtless intended to encourage the parties to enter into negotiations with a view to preventing litigation. It is now an essential procedural step prior to instituting proceedings.

Article 8 provides that proceedings may be brought in a summary manner. Until October 1998, this meant (by virtue of Order 3 Rule 21 of the Rules of the Superior Courts, 1986) that proceedings seeking to challenge the award of a contract were required to be brought by way of special summons grounded on affidavit.

Order 84A

Order 84A[5] came into effect on October 19th, 1998. It puts in place new procedures for the summary proceedings envisaged by the Remedies Directive and the Regulations. In practice, this means that challenges to awards of public procurement contracts will no longer be brought by way of special summons grounded on affidavit but rather in accordance with the procedures set out in Order 84A. These procedures mirror, to a certain extent, the judicial review procedures provided for by Order 84. Order 84A Rule 3 provides that an application for the review of the award of a contract shall be made by originating motion on notice grounded on a statement similar to the statement grounding an application for judicial review. However, unlike the judicial review procedure, there is no requirement to seek leave to bring procurement review proceedings. Rather, the notice of motion together with the statement grounding the application and verifying affidavit is served directly on the contracting authority, the proceedings being returnable for the first available motions day at least ten days after the date of service. The contracting authority intending to oppose an application then files a statement of opposition such as that which is used in judicial review. Prior to the hearing of the motion, the applicant must file an affidavit giving the details of all persons served with the notice of motion. No such requirement exists under Order 84 (due presumably to the fact that directions as to service can be given at the leave stage).

"Unlike the judicial review procedure, there is no requirement to seek leave to bring procurement review proceedings."

Time Limits

Order 84A Rule 4 provides that an application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose, unless the Court considers that there is good reason for extending such period. This provision is almost identical to Order 84 Rule 21(1). This rule is currently at issue in the case of *Dekra Eireann Limited v. Minister for the Environment and Local Government and SGS Ireland Limited.* In those proceedings, which have not yet been heard, the Applicant seeks declaratory relief and damages in respect of the alleged invalid award by the Respondent Minister of a contract for the introduction and operation of a system of testing private cars in Ireland (required by Directive 96/96/EC) to SGS Ireland Limited, the Notice Party. The Notice Party has issued a Motion seeking to strike out the Applicant's claim for failure to comply with Order 84A Rule 4. The Notice Party argues that the contract was awarded to SGS on November 23rd, 1998. It was signed by the Minister on December 15th, 1998. As the proceedings were commenced on March 25th, 1999, the Notice Party submits that the proceedings were not therefore brought at the earliest opportunity or within the three month time limit. It is anticipated that the Notice Party will argue that there is no "good reason" within the meaning of Order 84 Rule 4 to extend the time.

These proceedings will give the Courts an opportunity to consider the phrase "good reason" in the context of Order 84A. The phrase has, however, been considered in the context of Order 84 Rule 21 in *O'Donnell v. Dun Laoghaire Corporation*. Costello J., in that case, held that phrase was one of wide import which it would be futile to attempt to define precisely. However, he then went on to hold that what the Plaintiff had to show was a good reason which both explained the delay and afforded a justifiable excuse for the delay.

The equivalent UK provision to Order 84A Rule 4 was considered by the English High Court in *Keymed (Medical & Industrial Equipment) Limited v. Forest Healthcare NHS Trust*. Like Costello J., Langley J. held that it was not possible to define or circumscribe the scope of the expression "good reason". He nonetheless considered that the relevant considerations were:-

1. The length of and reasons for any delay;
2. The extent to which the Plaintiff was to blame for any delay;
3. The extent to which the Defendant might have induced contributed to the delay;
4. Whether the Defendant had been or would be prejudiced by the delay or by the grant of an extension.

It is anticipated that the Applicant will argue that it satisfies the relevant tests for extending time and, in the alternative, the

Order 84A Rule 4, in setting a three month time limit, breaches EC law. The Applicant may rely upon the principle of equivalence set out by the European Court of Justice ("ECJ") in Palmisani [8]. In that case, the ECJ held that "the conditions, in particular time limits, for reparation, loss or damage laid down by national law must not be less favourable than those relating to similar domestic claims (principle of equivalence) and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (principle of effectiveness)". The Applicant may argue that a restrictive interpretation of the three month time limit would defeat the purpose of the Remedies Directive. In assessing equivalence, the Applicant may argue that a comparison must be drawn between the position prior to the introduction of Order 84A, when an Applicant had six years within which to bring proceedings to review an award. Order 84 Rule 4 may thus be argued to be unduly restrictive.

Procedural Issue

Order 84A Rule 2 provides that an application pursuant to the Regulations for the review of a decision to award a public contract shall be made to the High Court in accordance with the provisions of Order 84A. This gives rise to a number of issues. Firstly, it has been pointed out[9] that the wording would seem to imply that a party wishing to bring proceedings challenging the award of a public contract must proceed by way of Order 84A. If this is so, then difficulties may arise in certain cases. Order 84A relates only to challenges to the award of a contract based on allegations of non-compliance with the EC directives. If an Applicant also wished to challenge an award on other grounds, other sets of proceedings might have to be brought. Thus, if an Applicant wished to institute proceedings on the grounds of the failure by the contracting authority to state or apply the relevant award criteria (a breach of the relevant directive) proceedings would have to be brought pursuant to Order 84A. However, if the Applicant also wished to claim that the contracting authority had exercised a discretion unreasonably, arguably it would be required to seek leave on this ground pursuant to the provisions of Order 84. If the Applicant wished to make a claim to the effect that the award of the contract breached the provisions of the Competition Act, 1991 - 1996 by foreclosing the market in an unacceptably restrictive manner, plenary proceedings would have to be brought together with Order 84A proceedings.

Order 84A Rule 9 provides that an Applicant, at any stage after the issue of the originating notice of motion, may apply for interim or interlocutory relief. This is stated to include an application for an order for discovery. This rule appears to acknowledge the potential importance of discovery in procurement matters and that discovery may be necessary prior to the completion of an exchange of Affidavits or closure of pleadings. Discovery may be vital as a tenderer may not be aware, prior to discovery, as to the extent of non-compliance with the procurement rules (such as the failure to apply the award criteria correctly).

Test to be applied

A further issue yet to be determined by the Courts is the test to be applied in assessing whether or not an infringement of the European procurement rules has taken place. This issue was raised in *SIAC Construction Limited v. The County Council of the County of Mayo*[10]. In those proceedings, the Applicant sought to challenge the award of a construction contract. As the proceedings were brought prior to coming into effect of Order 84A, the Applicant chose to proceed both by way of special summons and Judicial review proceedings. Two sets of identical proceedings were instituted. These proceedings were then heard together by the High Court.

The contracting authority had stated that it would award the contract to the most economically advantageous tender. However, the contracting authority was satisfied that all relevant tenderers had met the stated award criteria. The only remaining criterion to distinguish between the tenderers was that of price. It was submitted by the Applicant that, having regard to the fact that its tender price was lowest, the contract ought to have been awarded to it. In fact, the contract was awarded to the tenderer who had submitted the second lowest tender price.

In the High Court, Laffoy J. held that the contracting authority had a discretion in applying the price criterion. The Court could not review the contracting authority's decision on the merits. Rather, the *O'Keeffe v. An Bord Pleanala*[11] unreasonableness test should be applied. The *Wednesbury/O'Keeffe* principles did not have to be modified merely by virtue of the fact that EC law was at issue.

Laffoy J. then examined the Remedies Directive and the Regulations. She concluded that neither suggested that the review to be conducted by the High Court was to be in any form of appeal on the merits. Rather, she held that the requirement in the Remedies Directive that the review should be effective related to the procedural aspect of the review and the efficacy of the remedies available to give effect to the review only, rather than to the substantive nature of the review process and the principles applicable to its conduct. Therefore reviews of awards fell to be conducted in accordance with the ordinary principles of administrative law.

