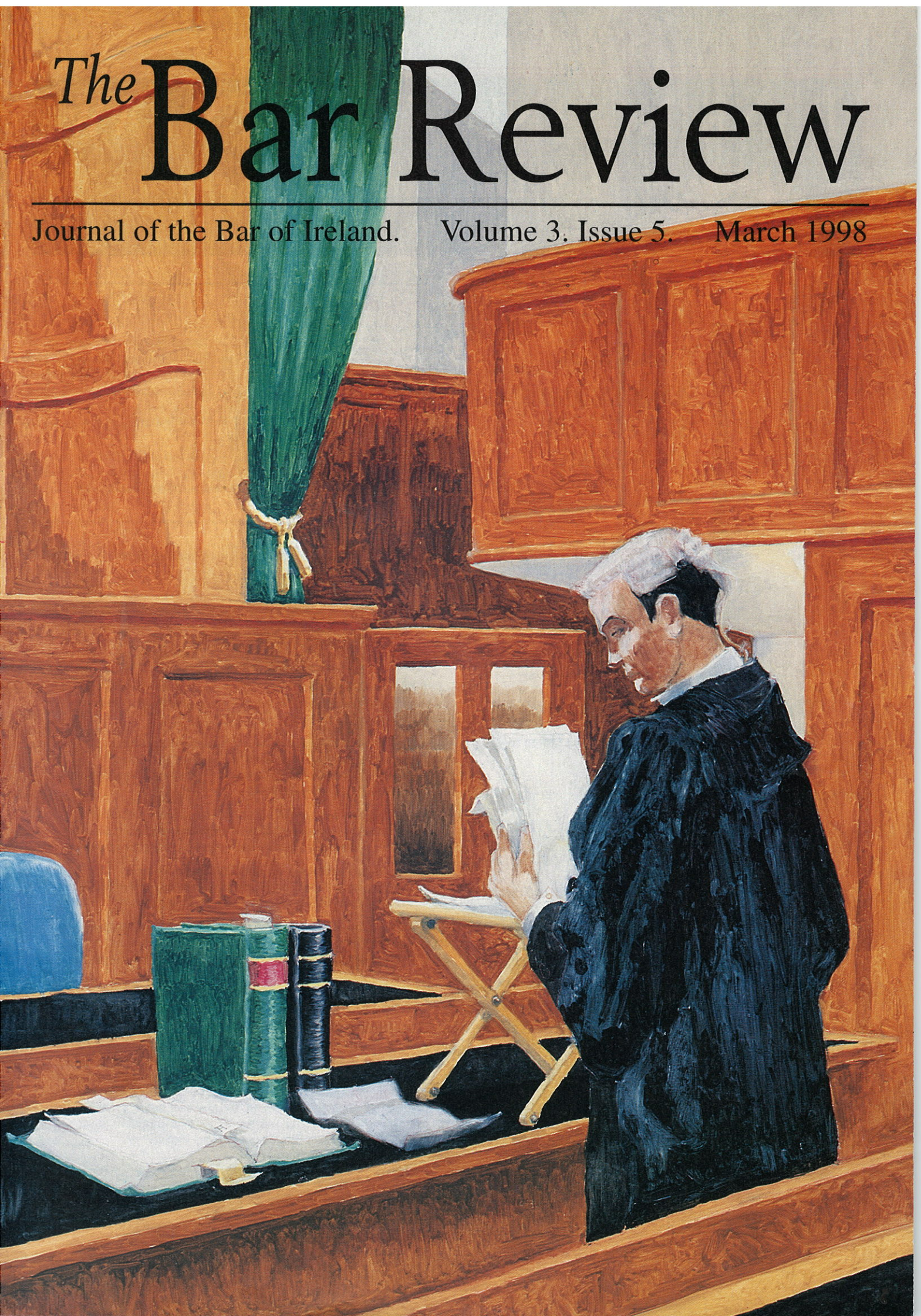
The Bar Review

Journal of the Bar of Ireland. Volume 3. Issue 5. March 1998



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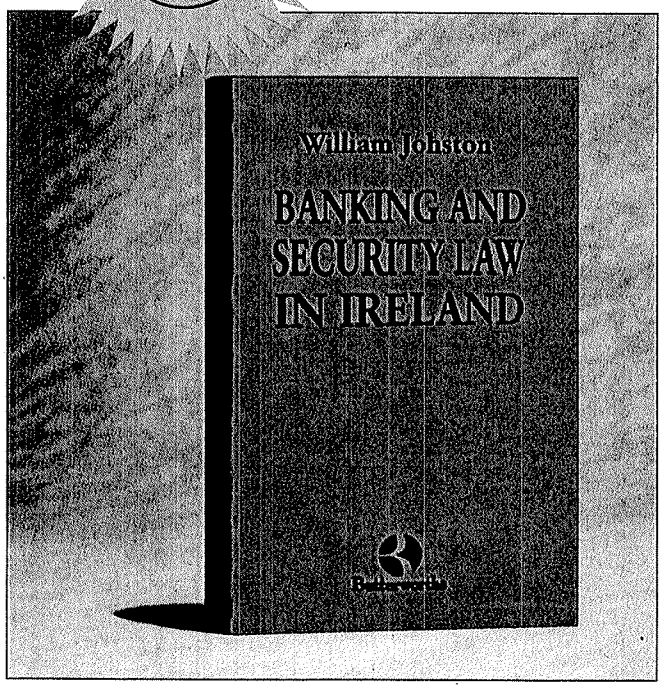
By William Johnston *MA, Solicitor, Partner, Arthur Cox*



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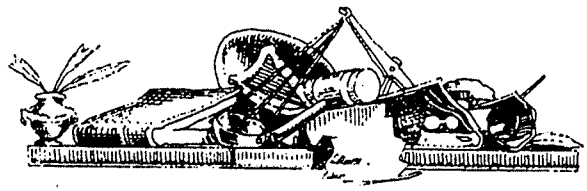

The Bar Review

Volume 3, Issue 5. March 1998. ISSN 1339-3426

Childcare and Relating Law

The enactment of the Children Act, 1997 is a welcome step forward in the on-going process of the promotion of childrens' rights. However, it also represents a missed opportunity to review the whole area of childrens' rights and to either consolidate or overhaul existing legislation.

The Act amends the Guardianship of Infants Act 1964 in relation to guardianship, custody and access, addresses the evidence of children in civil cases and provides for a system of Guardian *ad litem* and separate legal representation of children in certain circumstances.

The main features in relation to guardianship, custody and access are that the Act;

1. removes the need to go to court where unmarried parents agree on guardianship
2. highlights the court's existing discretion to grant joint custody of children, and
3. gives relatives and persons who have acted *in loco parentis* to a child a right to apply to court for leave to apply for access to that child.

The problem of ongoing access to and for children in situations of family breakdown is highlighted. While the best interests of the child remains the paramount consideration for the court, the court is now specifically required to have regard to whether the best interests of the child would be served by maintaining personal and direct contact with both parents on a regular basis. The wishes of the child are also to be taken into account where the court deems that appropriate and practicable, having regard to the age and understanding of the child. While these amendments are generally welcomed, the Act has been criticised for failing to go far enough in reviewing the basic concepts involved in modern family relationships.

The Act also inserts a new Part IV into the 1964 Act. This was described by the Government as a charter for the rights of children in cases of conflict. The aim was to help put Ireland at the forefront of the international community in relation to childrens' rights by facilitating the ratification of the European Convention on the Exercise of Childrens' Rights which Ireland signed in 1996. That Convention complements the U.N. Convention on the Rights of the Child which Ireland ratified in 1992.

The aim of the European Convention is to promote the rights of children in proceedings affecting them, to grant them procedural rights and to facilitate the exercise of those rights. The new provisions give legislative backing to the encouragement of alternative forms of dispute resolution, such as mediation in family matters, an approach which is urged on States by the European Convention. They also enable the appointment of a guardian *ad litem* for a child, which can be separately represented if necessary. Other provisions make the reception of a child's evidence easier by providing that children may give evidence through a live television link in proceedings concerning their welfare. The law on the admissibility of hearsay evidence of children is also amended. Furthermore, the court can now, subject to certain conditions, in all civil cases, hear the evidence of children under 14 years of age without requiring them to take an oath or affirmation. However the commencement of these reforming provisions has been deferred as the administrative arrangements necessary to facilitate evidence via television link, mediation services and provision of social reports on children are not yet in place.

This is perhaps an example of what the U.N Committee on the Rights of the Child was referring to when it recently described Ireland's approach to childrens' rights as "fragmented, with no comprehensive national policy which fully incorporates the principles and provisions of the UN Convention on the Rights of the Child."

The Competition (Amendment) Act, 1996: Extending the Criminal Law

PETER CHARLETON SC and MARGUERITE BOLGER, Barrister

1. The Background to the 1996 Act.

The Competition Act of 1991 was inspired by Articles 85 and 86 of the Treaty of Rome. Obviously, a national scheme which lacked competition law was very much against the letter and spirit of the Treaty which so clearly applied that discipline to inter-community trade. In effect EU membership necessitated such legislation, although it arrived eighteen years after joining. One of the most consistent criticisms of this legislation was the inadequacy of the enforcement procedures. Section 6 of the Act gave a cause of action to either the Minister[1] or "any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under section 4 or 5"[2].

If the enforcement provisions of the Act were inadequate, then it had to be questioned whether the Act was successful in its objectives of preventing the distortion of competition and the abuse of dominant positions.

The response of the Legislature to the inadequacies of the 1991 Act was the Competition (Amendment) Act of 1996. It is questionable whether legislation creating criminal offences can come within legislation necessitated by membership of the EU, protected from constitutional challenge by Article 29.4.3(iv) of the Constitution. However, our obligation as a Member State of the European Union, is to make such European legislation enforceable in Ireland. The choice of methods is, of course, one for the National Government[3]. Perhaps in many cases, in order to ensure enforceability, there was no way around the creation of criminal offences. The pattern we seem to have been drawn to is for the creation of true criminal offences carrying not only fines, but periods of imprisonment. Because the European Union was essentially commercial in its original formulation these offences have entwined themselves in the commercial sphere, an area previously closed to criminal law. Recent Acts, such as the Investment Intermediaries Act, 1995 have continued this trend by the creation of new and relevant criminal offences, coupled with powers of search and investigation essential for the bringing of such prosecutions. The high point of this development has to be the Competition (Amendment) Act, 1996. It is to be anticipated that opening up this area to the criminal law will provide some form of redress to third parties aggrieved by anti-competitive practices whom, up to now, have had a limited framework within which to ensure recourse to the law. Those third parties have now, in effect, being designated as victims of crime.

In essence, the 1996 Competition (Amendment) Act re-enacted the Competition Act of 1991 as a criminal statute, carrying draconian penalties in monetary terms. Section 3 provides for, upon conviction on indictment, a fine of three million pounds, or 10% of the turnover of the guilty company[4], clearly in order to make any penalty imposed actually hurt. Individuals found guilty of such offences may, in addition to that level of fine, face two years in jail[5]. Since, as one might expect, the offences are cast in a truly criminal form and since general company law theory regards the directors and executives as being the brains of the company, it can be expected that it is the top brains of a company that are going to face charges[6].

2. Articles 85 and 86

In order to understand the Irish competition legislation, a brief examination of Articles 85 and 86 is useful.

2.1. Article 85: The Distortion of Competition.

Article 85 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market". The key to that is that collusion must distort the market[7]. The examples given in Articles 85 are simple illustrations. Other activities which have fallen foul of the European Court of Justice include a product distribution agreement[8], exchange of data[9] and after sales guarantees redeemable only in the country of purchase[10].

> Such restrictions tended to partition the market and to withhold from the consumer the opportunity that the manufacturer had already claimed to treat the market as unified.[11]

Generally the European Court of Justice tends to interpret Article 85 in a flexible and pragmatic manner. Otherwise every contract could be deemed to distort competition as it ties the parties to dealing with each other rather than a third party. Businesses should enjoy the freedom to contract[12].

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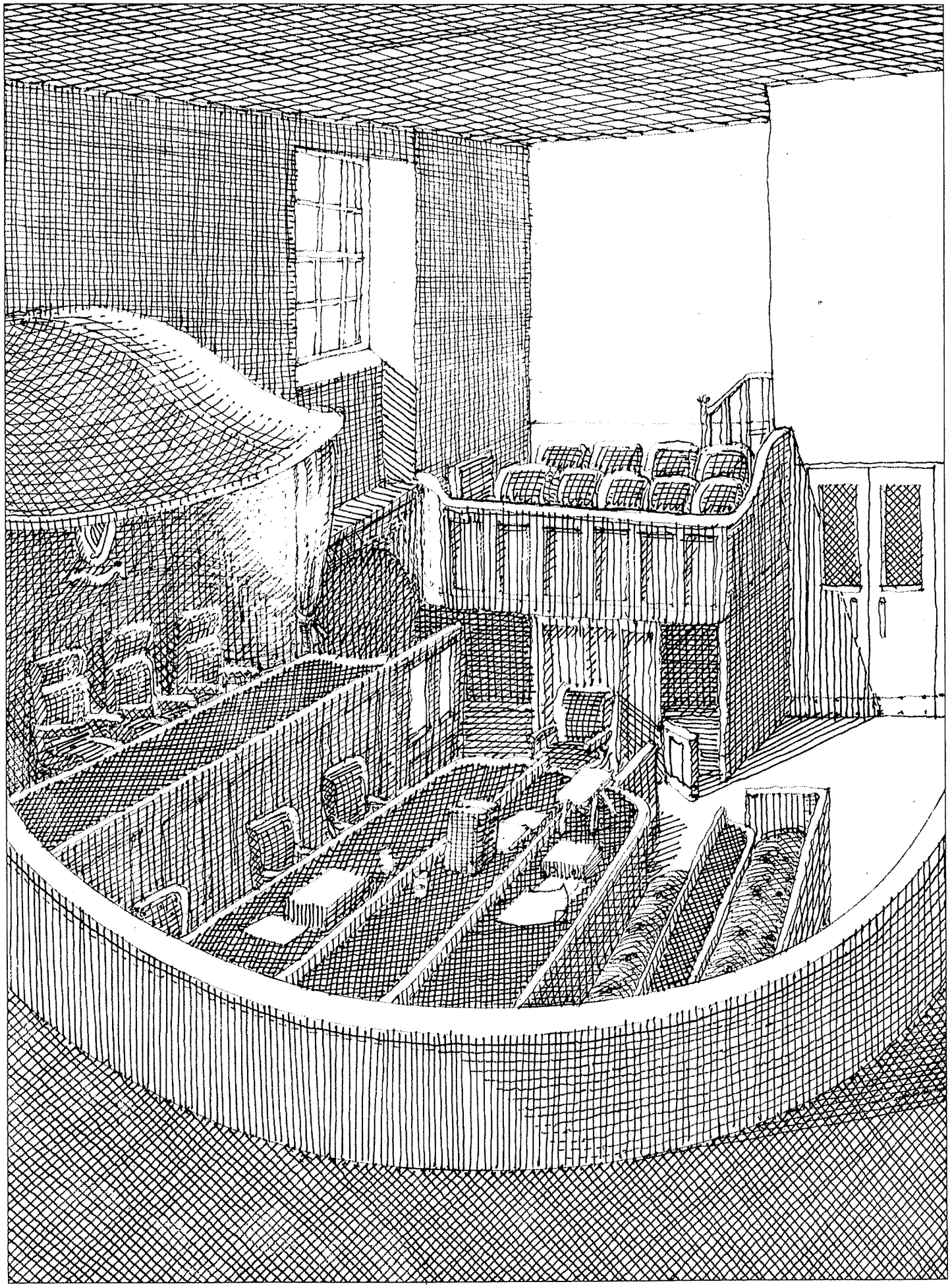


2.2. The Nature of the Abuse of a Dominant Position.

Article 86 has been described as the Treaty's monopoly provision[13]. A monopoly denies the consumer of choice and thwarts the "realisation of efficiency through the exercise of consumer preference"[14]. Legal intervention is designed to address this inefficiency. The classic example of an abuse of a dominant position is *United Brands -v- Commission*[15]. The undertaking was held to have abused their dominant position in the banana market by imposing arbitrary price differentials for different geographical areas of the common market, by tightly controlling re-sales and by refusing to supply a long standing customer.

It is the abuse of a dominant position that is unlawful rather than the dominant position per se.

> Dominance is tolerated, but its potential to foster inefficiency is subjected to supervision.[16]

Article 86 is therefore a compliment to and acts in tandem with Article 85 which attempts to create efficiency by outlawing restrictive practices.

3. The Elements of the Competition Offences

3.1. Distortion of Competition.

The elements of the offence are that firstly, one must distort competition and, secondly, one must either intend to do it or engage in conduct aware that the effect of one's conduct is a distortion of competition, but proceed nonetheless with that activity.

Section 2(2) of the 1996 Act effectively renders a breach of section 4 of the 1991 Act a criminal offence. In principle, section 4 provides that the "prevention, restriction or distortion of competition" is prohibited and then goes on to give specific examples of how such distortion might occur. Section 2(2)(c) of the 1996 Act provides a defence if it can be proved that:

(i) The defendant did not know, nor, in all the circumstances of the case, could the defendant be reasonably expected to have known, that the effect of the agreement, decision or concerted practice concerned would be the prevention, restriction or distortion of competition in trade alleged in the proceedings; or

(ii) At all material times a licence or certificate was in force...

This defence provides the mental element of the offence, i.e. knowledge of the effect of the agreement, the decision or the concerted practice. However, the effect of an arrangement is not the same as its object. This defence cannot be available to a defendant where they knew that the object of the arrangement was to distort competition[17].

Section 2(2)c refers to the company through its controlling agent. Therefore, both the company and the controlling agent are guilty. The defence is cast in terms of such a person not knowing, or acting in circumstances where they could not reasonably be expected to know of the effect of the relevant activity. The higher up one is within a company and the more knowledge of its affairs one has in terms of day to day management, the more difficult it would be to mount any defence of lack of awareness. No matter how one casts the defence it comes down to that essence. If one is aware, one is guilty, if one is not aware, one is not.

Can recklessness constitute awareness? Recklessness can consist of an advertent disregard of facts or, something extremely similar, a deliberate closing of one's mind to relevant facts[18]. Obviously, one cannot close one's mind to things unless the mind knows that they are there. An advertent disregard of facts is something which can happen very early on in a process whereby the slightest inkling in relation to a suspicious course of events is ignored. That guilty state of mind appears to be what is outlawed by this section. The reference to what a business person "could be reasonably expected to have known", allows behaviour to be tested against a model of ordinary business prudence. This does not create a strict liability element, but is merely a council of commonsense.

3.2. Abuse of a Dominant Position.

Like the offence of distortion of competition, the European model of Article 86, recreated by section 5 of the Competition Act, 1991 is simply made into a criminal offence by section 2(7):

(a) An undertaking of the acts in a manner prohibited by section 5(1) of the principle Act or which contravenes an order under section 14 of that Act shall be guilty of an offence;

(b) In proceedings for an offence under this subsection (being an offence which consists of the doing of an act in a manner prohibited by section 5(1) of the principle Act, it shall be a good defence to prove that:

(i) The defendant did not know, nor in all the circumstances of the case, could the defendant be reasonably expected to have known, that the act or acts concerned done by the defendant would constitute the abuse of the dominant position in trade for goods or services alleged in the proceedings, or;

(ii) That the said act was done in compliance of the provisions of an order under section 14 of the said Act.

Again, one basic offence is outlawed, but the doing of it may be perpetrated through many different forms of activity.

3.3 The Basis of the Offences

It would appear that the main reason for rendering what were previously only civil wrongs, to criminal offences, was to enhance the enforcement of competition law in Ireland. As the Constitution guarantees the right to a trial in due course of the law[19] and to fair procedures[20] the nature of any criminal offence must be clear. If a criminal offence is arbitrary, vague and ambiguous, it may be unconstitutional[21]. The differing schools of economic thought on what practices may or may not be anti-competitive could make it difficult, if not impossible, to clarify the nature of the offences created by the 1996 Act. Thus, it has been suggested that the vagueness of the offences created by the Act could cause them to be struck down as unconstitutional[22].