On appeal to the Supreme Court, the Applicant argued that Laffoy J. erred in her statement of the test to be applied. It was argued, firstly, that the procurement directives required the development of a sui generis test by the Irish courts, in order to comply with the EC principle of effectiveness. Consequently, Laffoy J. was incorrect in determining that the EC genesis of the procurement règime had no impact on the nature of the review to be undertaken by the Court. In the alternative, if a judicial review test were to be applied, on the facts of this particular case, a reasonableness test was inappropriate. No issue of the exercise of a discretion arose. The contracting authority was required to apply the criteria which it had indicated that it would apply. When it came to the criterion of

"The Supreme Court has referred a question to the European Court of Justice pursuant to Article 234 of the EC Treaty (formerly Article 177) for a preliminary ruling as to whether or not the contracting authority was entitled to take account of any cost other than the tender price in assessing the only live criterion of price."

price, there was no discretion as to how price was to be assessed. There could be no discretion as to the applicable criterion. The contracting authority was required to award the contract to the lowest price.

The contracting authority argued before the Supreme Court that what it had done was to assess the probable outturn costs of the contract, based on the tender price and the potential variation in the quantities of certain items required for the performance of the contract. The contracting authority submitted that it was not required to determine what would be the most economically advantageous tender on the basis of the tender price only. Rather, it could take into account the reality of the final potential cost to the contracting authority. This, the Applicant submitted, was impermissible as it would render the tendering process opaque and open to abuse.

The Supreme Court has referred a question to the European Court of Justice ("ECJ") pursuant to Article 234 of the EC Treaty (formerly Article 177) for a preliminary ruling as to whether or not the contracting authority was entitled to take account of any cost other than the tender price in assessing the only live criterion of price. A hearing before the ECJ is yet to take place. While the issue referred to the ECJ does not expressly require the Court to deal with the appropriate test to be applied in procurement review cases, it is hoped that the judgment of the Court will serve to clarify this issue.

Conclusion

The adoption of Order 84A is indicative of the increase in the number of cases brought before the Irish Courts in which the award of significant contracts is challenged and of the need to define procedures to govern such challenges. However, Order 84A relates only to the challenge of contracts awarded in the context of the European procurement régime. Contracts which do not exceed the EC monetary thresholds are not regulated by the EC directives. They therefore fall to be regulated by domestic law only. Order 84 may provide the relevant procedural framework for domestic challenges.

"Contracts which do not exceed the EC monetary thresholds are not regulated by the EC directives. They therefore fall to be regulated by domestic law only. Order 84 may provide the relevant procedural framework for domestic challenges."

The only national provisions dealing with domestic tendering are those to be found in the government published booklet "Public Procurement" (generally referred to as the "Green Book"). The Green Book provides that government departments, regional and local authorities and State bodies should generally abide by the principles of competitive tendering. The Green Book deals not only with procurement of goods, works or services but also with the disposal of property and equally applies the principle of competitive tendering to such disposals.[12] However, these guidelines are not legally binding. In the purely domestic context therefore, the only argument that could be made in order to ensure that a contracting authority complies with the principles of equality, non-discrimination and transparency, now well established in the European context, is to rely on the doctrine of legitimate expectation. An Applicant could perhaps argue that the precepts in the Green Book to the effect that competitive tendering ought to be availed of in sub EC threshold contracts gives rise to legitimate expectation that such competitive procedures will be followed and that the principles associated with such procedures would also be applied. ●

1. Council Directive 71/305/EC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts OJ No. L185 p.l., now replaced by Council Directive 93/37/EC of 14 June 1993 OJ No. L199 p54 and Council Directive 77/62/EC of 21 December 1976 co-ordinating procedures for the award of public supply contracts OJ No. L13, p1 now replaced by Council Directive 93/36/EC of 14 June 1993 OJ No. L199 p1
2. Council Directive 89/665/EEC on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts OJ No. L395, p33.
3. A specific Remedies Directive has also been adopted for the utilities sector. Council Directive 92/13/EC OJ L76 p7 was transposed into Irish law by way of the European Communities (Review Procedures by Entities Operating in the Water, Energy, Transport and Telecommunications Sectors) Regulations, 1993 (SI 104 of 1993).
4. SI 309 of 1994. The Remedies Directive was initially transposed by SI 38 of 1992. This was then amended by SI No. 5 of 1994 to include reference to Directive 92/50, relating to the co-ordination of procedures for the award of public service contracts. Article 41 of Directive 92/50/EC amended the Remedies Directive to include services contracts within its ambit. Both SI No. 38 of 1992 and SI No. 5 of 1994 were then subsequently revoked and replaced by SI No. 309 of 1994.
5. Brought into effect by the Rules of the Superior Courts (No. 4) (Review of the Award of Public Contracts) 1998 Regulations (SI No. 374 of 1998)
6. [1991] ILRM 301
7. Unreported High Court, Queens Bench Division, Unrep., Langley J., November 17th, 1997
8. Case C-261/95 [1997] ECR I - 4025
9. See Anthony M. Collins *"Litigating Public Procurement Issues in Irish Courts"*, paper delivered to the ICEL Conference on Public Procurement - Perspectives and Problems, Friday November 26th, 1999
10. Unreported, High Court, Laffoy J., June 17th 1997
11. [1993] 1 IR 39
12. It is noteworthy in this regard it was argued by the Plaintiff in *Howberry Lane Limited v. Telecom Eireann,* unreported, High Court, Morris J., May 6th 1999, that the principles of openness, fairness, transparency and non discrimination elaborated upon by the ECJ in the context of the European procurement rules should also be applied to major contracts not governed by the procurement rules and in particular to contracts for the disposal of assets, such as the disposal of Cablelink, at issue in that case and to which the principles of competitive tendering were stated to apply, pursuant to the Green Book. However, Morris J. did not consider it necessary to address this argument in finding against the Plaintiff on the interlocutory application before him.

NJUNCTING THE ARBITRAL PROCESS?

Ronan C. Kennedy BL considers the issue of the grant of interim relief by the High Court pending the arbitration of a dispute between parties, in light of the recent High Court decision in Telenor Invest AS v IIU Nominees and Esat Telecom Holdings Limited

Introduction

While the courts are generally loath to interfere in the arbitral process, there are circumstances in which the court must exercise its supervisory jurisdiction to support the process itself.[1] One such circumstance is where the interests of justice requires the making of protective orders to ensure that the status quo between the parties is preserved pending the arbitration and the arbitrator's award. The question to be decided by O'Sullivan J in the recent case of *Telenor Invest AS v IIU Nominees and Esat Telecom Holdings Limited*[2] was whether the Court had jurisdiction to grant interim relief pending the determination of a dispute by arbitration and if such relief were granted would that prevent the Court from exercising its jurisdiction under Section 5 of the Arbitration Act, 1980 to stay proceedings in respect of the substantive dispute between the parties.

Enforcing the Arbitration Agreement

Where a party commences litigation in respect of a dispute which ought, by virtue of an arbitration agreement, to have been submitted to arbitration, the usual remedies for breach of contract are of limited value. If the arbitration agreement is one within the meaning of the Arbitration Acts, 1954 to 1980[3] the principal remedy available[4] to the injured party is to obtain a stay of the proceedings under Section 5 of the Arbitration Act, 1980. Section 5 replaced Section 12 of the Arbitration Act, 1954 which gave the Court a general discretion to stay proceedings[5] and was introduced to bring our domestic arbitration procedure in to line with New York Convention.[6]

Section 5(1) of the Arbitration Act, 1980 provides that if a party to an arbitration agreement commences any proceedings in any court against any other party to such an agreement in respect of any matter agreed to be referred to arbitration any party to the proceedings may at any time after an appearance has been entered and before delivery of any pleadings or taking any other step in the proceedings apply to the court to stay the proceedings. On such an application, the court is obliged to grant a stay unless one of the grounds on which it may refuse to do so apply[7]. The burden of proof rests on the party resisting the stay and the grounds can be summarised as follows:

(i) where the court is satisfied that the arbitration agreement is null and void,[8] inoperative[9] or incapable of being performed.[10]
(ii) there is not in fact any dispute between the parties.[11]
(iii) the High Court is satisfied that the case is a proper one for the exercise of the courts discretion to refuse a stay of a dispute involving an allegation of fraud.[12]
(iii) the parties can invoke the alternative method provided for in the Rules of Court (as amended from time to time) of commencing and dealing with a civil proceeding in respect of a small claim i.e. the Small Claims procedure of the District Court[13]

A Step in the Proceedings

As stated above, a party to an arbitration agreement is entitled to seek a stay after an appearance has been entered but before any pleadings have been delivered or any other steps have been taken in the proceedings. Thus, if a step in the proceedings has been taken the court has no jurisdiction under section 5 of the Arbitration Act, 1954 to grant a stay. What constitutes a step was considered by Finlay P. in *O'Flynn v Bord Gais Eireann*[14] where it was held that a letter sent by the defendants to the plaintiff seeking an extension of time to lodge their defence and agreeing to pay their costs of the motion did not constitute a step. The learned President stated the position as follows:

> "a step must involve costs i.e. a step which invokes the jurisdiction of the court...the court should in general lean in favour of staying the proceedings and should only refuse to do so if satisfied that the party seeking such an order has instituted some process or procedure in the action which involves costs, no matter by whom they may be payable which are lost when the matter is referred to arbitration."