How will the ultimate definition of these offences, should any of them come to court, be cast? Both offences of distortion of competition and abuse of dominant position carry the same mental element of intention or recklessness. The uniting factor may be the participation section, discussed next. This operates as a clarifying factor for the offences which move their elements towards clarity and away from the unconstitutionality argument.

4. Parties to the Offence

4.1. The Common Law Rules on Complicity in a Criminal Offence

There is a problem with the offences created by section 2, i.e. what is created here is one generic offence which is capable of being done by the doing of different acts, which means that the offence may be cast, in terms of a charge, as a number of alternatives based on the same alleged act[23]. It is an activity which is outlawed, and may be pursued in a number of different ways[24]. An immediate and stark problem arises in terms of the creation of liability for participation in this offence. How does liability for the statutory offences provided for in section 2 fit within the common law rules of complicity in a criminal offence - i.e. how does the law determine who is a participant in these criminal offences?

Discovering who is a party to a crime involves the application of extremely complex rules which were not developed in the context of commercial offences[25]. Firstly, one has to do something which as a matter of fact provides assistance to the crime. Mere presence at the scene of a crime is not a crime but assisting in a crime, even slightly, is[26]. Secondly, one must know that the act alleged to have involved participation amounts to participation in a crime, but one does not need very much knowledge to participate in a crime. Knowledge that the accused is going to commit a crime of a kind similar to that contemplated by the accused is sufficient. In *The People (DPP) -v- Egan*[27], the defence was that the accused believed that only some small burglary was going to take place. If he had known that it was a £1.3 million jewellery robbery with firearms, he would have nothing to do with it. The Court of Criminal Appeal had little difficulty in finding him guilty of the armed robbery and giving him the appropriate sentence. Costello J. held:

> When goods are stolen it is not, in the opinion of this Court, necessary for the prosecution to establish that a person who has aided the principle offender before the crime was committed knew either the means which were to be employed by the principle offender, or the place from which the goods were to be stolen at the time at which the theft was to take place or the nature of the goods to be stolen. It would suffice if the prosecution is able to show that the accused who gave assistance to a principle offender before the crime was committed knew the nature of the crime intended, namely the theft of goods.

A warning: to close one's mind to apparently petty abuse may, if the facts develop as such, render one complicit in a much more serious crime within the generic categories that include competition, distortion or abuse.

4.2. Vicarious Criminal Liability: Section 2(9)

Section 2(9) provides for the criminal liability of an undertaking for the anti-competitive acts of its officers and employees.

> For the purpose of determining liability of an offence under this section, any act done by an officer or an employee of an undertaking for the purposes of or in connection with, the business or affairs of the undertaking shall be regarded as an act done by the undertaking.

Regardless of the position of the officer or employee in the organisation, the undertaking would be deemed responsible as the act of the officer or employee is deemed to be the act of the undertaking.

Constitutional issues also arise for consideration here, specifically whether such vicarious liability is consistent with the constitutional guarantee in Article 38.1 of trial in due course of law. In 'Re: Article 26 and the Employment Equality Bill of 1995[28]' the Supreme Court considered the constitutionality of section 15(1) of the Employment Equality Bill of 1995 which provided that:

> Anything done in the course of his or her employment shall be treated for the purposes of this Act as done also by that person's employer, whether or not it was done with the employer's knowledge or approval.

The court held that, in the absence of any express indication to the contrary, the section applied to criminal as well as civil proceedings. The section clearly did not require an employer to have any knowledge of the actions of the employees. The Supreme Court discussed the general principles of the vicarious liability of the master for the acts of his servant and observed that most of the exceptions to the general principle that vicarious liability did not extend to liability for criminal offences related to public welfare offences, for example the liability of a publican for the crimes of his servant in relation to the running of the pub[29]. The liability imposed by section 15(1) was distinguished from these exceptions:

> What is sought to be done by this provision is that an employer, devoid of any guilty intent, is liable to be found guilty on indictment of an offence carrying a fine of £50,000 or a prison sentence of two years, or both such fine of imprisonment, and to be tainted with guilt for offences which are far from being regulatory in character, but which are likely to attract a substantial measure of opprobrium. The social policy of making the act more effective does not, in the opinion of this court, justify the introduction of so radical a change to our criminal law. The change appears to the court to be quite disproportionate to the mischief with which the section seeks to deal.

In the course of his speech in *Sweet -v- Parsley* (HL)(E)) [1970] AC 132 at 150 Lord Reid - the case dealt more with the concept of strict liability as opposed to vicarious liability, but what

he had to say is equally pertinent to what the court has to consider - referred to -the public scandal of convicting on a serious charge persons who are in no way blameworthy.

Of course the English courts would have to recognise that if Parliament decreed that a person should be found guilty in those circumstances, then the legislation might be upheld because Parliament in the British system is said to be supreme.

Our situation, however, is totally different. We are governed by a Constitution with a separation of powers as its fulcrum and the two Houses of the Oireachteas are precluded from enacting any legislation which is in any respect repugnant to the Constitution.

The Court concludes that to render an employer liable to potentially severe criminal sanctions in circumstances which are so unjust, irrational and inappropriate would make any purported trial of such a person not held in due course of law and, therefore, contrary to Article 38.1 of the Constitution and also repugnant to the provisions of Article 40.1 of the Constitution[30].

In the U.K. the House of Lords has taken the view that an undertaking shall be vicariously criminally liable even when the employees were expressly instructed not to enter anti-competitive arrangements[31]. The instructions given by the undertaking to their employees only went to mitigation of sentence. The focus of these sections of the 1996 Act which create criminal offences is towards obligations, which if broken, constitute crimes. Again, one is thrown back to the consideration of the mental element and the nature of what is outlawed. If participation is based on actual assistance coupled with intent or recklessness, a constitutional problem arises.

4.3. Criminal Liability of Directors, Managers and Officers

Section 3(4)A of the Act provides for the category of persons who may incur liability under the Act:

> Where an offence under section 2 of this Act has been committed by an undertaking and the doing of the acts that constituted the offence has been authorised, or consented to, by a person, being a director, manager, or other similar officer of the undertaking, or a person who purports to act in any such capacity, that person as well as the undertaking shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she was guilty of the first mentioned offence.

This section brings the Act into conformity with general criminal law principles on complicity[32] and the basic principles of criminal and constitutional law, that a person should not be committed on a real criminal offence without a real criminal capacity.

The objective of the 1996 Act is to cast the broadest possible net with the narrowest possible filament. This has the effect of making common law principles of criminal complicity applicable to commercial undertakings. As the offences in the 1996 Act have been cast as being truly criminal in nature, there seems to be no reason why the facilitator of an armed robbery should be made subject to any more a stringent rule than the facilitator of a distortion in competition or the abuse of a dominant position. The criminal law has always been thus. The slightest infringement carries a massive penalty which is ultimately only mitigated by the circumstances and the mercy of the trial judge in sentencing.

5. Procedures under the 1996 Act

5.1. Right of Arrest.

Persons suspected of competition offences cannot, unlike the vast bulk of other criminal offences, be arrested and detained for questioning. There is no arrest provision in the 1996 Act. Offences under the Act are not, as yet, scheduled offences for the purposes of sections 29 and 30 of the Offences Against the State Act, 1939. Nor are they offences which pass the threshold of five years imprisonment which makes the detention and questioning powers under section 4 of the Criminal Justice Act, 1983 available[33]. Nor are they offences under the Criminal Justice Act, 1996 allowing for detention and questioning for up to seven days with the authority of a District Judge.

5.2. Investigation.

In contrast, the Act provides for extensive investigative powers which already existed under the 1991 Act, but are now available for both civil and criminal enforcement as a result of the 1996 Act. The Act also allows warrants of authority for the purpose of those investigations to prove themselves and extends the definition of records into all forms in which materials are recorded[34].

Even in relation to civil enforcement, these investigation powers were seldom used until the 1996 Act. The Act changed the legal framework from a purely civil remedy to encouraging the Authority to investigate on its own behalf. Section 7 extends the right of civil action and imposes a kind of criminal test as to who is a party to a civil wrong, a development described by the Minister as making section 7 "the key section" in the new Act[35]. Section 21 of the 1991 Act, as amended by section 11(2)(c) of the 1996 Act, sets out the extraordinarily wide powers of authorised officers, on production of a warrant issued by a District Judge. Section 21(2) provides the standard for issue of the warrant, i.e.:

> A justice of the District Court may issue a warrant under subsection 1, if satisfied by information on oath that it is proper for him to do so for the purposes of that subsection.

Section 21(3) makes it a criminal offence to "obstruct or impede" an authorised officer or not to comply with the requirement under section 21.

5.2.(i). Warrants.

The basis for the granting of a warrant to an authorised officer is, very simply, that information is needed by the authority for the purposes of carrying out their functions under the 1991 and 1996 Act. They do not have to suspect anything. They need merely require information. Even under the Investment Intermediaries Act, 1995 a statute which again has joined civil and criminal implications, a warrant under section 75 can only be granted "where

there are reasonable grounds for suspecting" that relevant information is on a particular premises and that a request to produce same has not been complied with. The use of the phrase "reasonable suspicion" carries with it a body of case law[36] which in the past has caused severe difficulty in criminal trials. That was so even though this phrase was very broadly construed. In the leading case of *Hussein -v- Chong Fook Cam*[37] Lord Devlin said:

> Suspicion can take into account matters which could not be put in evidence at all...suspicion can take into account also matters which though admissible, could not form a prima facie case. Thus the fact that the accused had given a false alibi does not obviate the need for prima facie proof of his presence at the scene of the crime; it will become of considerable importance when such proof as there is, is being weighed against perhaps a second alibi; it would undoubtedly be a very suspicious circumstance.

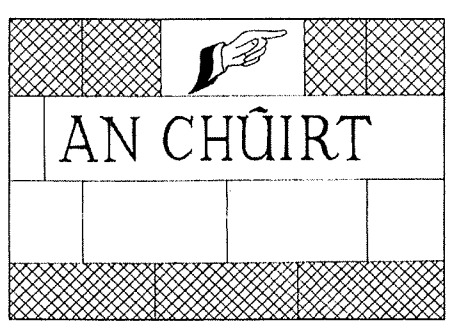
It would appear that there is no other criminal statute where a warrant is granted on any other basis apart from the existence of a reasonable suspicion of the commission of an offence. Unlike the US Constitution[38], there is no express provision in our constitution that a search can only be carried out on reasonable and probable cause being shown. However, it is arguable that the existence of a reasonable suspicion is a minimum constitutional standard for such a broad invasion of constitutional rights in this jurisdiction. Even under section 29 of the Offences Against the State Act, and under the Criminal Justice Act, 1996, warrants issued for offences against the State or for offences involving drug trafficking are issued by Chief Superintendents who are required to "reasonably suspect" that evidence in relation to the commission of such an offence may be found on particular premises. The notable feature of the competition legislation is the almost total absence of any standard. Once the information is necessary for the exercise by the authority of any of their functions under the Acts, a judge may issue a warrant.

5.2.(ii). Challenging the Validity of a Warrant.

There may be difficulties for the prosecution in establishing the level of necessity required to ensure a valid warrant. These difficulties have arisen in the past in relation to the sufficiency of the information granting search warrants for drug prosecutions, the most notable example of which was *The People (DPP) -v- Elizabeth Yamanoah*[39]. There, merely stating that Gardaí had confidential information and that surveillance had been carried out over a number of hours was insufficient and the Court of Criminal Appeal quashed the warrant and acquitted the accused.

The most immediate and obvious challenge that can be raised to a search warrant is that it was improperly granted. One may be foolish to refuse to allow a search on the basis that a warrant is incorrect. It is not a defence to a charge of obstructing an authorised officer under section 21(3) that the action was carried out in good faith. This is hardly surprising. If there were it would mean that a subjective belief in the invalidity of a warrant would be a sufficient defence to a charge of obstruction. Nor can one go to court prior to a criminal trial for the purpose of having a warrant declared invalid. This was tried in *Byrne -v- Grey* and *Berkley -v- Edwards* [1988] IR 31. Hamilton C.J., while making certain observations for the purpose of the case, indicated that it was a matter for trial judges to exercise their jurisdiction in deciding questions of admissibility by reference to the validity of a warrant. It was not for the High Court to make such decisions in advance.

The only option would appear to be a challenge to the validity of the warrant with a view to excluding the relevant evidence bearing in mind the practical reality that most criminal cases are won by the defence after successful exclusion of evidence.



5.2.(iii) The Powers of Authorised Officials under Section 21.

The Act allows an authorised officer to "inspect and copy and take extracts from any such books, documents and records", but there is no power to remove those items and to do so is an actionable civil trespass. In contrast, under section 65 of the Investment Intermediaries Act, 1995, on a warrant being granted, such documents may be removed for a reasonable period. The technology now exists, for example, to copy the entire of a computer hard disc. In the United Kingdom the fraud squad do this by making two copies, keeping one for themselves and giving one to the business searched. If a person is required to produce relevant records they must be produced, otherwise it is again an obstruction carrying up to twelve months imprisonment. The person carrying on the relevant activity, if asked, must give "any information" that the authorised officer "may require in regard to the person carrying on such activity". This means that people involved in the management of the relevant corporate entities cannot refuse to give that information.

5.2.(iv) The Admissibility of Information Given.

In evidential terms the result of information obtained pursuant to the exercise of section 21 powers might be quite limited. It is only if a person is authorised by virtue of an employment relationship to make declarations on behalf of another party that that other party is thereby bound[40]. Otherwise it is only where a conspiracy is in being that acts and declarations of co-conspirators are admissible against other conspirators. That situation does not appear to be relevant. Recently, the European Court of Human Rights declared the use of material obtained by compulsion in the course of a Board of Trade Inquiry which was later used in a criminal prosecution to be unlawful[41]. However, there may be consequences where the question that is used in a later criminal prosecution is garnered as a

result of a specific limitation on the right to silence, necessarily imposed for a proportionate reason within a legally authorised criminal investigation. This particular point has yet to go to the European Court of Human Rights.

In *Heaney and McGuinness -v- Ireland and the Attorney General*[42] the Supreme Court had to consider whether a failure to give an account of one's movements under section 30 of the Offences Against the State Act could constitutionally amount to a criminal offence under section 52 of that Act. At issue was whether section 52 was constitutional by reason of its conflict with the constitutional right to silence. The Supreme Court held that the existence of a penalty for failing to give an answer to a question which could impact upon the security of the State was a proportionate exercise by the State of its authority in conflict with what would otherwise be individual constitutional rights, and in so doing referred to the many existing pieces of legislation which limit the right to silence and so compel answers.

Clearly, there is authority for the cutting down of the privilege against self incrimination, as seems to have been done in section 21, as amended. However, whilst there is nothing to stop the prosecution using information as to who is in charge of the body corporate, and although that may not infringe the principle against self incrimination, it may be of little use apart from investigative purposes. It could not be used in a criminal trial for the obvious reason that it infringes the rule against hearsay. The exception to that would be where the person prosecuted makes the admission that he was the person in charge of the relevant records or that he made the relevant entry. It would appear that if these questions were asked then answers would have to be given. Any constitutional dimension would have to be worked out in the course of a criminal trial, or by seeking declaratory relief in advance.

An additional investigative power would be available where a Garda was involved as an authorised officer. Under section 9 of the Criminal Law Act, 1976 a Garda in a search may seize and retain as evidence anything which he believes may be evidence of any offence or suspected offence.

In summary, the investigative powers under the 1991 Act are very wide, available to be used on a minimum basis and subject only to very obvious constitutional limitations.

6. The Right to Legal Advice.

Pursuant to Article 38 of the Constitution which provides for trial of offences in due course of law, the courts have held that a person in detention has a constitutional right to "reasonable access to a solicitor"[43]. As there is no provision for detention under the 1996 Act, the only situation in which a person would require access to legal advice is at the investigative stage. Whether or not there is a constitutional right to have legal advice at that stage is questionable. To date, all of the statements in relation to the right of access to a lawyer occur within the context of a custodial investigation by the police[44].

It would seem that there must be a right of access to legal advice, but the exercise of that right must surely be done in such a way as not to impede the reasonable exercise by the authorised officers of their duties. Guidelines in relation to these raids exist in the United Kingdom. One of these provides that a person can seek legal advice provided that he obtains it within a reasonable time.

This is likely to be the situation here. It has never been pleaded in the course of a criminal trial that a person undergoing a search, pursuant to warrant, is entitled to have his solicitor present. That is because the way criminal trials are run are generally directed at excluding the relevant evidence and not at blocking out the investigation process in advance. It would be extremely difficult to get a court to rule that one was entitled to anything more than a warrant at the time of the search. Legal advice is, however, extremely valuable. If the warrant was invalid a person could be advised of the possibility of taking an action for trespass, which might make the authority think twice about embarking on a process.

The right to access to legal advice should not be any different or in any way reduced where one's constitutional right of privacy is being invaded under a search warrant. There is no authority, apart from first principle, to suggest this. There must be a right to seek advice and, if that right is not to be set at nought, there must also be a correlative right to have a reasonable period in which to obtain it. It may be that the courts will do something similar to the United Kingdom guidelines and indicate that one has a right to telephone a solicitor and has a right to half an hour's grace while the solicitor arrives.

The powers under section 21 though wide, are limited - there is a right to inspect books, but not to take them; there is a right to seek information in relation to the persons carrying on the activity under investigation. Similarly, there is a power requiring information to be given in regard to a specified activity. Simple and straightforward questions as to what activity is under investigation can reasonably be asked before such an answer is required.

As to whether the activity being investigated comes under the Acts or not is surely a question that could usefully be asked at this stage. Again, regrettably, a failure to answer in good faith is not a defence to a charge of obstruction under section 21(3). If one is to be at least reasonably sure that one is refusing correctly to give information which is outside the scope of a relevant investigation or is refusing, correctly, to give access to particular books or documents then one needs legal advice. If the lawyer is wrong in giving that advice his client may still go to prison for obstruction, but at least the client then has somebody to sue, or perhaps the benefit of company in his cell. ●

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1 Section 6(4)

2 Section 6(1).

3 Article 189 of the Treaty of Rome states:
A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall lead to the national authorities the choice of form and method.

4 3(1)(b)(i).

5 Section 3(1)(b)(ii).
6 Archbold (1997) at 1514 to 1515.
7 Weatherill & Beaumont P. EC Law, 2nd Edition (1995) at 692.
8 *Consten & Grundig* Case 56, 58-64 [1966] ECR 299.
9 Fatty Acids Comm. Dec. 87-1 [1989] 4 CMLR 445.
10 Zanussi Comm. Dec. 78-922, 1978 OJ L 322-26 [1979] 1 CMLR 81.
11 Weatherill & Beaumont Loc cit at 693.
12 Weatherill and Beaumont at 697.
13 Weatherill and Beaumont at 718.
14 Weatherill and Beaumont at 718.
15 Case 27-76 [1978] ECR 207.
16 Weatherill and Beaumont at 721.
17 A similar view is expressed by Creegan B. 'The Competition Amendment Act, 1996' (1996) Bar Review 6.
18 On recklessness generally see Charleton P. 'Offences Against the Person Act' (1992) at 45-46 and 61-65 and Criminal Law Cases and Materials (1992) at 21 - 52.
19 Article 38.1.
20 Article 40.1
21 *King -v- Attorney General* [1981] Vol 1 IR 233
22 Creegan B. Loc cit.
23 Criminal Justice (Administration) Act, 1924, Rule 4(1).
24 Archbold 'Criminal Pleading Evidence & Practice' (1995) at 1-152; *Fox -v- Dingley* [1967] 1 WLR 379.
25 See generally Smith & Hogan 'Criminal Law' (Seventh Edition, 1992) at 123-159; Clarkson & Keating 'Criminal Law' Cases & Material' (Third Edition) 1994 at 230-245; Charleton 'Criminal Law Cases & Materials' at 141-181; Accessories and Abettors Act, 1861.
26 *Dunlop and Sylvester -v- R.* (1979) 99 DLR (3d) 301.
27 [1989] IR 681.
28 Judgment of the Supreme Court (date to be confirmed).
29 *Police Commissioners -v- Cartman* (1896) 1QB 655.
30 At pages 84 to 85 of the Unreported Judgment.
31 Re: Supply of Readymixed Concrete (No. 2) 1995 1 AC 456.
32 Section 3(4)(a) of the Bill had provided for the liability of a person who had been guilty of neglect rather than active authority or consent - which would have gone considerably beyond the general law principles on complicity.
33 The maximum fine pursuant to section 3 of the 1996 Act is only two years.
34 Section 21 of the 1991 Act, as amended by section 11(2)(c) of the 1996 Act.
35 Minister Richard Bruton 147 Seanad Debates Col. 1380.
36 Clarke and Lindsell on Tort, Seventeenth Edition at (This reference to be confirmed later).*
37 [1970] AC 942.
38 Fourth Amendment.
39 [1994] 1 IR 565.
40 There is the possibility of an employee being bound not to release confidential information by virtue of a confidentiality clause in their contracts. However, as these powers relate to obligations pursuant to the criminal law, a contract of employment could not justify the withholding of requested information.
41 *Saunders -v- United Kingdom* European Court of Human Rights, 3rd of February, 1997.
42 Check reference.
43 Per Finlay C.J. in *The People (DPP) -v- Healy* [1992] IR 73.
44 See generally 'In Breach of the Constitutional Rights of Access to a Lawyer and the Exclusion of Evidence' Butler and ONG (1995) ICLJ 156.

The Statute of Limitations in Sexual Abuse Cases

JAMES NUGENT, S.C.

The Statute of Limitations 1957 sets limits on the time within which a variety of actions can be brought. In passing this legislation the Oireachtas was faced with reconciling competing interests. On the one hand there were persons wishing to bring claims. On the other, there were Defendants faced with the possibility of long delayed claims.[1]

In pursuit of the reconciliation of competing interests, a three year period was decided upon as being the length of time within which one was required to bring "an action claiming damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute, or independently of any contract or any such provision) where the damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consist of, or include damages, in respect of personal injuries to any person".[2]

The appropriateness of a relatively short period to bring a personal injury claim cannot be denied. "Claims of this nature can easily be simulated or exaggerated.... It is easier to simulate or exaggerate them than to do so with claims for damage to property or loss of money. That being so, it seems.... to be reasonable that a Defendant should have a relatively early opportunity of investigating such a claim, so as to protect himself from an unjust or unwarranted claim."[3]

An exception to the three year rule was made for persons under a disability. They are:

a) Infants
b) Persons of unsound mind, and
c) Convicts subject to the operation of the Forfeiture Act 1870 in whose case no Administrator or Curator has been appointed under that Act[4]

(For the purposes of this article the latter category of persons under a disability is irrelevant). The statutory three year period did not commence to run while a person was under any of the these "disabilities"

The 1957 Act, however, made no allowance for persons whose cause of action could be extinguished before they even knew that they had such a cause of action. This was adversely commented on by Henchy J. in *Cahill -v- Sutton*[5] and indicated to be unconstitutional in the minority judgement of McCarthy J. in *Norris -v- The Attorney General.*[6] These judicial utterances were ignored by the legislature and in *Brady -v- Donegal County Council*, Costello J. returned to the topic in declaring section 82 (3a) of the Local Government (Planning and Development) Act 1963 unconstitutional. (This decision was reversed by the Supreme Court on the issue of the Plaintiff's locus standi).

He stated "had attention been paid to what the Supreme Court said about the 1957 Limitation Act and steps taken to amend it, I am sure that other statutes containing limitation periods such as the one as I am considering would have been looked at also, and their defects remedied. I therefore think that it is proper that the costs of this issue should be borne by the State."[7]

Whether it was a result of another judicial rebuke or the financial implications of that case, or some other cause, the fact is that the legislature passed the Statute of Limitations (Amendment) Ac, 1991 and changed the law so that the limitation period set down by the 1957 Act did not run until the injured person had knowledge of the fundamental facts pertaining to that person's cause of action.[8]

That brief review of the introduction of 'knowledge' as a necessary ingredient of a just Statute of Limitations, helps to put in context another ingredient which is equally essential. In most cases knowledge, of itself, empowers the person who has it to act. Sexual abuse cases are, however an exception to this general rule. Frequently in a sexual abuse case the victim is unable even to divulge the fact of the abuse, let alone do anything about it. In such cases, knowledge is rendered useless because there is no "capacity" to act on that knowledge. A Statute of Limitations which does not make provision for lack of "capacity" as it did for lack of knowledge is equally unjust legislation.

The recent case of *Sophia McColgan -v- The North Western Health Board and Desmond Moran*, highlighted this deficiency in the Statute. The facts of that case were that the Plaintiff and her siblings had been physically, sexually and mentally abused by their father over a protracted period. Notwithstanding the fact of the abuse, the plaintiff completed her second and third level education, graduating with honours. She went on to obtain and hold down a job. She also developed a reasonably satisfactory personal relationship. She did not, however, commence her civil proceedings within three years of her eighteenth birthday. The Health Board and Doctor Moran pleaded that her claim was statute barred. In such a case,

a Plaintiff has only three routes open to him/her if the claim is not to be defeated.

Firstly they may be able to prove that they did not have the necessary knowledge to start the statutory period running. Secondly, they may be able to prove that they were "of unsound mind". Thirdly, the constitutionality of the Statute of Limitations may be challenged.

Knowledge

The issue of 'knowledge' did not arise in the McColgan case as the Plaintiff, when cross-examined, said that she "knew everything". She elaborated on this further in cross-examination. In other cases of sexual abuse, however, the situation could be different. There are cases of sexual abuse where the victim has been so profoundly affected by the acts of abuse that s/he is no longer conscious that the event took place at all. In other cases the victims of such abuse may only be conscious of some of the acts of abuse.

In the case of *M (K) -v- M (H)*[9] the Supreme Court of Canada held that because the victim of incest is typically psychologically incapable of recognising that a cause of action exists until long after the abuse has ceased, the limitation period for incest does not begin to run until the victim is reasonably capable of discovering the wrongful nature of the perpetrator's acts and their injuries. This is so, whether the victim always knew about the assaults but did not know the physical and psychological problems caused by them, or whether they had no recollection of the abuse until they commenced the action because of the trauma associated with it.

A hypothetically reasonable person in the position of the Appellant, could not, and the Appellant did not, discover the wrongful nature of the Respondent's acts and her injuries, until she entered therapy. She brought the action shortly thereafter. Moreover, a presumption arose that an incest victim does not discover the nexus between her injuries and the abuse, until she commences therapy. The presumption applied in that case.

That Court also held that the relationship of parent and child is fiduciary in nature and that the Limitation Act did not apply to equitable actions such as an action for compensation for breach of fiduciary duty. The decision of the Supreme Court of Canada is in sharp distinction to the decision of the House of Lords in *Stubbings -v- Webb*[10] and others. In that case Lord Griffith stated "I have the greatest difficulty in accepting that a woman who knows that she has been raped does not know that she has suffered a significant injury." On the issue of knowledge in sexual abuse cases in this jurisdiction there is, as yet, no authority.[11] The provisions of the 1991 Act, however, do give a statutory legal framework within which this issue can be dealt with.

Unsound Mind

In cases such as the McColgan case, where the Plaintiff did have the necessary knowledge but felt unable to disclose the fact of the abuse to anyone, the legislative framework is deficient. In such cases, if proceedings are not commenced within three years of the acts of the abuse or of the age of majority, the Plaintiff has to establish that s/he was "of unsound mind" or the case is statute barred. The phrase 'of unsound mind' has no statutory definition. Nor is it a phrase with which any Medical Practitioner today is comfortable. It has been judicially defined as meaning unable to manage one's own affairs.[12]

The Supreme Court has, however, recognised the stultifying effects of sexual abuse on the victim. In *B-v-DPP*[13] the Supreme Court recognised that one of the possible effects of such abuse was that it could make it impossible for the victim to report the matter. The factors which can lead to this incapacity are many, e.g. the trauma of the abuse itself, fear, the dominion of the abuser over the abused, the inability to cope appropriately with authority, etc.

But does this incapacity which is recognised by the Supreme Court amount to the victim being 'of unsound mind'? If the victim has proceeded successfully through third level education, obtained and held down a job and formed a reasonably satisfactory personal relationship, can it be said that she is 'incapable of managing her own affairs'? The answers to these questions will have to wait for the next case of a victim of sexual abuse who institutes proceedings. He or she will have to pursue those proceedings without the benefit of any firm legal advice on this point. It is impossible to advise a client with any degree of confidence as to whether the Courts will regard him or her, as a person who was unable, or who found it too difficult to commence proceedings within three years of their ordeal, or their majority, to be a person of 'unsound mind'.

Constitution

If the Courts do not find such persons to be 'of unsound mind' is the Statute of Limitations 1957 consistent with the constitution? Certainly, if one adopts the reasoning of *Costello J. in Brady -v-Donegal County Council*,[14] it is not. The three year period can expire at a time when the victim is unable to disclose to anyone the fact of the abuse. He or she is then deprived of the right to sue. Is there any public interest which is reasonably served by such a restriction or elimination of a victim's right to sue?

Procedure

As a matter of practice, it seems that in advising clients, there are two steps which it would be prudent to take. Firstly, proceedings should be taken not only in tort but also for breach of constitutional duty and for breach of fiduciary duty. Secondly, in cases where the statute is pleaded and where the Plaintiff had the necessary knowledge but felt unable to disclose the fact of the abuse, the State should be joined as a party to the proceedings and the constitutionality of the Statute of Limitations challenged. The Statute of Limitations as presently constituted places a real and unjust obstacle in the path of many victims of sexual abuse who come to the Courts seeking justice. That obstacle can be removed in one of two ways.

The burden can be placed on the shoulders of an individual who must put him or herself through unpredictable and enormously personally draining litigation so that the position can be clarified by the Courts. Alternatively, The Oireachtás can take the initiative and pass a simple amendment to the Statute of Limitations 1957. A suggested amendment which covers sexual abuse cases is twofold:

a. The existing three year limitation period should be doubled (at least) and,
b. The categories of persons who are deemed to be 'under a disability' should be extended to include victims of sexual abuse who, because of the abuse, have found it impossible to seek legal advice.

The main argument against the legislature amending this Statute is that it would open the floodgates. The Taoiseach has indicated that there are already one thousand claims pending against the Eastern Health Board alone. It certainly seems that there may indeed be serious financial consequences of amending the 1957 Act. If it is right, however, to amend the Act, then it ought to be done regardless of the consequences. Justice is an essential in a civilised society. It is not an optional extra to be acquired if the price is right.●

1 *Brady -v- Donegal County Council*, 1989 ILRM 282 at P.288
2 Statute of Limitations Sections 11:2:b
3 Per Finlay P. *Cahill -v- Sutton* ,1980 IR 269 at P274
4 Section 48
5 *Cahill -v- Sutton*, 1980 IR 269 at P288
6 *Norris -v- The Attorney General*, 1984 IR 36 at P89
7 *Brady -v- Donegal County Council*, 1989 ILRM 282 at P.289
8 Statute of Limitations (Amendment) Act, 1991, Section 2.
9 *M (K) -v- M(H)* 96 DLR 4th 289
10 *Stubbings -v- Webb*, 1993 I AER 322
11 Per Quirke J., *Whitely -v- Minister for Defence, Ireland & the Attorney General*, unreported 10/6/97. Judge Quirke deals with some general principles concerning the application of Section 2 of the 1991 Act. That case did not involved applying those principles in a case of sexual abuse.
12 Per Barron J., *Rohan -v- Bord na Mona*, ~~1992~~ 1990 2 IR 425 at P429
13 Per Denham *J., B -v DPP* unreported judgement delivered 19th February 1997
14 *Brady -v- Donegal County Council*, 1989 ILRM 282

The Right to Silence: Rock -v- Ireland and Others

MARY ELLEN RING, Barrister

The enactment of the Criminal Justice Act, 1984 (hereinafter referred to as "the 1984 Act") was subject to an amount of public controversy, primarily due to the introduction of the right conferred on the gardaí under the Act to detain persons after arrest for an initial period of six hours, which could be extended for a further six hours (Section 4). The debate centred on the fact that for the first time, other than under the provisions of Section 30 of the Offences Against the State Act, 1939 (hereinafter referred to as "the 1939 Act"), persons suspected of a criminal offence could be detained and questioned about that offence, albeit after they had been arrested.

While the public debate was concerned with these new powers of detention, the 1984 Act introduced many other changes, for instance, in relation to offences committed while on bail and criminal trial procedures. Of particular note in terms of serious changes in trial procedures and in the protection of accused persons before the courts, was the introduction in Sections 18 and 19 of the 1984 Act, of the possibility that inferences could be drawn from an accused's failure to account for certain matters and that a court or jury could act on those inferences, even though the two sections clearly stated that an accused person could not be convicted of an offence solely on an inference.

Writing on the 1984 Act for the Incorporated Law Society and the Bar Council seminar on the Act, solicitor Bobby Eagar noted that similar changes were published in a proposed Bill contained as part of the Eleventh Report of the Criminal Law Revision Committee published in 1972, which he maintained, had been ignored by parliamentarians. Mr. Eagar submitted that a clue to the incorporation into the 1984 Act of restrictions on what is popularly known as "the right to silence" could be found in a speech made on the 20th of January 1981 by the then Commissioner of the Gardaí, Mr. Patrick McLaughlin speaking at the Kings Inns. Mr. Eagar noted that having spoken about the increase in serious crime and criticisms being voiced about the ineffectiveness of the Gardaí to cope with this increase, the then Commissioner is quoted as saying

> "The gardaí are expected to try their best to detect crime, to try their best to find out what happened. If a suspect seems to know more about what happened on a particular occasion than anyone else, and he is told he need not say anything unless he wishes to, it is daft to say that we are trying our best to find out what happened. It would help if the suspect had to give an explanation, if not to the Gardaí, then to the Court."

The concern raised by the introduction of new powers to the gardaí and provisions that were seen to encroach on the right to silence were dealt with by the delayed introduction of certain sections of the Act until the introduction of a Garda Complaints Tribunal. The purpose of such a Tribunal was to allow for a vehicle to monitor abuses that might arise during the exercise of these new powers and thereby reassure the public.

Further, some sections of the Act, including Section 18 and 19, were to have a limited life of four years initially, which could be extended by the Dáil. It is interesting to note that while there was public discussion about the initial introduction of the provisions of the 1984 Act, by the time Sections 18 and 19 came into effect on the 1st of July 1987 (S.I.150/87) there was no public debate about the changes that were due to follow. The sections were further renewed in 1991 and again there was little public note taken about these changes.

As with many statutes, provision is made for certain steps to be taken but the practical reality often is that such provision is seldom relied upon. So too with the powers under Sections 18 and 19 of the 1984 Act.

It is difficult to say how frequently these sections have featured in criminal trials but suffice to say the powers have not been overused since their introduction. Perhaps this is why it was only in 1995 that the High Court was called upon to consider the constitutionality of Sections 18 and 19.

In 1995 Paul Rock sought declaratory relief from the High Court on the ground that Sections 18 and 19 of the 1984 Act were inconsistent with the provision of Bunreacht na hEireann and accordingly unconstitutional.

He had been charged in relation to an alleged offence in May 1994 of being in possession of forged banknotes, knowing same to have been forged, contrary to Section 8 of the Forgery Act, 1913. The circumstance of the charge were that it was alleged that Mr. Rock was arrested in a cubicle of a public toilet in a Dublin hotel and on the floor next to the accused was a bag in which there was a quantity of banknotes which it was alleged were forged.

The facts of the prosecution revealed that having been arrested Mr. Rock was detained under the provisions of Section 4 of the 1984 Act, and while detained the

provisions of Section 18 and 19 of the 1984 Act were explained to him in ordinary language. It was further alleged that Mr. Rock declined to reply to questions put to him during interrogation. In due course Mr. Rock applied and obtained leave to apply for the declarations sought and the matter came on for hearing on the 9th and 10th of November 1995 before Murphy, J. Judgement was given on the 10th of November 1995.

In his judgement Murphy, J. accepted that the right of a suspect to remain silent was protected by Article 38.1 of the Constitution. However the court further held that the right was not an unlimited one and went on to hold that the sections were not excessive intrusions on the rights of an accused and were therefore not invalid having regard to the provisions of the Constitution.

In the course of his judgement Murphy, J. referred to the case of *Heaney -v- Ireland* [1994] 3 IR 593. This decision of Costello J. upheld the constitutionality of Section 52 of the Offences Against the State Act 1939, which makes failure to account for one's movements when requested so to do under the Act an offence. (An appeal in the Heaney case was subsequently dismissed by the Supreme Court. *Heaney -v- Ireland* [1996] 1 IR 580.)

Mr. Rock appealed the High Court's decision and judgement in the appeal was delivered on the 19th of November 1997 by the Chief Justice. The Supreme Court decision distinguishes between the provisions of the 1939 Act and the 1984 Act by confirming that the 1984 Act is a piece of ordinary criminal legislation in contrast to the extraordinary nature of the 1939 legislation. Further the nature of the consequences which flow from the provisions of Section 52 of the 1939 Act (an offence which can be prosecuted) and Sections 18 and 19 of the 1984 Act (inferences which can be drawn at a trial) are also distinguished by the Supreme Court.

The Supreme Court looked at the terms of the impugned sections and in particular the fact that the sections do not interfere with the burden of proof which rests with the prosecution in a criminal trial. Further it considered the fact that the trial court must act in accordance with an accused's entitlement to a fair trial in deciding what inferences may be properly drawn from an accused's failure or refusal to account under the sections. The Supreme Court in light of the above was satisfied that Sections 18 and 19 of the 1984 Act did not interfere with an accused person's constitutional right to the presumption of innocence.

As to the argument that the sections constituted an attack on an accused person's right to silence, which it was submitted on behalf of Mr. Rock as a right or privilege guaranteed both at common law and under the provisions of the Constitution, the Supreme Court considered whether the restrictions placed on the right to silence were any greater than is necessary to enable the State to fulfil its constitutional obligations.

Applying the well established test of proportionality the Supreme Court found that, in enacting Sections 18 and 19 of the 1984 Act,

> "...the legislature was seeking to balance the individual's right to avoid self incrimination with the right and duty of the State to defend and protect the life, person and property of all its citizens..."

The Supreme Court went on to confirm the two limiting factors in the provisions under examination i.e.(1) that a person cannot be convicted solely on the basis of an inference and (2) that an adverse inference can only be drawn where a court deems it proper so to do. It is clear from the judgement that the Supreme Court considers these factors as safeguards which protect the rights of an accused which might otherwise be reduced in light of Sections 18 and 19 of the 1984 Act. The appeal was accordingly dismissed.

Sections 18 and 19 of the 1984 Act are clearly changes in criminal procedure. The burden of proof has shifted somewhat from the prosecution and an onus has been placed on an accused person to account for his/her presence at a particular place or other matters in certain given circumstances. What is less clear is how often these changes have been relied on in the prosecution of accused persons in the State. If Sections 18 and 19 have not been used as often as they might then this must raise the question of the need for such powers. Perhaps the time has come for a new look at criminal procedures and garda powers in light of evidence which may show a limited use of existing powers coupled with a welcome decrease in the crime rate.

We have seen over the years a continuing response to concerns voiced by various senior gardaí about the perceived ineffectiveness of the gardaí, including the remarks of the former Garda Commissioner Mr. McLoughlin in 1981, to be the introduction of greater powers of arrest and detention for the gardaí and more severe custodial options to the courts.