Mustill & Boyd[15] argue that two requirements must be satisfied for a step to occur. Firstly, the conduct of the applicant must be such as to demonstrate an election to abandon his right to a

stay in favour of allowing the action to proceed in court and secondly, the action must incur court costs. It appears that if a party invokes the jurisdiction of the court causing any party to the arbitration agreement to incur costs, then it is implied that the former no longer maintains the desire to have the dispute determined by arbitration because otherwise it would not have caused court costs to be incurred.

One of the issues yet to be determined conclusively in this jurisdiction, prior to the *Telenor Invest A.S.* decision, was whether making an application for interim relief such as the appointment of a receiver or an interlocutory injunction would constitute a step in the proceedings.

Earlier English authorities[16] suggest that an application for interim relief would not constitute a step, however the only Irish authority on the issue was *Maccormack v Monaghan Co-Operative Agricultural and Dairy Society Limited*[17] where O'Hanlon J. refused a stay on the grounds that the applicant had obtained an interlocutory injunction.

"One of the issues yet to be determined conclusively in this jurisdiction, prior to the *Telenor Invest A.S.* decision, was whether making an application for interim relief such as the appointment of a receiver or an interlocutory injunction would constitute a step in the proceedings."

In that case, by agreement in writing, the defendant company had contracted to supply a quantity of milk to the plaintiff over a period of 15 years. The contract between the parties contained a clause whereby any dispute between the parties in relation to the contract would be referred to arbitration. A dispute arose between the parties and the defendant threatened to withdraw supplies from the plaintiff and sell the milk to a competitor. As a result, the plaintiff issued a plenary summons seeking damages and obtained a mandatory interlocutory injunction and an interlocutory injunction preventing the defendant from supplying anyone else in such a manner as to prevent them maintaining supplies to the plaintiff.

The defendant sought an early hearing of the dispute but the plaintiff made an application to stay its own proceedings to allow all issues between the parties to be referred to arbitration. It was held by O'Hanlon J. that the plaintiff in applying for and obtaining interlocutory injunctions had taken a step in proceedings within the meaning of Section 5(1) of the Arbitration Act, 1954 and therefore was not entitled to a stay:

> "It appears to me to be the clear intention of our own legislation on arbitration that a party to an arbitration agreement is put to his election to proceed on foot of that agreement, or to concur in a resort to court proceedings to determine disputes, and if he takes steps which may be regarded as invoking the aid of the court he may well have burned his boats if the other party to the arbitration agreement prefers to retain the matter in court instead of going back to arbitration. It can hardly be intended that the party seeking to enforce his contractual rights in a situation where the contract contains an arbitration clause, should be entitled to conduct two forms of proceedings in tandem, extracting from the High Court such relief as it may be open to him to obtain at arbitration, while resorting to the arbitrator for concurrent rights under the contract. This is what it seems to me that the plaintiff has sought to do in the present case."

It has been argued convincingly elsewhere[18] that this case was decided on its own particular facts in that it was the plaintiff who after commencing an action for damages and seeking and obtaining interim relief, then applied to stay its own proceedings which clearly constituted an abuse of process. However, it appears that the learned trial judge focused on whether the application for the interlocutory injunctions constituted a step rather than issue of proceedings for damages which clearly would constitute a step. If the case is authority for the principle that the court has no jurisdiction to grant a stay of proceedings after granting interim relief it is submitted that the case was wrongly decided.

The Court's Jurisdiction to grant Interim Relief

Section 22(1) of the Arbitration Act, 1954 enumerates various protective orders that the court can make to preserve the status quo between the parties pending the determination of the dispute including interim injunctions[19] and stipulates that the court shall have the same power in respect of such orders for the purpose of, and in relation to, the reference as it has for the purpose of and in relation to an action or matter in the High Court. Section 22(2) of the Arbitration Act 1954 provides that nothing in subsection (1) of this section shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters mentioned in the said subsection.

In any given case, it will be necessary to construe the specific arbitration agreement to determine if the arbitrator has power to make the interim order sought and if there is any doubt as to whether in fact the arbitrator possess such power it will be necessary to apply directly to the High Court.

Prior to *Telenor Invest A.S.*, there does not appear to be any reported decision in this jurisdiction where the court considered section 22 of the Arbitration Act, 1954. Mustill & Boyd[20] cite the functions of such an order as twofold. Firstly, to ensure that property which is the subject matter of dispute does not come to harm during the reference and before the final award is made and secondly, where the property or an aspect of it is an item of evidence in the reference to ensure that the parties are able to exploit its evidential value to the full.

It is submitted that the court should only grant an order under section 22 of the Arbitration Act 1954 to preserve the status quo between the parties and the court should not grant an order for interim protection where to do so would be to usurp the function of the tribunal chosen by the parties to determine the dispute.[21] In *Garden Cottage Foods Limited v Milk Marketing Board*[22], Lord Diplock defined the status quo as:

> "the state of affairs existing during the period immediately proceeding the issue of the writ claiming the permanent injunction or if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion"

and while this interpretation is arguably correct, it should be noted that it has not always been strictly followed.[23]

The Facts of *Telenor Invest AS v IIU Nominees Limited and Esat Telecom Holdings Limited*

A dispute arose between the parties in relation to the interpretation of certain clauses contained in the shareholding agreement. The three parties to the proceedings were the shareholders in Esat Digifone Ltd. The first defendant had sold all but 1% of its shares in the company to the plaintiff and second defendant in equal shares. A clause in the agreement provided that "any party shall so long as it holds not less than 10% of the equity share capital be entitled to nominate one person as a director of the company". The plaintiff argued that this clause meant that once the shareholding of an individual party fell below 10%, that party would not only lose its right to nominate a director but also lose the right to maintain a director on the board. Therefore, the plaintiff sought an interlocutory injunction directing the first defendant to take steps to cause its nominees to resign or alternatively, to restrain them from acting pending the determination of the dispute. The first defendant submitted that it had a right to maintain its nominees on the board in the absence of an explicit provision requiring resignation.

The first defendant also brought a motion before the Court, seeking a stay on the plaintiff's proceedings on the basis that the dispute was subject to an arbitration agreement. The relevant clause in the shareholding agreement provided that "any disputes arising from the agreement, including those disputes relating to the validity, interpretation or termination of the agreement, shall be exclusively and finally settled by an ad hoc arbitration." The clause also provided that the arbitration would be governed by the Rules of the International Chamber of Commerce.

The plaintiff argued, *inter alia*, that there was no reference to arbitration and therefore the court had no jurisdiction to grant an order staying proceedings under section 5 of the Arbitration Act, 1980 and further, that if section 5 of the Arbitration Act, 1980 did apply, the court would have jurisdiction under section 22(1)(h) of the Arbitration Act, 1954 to grant the relief sought in the interlocutory application

The first defendant argued that a stay should be granted "pure and simple" and that section 22(1) of the Arbitration Act, 1954 (if it applied) could only be to maintain the status quo between the parties pending the arbitrator's determination of the dispute.

The Judgement

O'Sullivan J., noting that the parties had accepted that the Arbitration (International Commercial) Act, 1998 did not apply to the arbitration agreement[24] found that it was an agreement within the meaning of the section 2 of the Arbitration Act, 1954 and section 2 of the Arbitration Act, 1980.

The learned judge continued that the application of section 22(1)(h) of the Arbitration Act, 1954 had not been suspended in relation to what are termed "foreign agreements" by necessary implication of the Arbitration Act, 1980. The fact that the latter provides for the enforcement of "New York Convention Awards" did not mean by necessary implication that the jurisdiction conferred on the Court by section 22(1)(h) of the Arbitration Act, 1954 had been repealed or abrogated in relation to foreign arbitration agreements.

O'Sullivan J. emphasised that while section 4 of the Arbitration Act, 1980 enacted an explicit repeal of section 12 of the Arbitration Act, 1954 it did not repeal section 22(1)(h) of the Arbitration Act, 1954. No authority was submitted to the learned judge to support the proposition that in the context of an arbitration within the Arbitration Acts 1954 and 1980, the jurisdiction conferred on the Court by section 2(1)(h) of the Arbitration Act, 1954 did not apply or had been curtailed. The learned judge stated:

> "while it may be appropriate to grant the first Defendant a stay on part of the Plaintiff's proceeding, this in no way trammels the Court's jurisdiction to afford interim relief (which clearly includes what is usually termed interlocutory relief) to the Plaintiff pending the termination of the dispute".

In relation to the plaintiff's interlocutory application, O'Sullivan J. was satisfied that there was a substantial question to be tried in relation to the interpretation of the relevant clause in the agreement and was further satisfied that damages would be an inadequate remedy for both parties. He determined the matter by considering the balance of convenience holding that the extent to which disadvantage to the plaintiff as a 49.5% shareholder was incapable of being compensated in damages far outweighed that which might be suffered by the first defendant.

O'Sullivan J granted the interlocutory relief sought by the plaintiff and also granted the first defendant a stay of the plaintiff's proceedings in so far as they related to the present dispute between the parties.

Analysis

It is submitted that the learned trial judge's interpretation of the relevant provisions of the Arbitration Acts 1954 to 1980 was correct, and furthermore that the balance of convenience test

"However, there is one aspect of the judgment, which gives some cause fo concern, and that is the nature of the interlocutory relief granted on the facts'

as propounded in *American Cyanamid Co.*[25] and approved in *Campus Oil Ltd (No.2)*[26] is the appropriate criteria to apply in deciding whether or not the interlocutory relief should be granted pending determination of a dispute by arbitration. However, there is one aspect of the judgment, which gives some cause for concern, and that is the nature of the interlocutory relief granted on the facts.

Considering the definition of status quo above, it is arguable that the interlocutory relief granted by the learned trial judge went further than preserving the status quo between the parties pending the resolution of the dispute by arbitration. The state of affairs, which existed immediately prior to the issue of proceedings, was that the first defendant's present nominees remained as active members on the board of directors.

However, the effect of the interlocutory relief granted was to restrain the activities of the nominees of the first defendant in relation to the management of the company.

The substantive question to be determined by the arbitral tribunal was whether or not the first defendant was entitled to maintain its present nominees on the board of directors. While the learned trial judge did not explicitly interpret the relevant clause in the shareholding agreement, it is arguable that by restraining the first defendant's nominees from acting pending the determination of the dispute by arbitration, the court to some degree pre-empted the decision of the arbitrator. It is submitted that it may be difficult for a lay arbitrator to ignore the fact that the High Court restrained these same nominees from acting when interpreting the relevant clause in the shareholding agreement. Therefore, it is respectfully submitted that in future, the court when granting interlocutory relief in such cases should emphasise that in so doing it is not playing any part in the resolution of the substantive issues in dispute between the parties, but is merely acting as a facilitator to ensure the reference to arbitration is effective.

"It is respectfully submitted that in future, the court when granting interlocutory relief in such cases should emphasise that in so doing it is not playing any part in the resolution of the substantive issues in dispute between the parties, but is merely acting as a facilitator to ensure the reference to arbitration is effective."

Conclusion

The decision of O'Sullivan J. in *Telenor invest A.S.* is to be welcomed as further judicial support for the arbitral process in clarifying that the court can indeed grant interim relief when a dispute is pending arbitration and that there is no difficulty in principle in combining a stay of court proceedings with interim relief. Where there is an arbitration agreement and a party is forced to act quickly by seeking interlocutory relief, that party should not be forced to forego its right to arbitrate. However, it must be emphasised that the courts statutory powers should only be used to support the arbitral process and not to interfere with it. By exercising its discretion to grant interim relief the court should not engage in the resolution of the substantive dispute but seek to make the resolution of the dispute by arbitration more effective. The only purpose of interim relief can be to maintain the status quo pending the arbitrator's award. If the interlocutory relief is wholly or substantially the same as that which is sought from the arbitrator, it is submitted that the court should exercise its discretion on the balance of convenience not to grant such relief because otherwise the court may be pre-empting the decision of the chosen tribunal. ●

1. For examples of court's reluctance to interfere in the arbitral process see the decision of the Supreme Court in *Doyle v Kildare Co. Co. & Shackleton* [1996] ILRM 252.
2. Unreported, High Court, O'Sullivan J., 20th July 1999.
3. An arbitration agreement must be in writing for the Arbitration Acts to apply. See Section 2(1) of the Arbitration Act, 1954 and Section 2 of the Arbitration Act, 1980.
4. For a discussion of the other remedies available see Hutchinson, B., *Staying Litigation Pending Arbitration* (1994) CLP 133.
5. Section 12 of the Arbitration Act, 1954 was repealed by section 4 of the Arbitration Act, 1980
6. Article II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10th June 1958.
7. In *Mitchell v Budget Travel* [1990] ILRM 739, the Supreme Court held that any court before which proceedings are commenced can grant a stay under section 5 of the Arbitration Act, 1954 but note only the High Court can grant a stay under section 39(2) of the Arbitration Act, 1954.
8. Section 5(1) of the Arbitration Act 1980.
9. Section 5(1) of the Arbitration Act 1980. For example, see *Liston v O'Malley*, Unreported, High Court, Murphy J., November 1992.
10. Section 5(1) of the Arbitration Act 1980. For example, see *Carr v Phelan* [1976-77] ILRM 149.
11. This ground was recommended in the Mckinnon Report in the UK, Cmnd. 2817.
12. See section 39(2) of the Arbitration Act, 1954 and *Winthur Swiss Insurance Company v Insurance Corporation of Ireland Plc* [1990] ILRM 159
13. Introduced by section 18 of the Arbitration (International Commercial) Act, 1998 which inserted section 5(3) of the Arbitration Act, 1954.
14. [1982] ILRM 324
15. Mustill & Boyd, *Commercial Arbitration,* (2nd edn. Butterworths, 1989) at p.472.
16. See for example *Compagnie du Senegal v Woods & Co.* (1883) 53 LJ Ch 166 where it was held that making an application for interim relief would not constitute a step and *Roussel-Uclaf v GD Searle & Co.* [1978] 1 Lloyds Rep. 225 where it was held that resisting an application for interlocutory relief would not constitute a step.
17. [1988] IR 304
18. For a fuller discussion see Hutchinson, B, *Staying Litigation Pending Arbitration,* (1994) CLP 133.
19. See section 22(1)(h) of the Arbitration Act, 1954.
20. Mustill & Boyd, Commercial Arbitration, (2nd edn. Butterworths, 1989) at p.328.
21. See *Foster & Dicksee v Hastings Corporation* (1903) 87 LT 736.
22. [1984] AC 130 at 140.
23. See Delaney, H., *Equity & The Law of Trusts* (2nd edn. Roundhall, Sweet & Maxwell 1999), p467-468.
24. It should be noted that if the Arbitration (International Commercial) Act 1998 had applied, then the matter would have been determined by Articles 8 & 9 of the UNCITRAL Model Law which, respectively, give the Court power to stay proceedings where there is a subsisting arbitration agreement and permit the Court to grant interim relief pending determination of the dispute by arbitration.
25. *American Cyanamid Co. v Ethicon* [1975] AC 396
26. *Campus Oil Ltd v Minister for Industry & Energy* (No.2) [1983] IR 88

SECTION 117:

WHEN TESTATOR CHILD ARE IN DISPUTE

Gillian Reid BL analyses the recent case of McDonald v. Norris *which dealt with the extent to which bad feeling between the testator and his child should be taken into account in determining the testator's "moral duty" towards the child under Section 117 Succession Act, 1965.*

Introduction

Following the recent case of *McDonald v Norris,*[1] it is arguable that the discretion of the court under "section 117" to vary a will and make proper provision for a child may be exercised even where that child had behaved 'appallingly' towards his parent. Barron J., in delivering the judgment of the Supreme Court (Keane and Barrington JJ concurring) stated "This case gives rise to what is in effect a new question in this field. It is to what extent should account be taken of bad feeling between the parent and the child"[2].