What we are badly lacking is confirmed research that these new powers have had an effect on crime, or whether the decrease we are now being reassured is taking place, would have occurred in any event. Statutory changes may be constitutional but that does not mean that they are required or effective.

Section 18

(1) Where

(a) a person is arrested without warrant by a member of the Garda Siochana, and there is -

(i) on his person, or

(ii) in or on his clothing or footwear, or

(iii) otherwise in his possession,

or

(iv) in any place in which he is at the time of his arrest, any object, substance or mark,

or there is any mark on any such object, and the member reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of the offence in respect of which he was arrested and

(b) the member informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark, and

(c) the person fails or refuses to do so, then if, in any proceedings against the person for the offence, evidence of the said matters is given, the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or, subject to the judge's direction, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any other evidence in relation to which the failure or refusal is material, but a person shall not be convicted of an offence solely on an inference drawn from such failure or refusal.

(2) References in subsection (1) to evidence shall, in relation to the preliminary examination of a charge, be taken to include a statement of the evidence to be given by a witness at the trial.

(3) Subsection (1) shall apply to the condition of clothing o footwear as it applies to a substance or mark thereon.

(4) Subsection (1) shall not have effect unless the accused was told in ordinary language by the member of the Garda Siochana when making the request mentioned in subsection (1) (b) what the effect of the failure or refusal might be.

(5) Nothing in this section shall be taken to preclude the drawing of any inference from a failure or refusal to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section.

(6) This section shall not apply in relation to a failure or refusal if the failure or refusal occurred

before the commencement of this section.

Section 19

(1) Where -

(a) a person arrested without warrant by a member of the Garda Siochana was found by him at a particular place at or about the time the offence in respect of which he was arrested is alleged to have been committed, and

(b) the member reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence, and

(c) the member informs the person that he so believes, and requests him to account for such presence, and

(d) the person fails or refuses to do so, then if, in any proceedings against the person for the offence, evidence of the said matters is given, the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure or refusal is material, but a person shall not be convicted of an offence solely on an inference drawn from such failure or refusal.

(2) References in subsection (1) to evidence shall, in relation to the preliminary examination of a charge, be taken to include a statement of the evidence to be given by a witness at the trial.

(3) Subsection (1) shall not have effect unless the accused was told in ordinary language by the member of the Garda Siochana when making the request mentioned in subsection (1)(c) what the effect of the failure or refusal might be.

(4) Nothing in this section shall be taken to preclude the drawing of any inference from the failure or refusal of a person to account for his presence which could properly be drawn apart from this section.

(5) This section shall not apply in relation to a failure or refusal if the failure or refusal occurred before the commencement of this section. ●

Mr Justice Brian Walsh - an appreciation

The Contributions of Mr. Justice Brain Walsh to the development of Irish Constitutional and Common Law, and to the global understanding of fundamental Human Rights, have inevitably and properly been widely praised since his recent sad death.

The bare facts of his legal career are staggering - junior counsel for 13 years; senior counsel for 5 years; Judge of the High Court for two years; Judge of the Supreme Court for 28 years; Chairman of the Law Reform Commission for 10 years and Judge of the European Court of Human Rights for 18 years up to his death in his eightieth year. This was all in addition to much lecturing and writing on law and the holding of high office for a sustained period in the International Association of Judges.

To none of these activities did he bring anything less than a total dedication of his energy, a striking intellectual power and an overriding passion for justice.

There can be no doubt that further use and examination of his legal legacy by judges, practitioners, academics and legal historians must unavoidably lead to an even greater appreciation, if that is possible, of his stature.

In the short time which has elapsed since his sudden death, the most poignant sense of loss is not so much of a great jurist, whose monuments after all remain with us, but rather of a splendid colleague, a warm and loyal friend and I would believe an exemplary judge.

Brian Walsh's period as a trial judge was probably before the time of many now practising at the Bar. He was in fact a superb one, patient and courteous and detached, never stooping to engage in conflict, yet alert and accurate in defining it's relevant ingredients.

The major part of his judicial career was his 28 years in the Supreme Court. I had experience of him there as an advocate and even more closely and more regularly, later studied his approach as a colleague.

He exemplified, I believe, the perfect approach by a judge to the oral hearing of a case by the adversarial system. Every proposition major or minor which was advanced was tested by him by dialogue. Questions were calm, quite and polite, but they were searching and all were asked for the purpose of testing the real strength of an argument.

Brian had a deep concern for the dignity of the courts though he was never unduly concerned about his own. He was deeply conscious at all times of the great importance of the right to access by all citizens to the courts. He would show immense patience in dealing with what were often in reality obsessive lay litigants, explaining his attitude by saying that it was much preferable that they should occupy the time of the court with even an unreasonable grievance than that they should air it in the streets.

I was fortunate in enjoying the friendship of Brian Walsh for over 50 years. I was even more fortunate in that for the first five years during which I regularly sat in the Supreme Court from 1985 to 1990, I had him as a colleague and derived a great advantage from his unobtrusive guidance and wisdom, not only on issues of law but also on problems in the administration of the court.

His company was a constant tonic, and a sharp intelligence allied to a largely concealed sense of humour lightened for me the burden of many a day.

Above all else, the lasting impression one has of the life and career of Brain Walsh must in one sense also be his greatest contribution to Irish Law, and this is his single minded devotion to justice.

May the Good Lord, in whom he so firmly believed, receive him into paradise.

Former Chief Justice, Mr. Justice Thomas Finlay.

KING'S INNS NEWS

"Good Morning. I would like to introduce Clare Moran and Paul Moloney from the Law Library IT Staff, who will be giving tutorials on electronic legal research, using the Law Library database."

With these words, student education in the King's Inns entered the 21st century on 28th February 1998.

It was the culmination of a project that commenced in mid-1997 when the Under Treasurer was given the green light by the Standing Committee to set up a sixteen workstation facility for student training. No one could have foreseen that problems that lay ahead. First, a suitable room had to be found. Then, what should have been the simple task of redecoration became a conservationist's nightmare when an entire scheme of mid-19th century wallpaper was uncovered by accident. The technical difficulties of using the Internet to provide a dedicated connection to the Law Library had to be overcome - the installation of a fibre-optic cable proving to be prohibitively expensive.

In an institution where the main stress experienced is with approaching examinations, the weeks prior to the first IT tutorials were punctuated with high levels of anxiety.

Bug after bug was discovered and patiently eliminated by Greg Kennedy, Helen Bradley and the Moss Technology experts. On the morning of the first tutorial, staff experienced the same feelings as students on the day of the first examination - would it work? Was something overlooked? Would another bug be discovered? In the end everything went fairly smoothly and a new skill was added to the aspiring barrister's repertoire.

This now means that King's Inns graduates joining the Law Library will be familiar with the systems there, and be capable of performing research tasks for their masters using the terminals in the library or in the new legal research centre in the Distillery Building.

There will be many benefits for the practising Bar arising from the use of electronic legal research, such as speed of access, breadth of topics, thoroughness of research and the ability to perform preparatory tasks at remote locations. The one major benefit however, will be a reduction in damage to frequently used texts and bound reports from copying. Currently the King's Inns library has a full time conservationist repairing such damage.

Many people deserve credit for this initiative; the Under Treasurer for her foresight in identifying the need for such a facility fir students, the library staff, especially Jonathan Armstrong and Helen Bradley for identifying and procuring the CD Rom databases, the Law Library IT supremo Greg, for his patience and skill in getting the link to work, Clare and Paul for their effective presentation of the search procedures in tutorials, Cian Ferriter for his early encouragement and Adele Murphy for her advice. To all many thanks.

Richard J. Tuite, Director of Education

Legal Materials on the Internet: Part 2

The Online section in the last Bar Review chronicled the Irish, English and European materials available on the Internet. This week, Online looks at the emergence of Public Legal Information Institutes and surveys the substantial amounts of US, Canadian and Australian legal materials on the Internet.

CIAN FERRITER, Special Projects Manager, Bar Council

Finding legal materials on the Internet can be a hit-and-miss process; there is no one overall index to the materials on the Internet; rather a set of search engines and indexes which use different methods to attempt to keep track of materials as they appear on the Internet. Searching the Internet for a legal documents is thus akin to searching for a book in a library that has a dozen separate, unrelated indexes, with some books not indexed at all.

Attempts have been made in the international legal information community to impose some structure on this chaos. The Australasian Legal Information Institute (AustLII) have pioneered free access via the Internet to public legal information. The AustLII was set up jointly in 1995 by the University of New South Wales and the University of Technology, Sydney with Australian state funding. It runs probably the single best legal research resource site on the Web with well-maintained indexes to legal Internet sites around the world in addition to the full text of Australian legislation and case law. Their site contains, *inter alia,* the full text of all Australian High Court decisions since 1947. Their service is a good example of the effectiveness of state and third level partnership in providing public information to citizens for free.

The founders of the AustLII have set up an International Association of Public Legal Information Institutes which, at present, includes the AustLII, the Centre de Recherche en Droit Public at the University of Montreal (which publishes Canadian case law on the Net), the Lovdata Foundation Norway (which publishes extensive amounts of Norwegian legal information) and Cornell's Legal Information Institute (responsible for a large amount of US legal information which is posted up). They define a Public Legal Information Institute as "an organisation that publishes via the Internet substantial quantities of legal information originating from more than one source, provides non-profit public access to that information and does not support monopoly provision of that information."

They hope in time to build up a global network of Public Legal Information Institutes which will provide those working in the law, and citizens, free and speedy access to primary legal materials from around the world.

Outside of these Public Legal Information Institutes, legal materials are published on the Internet by a rainbow of universities, publishing firms, governments agencies, court services, law associations, private law firms and individuals. The eclecticism of the sources is matched by the difficulty of keeping track of exactly what is on the Internet at anyone time and where the materials are located. The best starting points are the Internet search engines which index materials on the World Wide Web and match your query against their indexes. The following are amongst the main search engines:

alta vista	*alttavista.digital.com*
yahoo	*www.yahoo.com*
excite	*www.excite.com*
infoseek	*www.infoseek.com*

However, be careful of these search engines; recent surveys have shown that any given search engine may only index as little as 20-30% of available Web pages at any one time, so do not treat the results of a keyword search on any one search engine as exhaustive.

There are some specialist legal search

engines such as:

Hieros Gamos *www.hg.org*
FindLaw *www.findlaw.com*
LawCrawler *www.lawcrawler.com*
Legal Journal Extra *www.ljx.com*

These tend to have a US bias but are nonetheless useful starting points. The wealth of US, Canadian and Australian primary legal materials on the Internet gives an appetising foretaste of how valuable the Internet may become to Irish practitioners once Irish legal materials are available on it.

Here follows an attempt to survey the principal sources of publicly-accessible US, Canadian and Australian legal materials on the Internet. Given the nature of the Internet it does not purport to be an exhaustive trawl of all relevant sites.

US Materials

Unsurprisingly, there is a large amount of primary US legal materials on the Internet.

Good general Law Indexes include the Hieros Gamos service at *www.hg.org*, the LawCrawler service at *www.lawcrawler.com/index.html*, the FindLaw index *www.findlaw.com* and the Legal Journal Extra at *www.ljextra.com.* Cornell University has an excellent legal resource site at *www.law.cornell.edu* .

There is a good, succinct index to US legal materials on the Internet at the New York Unified Court site: *ourworld.compuserve.com/homepages/w_c_d/internet.htm.*

The full text of US Supreme Court judgments are available free of charge at a number of sites. The service is very sophisticated; the judgments can be searched by key word, there is hypertext-linking within the judgments (enabling the user to jump to cases referred to in a judgment) and there are lists of subsequent citation of the judgment. The case law database is available at the following sites: *www.findlaw.com/casecode/supreme.htm* (full text of cases from 1893 to present)*www .fedworld.gov/supcourt/index.htm* (full text of cases from 1937 to 1975) *www.law.cornell.edu/supct/* (historic cases from 1801 to 1989)

Federal Circuit Court of Appeals are also available in full-text, in most cases from 1995. See *www.law.cornell.edu/opinions.*

The Federal Code is available in full on the Internet at*www.law.cornell.edu:80/uscode/*

Most states have an official web site hosted by the courts service, many of which contain the text of court judgments and state legislation. See e.g. for New York, *assembly.state.ny.us/ALIS/laws.html* (legislation) and *www.law.cornell.edu/ny/ctap* (case law).

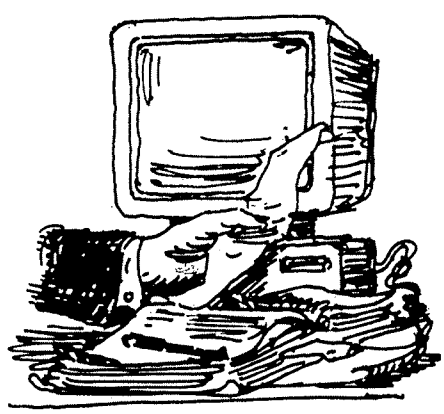
A number of legal publishers provide document delivery services. The US giant, West Publishing, offer a service called Westdoc, whereby they will e-mail/post any judgment from their Westlaw database for a flat fee of $8 regardless of the size of the judgment. Payment is by credit card. The service is available at *www.westdoc.com.*

There are a large number of sites that collate legal materials by subject matter. These will be reviewed in a later article.

Canadian Materials

Canada is similarly well served with legal materials on the Internet. A statutory order ("Reproduction of Federal Law Order") was passed in December 1996 which provided that federal statutes and regulations and the decisions of courts and tribunals could be copied without the usual restrictions on Crown copyrighted materials. This facilitated Internet publication of such materials on a free-access basis.

The Access to Justice Network is the best starting point - see *www.acjnet.org/resource/prime.html.* This site contains links to the full text of Canadian Federal, State legislation and case law, as well as parliamentary proceedings, bills in progress through the legislature etc.



The University of Montreal hosts the full text of Canadian Supreme Court judgments (in both English and French) from 1989 at *www.droit.umontreal.ca/doc/csc-scc/en/index.html* along with links to other legal resources, including a "Virtual Canadian Law Library" *(www.droit.umontreal.ca/doc/biblio/en/bv).*

Australian Materials

As mentioned above, the key site for Australian legal materials is that of the Australasian Legal Information Institute at *www.austlii.edu.com.* This site contains links to all Australian legal materials on the Internet.

It includes a searchable full text database of all High Court decisions from 1987; the full text of decisions of the Federal Court of Appeals from 1977 and selected decisions from the courts of the seven states and territories. The High Court decisions are available within 24 hours of judgment being handed down.

There is also access to the full text of consolidated and unconsolidated Australian federal legislation.

The site also has a very comprehensive index of other Internet legal resource sites on a country-by-country basis.

Incidentally, while the full text of New Zealand legislation from 1982 is available on the Internet (at *www.knowledgebasket.co.nz/gpprint/acts/reprint/text)*, there is no New Zealand case law yet available on the Internet.

Conclusion

Practitioners undertaking comparative research on Irish law would be well-advised to use the Internet as a cost-free starting point. Availing of the databases mentioned above can avoid the time and expense of trying to procure overseas materials through the more traditional routes of inter-library loans and document delivery services. ●

Legal

The Bar Review
Volume 3, Issue 5. March 1998. ISSN 1339-3426

Update

A directory of legislation, articles and written judgments received from 26th January 1998 to 20th February 1998.
Judgment information compiled by the researchers in the Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts, Dublin 7.

Administrative

Barry v. Medical Council
Supreme Court: Hamilton C.J., O'Flaherty J., Denham J., **Barrington J.**, Keane J.
16/12/1997

Judicial review; fair procedures; natural justice; alleged professional misconduct; conduct of internal inquiry by Fitness to Practice Committee; whether committee had a discretion to hold inquiry in private; whether private inquiry in violation of human rights; whether inquiry in violation of constitutional fair procedures; Art. 6.1 ECHR; Art. 40.3 of the Constitution; s.45 Medical Practitioners Act, 1978
Held: Committee had a discretion to hold inquiry in private; no violation of constitutional rights

Carrigaline Community Television Broadcasting Company v. The Minister for Transport

High Court: **Carney J.**
23/01/1998

Judicial review; ultra vires decision; rebroadcasting service; application for licence; prior judgment ordered consideration of application in accordance with law; Minister refused application but invited resubmission under new scheme; whether decision made on merits of application; whether grounds for decision related to application; whether decision deferred or avoided rather than made
Held: Refusal not on merits; Minister did not discharge obligation imposed by court; application to be reconsidered

Farrell v. Ahern High Court: **Geoghegan J.**
19/12/1997

Natural justice; army inquiry procedures; alleged absence without leave; court of inquiry held; applicant not notified although in communication with army; whether rules of procedure followed; whether rules of natural justice complied with; whether membership of army estopped assertion of rights
Held: Relief granted; given consequences of inquiry and conduct of applicant lack of notification constituted breach of natural justice

Animals

Article
Wildlife legislation the rocky road to special areas of conservation surveyed.
Grist, Berna
1997 IPELJ 87

Arbitration

Doyle v. Irish National Insurance Company Plc.
High Court: **Kelly J.**
30/01/1998

Stay; application; arbitration clause; validity; jurisdiction; whether arbitration clause contained in a contract is independent of the main contract; whether clause survives if contract is rescinded due to non-disclosure of material fact; whether arbitrator has jurisdiction to rule upon existence of contract under which appointed; whether terms of clause wide enough to cover dispute; s.5 Arbitration Act, 1980
Held: Arbitration clause survived independently of the original contract and was wide enough to cover dispute

Champerty

O'Keefe v. Scales
Supreme Court: Barrington J., Murphy J., **Lynch J.**
11/12/1997

Champerty; maintenance; defendant seeking dismissal of action against her on grounds proceedings champertous; impecunious plaintiffs in debt to their solicitor from previous proceedings; whether consequently plaintiffs' solicitor had unlawful interest in the outcome of the proceedings; whether valid grounds for staying action in advance of plenary trial
Held: No grounds for dismissing action in advance of plenary trial

Commercial

Library Acquisition
Commercial Law 2nd ed.
Dublin Butterworths 1997
Forde, Michael
N250.C5

Competition

Hinde Livestock Exports Ltd. v. Pandoro Ltd.
Supreme Court: **O'Flaherty J.**, Barrington J., **Barron J.***
* Dissenting
18/12/1997

Interlocutory injunction; dominance; quantitative restrictions; discontinuation of transport of live herds to Europe; injunction sought to restrain defendant from discontinuing service; whether fair question raised that defendant in breach of community obligations; whether defendant in a dominant position;

whether abuse of dominance; whether restrictions on exports applicable to private undertakings; balance of convenience; damages; Arts. 86 & 34 Treaty of Rome
Held: Injunction granted; fair question raised as to dominance

Company

Article
Registration of company charges over foreign property–who needs s.99(5) of the Companies act 1963?
Nolan, Sean
1995 ILT 9

Constitutional

Donnelly v. Ireland
Supreme Court: **Hamilton C.J.,*** O'Flaherty J., Denham J., Barrington J., Murphy J.
22/01/1998
(*Decision of the Court delivered by Hamilton C.J.)