The applicant son (aged 50 at the time of the application) had actively worked on the family farm from the age of 14 at which time his father, the testator, had an accident. The applicant had married against the testator's wishes and thereafter relations between them broke down. The testator had sought an injunction against the applicant and had sold land to a third party as well as transferring some of the land to his other son. This demonstrated a clear intention on the part of the testator to deny the applicant ownership of any of his land. Evidence was adduced to the effect that the applicant had behaved very badly towards the testator.

"Following the recent case of *McDonald v Norris*, it is arguable that the discretion of the court under section 117 to vary a will and make proper provision for a child may be exercised even where that child had behaved "appallingly" towards his parent."

The testator left the applicant £5,000, "in discharge of any moral obligations which it might be considered I have" and the rest of his estate in trust to his niece. The Supreme Court held, in reversing the High Court, that the testator had failed in his moral duty towards the applicant, notwithstanding the applicant's appalling conduct towards him. The Court ordered that the entirety of the lands must pass to the applicant in lieu of the relatively small legacy of £5,000 provided for. It was held that the applicant's conduct towards the testator, although deplorable, was prompted by the testator's intention of denying him the lands following the applicant's marriage. The Court viewed the applicant's conduct as in defence of "his birthright".

Following this decision, it would appear that the Courts are now less reluctant to vary a testator's will where the applicant is the primary author of the bad feeling between parent/testator and child/applicant.

Section 117 - The General Approach[3]

Section 117 (1) permits the Court to make proper provision for a child out of the estate as the Court thinks fit, where it is of the opinion that the testator has failed in his moral duty to make proper provision in accordance with his means whether by will or otherwise. Therefore *inter vivos* gifts or settlements may dilute the moral duty.
Section 117 (2) provides that the Court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the Court may consider to be of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children.

The seminal decision in relation to section 117 applications is *Re G.M.: F.M v. T.M*[4] In that case Kenny J. stated that the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death and must depend upon (a) the amount left to surviving spouse or the value of the legal right if the survivor elects to take this, (b) the number of the testator's children, their ages and their position in life at date of testator's death, (c) the means of the testator, (d) the age of the child whose case is being considered and his or her financial position and prospects in life, (e) whether the testator has already in his lifetime made proper provision for the child. The Court must decide objectively whether the duty exists and the subjective view of the testator is not decisive. *In Re IAC deceased C. &F v W.C. &T.C.*[5] Finlay CJ. approved of these principles of Kenny J. but added that there is a high onus of proof on the applicant to establish a failure of the moral obligation.

Previous Decisions

Prior to *Mc Donald v Norris,* cases involving bad feeling had been limited to those where the child had been relatively passive towards the parent. Where the parent has behaved particularly badly towards a child during his lifetime it is easier to establish a failure of moral duty where no (or only minimal) provision is made for that child out of the estate. In *NO'H. v G.R.*[6] a mother who left her son in foster care was held to have failed in her moral duty to properly provide for him by will. It was significant that at the time of her death he was not very well off and had five children of his own to support.

In the aforementioned case of *Re GM* the testator had "grudgingly consented" to his wife's adoption of the applicant son. At the time of the application the son was aged 32, married with one child but not dependent on the testator. Kenny J. found that although the bond of affection which the relationship of father and son usually creates never had existed in this case, a prudent and just parent would grant his son half of the estate in question.

"Prior to *Mc Donald v Norris*, cases involving bad feeling had been limited to those where the child had been relatively passive towards the parent."

In *J.H. v AIB*[7] the testator had been separated from his wife for six years prior to his death during which time there was very little communication "other than formal" between the testator and his children (who lived with their mother). In deciding whether the testator had a moral duty to make provision for them in accordance with his means, MacWilliam J. stated that the Court had no

> "duty to decide any question of responsibility for the subsequent lack of communication between the testator and the plaintiffs. In my opinion, there can only be one answer on this issue. The testator did have such a moral duty, however neglected, thwarted or aggrieved he may have felt."[8]

The learned judge determined that the greater part of the estate after deducting one-third for the wife should be given to the plaintiffs. However, an important fact in this case was that the applicants suffered from depressive illnesses which prevented them from finding permanent employment.

In the case of *Falvey v Falvey*[9] the testator ran a successful chemist shop where his son, the applicant, had worked since leaving school. When the testator fell ill, his second wife (the defendant) kept the books while the applicant looked after the shop on a daily basis. Following a row between the applicant and defendant, the testator cut the applicant from his will. Barron J. found that a lack of family harmony did not lessen the moral obligation of the testator and granted the relief sought. In altering his will and thereby cutting out the applicant the testator had had a "hot headed" reaction.

In *E.B. v S.S* [10] the applicant son had developed a major problem with drink and drugs for which he had obtained treatment. He was separated from his wife, unemployed and had three children of his own at the time of the application while his siblings were comfortable. The applicant had received inter vivos gifts of shares worth £275,000 in 1988 which he had dissipated by the time the testator made her will. In that will the testator made provision for a number of charities and made no provision for the applicant. The Supreme Court refused the application as the moral obligation had been satisfied by the prior gifts. The court was also influenced by the fact that the charities could be adversely affected by the outcome of the proceedings.

Barron J. dissenting, stated that although the applicant had been looked after financially during the testator's lifetime, he remained in need and part of those needs involved his responsibilities both legal and moral towards his own wife and children. The learned Judge considered that the relief should be granted in the form of a supervised trust for the applicant's own children:

> "The right is given to the child, whereas the benefit is to be taken by the grandchildren. Having regard to the overall purpose of this part of the Act to prevent a testator from wrongfully disinheriting his nearest family, such a construction is meeting that purpose. It is the responsibility and therefore the need of the child and not that of the grandchildren which the relief is intended to meet. In other Parts of the Act children of a deceased parent step into the shoes of that parent, where as s117 is silent on this."[11]

This interpretation of the law, albeit obiter, shifts the focus of the Court away from the wrongful conduct of the applicant child. This shift of focus is also manifest in Barron J.'s unanimous decision of the Supreme Court in *McDonald v Norris.*

Mc Donald v Norris - The High Court Judgment

In this case, Mc Cracken J. found that the applicant, although not in receipt of a regular wage, had tillage land of his own, an account in a local shop run by the testator for a number of years and the use of a quarry for one year at an undervalue. The applicant had also obtained real and substantial benefit during his father's lifetime by occupying lands without payment and had been in "flagrant breach" of a Court order directing him to leave the lands. The applicant was ultimately attached and imprisoned for 11 months and during this time the testator transferred a holding of his land to his other son and sold another holding at an "undervalue" to a friend. This clear intention of the testator to deny the applicant the lands influenced the Court. Local aggression was directed both against the friend who purchased some lands and against the Norris family (with whom the testator had been compelled to reside as he had been *de facto* excluded from his own lands by the applicant). The fact that the applicant and his wife were aware of the campaign of victimisation in the locality and did nothing to stop the various incidents, was held to be important. The applicant's behaviour towards testator was found to be "appalling" in refusing to leave the land. Thereafter, the applicant had no right to remain in the family home and work the farm and the "worst of the intimidation directed at the testator which was permitted and encouraged by the plaintiff was when the testator was over 70 years and in poor health".

McCracken J. referred to *JH v AIB* but found that the Supreme Court case of *EB v SS* was relevant to the present application. He found that the majority decision, (Barron J. dissenting) supported the view that there may be cases where a child is in serious need, but nevertheless no moral obligation to provide for that child exists. In light of the foregoing, the High Court refused the relief sought.

Mc Donald v Norris - The Supreme Court Judgment

On appeal to the Supreme Court, Barron J. stated that when assessing whether or not a moral obligation had been satisfied for the purposes of s.117, the relevant time for consideration of the assessment is at the date of the death of the parent. However, the learned Judge went on to state that it is an obligation which exists from the relationship between the parties and is continuous from the date of birth of the child until the date of death of the parent unless in the meantime it has been satisfied or extinguished. In applying that principle to the instant case, the decision to eject the applicant must have been in breach of his moral obligation to provide for his son. It was also in breach of the moral obligation which he owed to his son for keeping the farm - but for the applicant keeping the farm, the testator's lands would have been dissipated.

The Supreme Court applied a three-fold test in order to assess whether there was a failure in the moral obligation of the parent.

The first question to be asked by the Court is what would have satisfied the moral obligation in the particular circumstances of the family. The fact was that the other son had left the land and was in a position to earn his own living while the applicant stayed and had no other means of livelihood. His only training was as a farmer and he would thus be left in mid-life with no lands and no capital to acquire any. Therefore the applicant should have been left something over half the lands by his parent - 250 acres in all.

The second question is, should the behaviour of the son be taken into account either to extinguish or to diminish the obligation of the parent. According to Barron J. the answer to that must be yes. With regard to the behaviour of the applicant, Barron J. found that the only other case applicable was that of *J.H. v AIB.* That decision did not tackle the question to what extent, if any, the moral obligation is diminished by bad relations *inter partes.*

Barron J. did not accept that the conduct of the applicant extinguished his moral claim on the estate of the testator due to a number of factors. The Court firstly accepted that the immediate cause of the row was the applicant's spouse and her family but found the relationship between father and son unusual. At one stage the testator introduced the applicant son as an "employee" to a neighbour. The fact that the applicant's brother also reacted against his father and was subsequently transferred lands was important. The reaction of the testator to his son's marriage was in itself a breach of the independent moral obligation the testator owed to his son for maintaining the farm which he was unable to do. The learned Judge emphasised that he was not stating that the son's reaction was justified. Although the reaction was deplorable, one cannot ignore the reason for it. Although the applicant stood by when bad feeling in the neighbourhood erupted he was never actively involved. Barron J. went on to state that

> "In judging a child's behaviour towards a parent, it is important to determine whether that conduct would have been the same had a stranger been involved. It should not be overlooked that parents and children have the same genes and that an uncompromising stubbornness in the one is likely to be mirrored in the other. This situation would not have developed had the applicant been farming in a stranger's lands". [12]

The third question focuses upon what benefits, if any, the applicant had received from the testator during the testator's lifetime. Barron J. found that the benefits received by keeping the farm and the profits from the tillage and the quarry had been overstated and given undue weight by the High Court. In order to satisfy the moral obligation, benefits should be advancements of money which would enable the child to establish himself. The fact that the applicant did not have to rent the lands or the quarry was a form of advancement, but these were limited by their temporary nature.

The Supreme Court recognised that the wishes of the testator must not be ignored. The testator wished to benefit the Norris family but did not have had any moral obligation to provide for them to the detriment of his son. Barron J. inferred that the testator was the main contributor to enabling the Norris family to discharge substantial previous debts incurred by them. The Court ruled that the entirety of the lands must pass to applicant.

Conclusion

McDonald v Norris provided the Supreme Court with the opportunity to identify clearly the law in relation to section 117 applications where a child had actively behaved in an appalling manner towards his parent. While the Court accepted that the moral obligation of the parent would be diminished when account is taken of such behaviour, the extent to which it is so diminished remains negligible where the child can point to some act of the parent which prompted such behaviour. ●

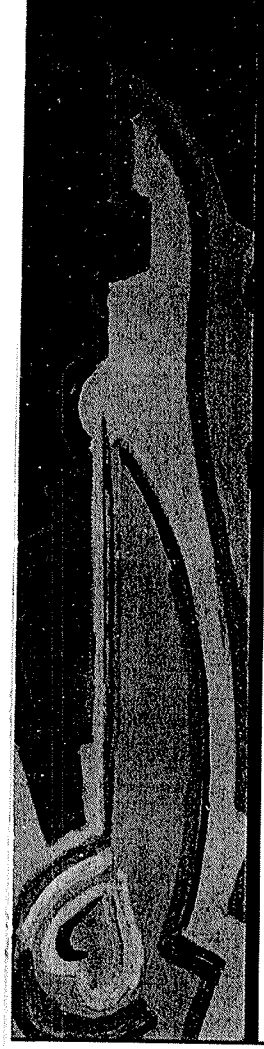
1. *In the Matter of the Estate of James McDonald, deceased, and in the Matter of the Succession Act 1965; Peter McDonald v Mary Norris* (Senior) High Court McCracken J. [1999] 1 ILRM 270 ; Supreme Court, November 25th 1999, Barron J.
2. ibid page 10
3. With regard to testate succession the legislature had a choice between the fixed rate share common in civilian legal systems, or a provision for application to the court in the absence of such rate, as favoured in commonwealth systems. The result was a compromise - the *legitimo portio* system for spouse and the flexible "section 117" application with regard to provision for children. There is no fundamental right to disinherit one's family.

   Section 117 provides as follows:

   "(1). Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.
   (2). The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children.
   (3). An order under this section shall not affect the legal right of a surviving spouse or, if the surviving spouse is the mother or father of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy.
   (4). Rules, of court shall provide for the conduct of proceedings under this section in a summary manner.
   (5). The costs in the proceedings shall be at the discretion of the court.
   (6). An order under this section shall not be made except on an application made within twelve mouths from the first taking out of representation of the deceased's estate."
4. [1972] 106 ILTR 82
5. [1989] ILRM 815
6. [1986] 6 ILRM 563
7. *J.H. and C.D.H. v Allied Irish Banks Limited and Others* [1978] ILRM 2038 ibid page 207
9. Unreported, High Court, Barron J., 28th July 1983
10. *In the Matter of the Estate of L.B. and in the Matter of the Succession Act 1965 and in the Matter of an application by E.B., E.B. v S.S. and G.McC.*: [1998] 2 ILRM 141
11. ibid page 154
12. at page 17-18

a buyer's guide to irish art

on sale now in bookshops nationwide



a buyer's guide to irish art is the definitive, long-awaited record of over 7,000 paintings by 700 Irish artists which have gone to auction in Ireland and the UK over the last five years. Illustrated in full colour and presented in an informed and easy-to-use reference format, **a buyer's guide to irish art** provides a wealth of information for any lover of Irish art. From the guide's unrivalled Buyer's Index to its collection of fascinating and unique editorial features, **a buyer's guide to irish art** is the perfect personal and corporate gift.

ORDER a buyer's guide to irish art now

Please send ☐ copies of **a buyer's guide to irish art** to:

Name: .....

Address: .....

.....

Daytime telephone number: .....

Domestic and Overseas orders *(to include postage and packing)*: Republic of Ireland – IR£31.99
UK – IR£32.99; Europe – IR£33.99; Rest of the world – IR£34.99

I enclose a cheque/postal order for ..... made payable to Ashville Media Group

Or: Please charge my credit card ❑ Visa ❑ Mastercard ❑ American Express ❑

Card no.: ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ ☐☐☐☐

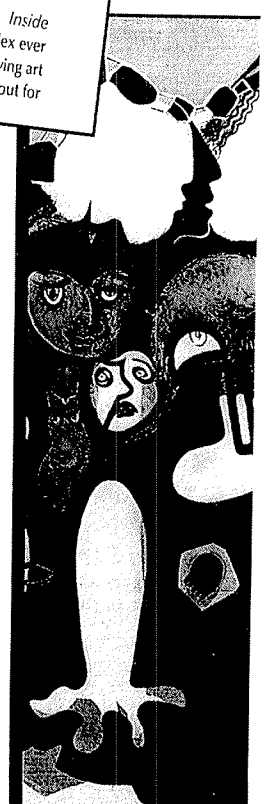
Card expiry date: ☐☐☐☐

Signature: ..... Date: .....

Send to: **a buyer's guide to irish art**, Ashville Media Group, Pembroke House,
8 Lower Pembroke Street, Dublin 2.

ORDER NOW BY CREDIT CARD

Call us at 1850 689 789; fax: (01) 678 7344; e-mail: info@ashville.ie
Discount available for bulk orders of 20 or more. Tel: 1850 689 789



TO ORDER TEL: 1850 689 789

KING'S INNS NEWS

Death of former chairman of King's Inns Council

It was with deep regret that we learned of the death of Ralph Sutton SC in December. In 1980 Ralph Sutton took over the chairmanship of the newly constituted council of King's Inns. He held this position until 1998. During his tenure, he oversaw the huge conservation project of the 1980s when granite corners were replaced on the main building at King's Inns, the stonework was cleaned and the railings were conserved. As chairman, he was instrumental in ensuring that the course for the new diploma in legal studies got the green light. One of his last projects was the introduction of computerised legal databases. All through these changes and developments, Ralph Sutton remained one of "nature's gentlemen". His contribution to the Inns will always be appreciated.