Legislation; challenge; validity; right to trial in due course of law; evidence; whether giving of evidence via live television link in sexual offence cases constitutional; whether giving of such evidence infringes right of confrontation and cross-examination; whether breach of constitutional and natural justice and fair procedures; whether legislation discriminatory; ss. 12, 13 (1) & (2) and 18 Criminal Evidence Act, 1992; Art. 38.1 & 34.4.4 of the Constitution
Held: Legislation not repugnant to Constitution

Articles
The freedom of information act in context
Meehan, David
1997 ILT 231

U.S. Supreme Court rules no constitutional right to physician assisted suicide
Carolan, Bruce
(1997) 3 MLJI 43

Consumer

Article
The European ombudsman
1997 IPELJ 101

Contract

Mackey v. Wilde
Supreme Court: Hamilton C.J., Barrington J., **Barron J.**
17/12/1997

Agreement; existence; part-performance; fishing river licences; restriction of issuing annual licences and day tickets; whether agreement concluded between parties as to number of licences; whether agreement to enter into an agreement at a future date; whether part performance of agreement; doctrine of part performance discussed
Held: No concluded agreement; no acts on part of plaintiff to show intention to perform contract

Hearn v. Collins
High Court: **O'Sullivan J.**
03/02/1998

Agreement; fundamental breach of contract; repudiation; claim for management fees; whether original management agreement extended; whether agreement dependent upon conditions; time of operation of agreement; whether fundamental breach of obligations under contract; whether conduct of plaintiff amounted to fundamental breach; whether agreement repudiated; whether repudiation of agreement accepted by defendant
Held: Plaintiff's claims dismissed

Cotter v. Brewster
High Court: **O'Donovan J.**
18/12/1997

Contract; breach; plaintiff agreed to sell horse to defendant; whether contract subject to particular terms relating to lameness of horse, its suitability as an event horse and the furnishing by plaintiff of certificate of fitness from veterinary surgeon; whether plaintiff in breach of such terms
Held: defendant's appeal dismissed.

Copyright, Designs & Patents

DSG Retail Ltd. v. PC World Ltd.
High Court: **Laffoy J.**
13/01/1998

Passing off; computer businesses; interlocutory order sought restraining use of name; whether serious issue to be tried; whether likelihood of confusion given different scale of businesses and style of trading; whether goodwill established associated with name; whether inference of exclusive association could be drawn from volume of sales and advertising; whether name entirely descriptive of business; whether if relief refused damages adequate compensation for loss of goodwill; whether order would result in greater injustice to the defendant given disparity in size
Held: Justice does not require the relief be granted

Articles
The tort of passing off Part 1 - developments and current tensions
Healy, John
1997 ILT 196

Copyright and the Internet
McAleese, Don
1997 IIPR 2

Public lending right-authors' coin or librarians' burden?
Quinn, Anthony P
1997 IIPR 16

The European database directive-an example to the rest of the world?
Scales, Linda
1997 IIPR 21

Trade marks in the Internet
Cullen, David
1997 IIPR 9

Criminal

Ward v. Government of Ireland
Supreme Court: Keane J., **Lynch J., Barron J.**
18/12/1997

Judicial review; application for leave to apply; decision of DPP to prosecute under s.47 of the Offences Against the State Act, 1939; whether decision of DPP amenable to judicial review; whether acting in quasi-judicial role or administrative
Held: Not amenable to judicial review; carrying out administrative function

D.P.P. v. Felloni
High Court: **Shanley J.**
18/12/1997

Legal aid; convictions for drug trafficking; restraint of assets order; application to vary order to access money for legal expenses; free legal aid certificate obtained to defend application by D.P.P. for confiscation of assets; certificate only valid for criminal proceedings; whether confiscation proceedings criminal; whether certificate valid; whether failure to fully disclose assets deliberate
Held: Application refused; under s.3 Courts of Justice Act, 1994 until confiscation order satisfied criminal offence proceedings not concluded; if otherwise, civil legal aid still available; no risk of prejudice to applicants

S.F. v. D.P.P.
High Court: **Geoghegan J.**
17/12/1997

Due process; reasonable expedition; alleged sexual offences; order sought prohibiting prosecution; delay between commission and reporting of alleged offences; whether delay prejudiced Constitutional right to fair trial; whether adverse pre-trial publicity constituted prejudice; whether large number of charges prejudiced preparation of defence; whether delay attributable to applicant; whether delay due to applicant's dominion over victims
Held: Order granted concerning the charges relating to one victim; otherwise delays due to applicant's dominion; proper direction to jury should counteract adverse publicity; number of charges no ground for order; specificity impossible given nature of charges

Lynch v. D.P.P.
High Court: **Morris J.**
16/12/1997

Judicial review; delay and prejudice; applicant charged with offences 6 months after pleading guilty to commission of other offences; whether respondent acted so as to deprive applicant of opportunity to have all offences dealt with together in order to place him at a disadvantage; whether applicant suffered specific prejudice as a result of respondent's delay; whether delay was such as to demonstrate that prejudice must, as a matter of necessity, have arisen
Held: Relief refused

Fitzpatrick v. D.P.P.
High Court: **McCracken J.**
05/12/1997

Judicial review; delay; fair trial; expert evidence; applicant charged with rape and indecent assault; offences allegedly committed on three separate occasions 13 and 16 years previously; alleged abuse not reported at the time; unavailability of vital witnesses; whether by reason of delay there was real risk applicant would not obtain fair trial; special factors to be considered where there has been delay in cases relating to allegations of sexual abuse of children; duty of expert witness to give evidence in the context of surrounding facts.
Held: Relief granted; serious risk that applicant would not obtain fair trial because of delay.

D.P.P. v. Early
High Court: **McGuinness J.** (ex tempore)
02/12/1997

Jurisdiction; statutory interpretation; drugs offence charges; order sought quashing discharge and compelling charging of suspects; rearrest of suspects under s.4, Criminal Justice (Drug Trafficking) Act, 1996; whether s.4 permits rearrest, for the purpose of immediate charge, in the absence of new information or a court warrant; District Judge thought not and discharged suspects; whether interpretation erroneous; whether error within jurisdiction; whether District Judge could determine legality of detention; whether orders should be granted given State's conduct of proceedings
Held: S.4 misinterpreted; error outside basic jurisdiction of District Court; validity of detention matter for High Court; orders should not be refused as important point at issue; order of certiorari granted

Damages

Murphy v. DeBraam
Supreme Court: O'Flaherty J., Keane J., **Barron J.**
12/12/1997

Damages; assessment; absolute liability; aircraft collision; defendant absolutely liable in negligently flying aircraft; whether damages awarded excessive; whether defendant's aircraft sabotaged; defendant unaware of absolute liability; issue not mentioned in pleadings; s.21 Air Navigation and Transport Act, 1936
Held: Damages reduced; injustice to defendant in not amending pleadings

Library Acquisition
De Wilde, Robin
Professional Negligence Bar Association
Facts and figures tables for the calculation of damages 1997 #
compiled and edited by Members of the Professional Negligence Bar Association;
general editor Robin de Wilde
London S & M 1997
N37.1

Employment

Telecom Eireann v. O'Grady
Supreme Court: **Hamilton C.J., Keane J.,** Barron J.
04/02/1998

Equality; sex discrimination; adoptive leave; maternity leave; interpretation of EC directives; differentiation between adoptive and maternity leave; adoptive leave scheme created by employer for women only; employer refused male employee adoptive leave; whether male adoptive parent treated less favourably than female adoptive parent; whether legislation gives effect to principle of equality in Directive; derogation from Directive permissible with regard to "pregnancy or childbirth"; whether this derogation extends to "adoption"; approach to be taken to interpretation of Directives; s.16 Employment Equality Act, 1977; Directive 76/207/EEC
Held: Male adoptive parent discriminated against

O'Leary v. Minister for Transport, Energy and Communications
Supreme Court: Hamilton C.J., Keane J., **Murphy J.**
03/02/1998

Equal pay; sex discrimination; communication assistants; radio operators; decision of Labour Court that claimants and comparators not engaged in "like work"; whether Labour Court failed to give adequate reasons for decision; whether appeal on facts or on law;
Held: Appeal dismissed

Environmental

Library Acquisition
Environmental law in property transactions
Waite, Andrew & Jewell, Tim
London Butterworths 1997
N96.4.C5

Article
Toxic torts now a reality in Ireland
Lennox, Susan V
1997 ILT 236

Wildlife legislation the rocky road to special areas of conservation surveyed.
Grist, Berna
1997 IPELJ 87

European

Articles
The Euro-Mediterranean partnership making the same mistakes again?
McMahon, Joseph A
1997 IJEL 203

SFEI - a missed opportunity?
Struys, Michel L
1997 IJEL 181

The European ombudsman
1997 IPELJ 101

Family

Article
Judicial discretion in family law
Martin, Frank
1997 ILT 226

Information Technology

Articles
Copyright and the Internet
McAleese, Don
1997 IIPR 2

Trade marks in the Internet
Cullen, David
1997 IIPR 9

International

Article
Par in parem non habet imperium; the problem of foreign sovereign immunity- an Irish perspective
Anderson, Jack
1997 ILT 200

Judicial Review

Article
Judicial review of planning decisions subsection (3B) - Part 1
Macken, James
1997(6) P& P 5

Landlord and Tenant

Power v. Limerick Corporation
Supreme Court: Lynch J., Barron J., **Murphy J.**
04/12/1997
Tenancy; eviction order affirmed on appeal; alleged failure by applicant's solicitors to notify his wife of appeal date; whether fact effective representation not made at appeal due to lack of notice ground for quashing order; whether alleged failure by applicant's solicitors to appeal on his behalf breached applicant's constitutional rights as a tenant
Held: Appeal dismissed

Legal Profession

McMullen v. Carty
Supreme Court: O'Flaherty J., Barrington J., **Lynch J.**
27/01/1998

Professional negligence; breach of duty of care; privilege of confidentiality; action arising out of nuisance; action settled by consent; whether solicitor negligent in settlement of proceedings; whether unjust to preclude solicitor from making his case by the rule of confidentiality; whether legal professional privilege breached by barrister giving evidence; whether client waived privilege of confidentiality by settling dispute
Held: Negligence not found; privilege of confidentiality waived by client

Local Government

McDonagh v. Cork County Council
High Court: **Kinlen J.**
12/01/1998
Judicial review; housing authority; housing application; representation that applicants would be allowed a specific house; whether applicants entitled to housing; whether applicants entitled to specific house
Held: Representation did not entitle applicants to a particular house

Medical

Article
Time to clone around–human cloning a brave new world for law, medicine and ethics
3 (1997) Medico-legal journal of Ireland 89
Sheikh, Asim

The person behind the choices anthropological assumptions in bioethics debate
Smith, David
(1997) 3 MLJI 57
U.S. Supreme Court rules no constitutional right to physician assisted suicide.
Carolan, Bruce
(1997) 3 MLJI 43

Mental Health

Article
Issues for the new mental health act
Keys, Mary
(1997) 3 MLJI 97

Negligence

Fenlon v. Minister for Defence
High Court: **Kelly J.**
19/01/1998

Personal injury; causation; plaintiff claimed hearing loss resulting from army training in his youth; negligence conceded; which hearing test applicable whether hearing impairment caused by noise or age; whether action opportunistic
Held: Plaintiff's claim dismissed

Hanahoe v. Hussey
High Court: **Kinlen J.**
14/11/1997

Duty of care; right to privacy; suspected money laundering; gardaí investigating solicitors' clients decided investigation

required access to solicitors' files without alerting clients; search warrant obtained under s.64 Criminal Justice Act, 1994; search leaked to media; subsequent adverse publicity; whether gardaí responsible for leak; whether leak constituted negligence; s.64 warrant serious invasion of Constitutional rights; whether District Judge properly satisfied warrant appropriate; whether misfeasance by gardaí; whether duty of secrecy owed to public or State; whether if gardaí negligent warrant invalid and search unlawful; whether gardaí immune from liability; whether respondents vicariously liable
Held: Warrant properly issued; garda leak outrage to legal profession and administration of justice; negligence and harm occurred; damages awarded

Bolger v. Governor of Mountjoy Prison
High Court: **O'Donovan J.**
12/11/1997

Personal injuries; duty of care; plaintiff suffered burns when fellow-prisoner threw bucket of scalding water on him; whether defendants liable in damages to plaintiff; whether failure to accede to plaintiff's request to be put in protective custody; whether, in the light of prisoner's previous violent behaviour, defendant's duty of care for the safety of other prisoners in its custody required the segregation of such prisoner and the denial to him of access to buckets of hot water.
Held: claim dismissed; incident not attributable to any want of reasonable care on the part of defendant for the safety of plaintiff.

Fitzpatrick v. Midland Health Board
High Court: **Johnson J.**
01/05/1997

Medical treatment; infected finger; initial decision not to prescribe antibiotics; delay in analysis of swab and prescription of antibiotics; subsequent amputation; whether practice negligent; whether delay unreasonable; whether outcome would have been affected by earlier administration of antibiotics
Held: Practice not negligent as supported by other doctor; delay unreasonable especially as antibiotics not initially prescribed; damages awarded

Library Acquisition
De Wilde, Robin
Professional Negligence Bar Association
Facts and figures tables for the calculation of damages 1997 # compiled and edited by Members of the Professional Negligence Bar Association;
general editor Robin de Wilde
London S & M 1997 N37.1

Planning

Hynes v. An Bord Pleanala
High Court: **Laffoy J.**
10/12/1997

Judicial review; application for leave to apply; whether grounds relating to validity of planning application and conduct of respondent in processing and adjudicating upon appeal disclosed 'substantial grounds' for contention that decision of respondent was invalid or ought to be quashed; stage at which applicant is entitled to pursue challenge by way of judicial review on constitutional grounds; s.82, Local Government (Planning and Development) Act, 1963 as amended by s.19, Local Government (Planning and Development) Act, 1992.
Held: Leave granted in part; application for leave to challenge constitutionality of legislation should not be left over until substantive application but should be determined at leave stage

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Gallagher v. Stanley
Supreme Court: **O'Flaherty J., Lynch J., Barron J.,**
18/12/1997
Discovery; privilege; statements; plaintiff seriously injured in birth; alleged negligence and breach of duty on part of defendant; whether statements of nurses privileged; test of legal professional privilege;
Held: No privilege; disclosure granted

Cork County Council v. CB Readymix Ltd.
Supreme Court: **Keane J.,** Murphy J., Barron J. (ex tempore)
12/12/1997

Locus standi; appeals procedure; High Court order; application to extend time to appeal order; applicant not named in order made solely against company; whether applicant entitled to apply for extension of time limit
Held: Application dismissed; in order to obtain extension of time for appeal, must have locus standi to appeal; applicant cannot appeal on company's behalf

McKenna v. Deery
Supreme Court: **Lynch J.** Barrington J. Keane J.
11/12/1997

Case stated procedure; convictions for gaming affirmed in Circuit Court; High Court order to state case; whether Circuit Court judge obliged to state case under s.16 Courts of Justice Act, 1947; whether points of law in question arise on facts found by Circuit Court judge
Held: Circuit court judge's discretion unqualified under s.16; superior courts should be slow to interfere; points moot on facts as found

Haughey v. Moriarty
High Court: **Geoghegan J.**
20/01/1998

Discovery; application; relevance; confidentiality; privilege; discovery sought against tribunal inquiring into plaintiff's financial affairs; discovery sought of documents issued in private investigatory phase of tribunal; whether documents relevant; whether public interest overrides confidentiality
Held: Discovery refused

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Supreme Court: Hamilton C.J., Keane J., **Murphy J.**
03/02/1998

Motor car collision; plaintiff and defendant in same car; liability; whether vehicle driven by defendant; whether vehicle driven negligently by defendant; dispute as to who was driving the car at the time of the accident; whether this should be proved on balance of probabilities; whether non-suit should be granted
Held: Retrial ordered

Buckley v. M.I.B.I.
Supreme Court: Hamilton C.J., Murphy J., **Lynch J.** (ex tempore)
12/11/1997

Burden of proof; car accident; no witnesses; plaintiff claimed untraced other driver involved; appeal against dismissal of claim for damages for personal injuries; onus on plaintiff to discharge burden of proof; whether the plaintiff satisfied the trial judge that on the balance of probabilities the accident happened as he alleged
Held: Appeal dismissed; plaintiff failed to discharge onus of proof

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Value added tax; input credits; reversionary leases; whether a reversionary interest in a lease for more than 10 years is taxable; whether input credits allowable; whether reversion supplied; meaning of "supply" and "delivery" in legislation; ss. 4, 3 and 12 Value Added Tax Act, 1972
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1st stage - Dail

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2nd Stage - Seanad
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1st stage - Dail

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1st Stage - Dail

Road traffic reduction bill, 1998
1st Stage - Dail [PMB]

Seanad electoral (higher education) bill, 1997
1st Stage - Dail

Social welfare bill, 1998
1st Stage - Dail
Trade union recognition bill, 1998
1st Stage - Dail [PMB]

Turf development bill, 1997
Committee - Dail

Abbreviations

BR - Bar Review
CLP - Conveyancer & Property Law Journal
DULJ - Dublin University Law Journal
GILSI - Gazette Incorporated Law Society of Ireland
ICLR - Irish Competition Law Reports
ICLJ - Irish Criminal Law Journal
IFLR - Irish Family Law Reports
IIPR - Irish Intellectual Property Review
ILT - Irish Law Times
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

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Industrial Relations, the Right to Picket and Restrictions of Right to Injunction

C & T Crampton Ltd -v- Building & Allied Trades Union, Denis Farrell, Derek Doyle, Kenneth O'Connor, Patrick McCallion and Neville Farrelly

PAT PURCELL, Barrister

Introduction

Prior to the introduction of the Industrial Relations Act, 1990 the legislation in the area of industrial relations/ trade disputes was covered by the Industrial Relations Act 1906. The 1990 Act repealed the 1906 Act in total and while it effectively repeats the main provisions of the Act, it also introduces new areas such as 'secret balloting'.

Case law also has had a major influence in shaping the development of trade union activity e.g. *The Educational Company of Ireland Ltd and Edward Healy and Co. Ltd -v- Fitzpatrick and Ors* 1961 I.R. 345 established the principle that the right to form associations implies a correlative right to abstain from joining associations and also held that a trade union dispute which had as its object the coercion of persons to join a trade union dispute against their will could not be entitled to immunity under the 1906 Act. In *Meskell -v- Coras Iompair Eireann* 1973 I.R. 1221 (Walsh J., O'Dalaigh CJ and Budd J. concurring) held that an attempt by CIE to compel the plaintiff to join a particular union was an infringement of his constitutional right to dissociate. In fact this case was important in identifying a Constitutional tort i.e. the private right of action for damages for breach of a constitutional right (in this case the right to associate or not).

Article 40.6.1(iii) guarantees liberty, subject to public order and morality, the right for the citizen to form associations and unions.

The Industrial Relations Act 1990 brought noticeable changes in the area of trade, disputes and picketing. For example under the 1906 Act there was:

1. No provision for a secret ballot (Section 14 of the 1990 Act)
2. No reference to secondary picketing (Section 11(2) of the 1990 Act)
3. No limitations on the rights on an employer in seeking an injunction (Section 19 of the 1990 Act)

The judgement of the High Court of Miss Justice Laffoy delivered on the 20th November 1997 in G.T Crampton -v- Building and Allied Trades Union and Others.

Factual Background

This was a case concerning the Plaintiff's application for an interlocutory injunction restraining the Defendants or any person acting in concert with them or with the knowledge of the making of the Orders sought from:

1. Engaging in industrial action against the Plaintiff at the Plaintiff's construction site at Collins Avenue, Glasnevin, Dublin.
2. Watching or besetting or picketing the said construction site
3. Interfering with access or egress from the said construction site
4. Portraying or communicating whether by recourse to pickets or posters or leaflets or otherwise, that they have a trade dispute with the Plaintiff and,
5. Interfering with the Plaintiff's business interests and economic relations and breaching and inducing breaches of the Plaintiff's commercial contracts

The Plaintiff in this case is a construction company which had contracted with Dublin City University to construct a Science Block on its campus at Collins Avenue. Contract price was £13 million. Under the contract, completion date was 14th August,1998 and the Plaintiff subject to penalty clauses providing for £30,000 per week in the event of default in its part in performing the contract.

The core issue between the Plaintiff and the Defendants (the union) is that the Union objected to the Plaintiff's practice of sub-contracting blocklaying and bricklaying on its construction sites and of not employing blocklayers and bricklayers directly.

Earlier proceedings in July 1997 concerned the employment of three of the defendants, other than the union, and the second Defendant, who was not a union official, on the Glasnevin site and in particular, whether they were employed by the Plaintiff, the main contractor, rather than a sub-contractor. At that time a subcontractor M.J. Lambe & Sons Limited was carrying out ground work and drainage works on the site under sub-contract. This dispute was resolved by an agreement on the basis that the workers involved would resume work on the site as employees of Lambe and that the union would not picket.

However, in the months following July, Lambe completed its contract and terminated the employment of all the bricklayers. Another sub-contractor, Colm Murphy who had a contract for the block and brick work on the super-

structure of the building, resumed superstructure work at the end of October 1997. He did not re-employ the Union's members who had hitherto been employed on the site. The Union contended that this was in breach of the spirit of the earlier agreement (i.e. the July agreement). The Plaintiff did not accede to that request.

Then, on the 5th of November, 1997 the Labour Court issued its recommendation on a dispute, which had been referred to it in September 1997 in consequence of the agreement reached in July 1997, as to whether the Plaintiff was obliged to give an undertaking that the Union's members who had worked for Lambe on the site would be retained by the Plaintiff when the Lambe sub-contract expired. The Labour court found that the workers, the subject of the dispute, were employed by Lambe, not by the Plaintiff, and the Labour Court's recommendation was that the union's claim should not be conceded. The Union rejected this recommendation. On the 7th of November 1997 the Union notified the Plaintiff in writing that its trade dispute with the Plaintiff remained unresolved and that its intention was to engage in a strike or other industrial action

On the 17th November 1997 a picket was placed at the entrance to the site. It was not in dispute that five men were picketing the site, three of whom, the second Defendant, George Lamon and Brendan O' Sullivan, were Union officials. It was not disputed that the other two picketers were David Leonard and Michael Deakin whom the union claims were former employees of the Plaintiff. The Plaintiff contended that the five were joined by the fourth Defendant Kenneth O' Connor, but this was denied by the Union. There was no evidence that the picket was not a peaceful picket. There was evidence however, that the entrance to the site was being obstructed and that, while some workers had passed the picket, no work was being carried out on the site and that the Plaintiff was unable to obtain delivery of supplies and materials.

The Defendants contended that they were protected by Section 11 of the Industrial Relations Act 1990 and the Court was precluded from granting the injunction. Section 11, which deals with peaceful picketing states as follows:

11(1) "It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union in contemplation or furtherance of a trade dispute, to attend at, of where that is not practicable, at the approaches to, a place where their employer works or carries on business, if they attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or to abstain from working."

(4) "It shall be lawful for a trade union official to accompany any member of his union who he represents provided that the member is acting in accordance with the provisions of subsection (1) or (2) and provided that such official is attending merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working".

(5) " For the purpose of this section ''trade union official" means any paid official of the trade union or any officer of a union or branch of a union elected in accordant with the rules of a union"

The High Court

Miss Justice Laffoy referred to a transcript of an ex tempore judgement delivered by Keane J. in March 1994 in *Nolan Transport (Oaklands) Limited -v- Halligan and Others*

This was an application for an interlocutory injunction. One of the crucial issues in the Nolan case was that many irregularities regarding the 'secret ballot' procedure were alleged to have taken place. There was an unambiguous assertion by a number of the employees who supported their employer in the dispute, that the secret ballot requirement was not complied with. Miss Justice Laffoy agreed with the views expressed by Keane J. as to the approach to be adopted when the provisions of Section 19, which deals with the restriction of a right to an injunction, are relied on in answer to an application for interlocutory relief. In the Nolan case Keane J was satisfied that there was not sufficient evidence before him to indicate that Section 14 had been complied with and that therefore the defendants should not have the benefit of Section 14(2).

Subsection (2) of Section 14 provides:

"Where a secret ballot has been held in accordance with the rules of a trade union as provided for in section 14, the outcome of which... favours a strike or other industrial action and the trade union before engaging in the strike or other industrial action gives notice of not less than one week to the employer concerned of its if intention to do so, the Court shall not grant an injunction restraining the strike or other industrial action where the Respondent establishes a fair case that he was acting in contemplation or furtherance of a trade dispute."

Miss Justice Laffoy was of the opinion that in applying the foregoing provisions she must determine:

(1) Was a secret ballot held
(2) Did its outcome favour industrial action
(3) Was the requisite notice given

If points (1) to (3) had been fulfilled then she expressed the view that she had to decide whether the Defendants had established a fair case that they were acting in contemplation or furtherance of a trade dispute and if so then she would have to refuse the Plaintiff s application.

She commented that in the Nolan case it appeared to have been established that the onus is on the person resisting the injunction that the 'secret ballot' procedure set out in Section 14 had been complied with and that the Court must be satisfied on the evidence before it that Section 14 has been complied with.

Section 14(2) of the 1990 Act requires the rules of every trade union to contain certain provisions regarding secret ballots.

Paragraph 2 (a) precludes union involvement in a strike or other industrial action ''without a secret ballot' and entitlement to vote shall be accorded,

"equally to all members whom it is reasonable at the time of the ballot far the Officials concerned to believe that they be will be called upon to engage in a strike or other industrial action"

Paragraph 2(b) provides that as soon as practicable after the conduct of the ballot, the Union shall take reasonable

steps to make known to all its members entitled to vote in the ballot

1) the number of ballot papers issued
2) the number of votes cast
3) the number of votes cast against the proposal, and,
4) the number of spoilt votes

The evidence before the Court dealing with compliance with Section 14 was as follows:

The Plaintiff's grounding affidavit, sworn by Patrick Walsh stated that in his belief the provisions of the 1990 Act had not been had not been fully complied with as all the members likely to be affected had not been properly balloted. In particular, that the union members employed by Murphy had not been balloted and that if they had been balloted they would have voted against industrial action. Mr. Walsh also averred that although notification of the intention of the Union to ballot its members was issued on the 23rd October 1997, in advance of the Labour Court's recommendation on the 5th November 1997, one of the grounds intimated to the plaintiff's personnel manager for picketing was the rejection of the Labour Court's recommendations

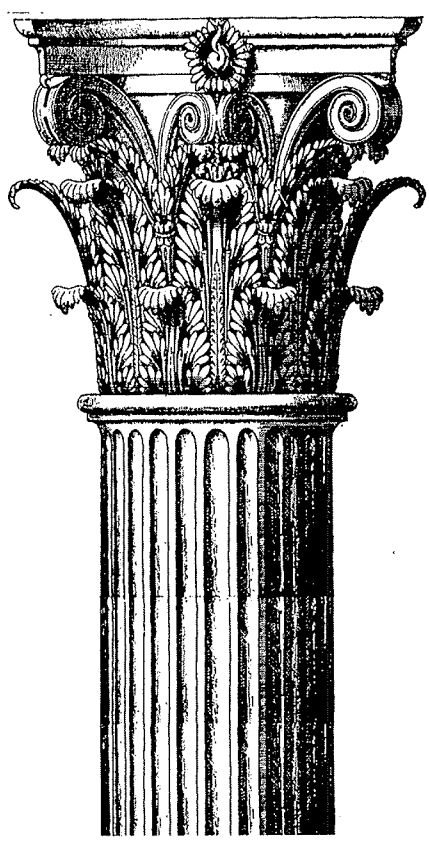
In the Defendants replying affidavit there was a bald statement that the ballot in question had been carried out in accordance with the rules of the Defendant's trade union as required by the 1990 Act. It was acknowledged that the two employees of Murphy had not been balloted because it was claimed that it was never intended that these persons should be called upon to engage in the strike or other industrial action and that neither were paid up members.

In further supplement affidavits on behalf of the Plaintiff it was claimed that Murphy had informed the Plaintiff that he, Murphy, was employing members of the Union on site. The Plaintiff further averred that it was advised by George Lamon, a union official and one of the picketers, that only members who worked for Lambe on the site had in fact been balloted.

In a supplement affidavit sworn on behalf of the Defendants, it was claimed that the second Defendant called to the site on the 22nd Oct 1997 and queried if any bricklayers on the site were members of the Union. Subsequently he claims he met with Murphy, two bricklayers and a general operative. He claims that one of the bricklayers said he was not a member of the union. The other bricklayer, he claimed, produced a card that was £100 in arrears and that because of the level of arrears, this person ceased to be a member in accordance with the rules of the union.

Miss Justice Laffoy found there was no evidence whatsoever before the Court as to the outcome of the secret ballot conducted by the union and in particular no evidence that the outcome favoured picketing the site. On this ground alone the Judge was satisfied that there was no evidence before the court that the pre-conditions stipulated in Section 19 of the 1990 act had been complied with. Accordingly the Defendants had not established that they are entitled to rely on the provisions of Section 19(2). Laffoy J stated that the Plaintiff's application had to be decided on the basis of the ordinary principles set down by the House of Lords in *American Cyanamid Company -v- Ethicon Limited* (1975) A.C, 396 as adopted by the Supreme Court in *Campus Oil Limited -v- Minister for Industry and Energy* (No. 2) 1983 I.R. 88

The first question was that of a fair issue to be tried between the Plaintiff and the Defendants. The Defendants contended that their members Deakin and Leonard were entitled to the protection of subsection (1) of Section 11 of the 1990 Act and that their officials Lamon and Sullivan were entitled to protection under subsection (4) of Section 11.



On the evidence before her, Laffoy J had no doubt that the Plaintiff's contention that the picketers were not entitled to the protection of Section 11 raised a fair issue to be tried between the parties. On the same basis had the Defendants established compliance with Section 19(2) she would have concluded that the Defendants had established a fair case that they were acting in contemplation of a trade dispute.

Laffoy J then went on to deal with the issue as to whether or not damages would adequately compensate the Plaintiff for loss suffered between the granting of an injunction and the full trial of the action. It was her view that the Plaintiff would not be adequately compensated. That it was not just the monetary loss which the Plaintiff is likely to incur if it is delayed in performing the contract which has to be considered, but also the damage to the Plaintiff's goodwill and reputation if it was perceived to be incapable of carrying out a large construction contract on time. She also had misgivings as to the availability of funds to meet an award of compensation if the injunction was refused and it transpired at the trial that the Defendants were not entitled to the protection of Section 11 of the Act.

The Judge made an Order restraining the Defendants from watching or besetting or picketing the site and from interfering with the access or egress from the site, subject to the Plaintiff giving the usual undertaking as to damages.

(It is debatable as to whether American Cyanamid rules should apply to trade disputes - for further discussion refer to conclusion).

The Supreme Court

The decision was appealed by the Defendants to the Supreme Court on the 12th December 1997. Hamilton CJ., O'Flaherty J. and Barrington J. presiding. The Chief Justice remarked in

his judgement that the Trial Judge had before her all relevant information other than a further affidavit of one Mr. Lamond which dealt with the circumstances of the ballot carried out by the Trade Union. He then went on to deal with the relevant statutory provisions and in particular Sections 11, 14 and 19 of the 1990 Act. The Chief Justice referred to the Union's Rules and in particular Rule 6 thereof which provides;

> "The Union shall take reasonable steps to ensure that every member entitled to vote in the ballot, votes without interference from or constraint imposed by the Union or any of its members, officials or employees and so far as is reasonably possible that such members shall be given a fair opportunity of voting."

It was therefore clear that the Union rules did make provision for adherence to the relevant parts of the Industrial Relations Act 1990.An interesting point was then raised by the Supreme Court. (This point was not referred to in the High Court). In a brief reference to Section 8 of the Act, the Chief Justice stated that industrial action encompasses many different activities, picketing being only one of them. He then posed the question as to whether there is an obligation on the Union in conducting a ballot to phrase the proposals so as to give a clear indication of the nature of the action to be taken by a trade union.

He referred to the letter dated the 7th November 1997 which related to "strike or other industrial action." This letter he said did not purport to particularise the nature of the industrial action sought to be taken and that a question arose on the interpretation of Section 14 and 19 as to whether it is sufficient merely to have a proposal before members on the question of strike or other industrial action without specifying the nature of the action for which the members approval is sought and necessary by virtue of the terms of Section 14 and 19. In the opinion of the Chief Justice, on this issue alone there was a fair question to be tried. He also held that there was an issue to be tried on the adequacy of the ballot.

The Supreme Court then went on to deal with the actual ballot paper used. It was described as 'official ballot paper', on proposal to engage in strike or other industrial action. However it was noted that even though the word 'proposal' had a blank space after it, the ballot papers did not contain any proposal upon which the members were being called to ballot. The adequacy of the ballot paper in keeping with the requirements of Section 14 of the Act was also considered a relevant issue which arose on the proceedings.

In conclusion the Supreme Court was satisfied that the Trial Judge was entitled to come to the conclusion that the condition precedent to the implementation of Section 19 was not established and in the circumstances the appeal brought by the first and second named defendants was dismissed.

Conclusion:

The Industrial Relations Act 1990 brought about considerable changes in the law in the area of trade unions and industrial relations. As highlighted in the Crampton case, some of the more important sections of the Act are those relating to secret ballots, restriction of actions of tort (section 13) against trade unions and a restriction on a right to an injunction under section 19. Section 19 is a very important section. While this section can been used by unions as a defence against applications for injunction, it is also quite clear that the courts require a rigid application and strict adherence to the rules of a trade union introduced pursuant to Section 14. The injunction has long been regarded as possibly the most powerful weapon an employer can use against employees if there is a trade dispute. It has been recognised that in the past the obtaining of an exparte injunction took a lot of the momentum out of will power of the trade union to engage in a strike or industrial action.

As was clearly outlined in the Crampton and Nolan cases the carrying out of a secret ballot is not a procedure that may be treated lightly. A 'bald assertion' that this procedure has been adhered to is not sufficient. As was demonstrated in the Nolan case, a Court will not grant an injunction if the ballot is not held in accordance with section 14. The Supreme Court in the Crampton case appears to have taken a very strict line on how the secret ballot must be conducted. The use of the Section 19 injunction is and will continue to be useful in the area of trade disputes but this is subject to a strict adherence to the provisions of the Act and to the findings of fact in the cases outlined above.

It is important to note that in this case, the Defendants failed to establish that they were entitled to rely on Section 19(2) and that the Plaintiff's application fell to be decided on the basis of the rules set out by the House of Lords in *American Cyanamid -v- Ethicon* case i.e. a serious question to be tried, the adequacy of damages and where the balance of convenience lies. However Lord Diplock concluded in his discussions in the Cyanamid case that there may be "special factors to be taken into consideration in the particular circumstances of individual cases." Trade disputes would come under this category.

In *NWL -v- Woods* 1979 1 WLR 1294 at 1306 as per Lord Diplock, "American Cyanamid was not dealing with a case in which the grant or refusal of an injunction at the interlocutory stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial."

It is arguable that this sort of 'special case' scenario could apply to trade disputes as there will rarely be a trial as the dispute will often be frustrated by the granting of an interlocutory injunction.

Notwithstanding this the granting of an injunction under the 1990 Act is a powerful weapon. A right to picket is also a persuasive tactic but may only be permitted if the rules of the union concerned are adhered to strictly. While the 1990 Act may have been regarded as being as pro-union/employee rights, the Courts will ensure strict compliance with the ballot procedure and consequently "the bloom may well go off the steel." ●

The Amsterdam Treaty

A GLANCE AT THE MAIN SUBSTANTIVE PROVISIONS

JULIE LISTON, Barrister

The Amsterdam Treaty proposes to amend the Maastricht Treaty, or Treaty on European Union ("the TEU"), in various ways. It has been said of the Amsterdam Treaty that it is, in reality, simply an amending Treaty and that it does not have any real significance or power in its own right.

While this may be true in many respects, and while there is little that is particularly innovative in the Amsterdam Treaty, it's proposals will build upon and further assert the developments originally established under Maastricht.[1]

This article will look at two substantive areas of change proposed under the Amsterdam Treaty[2] :
(a) social policy and related issues, and
(b) an area of freedom, security and justice throughout the European Union ("the EU")

In both of these areas, the rights afforded to EU citizens are to be enhanced and increased somewhat. Indeed, in the area of freedom, security and justice, certain matters which were formerly dealt with under Pillar III are now to be transferred to Pillar I, thereby becoming part of the immediately enforceable rights conferred upon the citizens of the EU.

It should also be noted that the jurisdiction of the European Court of Justice ("the ECJ") throughout the Union, is also to be extended in certain areas under the Amsterdam Treaty and this, in itself, is an important development for the EU citizen.

A. Social Policy and Related Issues

(i) Social Policy and Employment:

At the time of the negotiations of the Maastricht Treaty, some of the Member States wanted to enhance the position of the social provisions (dealing with employment, vocational training, social security, etc.), as provided for in the 'Social Chapter' of the then EEC (now EC) Treaty. However, the UK was opposed to these changes and as a result, the proposed amendments were kept out of the Maastricht Treaty and were incorporated into a Social Agreement that was subscribed to by the other Member States. A Social Protocol was adopted which allowed the participating Member States to avail of the institutions of the EU to implement the aims of the Social Agreement, while allowing the UK to opt out of any measures so adopted by the Member States.

Following the British elections in May 1997, and the election of the Labour Government, the UK decided to accede to the provisions of the Social Agreement. As a result, the terms of the Social Agreement can now be brought into the EC Treaty where they will amend and add to the social provisions already existing. The Amsterdam Treaty proposes to do this, and to further extend the terms of the Social Agreement. The objectives of the Social Chapter, to be inserted into Article 117 of the EC Treaty[3], will be 'the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.'

Article 118 will assert that, with a view to achieving the objectives of Article 117, the Community shall support and complement the activities of the Member States in the following fields :- (a) improvement in working environments in order to protect the health and safety of workers; (b) working conditions; (c) the integration of persons excluded from the labour market; (d) equality between men and women with regard to labour market opportunities and treatment at work. Article 119, which deals with the principle of equal pay for equal work, is to be amended further by the addition of the provision 'or work of equal value'. It will also provide that equal opportunities and equal treatment of men and women in matters of employment and occupation must be ensured. In addition, Article 119(4) is to provide that Member States may adopt 'measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.' The Amsterdam Treaty thus grants permission to Member States to provide for positive discrimination where this is thought to be necessary to redress an existing imbalance.

The Amsterdam Treaty, while restating the Community's commitment to achieving a 'high level of employment' throughout the Community[4] , will also add a new Title, Title VIa, to the EC Treaty. This Title will assert the commitment on the part of the Community and the Member States to developing co-ordinated strategies in the area of employment.[5] This reflects the common stated concern amongst Member State governments to combat the high levels of unemployment which exist throughout the EU.

(ii) Non-Discrimination:

The Amsterdam Treaty will further develop and extend the provisions on non-discrimination. Equality between men and women is to be taken beyond the confines of the workplace and the Community will now be required to promote such equality in all its activities.[6] In addition, by way of proposed Article 6a, the prohibition on discrimination will be extended beyond that of sex and nationality into the areas of racial or ethnic origin, religion or belief, disability, age or sexual orientation.[7] However, two things must be remembered when examining Article 6a: firstly, the Council must act unanimously when taking appropriate action pursuant to this Article; and secondly, it has been said that Article 6a is not intended to be of direct effect. The combination of these two factors means that the actual affect of Article 6a on a practical level will be quite limited.

B. An area of freedom, security and justice

An aim of the Amsterdam Treaty is to see the progressive establishment of the Union as an area of freedom, security and justice. This is to be done in four main ways:

(i) New Title on Free Movement of Persons and Related Issues

The Amsterdam Treaty will add a new Title, Title IIIa to the EC Treaty, and therefore to the whole body of Community law. This Title will deal with issues such as free movement, the abolition of frontier controls, visas, immigration policy, rights of illegal residents, asylum, refugees and judicial co-operation in certain procedural aspects of civil litigation. Some of these issues were formerly dealt with under Pillar III of the EU, in the area of Justice and Home Affairs. Title IIIa will move these matters into the domain of Pillar I and consequently into the competence of the EC. In this way these measures will become part of Community law and will be capable of being relied upon by individuals at a national and European level. They will also be subjected to the jurisdiction of the ECJ. As a result, free movement throughout the Community, which is already provided for under European law, will be greatly enhanced as a result of these provisions.