Print Series

Not unexpectedly, the response to Robert Ballagh's vision of the Round Hall (Print No 3 in the King's Inns series) has been excellent with great praise from both the art world and the purchasers. We believe that the edition will be a sell-out (as was his first print in the series). The price including postage and packaging is IR£108. If you are interested in obtaining a numbered print, please telephone David Curran at (01) 874 4840. It was good to see that in a recent survey of artists working in Ireland, Robert Ballagh is considered to be one of the top ten.

Unrelated to the King's Inns series, we have also secured a limited number of copies of the magnificent print by Michael Craig showing Francis Johnston's archway viewed from Henrietta Street. Michael Craig has an inimitable style - pen and ink architectural drawings that are delightfully composed and in which he ensures that no detail is omitted. This is a must for anybody who has ever studied at the Inns. Of course, it also gives great aesthetic pleasure. Again, David Curran is looking after sales.

Dining

The Hilary dining term ends on Monday 7 February. Spouses' Guest Night is scheduled for Friday 4 February. Guests are encouraged to be in the Inns at 7.30 pm with dinner beginning at 8.00 pm. Contact Claire Hanley (01) 878 0410 to make a reservation.

The next dining term will be from Tuesday 2 May to Monday 15 May 2000. Dates for benchings will be posted in the Law Library in due course.

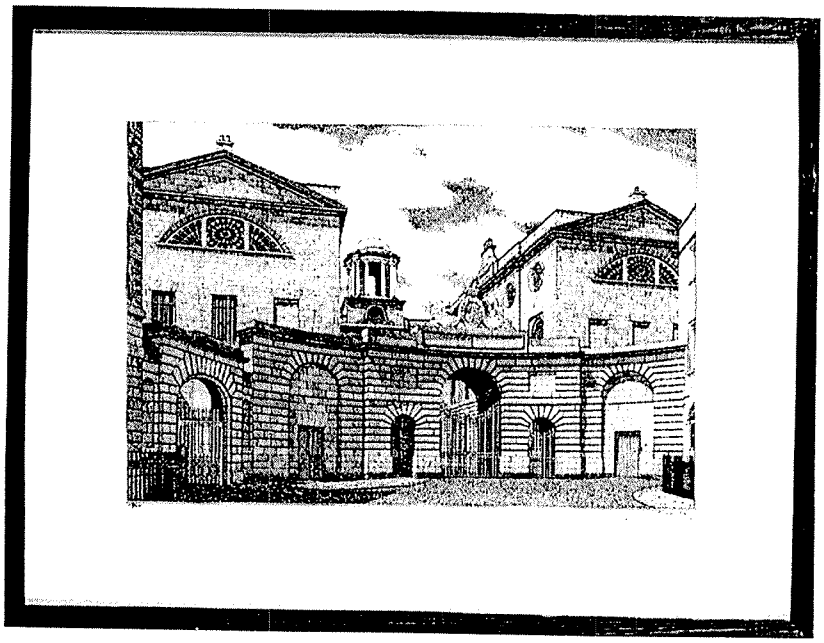
This year there will be no student dining during Trinity term. However, there will be dining for members and their guests on a number of evenings. More about these evenings in future issues.

Films

We are still proving to be an attractive location for directors and producers.

Just before Christmas we had Barry Levinson (*Good Morning Vietnam, Rainman, etc.*) directing Anna Friel (*Brookside*) and others. We jumped at this film when we were told that the title was 'everlasting peace' and was set in Stormont. However, it transpires that the correct title is "Everlasting Piece" and relates to a barrister who takes off his wig after court and is told by two salesmen that they could replace his hair forever.

Shooting of an epic BBC film on 1916 is due to get under way in late Spring. But more about this at a later date. ●



The King's Inns

(viewed from Henrietta Street)

by Michael Craig

This print was commissioned by the Irish Architectural Archive and Trinity Trust in 1986. It is a particularly fine example of Michael Craig's pen and ink drawings. The print was never actively marketed and for this reason a number of copies remain in the limited edition (300). King's Inns has some copies available at £70 including frame. The framed print (shown left) measures 38cm x 43cm (15"x17"). The frame has a high gloss black finish. If you are interested please contact:

David Curran at King's Inns
Tel: 01 874 4840

This is **not** part of the Kings's Inns print seris

THE ENFORCEMENT JUDGMENTS

By Stephen Glanville BL
(Round Hall Sweet & Maxwell 1999)

Reviewed by James Doherty BL

In the preface to this book Stephen Glanville clearly sets out his intentions for the work, "to meet the need for a reliable guide to the enforcement of judgments of the superior and circuit courts". To this end he has produced an up-to-date textbook which not only examines recent legislation but also recent Irish case law. His exposition of the law is informative and complete and its analysis of, and comment upon the case law is both thorough and balanced. In both its preliminary chapters and the main body of the work, enforcement and execution processes are described and explained in a maner which will enable practitioners to get into the particular area with ease and speed.

Two of the chapters addressed as "preliminary matters" which may be of particular interest to practitioners deal with "Reciprocal Enforcement of Foreign Judgments" and "Discovery in Aid of Execution". The first of these chapters provides a neat introduction to the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters as incorporated into the law of the State. The jurisdiction and rules of procedure that apply to foreign judgments are then dealt with comprehensively, lucidly and authoritatively with useful reference being made to the Supreme Court decision in *Rhatigan v. Textiles y Confecciones Europas SA* [1990] 1 IR 126. The enforcing court's discretion to refuse enforcement of the foreign judgment also comes in for consideration. This discretion arises where it would be against Irish policy to recognise the judgment, and, in the case of default judgments, where it appears to enforcing court that the defendant was not given an adequate opportunity to defend himself.

Discovery in aid of execution allows a judgment creditor to make application to the court for an order directing the judgment debtor, amongst others, to attend at the court for the purpose of giving information on the debtor's assets and means. The author notes that whereas by virtue of RSC Ord. 52, r.2 the existing practice should apply, all reported application have been by motion *ex parte* before a judge (and not the Master of the High Court). In the Circuit Court it would appear that the county registrar has a general power to summon to attend before him and examine on oath the appropriate parties.

Part II of the book is concerned with Remedies pursued through the Sheriff and covers such matters as *fieri facias*, vendito exponas, possession and delivery. Since the recently acquired authority of the revenue sheriff is not, in the first place, a matter for the courts, the author has not addressed it.

Part III deals with other original methods of enforcing judgments. It encompasses sequestration, charging and stop orders, charging the interest of a partner, attachment and committal and attachment of debts. Part IV relates to certain statutory methods of enforcement with particular chapters on Judgment Mortgages and Bankruptcy, and while some of these topics are comprehensively covered in other texts, no volume on enforcement of judgments would be complete without such references. To this end the author candidly refers the reader to the most up-to-date works, where a thorough treatment is to be found on these specialised areas.

Perhaps the greatest achievement of this work is to draw together in one concise volume a storehouse of information on which no specialised text is available. To a large extent this will alleviate the necessity for the busy litigation lawyer to leaf through copies of Wylie's *Judicature Acts* in order to ascertain some point of jurisdiction or procedure on a particular enforcement topic. Nowhere is this better illustrated than in the final chapter of the book dealing with equitable execution; the primary principle behind which is that equity will not suffer a wrong to be without a remedy. Equitable execution derived from the jurisdiction of the court of Chancery, and was given statutory form in the Supreme Court of Judicature (Ireland) Act 1877. It is also noteworthy that the majority of case law relating to this method of enforcement is drawn from the law reports compiled at the end of the nineteenth century.