It is important to note that Ireland, by way of a Protocol, has exempted itself from the entirety of Title IIIa. As a result, this Title will be of no effect in Ireland until Ireland decides to opt into it. Ireland's position on this matter is due to the UK's decision to opt out of the Title and Ireland's desire to maintain it's Common Travel Area with the UK. As such, it appears that Ireland's current position on this matter is a pragmatic rather than a policy based one; and therefore, it is possible that at some future date Ireland will opt in to the provisions of this new Title.

(ii) The Schengen Protocol

The Schengen Agreements are a set of agreements that have been entered into by thirteen of the Member States, for the purpose of removing customs and police formalities throughout the Union, for persons travelling within the Union. As the UK, and subsequently Ireland, adopted a different and more conservative approach to the concept of free movement within the EU, the other thirteen Member States came together, in an intergovernmental way, and formed their own agreements and rules in relation to this matter. These agreements provide for: (i) the harmonisation of visa and asylum policies; (ii) police and security co-operation, including cross border observation and cross-border pursuit; (iii) the harmonisation of provisions on weapons and ammunition; (iv) judicial co-operation, including judicial assistance in criminal matters, extradition and matters relating to the enforcement of criminal verdicts; and (v) the development of a common information system in relation to entry, the granting of visas and police co-operation.

The Amsterdam Treaty proposes, by way of the Schengen Protocol, to incorporate the Schengen Agreements into the EC and EU Treaties and, as such, make them part of both Community law and European Union law for the thirteen Member States who are parties to them and for any future members of the EU.[8]

As stated above, Ireland was not party to the Schengen Agreements and, by a special arrangement proposed under the Schengen Protocol, it will be exempt from their provisions under the EC and EU Treaties. As with Title IIIa discussed above, the reason for Ireland's opting out of the Schengen Agreements, and the subsequent Protocol, is due to the reluctance on the part of the UK to cede any of its national authority with regard to the entry and exit of people to and from the UK.

As Ireland wants to maintain it's Common Travel Area with the UK, it has felt obliged to opt out of the Schengen Agreements along with the UK. Again, as with Title IIIa, it could be said that the position adopted by Ireland in this regard is a practical as opposed to a principled one. As such, it is possible that Ireland may opt in to the provisions of the Schengen Protocol in the future, depending on the position adopted by the UK.

(iii) Police and Judicial Co-operation in Criminal Matters

Pillar III of the TEU, formerly named Justice and Home Affairs, is to be renamed 'Police and Judicial Co-operation in Criminal Matters' under the Amsterdam Treaty. The objective of Pillar III is stated as being 'to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial co-operation in criminal matters and by preventing and combating racism and xenophobia.'[9]

As stated above, some of the matters initially dealt with in this 'intergovernmental' Pillar are, under the Amsterdam Treaty, to be transferred to Pillar I and to the competence of the EC, namely the matters covered under Title IIIa. The issues which remain to be dealt with in a more intensive way under Pillar III include (i) combating crime, terrorism, international fraud and corruption, trafficking in persons and offences against children, illicit drugs trafficking and illicit arms trafficking; (ii) establishing closer customs co-operation and police co-operation

against terrorism, drugs and other international crime by way of information exchange through Europol; (iii) establishing closer judicial co-operation in criminal matters; and (iv) approximating, where necessary, the rules on criminal matters between Member States.

As this is an intergovernmental pillar, Community measures in the way of secondary legislation (i.e. regulations, directives and decisions) are not made pursuant to these provisions. Instead the types of measures which are adopted under Pillar III are common positions; framework decisions; decisions for other purposes consistent with the objectives of the Treaty; and conventions. At present, as has been the standard position, the ECJ has no jurisdiction in Third Pillar matters, except in a limited way in relation to conventions. However, the Amsterdam Treaty, in a manner not previously seen, proposes to extend the jurisdiction of the ECJ under the Third Pillar in three respects. It will enable the ECJ:

(i) to give preliminary rulings on a wide range of acts adopted under the Third Pillar. It is up to each Member State to decide whether to accept this jurisdiction of the ECJ or not. To date, Ireland has not made the appropriate declaration accepting such jurisdiction, whereas a number of other Member States have.

(ii) to review the legality of measures adopted under the Third Pillar. Within two months of the publication of a framework or other decision, a Member State or the Commission, where they consider that the measure has been adopted illegally, may take the matter before the ECJ in order for the ECJ to review its legality.

(iii) to rule in disputes between Member States. If a Member State refers a dispute to the Council in relation to a matter adopted under the Third Pillar, and the Council is unable to resolve it within six months, the ECJ will now, under the Amsterdam Treaty, be given jurisdiction to rule upon the matter.

The jurisdiction of the ECJ under the Third Pillar will clearly be extended under the Amsterdam Treaty. Not only will certain matters currently dealt with under the Third Pillar be moved into the First Pillar, and therefore into the unambiguous remit of the ECJ, but the ECJ will also be given a certain amount of jurisdiction over matters remaining in the Third Pillar. This is a significant development for the ECJ as, formerly, matters dealt with under the Third Pillar were seen as being very strictly intergovernmental in nature and, therefore, beyond the ambit of the supra-nationalist judicial review of the ECJ.

(iv) Fundamental Rights Protection

The Amsterdam Treaty proposes to extend and enhance human rights protection within the EU. The Amsterdam Treaty will affirm that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States.'[10] Respect for fundamental human rights had already been stated in the earlier Maastricht Treaty; however, it should be noted that under the Maastricht Treaty the ECJ was not afforded any explicit jurisdiction in this area. Over the years however, the ECJ, in its jurisprudence, has made respect for human rights one of it's considered general principles of Community law; and has assessed the legality of various Community measures by reference to this principle.[11] Under the Amsterdam Treaty, in the areas of the First Pillar and in the areas of the Third Pillar in which it has been given new jurisdiction, the ECJ will now have the explicit power to ensure that actions by the institutions of the Union respect fundamental human rights.

The Amsterdam Treaty also makes respect for the above mentioned principles of fundamental rights and the rule of law, a condition which other European States must meet if they wish to apply for membership to the Union.[12]

The Amsterdam Treaty also proposes to introduce for the first time a sanctions procedure to be used against a Member State should there be a serious and persistent breach of these principles of human. The procedure is primarily a political one. It is initiated by the Member States or the Commission and confirmed by a unanimous decision of the European Council. The sanction involves the suspension of certain rights of the offending Member State, including suspension of the voting rights of it's representative in the Council.[13]

C. Conclusion

The Amsterdam Treaty, regarded primarily as an amending and tidying up Treaty, will add to European law and integration in various ways. Firstly, it will contribute to the area of European social policy. Although none of the proposals here are particularly radical or novel, they will contribute to the gradual and incremental process of developing a Union which has the same high level of social policy protection throughout. The Treaty will also add to the free movement of persons in a very real way. As discussed above, it will do this by inserting new provisions in this regard into the EC Treaty. Ireland remains outside of these provisions for the time being, but it is hoped that at some future date it will see itself able to participate in these arrangements.

Co-operation between Member States in the combating of crime will also be enhanced under the Amsterdam Treaty, albeit that these measures will remain in the primarily intergovernmental Third Pillar. However, significantly, the ECJ will be afforded a certain amount of jurisdiction over some of these Third Pillar matters. Finally, respect for human rights will become a more firmly entrenched provision in the Treaties. The Amsterdam Treaty for the first time proposes sanctions for serious breaches of these rights to be imposed on Member States. If the Amsterdam Treaty were to contain nothing else it would be still be an important Treaty by virtue of this new sanctions procedure alone. ●

1 The structure of the European Union, as created by the Maastricht Treaty, or TEU, may be noted here as a reminder to readers. The TEU created a Union composed of three pillars. Pillar I of the EU encompasses the Communities, including the European Community (the former European Economic Community). Pillar I can be described as being 'legal' in nature, being made up of treaty articles and secondary legislation which an individual may invoke at a national and a European level. Pillar II deals with Common Foreign and Security Policy. It is an intergovernmental pillar and may be

described as being a 'political' aspect of the European Union as it involves co-operation on a political level between the Member States. It does not afford the individual any immediate rights capable of enforcement at a national or European level. Pillar III deals with co-operation between the Member States in the area of Justice and Home Affairs. Again, it is an intergovernmental aspect of the European Union and, like Pillar II, can be described as 'political' in nature. Like Pillar II, Pillar III does not afford the individual any enforceable rights at a national or European level. The three pillars make up the European Union.

2 The Amsterdam Treaty also proposes to make certain limited changes to the area of environmental protection, public health protection and consumer protection. It also proposes to make certain procedural, institutional and operational changes to the TEU. These will not be examined in this article.

3 The numbering system of the Treaties is to be amended by the Amsterdam Treaty. It should be noted that I will be relying on the old numbering system in this article.

4 Article 2, EC Treaty.

5 Article 109n, EC Treaty.

6 Article 3(2), EC Treaty.

7 The Irish Equal Status Bill, 1996, still awaiting enactment after it was struck down as being unconstitutional in certain parts, seems to be in keeping with the requirements of the proposed Article 6a of the EC Treaty.

8 Denmark, while being party to the Schengen Agreements, is not acceding to the Schengen Protocol, as it is opposed to these Agreements becoming part of EC and EU law. As such, a special opt out arrangement has been made under the Protocol to reflect Denmark's position in this regard.

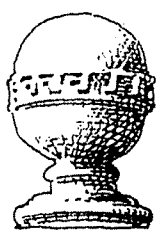
9 Article K1, EC Treaty.

10 Article F(1), EC Treaty.

11 In this regard see the cases discussed in EC Law, Text, Cases and Materials, Paul Craig and Grainne de Burca, Chapter 7, General Principles I -Fundamental Rights, p.283.

12 Article O, EC Treaty.

13 Article F.1(1), EC Treaty.



Arbitration Clauses and the Void or Terminated Contract

GARRET SIMONS, Barrister

The recent decision of Doyle v. Irish National Insurance Company plc,[1] provides an example of the willingness of the courts to uphold an arbitration clause in circumstances where the underlying contract may have terminated. This approach is also consistent with a number of other judgments wherein the courts have indicated a reluctance to interfere with an arbitral award,[2] or have interpreted the arbitration clause expansively so as to capture, for example, actions in negligence.[3]

These three strands of decisions are indicative of a judicial climate favourable to the resolution of disputes by arbitration. The Supreme Court decision in *Superwood Holdings plc v. Sun Alliance & London Insurance plc*[4] intrudes, however, to cast a cloud over these decisions, and to undermine the very reasoning upon which they are based.

Arbitrator's jurisdiction

In determining whether or not a particular dispute comes within an arbitrator's jurisdiction under the arbitration clause of a contract, two issues may arise:

(i) Whether or not, as a question of interpretation, the dispute is one which falls within the terms of the arbitration clause.

(ii) Whether or not, as a question of law, the arbitration clause is still effective, in circumstances where the underlying contract may have terminated, or may have been void ab initio.

Although these two issues are distinct, the English courts tend to treat the determination of the extent of the arbitrator's jurisdiction simply as a question of the interpretation of the arbitration clause: does the clause capture the particular dispute sought to be referred to arbitration.[5]

Provided that the words of the arbitration clause are sufficiently wide, disputes as to the very existence of the underlying contract may, on this view, be referred to arbitration. In other words, the parties by their express agreement may confer jurisdiction on an arbitrator even in circumstances where the underlying contract is void for illegality,[6] or has been avoided for misrepresentation.

The difficulty with approaching the arbitrator's jurisdiction simply as a question of interpretation, is, however, that it tends to obscure the fact that the agreement to arbitrate may form part of the underlying contract.

If the underlying contract is void, then the arbitration clause must fall with it. By attaching paramount importance to the interpretation of the arbitration clause, the dependence of the arbitration clause on the existence of the underlying contract is in danger of being overlooked.

Whereas questions as to the validity of a contract can, in principle, be referred to arbitration, the submission to arbitration must not itself be tainted by the same alleged invalidity;[7] thus, the submission cannot be based on an arbitration clause in a contract, the validity of which is to be the subject matter of the arbitration. In order to achieve such a result, the courts would have to hold that the arbitration clause constitutes an independent contract in itself.

Effect of termination of the underlying contract

It is only where the contract is void ab initio that the arbitration clause must fall. This may be illustrated by reference to the various circumstances in which a contract, although it may be said to have 'terminated', subsists for certain purposes.

(a) Repudiation for breach

In *Parkarran Ltd. v. M. & P. Construction Ltd,*[8] the High Court was required to rule on whether or not an arbitration clause in a building contract survived the repudiation of the contract for breach. Morris J. held that repudiation for breach does not terminate the contract for all purposes, and, in particular, the contract remains for the purpose of assessing damages. In so holding, Morris J. expressly endorsed the following principles laid down in *Heyman v. Darwins Ltd:*[9]

"[W]hat is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate a contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract."

Thus, as a matter of law, the arbitration clause was capable of surviving the repudiation of the underlying contract. Morris J. then further ruled, as a question of interpretation, that the terms of the arbitration clause were wide enough to capture a dispute arising from the breach of the contract. The arbitration clause had specifically referred to disputes arising 'under the contract or the abandonment or breach of the contract'.

(b) **Recission for misrepresentation**

More recently, in the decision of *Doyle v. Irish National Insurance Company plc,*[10] the High Court has had to consider the effect of the recission of a contract for misrepresentation on the arbitration clause. The defendant insurance company had purported to avoid a policy of insurance on the grounds of non-disclosure of a material fact, and had refunded premiums paid under the policy.

The insured subsequently instituted High Court proceedings seeking specific performance of the contract of insurance, and the defendant insurance company applied for a stay under Section 5 of the Arbitration Act, 1980. Kelly J., in refusing the stay, applied the orthodox two-step analysis to the arbitration clause, considering, firstly, whether as a matter of law, the arbitration clause remained effective notwithstanding the recission of the underlying contract, and secondly, whether, as a matter of construction, the clause was wide enough to cover the instant dispute.

In relation to the first issue, Kelly J. held that the principles laid down in *Heyman v. Darwins*[11] in connection with repudiation of a contract for breach, were equally applicable to circumstances where one party seeks to avoid or rescind a contract on the ground of misrepresentation or non-disclosure.

With respect, this does not necessarily follow. Recission of a contract for misrepresentation is a distinct concept to repudiation of a contract for breach. In the case of the former, if recission occurs the contract is void ab initio, and is treated as never having existed: for example, no damages for breach of contract will then lie. In the case of repudiation, conversely, the contract, although terminated, continues to exist for certain purposes (including that of arbitration).

Given that the effect of recission on the underlying contract is quite different from that of repudiation, the decision in *Heyman v. Darwins*[12] that an arbitration clause may survive the latter, does not determine that it must also survive recission. If the contract is avoided for recission then arguably it is void for all purposes including arbitration.[13] This argument could be met, perhaps, by reliance on the fact that the effect of misrepresentation is to make a contract voidable not void i.e. the contract is not automatically void and recission may be impossible where, for example, the rights of third parties intrude. Until recission occurs the contract subsists, and under the terms of the contract the very availability of recission is to be determined by arbitration. If recission is allowed by the arbitrator, the arbitration clause will then fall away as will the contract itself.[14]

In relation to the separate question as to whether, as a matter of construction, the arbitration clause was wide enough to allow an arbitrator jurisdiction in respect of recission, Kelly J. ruled that the phrase 'all differences arising out of this policy' embraced the issue of non-disclosure.

One might have expected, however, given the difference between the two concepts of reputation and recission in connection with the existence of the contract, that the wording of the arbitration clause would have to be wider to capture the latter. This was expressly recognised by Lord Wright in *Heyman v. Darwins Ltd.*[15]

> "[G]enerally speaking, a dispute whether the contract ever existed, as contrasted with the question whether it has become ended, is not within the usual form of submission of differences arising out of a contract or the like, because, if there was never a contract, there could never be disputes arising out of it - *ex nihilo nihil fit.* It is all a question of the scope of the submission. Hence, if the question is whether the alleged contract was void for illegality, or, being voidable, was avoided because induced by fraud or misrepresentation, or on the ground of mistake, it depends on the terms of the submission whether the dispute falls within the arbitrator's jurisdiction."

(c) **Fundamental Breach**

The High Court has now accepted that an arbitration clause can survive the termination of the underlying contract whether by repudiation for breach, or by recission for misrepresentation. The effect of a fundamental breach of contract on the arbitration clause has, however, yet to be fully considered.

In certain contracts, the arbitration clause may be regarded as some form of exemption clause; for example, the arbitration clause might provide that any claim must be brought within a short period of time,[16] or that liability be limited to a certain amount.[17] Here, the doctrine of fundamental breach of contract may be relevant and a court may take the view that, in the circumstances of the particular case, the breach of contract was of such a fundamental nature as to preclude reliance on any exemption clause.[18] An argument to this effect appears to have been made in *Parkarran Ltd. v. M. & P. Construction Ltd.*[19] The plaintiff had sought to resist arbitration on the basis that the fundamental nature of the breach of the contract had had the effect of bringing the contractual relations between the parties to an end: under the terms of the contract the work was to be completed on or before a particular date, and this had not happened. Morris J., however, rejected the argument and held that the arbitration clause embraced the claim for breach of contract. *Kelly J. in Doyle v. Irish National Insurance Company plc*[20] expressly reserved his position as to whether a time bar in the arbitration clause would have survived the avoidance of the contract for recission.

Superwood Holdings plc v. Sun Alliance & London Insurance plc[21]

The decisions of the High Court in *Parkarran Ltd. v. M. & P. Construction Ltd.*[22] and in *Doyle v. Irish National Insurance Company plc*[23] are predicated on the fact that an arbitration clause subsists even in circumstances where other obligations under the contract have come to end, and where the contract may be described, albeit imprecisely, as having terminated. The decision of the *Supreme Court in Superwood Holdings plc v. Sun Alliance & London Insurance plc*[24] is based on the converse premise that once a contract has been avoided or repudiated, no reliance may be placed on its terms including the arbitration clause. The Supreme Court decision is thus diametrically opposed to those of the High Court and undermines the very reasoning upon which they are based.

On the facts of Superwood Holdings plc, the defendant insurance company had sought to forfeit a policy of insurance on the basis of fraud, pursuant to an express provision of the agreement. In the alternative, the defendant had sought to rely on another term of the policy to exclude liability. The Supreme Court held that having sought to avoid the policy, the defendant was not entitled to rely on a term of that policy. In so doing, reliance was placed on a number of older cases in connection with arbitration clauses. [25] Blayney J. ruled as follows:[26]

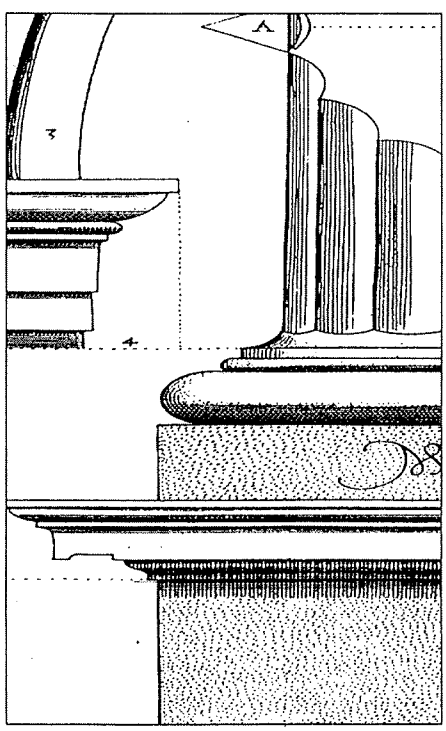
> "I am satisfied that the authorities establish that where an insurance company avoids a policy of insurance, as the defendants clearly did in their defence in this case, they cannot at the same time seek to rely on a term contained in that policy. Accordingly, the defendants, having avoided the policy on the ground that the claim being made fraudulent could not at the same time dispute the claim on the ground that the requirements of condition 4 had not been complied with."