It will be obvious even to the casual reader that the author has gone to painstaking efforts to compile this work, and for the resulting volume he must be congratulated. One criticism, which may be levelled at the work in general, is that in its desire to provide a detailed examination of enforcement processes, too little analysis has been offered. Nevertheless, the work is incisive and loses nothing for its conciseness. ●

THE IRISH REPORTS - TUAIRISCÍ SPEISIALTA 1980 - 1998

(arna chur in eagar ag ***Séamus O Tuathail B.L.*** *agus foilsithe ag an Incorporated Council for Law Reporting for Ireland). Text + translations, 140 ff. Price : IR£15*

Reviewed by Benedict O Floinn BL

Prior to 1922, a monoglot Irish-speaker coming before the courts without an interpreter was deemed not to be a "witness", within the meaning of the rules of court, at all : *Plunkett -v- Williams* IR 6 Eq 80 at 82. Even where an interpreter was made available, the six hundred and forty thousand persons returned as Irish-speakers in the 1901 census were only entitled to give evidence in Irish if they could prove that they did not speak any word of English : *Reg. -v- Cox* (1858) Cox's Criminal Law Cases 44. This excluded all but a small fraction of the whole from participating in the legal system in their language of choice.

As the decline in bilingual speakers of Irish was arrested in the early decades of the twentieth century by the activities of Conradh na Gaeilge, the position became ever-more unsatisfactory, until the Constitution of 1922 (which recognised that Irish was the national language of Ireland and that, as a consequence, each citizen had a right to use it) brought the legal basis for such linguistic discrimination to an end. The recognition contained in the Constitution of 1922 was both embraced and enhanced in Bunreacht na hEireann and the interaction of the rights of those who speak Irish with other rights and with the rights of other linguistic groups has been the subject of case-law and commentary ever since.

Although the Irish legal system has yet to develop to the point where justice is neither delayed nor denied to the minority who choose to speak Irish, tremendous strides have been made. Pride of place among the dramatis personae in this unfolding story must go to Mr. Justice Rory O'Hanlon (now retired) and Séamus O Tuathail B.L. Both names recur constantly, both in the text of judgments dealing with the right to use Irish and in cases dealing with a host of other personal rights. Both men were central to the comparatively recent shift to Irish as the routine medium for the discussion of linguistic rights and they have now added to their considerable achievements this splendid volume - a collection of hitherto unreported judgments delivered in Irish. In addition to editing the material, Mr. O Tuathail has added to each case a head-note which brings all the various issues raised into sharp focus.

The judgments included in the volume clarify, as one would expect, some of the specific rights and entitlements of Irish-speakers. For example, the ambit of the right to use Irish before any court or tribunal : *Stát (Mac Fhearraigh) -v- Mac Gamhnia;* or the entitlement to forms or documents : *O Murchú -v- Cláraitheoir na gCuideachtaí* and *Delap -v- An tAire Dlí* . However, they go far beyond this. There are important dicta relating to the practice and procedure to be adopted in dealing with cases stated *(An tAire Poist agus Telegrafa -v- Cáit Bean Uí Chadhain)* the composition of juries *(Mac Carthaigh -v- Eire)* and the rights to equality before the law and freedom of expression generally.

To the erudition which he evinces in a number of the cases, Mr Justice O'Hanlon has added a thoughtful and thought-provoking preface. It is a good starting-point for anyone whose New Year's resolutions include either the achievement of a greater proficiency in Irish or a greater understanding and appreciation of the issues which its use in the public sphere raises. Without entering into a debate on the expressions of opinion, however, it is important to add one caveat. The learned judge must surely be wrong in referring to each citizen's "pribhléid" or "privilege" to give evidence in, or conduct his case in, Irish. There can be no doubt, whether one scrutinises domestic case-law or international conventions, that one is dealing here, not with privileges, but with rights of the most fundamental kind.

"the volume under review highlights the urgent need for the Council to formulate an editorial approach to future cases in Irish which is both compatible with the house-style applied to English language cases and internally coherent."

The Incorporated Council for Law Reporting, through successive members and administrative staff, have served the legal profession for nearly a century and a half in an invariably trying and a frequently thankless task. In publishing this collection, the current Council have shown both imagination and courage. At a stroke, the Council generally and Sinéad Ní Chúlacháin in particular have drawn a line under the past neglect of Irish language material and lead one to hope that the days are at an end when such cases are excluded from reports simply by virtue of the language in which they are delivered.

Paradoxically, if that happy day is at hand, the volume under review highlights the urgent need for the Council to formulate an editorial approach to future cases in Irish which is both compatible with the house-style applied to English language cases and internally coherent. This volume and the most recent edition of the Irish Reports contain the text of the judgments, as delivered, together with a translation into English. It is unacceptable that cases which have been delivered in one of the official languages of the State should be translated into another, even by an editor who brings Mr. O Tuathail's skill and experience to bear on the task. There are a number of reasons for taking this objection. In the first instance, the Council do not treat cases delivered in English in this fashion. As a consequence, however well-intentioned, the policy of translation is itself discriminatory, in the absence of a similar policy directed towards the other official language. On a practical level, given the predominance of English in the administration of justice, such differentiation can have far-reaching consequences. There will always be the fear that the translation, rather than the original, will become common currency and that a modest, but important, advance in the development of Irish as a medium for legal discourse will be eroded. The possibility of such an outcome in this case is exacerbated by the failure of the special edition, or the most recent edition of the Irish Reports, to differentiate clearly between the original judgment and the translation. The point is of no little importance. The translation of Irish into English is not the neutral process that furnishing translations into English is. Sensitivity must be shown if Irish is to carve out a distinct niche for itself and move beyone the 'twilight zone' of a reciprocity of translation.

While there is an argument for making translations available unofficially - for example, in the pages of the Bar Review - it remains the fact that there is only one authoritative text of each of the judgments contained in this volume - the Irish one - and I know of no precedent for the Council furnishing an alternative text or concerning itself with anything other than the approved text of the judgment actually delivered. This is consonant with the aims and objectives set out in the Council's documents of incorporation which describe its principal object as "the preparation and publication in a convenient form ... of reports of judicial *decisions* of the superior and appellate courts in Ireland (emphasis added)." It is unsafe and unwise to depart from this principle, presumably in reliance on some implied power, even were translations of judgments to be approved by the judges in question - and one is bound to observe that there is no indication, in this special volume, that the translations furnished have been so approved.

One has to accept that it is unlikely that a fully bilingual series of reports will be realised in early course - although the Canadians have much to teach us in this, as in other consequences, of living in a bilingual society. However, there is no barrier to the introduction of bilingual headnotes as a matter of course. Insofar as these relate to English cases, they would be an important means of ensuring that Irish keeps pace with legal developments. Insofar as cases in Irish are concerned, such a headnote would furnish the monoglot English-speaker with a sufficient outline of the case in question without harming the intergrity of the original. Such an initiative would not alone be a worthy new departure for the new century, but might also attract public funding as a discrete undertaking by the Council. It would undoubtedly be an important public service.

One can sympathise, whilst not agreeing, with the stance taken by the Council on this occasion. The horns of their dilemma are illustrated by the fact that a volume, whose principal importance arguably lies in its service to Irish, should be the subject of a review in English. However, the time is ripe for a proper and principled stand to be taken to ensure that the consistency for which the Council is a by-word is maintained. In the meantime, everyone who has even the most modest interest in law, the Irish language or the analysis of personal rights should buy this special edition. In doing so, they will not only be privy to an important act of reclamation but they will also encourage all those involved in this undertaking to unleash the talents, flair and imagination, which are so evident from the volume, on still nobler projects. ●

To all members of the legal profession

EBS BUILDING SOCIETY
CLARE STREET, DUBLIN 2
(BESIDE GREENE'S BOOKSHOP)

OPENING HOURS
9.30 A.M. TO 5.00 P.M.
NO LUNCH CLOSURE

WE OFFER

- ***MORTGAGES AT EXCELLENT RATES***
- ***WIDE RANGE OF DEPOSITS***
- ***NO BANK CHARGES***

MANAGER PADRAIC HANNON WILL BE MORE THAN PLEASED TO DISCUSS YOUR MORTGAGE REQUIREMENTS NOW OR IN THE FUTURE

THIS BRANCH AT CLARE STREET IS PARTICULARLY STRUCTURED TO CATER FOR THE REQUIREMENTS OF BARRISTERS AND SOLICITORS

JUST TELEPHONE
01 6763663, OR 6762135
OR 087 633039
FOR AN IMMEDIATE QUOTE

PADRAIC HANNON
MANAGER

EBS
BUILDING SOCIETY