Insofar as the earlier authorities relied upon indicated that repudiation of a contract precludes reliance on the arbitration clause, they are clearly at odds with the decisions in Heyman v. Darwins, and Parkarran Ltd. v. M. & P. Construction Ltd., and, it is submitted, should not have been followed for the reason that they misstate the effect of repudiation on a contract. In connection with recission of a contract for misrepresentation, it is submitted that the arbitration clause may survive to determine the availability of the remedy of recission. In any event, it is arguable that the defendant insurance company in Superwood Holding plc were, in fact, seeking to avoid liability pursuant to and in reliance upon the terms of the contract, as opposed to seeking to avoid the contract entirely.[27]

There remains, however, a clear conflict between the High Court decision in *Doyle v. Irish National Insurance Company plc* and that of the Supreme Court in *Superwood Holdings plc v. Sun Alliance & London Insurance plc* on this point.

The effect of illegality on the arbitration clause

The effect of the illegality of the underlying contract on the arbitration clause requires separate consideration because illegality goes to the initial existence of the contract, and not to its termination. An illegal contract



is void ab initio and will not be enforced by the courts.[28] Two distinct grounds may be advanced as to why an arbitrator cannot have jurisdiction to determine the question of the legality of the underlying contract:

(i) The arbitration clause must be tainted by the illegality of the underlying contract, and, accordingly, the arbitration clause must fall with the contract. In order to save the arbitration clause it would be necessary to hold that it exists as an independent or collateral contract.

(ii) If the arbitrator mistakenly upholds an illegal contract, the courts will have to enforce (albeit indirectly through the medium of the award) a contract contrary to public policy. This objection applies equally to an arbitrator ruling on the legality of a contact other than that which founds his jurisdiction.

This concept of the arbitration clause as an independent contract has been suggested in certain of the cases concerning the effect of repudiation for breach on the arbitration clause.[29] It is submitted, however, that any finding that the arbitration clause existed as a collateral contract must be obiter: the resolution of the cases turned on the fact that repudiation does not put the contract out of existence for all purposes; in particular, the contract subsists for the purpose of assessing damages and it is in this context that the arbitration clause survives i.e. as part of the underlying contract, not as a collateral contract.

The concept of the independent contract becomes essential, however, where the legality of the underlying contract is impugned. The concept underlies the decision in *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.*[30] wherein it was held that the initial illegality of a contract is capable of being referred to arbitration, provided that any initial illegality does not directly impeach the arbitration clause.[31] In so holding, the Court of Appeal rejected the orthodox view that nothing can come from a void contract:[32]

> "The logical proposition, however, upon which the orthodox view is

based, does not depend upon the terms or construction of the arbitration clause. It asserts that if the containing contract is void ab initio, an arbitration clause contained within it is also void. It follows that if the logical argument is applied according to its terms, the intention of the parties could be thwarted even if, on its true construction, the clause shows, not only that the dispute is within those agreed to be referred, but also that the clause was intended to survive the validity of the contract. Such a rule of law should, in my judgment, be rejected if this court can properly hold that it is not part of our law."

It is uncertain as to whether such an approach would recommend itself to the Irish courts. The collateral contract concept was not strictly necessary for the decision in either *Parkarran Ltd. v. M. & P. Construction Ltd.*[33] or Doyle v. Irish National Insurance Company plc,[34] and would be inconsistent with the approach of the Supreme Court in *Superwood Holdings plc v. Sun Alliance & London Insurance plc.*[35] The issue of the legality of contracts has, however, been considered indirectly by the High Court in at least two other cases. In *Vogelaar v. Callaghan*,[36] Barron J., insofar as he accepted that there was no reason for upsetting a finding of the arbitrator that the underlying contract was not intended to defraud the revenue, appears to have regarded the question as to the legality as being within the competence of the arbitrator. In *Church & General Insurance v. Connolly*,[37] Costello J. indicated obiter that had an arbitrator considered and incorrectly rejected an illegality argument, this would not have constituted misconduct for the purposes of setting aside the award. It is again implicit in this finding that the arbitrator had jurisdiction to determine the question of the legality of the underlying contract.

Even if the Irish Courts were to accept that it is simply a matter of interpretation whether or not the agreement to arbitrate constitutes a collateral contract, and that an arbitration clause may thus be valid notwithstanding the invalidity of the underlying contract, the public policy argument remains. It is implicit in the finding that the arbitration clause survives the illegality of the underlying contract, that the arbitrator must have competence to rule definitively on the legality of the underlying contract. Where a specific question of law has been referred to an arbitrator, his decision on that question will not be quashed even if an error of law appears on the face of the award.[38] It would thus seem that even a clearly erroneous decision of an arbitrator that an illegal contract is valid cannot be set aside by the courts. The jurisdiction of the arbitrator to determine such an issue can only arise where a dispute as to the legality of the contract is captured by the terms of the arbitration clause. Thus the requirement for immunity from judicial review i.e. that a specific question of law be referred to arbitration, is by definition fulfilled. This result, which is the irresistible conclusion of an acceptance that the arbitration clause may survive the illegality of the underlying contract, may yet prove a fatal stumbling block. ●

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1 High Court unreported 30th January, 1998
2 *Vogelaar -v- Callaghan* (1996) 1 I.R. 88(1996) 2 I.L.R.M. 226; *Manning -v- Shackleton* (1996) 3 I.R. 85; *Doyle -v- Shackleton* (1995) 2 I.R. 424
3 *Carroll (A Minor) -v- Budget Travel High Court*, unreported 7th December, 1995
4 (1995) 3 I.R. 303
5 See, for example, *Harbour Assurance Co. (UK) Ltd. -v- Kansa General International Insurance Co. Ltd.* (1993) Q.B. 701. See also dicta in *Heyman -v- Darwins Ltd.* (1943) A.C. 356 per Lord Wright 'I should prefer to put it that the existence of his jurisdiction in this as in other cases is to be determined by the words of the submission. I see no objection to the submission of the question whether there ever was a contract at all, or whether , if there was, it had been avoided or ended. Parties may submit to arbitration any or almost any question. In general, however, the submission is limited to questions arising upon or under the or out of a contract which would, prima facie, include questions whether it has been ended, and, if so, whether damages are recoverable, and, if recoverable, what is the amount.'
6 *Harbour Assurance Co. (UK) Ltd -v- Kansa General International Insurance Co. Ltd* (1993) Q.B. 701
7 See, for example, *McCarthy -v- Joe Walsh Tours Ltd.* (1991) I.L.R.M. 813. Cp. *Carroll (A Minor) -v- Budget Travel Ltd.* High Court unreported 7th December , 1995
8 (1996) 1 I.R. 83
9 (1942) A.C. 356 at 374 per Lord MacMillan
10 supra footnote no. 1
11 (1943) A.C.356
12 supra footnote no. 11
13 This was the approach adopted by the Supreme Court in *Superwood Holdings plc -v- Sun Alliance & London Insurance plc* (1995) 3 I.R. 303
14 This analysis is open to the criticism that the recission, in fact, dates from the act of the rescinding party: the arbitrator merely declares that act to have been effective at a time when the contract has already been avoided as has the arbitration clause
15 Insofar as this passage suggests that is simply a question of interpretation, it is submitted that this is to ignore the separate issue as to whether, as a matter of law, the arbitration clause can survive the recission of the contract
16 *Doyle -v- Irish National Insurance Company plc* High Court unreported 30th January, 1998
17 It seems unlikely that the courts would regard the requirement to go to arbitration per se as constituting an exemption clause i.e. there would have to be some further stipulation such as a time bar.
18 *Clayton Love -v- B & I Transport* (1966) 104 I.L.T.R. 157
19 supra footnote no. 8
20 supra footnote no. 1
21 For a detailed treatment of this case see O'Dell in 'Annual Review of Irish Law' (1995) at p.288
22 supra footnote no. 8
23 supra footnote no.1
24 (1995) 3 I.R. 303
25 *Ballasty -v- Army, Navy and General Assurance Association Ltd.* (1916) 50 I.L.T.R. 23; *Coen -v- The Employers Liability Assurance Corporation Ltd.* (1962) I.R. 314
26 (1995) 3 I.R. 303 at p.380
27 For a discussion of this distinction see Lord Wright in *Heyman -v- Darwins Ltd.* (1943) A.C. 356 and the cases cited therein, in particular, *Macuara -v- Northern Assurance Co.* (1925) A.C. 619
28 *Vogelaar -v- Callaghan* (1996) 1 I.R. 88 at 93. See also *Hayden -v- Sean Quinn Properties Ltd.* (1994) E.L.R. 45
29 See dicta in *Heymann -v- Darwins Ltd.*
30 (1993) Q.B. 701 at 711
31 See for example, the facts of *McCarthy -v- Joe Walsh Tours Ltd.* (1991) I.L.R.M. 813
32 (1993) Q.B. 701 at 711
33 supra footnote no. 8
34 supra footnote no. 1
35 supra footnote no. 24
36 (1996) 1 I.R. 88
37 High Court unreported 7th May, 1981
38 *McStay -v- Assicurazioni Generali spa* (1991) I.L.R.M. 237. The making of an error of law does not constitute misconduct for the purposes of setting aside or remitting an award: *Church & General Insurance -v- Connolly*, High Court unreported 7th May, 1981 at p.16 endorsing the statement of principle in Russell on Arbitration; it is also implicit in *Keenan -v- Shield Insurance Company Ltd.* (1998) I.R. 89 where the Supreme Court accepted that it's jurisdiction to review an error of law was confined to where that error appeared on the fact of the award.

The Minister's Alter Ego

The Carltona Principle

CAROL O'SULLIVAN, Barrister

"Although it is referred to as a principle and it has entered our law by way of common law, the Carltona principle is in fact a fundamental concept which enables democratic government to work. It enables Ministers to function efficiently in, yet to accept responsibility for, complex modern government where a vast number of decisions have to be taken. It enables Ministers to remain responsible, and accountable to the legislature, whilst having responsible officials make many of the decisions. It is an eminently practical rule which has important constitutional implications - it retains accountability."[1]

In *Patrick Devanney v District Judge Shields & Others*[2] a point of considerable importance was raised as to whether an official of the Department of Justice was entitled to take a decision on behalf of the Minister for Justice on appointing a District Court Clerk. The point involved a consideration of what is known as the Carltona principle, that principle being derived from the judgment of Lord Greene MR in *Carltona Limited v Commissioners of Works*[3]. It may be convenient at this point to cite the passage from the judgment of Lord Greene MR which enshrines and explains the principle

> "In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case, no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department.
>
> Public business could not be carried on if that where not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter, he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."[4]

The Carltona principle has been approved and regularly applied by the English Courts[5]. In this jurisdiction the principle had been expressly applied on only one occasion prior to the Devanney case, by the Supreme Court in *Tang v The Minister for Justice*[6]. That case concerns the propriety of decisions taken by civil servants in the name of the Minister for Justice under the Aliens Act, 1935. In the course of his judgment the Chief Justice having quoted the foregoing passage of Lord Greene MR stated:

> "I am satisfied that this represents an accurate statement of the law as regards the powers of the Minister in relation to the granting or refusal of permission to aliens to remain in the State. Having regard to the extensive powers conferred on the Minister by the Aliens Act, 1935 and the regulations made thereunder, it cannot be supposed that it was the intention of the Legislature that the Minister personally should exercise these powers.
>
> The duties imposed upon the Minister and the powers given to the Minister can be and are normally exercised under the authority of the Minister by responsible officials of the Minister's department".7

In the Devanney case the Applicant challenged the validity of a summons on the ground that the District Court Clerk (the Notice Party) who had issued the summons had not been validly appointed a District Court Clerk by the Minister for Justice. The Notice Party had been appointed a District Court Clerk on foot of two documents which issued from the Department of Justice on the 5th December 1996. The first document was signed by Margaret Kerrigan who was described as "an Officer authorised in this behalf by the said Minister" and read as follows:

"Court Officers Act, 1926.

> The Minister for Justice, in exercise of the powers conferred on her by subsection (2) of section 46 of the Court Officers Act, 1926, hereby

appoints Ms Ann Giblin a District Court Clerk.

Dated this 5th day of
December 1996
For the Minister for Justice"

The second document was signed by Noel Synott who was described as "an Officer authorised in this behalf by the said Minister" and read as follows:

"Court Officers Act, 1926.

The Minister for Justice, in exercise of the powers conferred on her by subsection (1) of section 48 of the Court Officers Act, 1926 hereby appoints Ms Ann Giblin a District Court Clerk and assigns her to the District Court areas of Ballina, Belmullet, Ballycastle, Crossmolina, Foxford, Easky, Killala, Inniscrone, Balla, Ballycroy and Swinford, with effect from 5th December 1996.

Dated this 5th day of
December 1996
For the Minister for Justice"

The office of District Court Clerk was established under the Court Officers Act, 1926 and appointment to that office is governed by the provisions of subsection (2) of section 46 of that Act which provides:

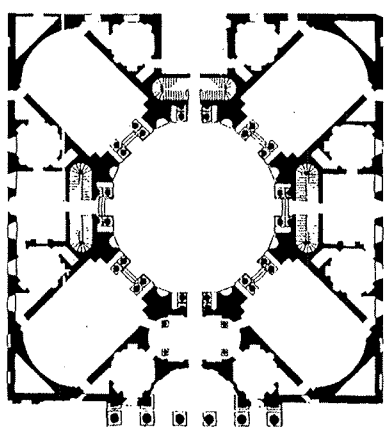
"Subject to the provisions of this section, every District Court Clerk shall be appointed by the Minister and shall (unless he is a pensionable officer) hold office at the will of and may be removed by the Minister."

Section 48(1) provides:

"Every District Court Clerk shall be assigned to such one or more District Court areas as the Minister shall from time to time direct and shall have and exercise all such powers and authorities and perform and fulfil all such duties and functions in relation to the District Court in such District Court area or areas as shall from time to time be conferred or imposed on him by statute or rule of court.."

Before McCracken J. in the High Court it was argued on behalf of the Applicant that section 46 requires the appointment of a District Court Clerk to be made personally by the Minister for Justice and that the power conferred upon the Minister by that section was not one which could be delegated by him. The Respondents formulated a number of submissions in opposition to the Applicant's claim. Firstly, the Respondent relied on the Carltona principle to argue that the appointment did not require the personal decision of the Minister. Secondly, it was contended that the appointment was valid as the signatories of the aforesaid documents were authorised by order of the Minister for Justice dated the 11th July 1996 to authenticate by their signatures, orders and instruments made by the Minister for Justice pursuant to the provisions of subsection (4) of section 15 of the Ministers and Secretaries Act, 1924 and subsection (7) of section 7 of the Documentary Evidence Act, 1925. Thirdly, the Respondent relied on the authority of *D.P.P. v O'Rourke*[8] to the effect that the assignment of a District Court Clerk to a specific District Court area did not require the personal decision of the Minister. Finally it was argued that, even if the Notice Party had not been properly appointed, the summons was defective only to the extent that the name of an appropriate District Court Clerk did not appear on its face and that such defect had been cured by the attendance in the District Court of the Applicant in answer to same or, alternatively, that such defect could be cured by the issue of a new summons.

McCracken J. in the course of his judgments[9] considered the Carltona case but sought to distinguish it on the basis that Lord Greene M. R. in that case was dealing with the requisition of a factory



premises under wartime emergency legislation where it appeared to be necessary or expedient to do so in the interest of public safety, the defence of the realm, the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community. In holding that the Notice Party had not been properly appointed a District Court Clerk and granting a declaration that the summons was invalid and of no effect McCracken J. made the following observations:

- no authority had been cited to him that the Carltona principle had ever been applied to the appointment by a Minister of a person to any particular office.

- the office of District Court Clerk is an important statutory position carrying serious responsibilities in the administration of justice

- under the provisions of section 46 of the Courts Officers Act, 1926 District Court Clerks are not only appointed by the Minister for Justice but hold office at the will of and may be removed by the Minister

With regard to the Respondent's subsidiary submissions the Court was of the view that the order of the Minister for Justice dated the 11th July 1996 merely authorised the aforesaid officers in the Department of Justice to authenticate by their signatures, decisions made by the Minister and did not authorise them to make decisions for the Minister. McCracken J. accepted that the Carltona principle did apply to the assignment of District Court Clerks to District Court areas and that the only defect in the summons was that the name of an appropriate District Court Clerk did not appear on the summons, but considered that these were not matters which could be of assistance to the Respondent.

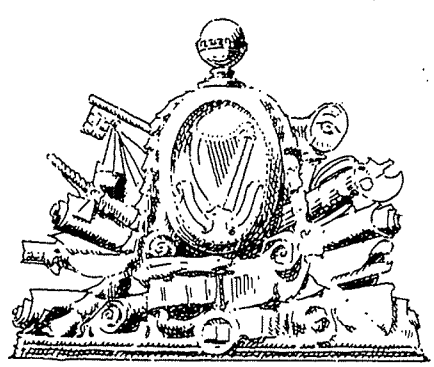
It is clear from the judgment of McCracken J. that although he accepted that certain administrative functions could be performed by department officials under the Carltona principle, he was of the opinion that there was no reason why the Minister for Justice

could not attend personally to the appointment of District Court Clerks and that the Minister should in fact do so in light of the importance of that statutory office.

The judgment of McCracken J. had serious implications for thousands of other summons issued by District Court Clerks who had been appointed in a similar manner as the Notice Party in the judicial review proceedings. The procedure for the issue of a summons by a District Court Clerk in respect of a criminal matter is governed by the provisions of Section 1 of the Courts (No 3) Act, 1986. Insofar as it is relevant, that section provides that proceedings in the District Court in respect of an offence may be commenced by the issuing, as a matter of administrative procedure, of a summons by the appropriate office of the District Court. If a District Court Clerk issues a summons by administrative procedure under the Courts (No 3) Act, 1986 and it can be shown that the District Court Clerk has not been properly appointed at the time of issue, the summons must be struck out as the basis of the District Court's jurisdiction is missing, that is, the making of a complaint to a person authorised to receive it. As a result of the High Court decision in the Devanney case, a number of Judges of the District Court commenced striking out summonses which had been issued prior to the date of that decision, the Minister for Justice having taken the precautionary step of personally re-appointing all District Court Clerks following the judgmment. Though new complaints could be made in respect of the offences alleged by the majority of those summonses which had been struck out, the statutory time limits providing for the issue of summonses in the Petty Sessions (Ireland) Act, 1861 would afford a complete defence to the re-issue of certain other summonses unless the judgment of McCracken J. was overturned by the Supreme Court. The judgment also had serious implications for other statutory appointments which had been effected in a similar manner by the Department of Justice or other ministerial departments. The Respondents'[10] appealed to the Supreme Court on the grounds that McCracken J. had erred in law in finding that the Notice Party was not properly appointed a District Court Clerk and in finding that the Carltona principle did not apply to the appointment of a District Court Clerk. The appeal was expedited.

On the 28th November 1997 the Supreme Court allowed the appeal. In the course of his judgment Hamilton C.J.,[11] citing with approval a number of authorities on the operation of the Carltona principle,[12] accepted that the principle is a common law constitutional power capable of being negatived or confined by express statutory provision, that the principle can apply to decisions of great importance and that no question of delegation arises under the principle. In particular, he found that the provisions of section 46(2) of the Courts Officers Act, 1926 did not confine or negative in any way the exercise of the Minister's power and that though delegation was not necessary for the principle to operate, he found on the facts that delegation had occurred.

The Chief Justice accepted that District Court Clerks play an important role in the administration of the District Court and in the supervision of the issue of summonses. However, holding that the Carltona principle can apply to decisions of great importance, and noting that the Court's decision in the Tang case had not been distinguished in the High Court, he was of the view that a decision to appoint a person to the office of District Court Clerk was no more important than many decisions which fall to be considered by civil servants in the name of the Minister under the Aliens Act 1935. This point was elaborated on by Denham J. in her judgment, when noting the similarities between the statutory powers of the Minister at issue in the Tang case and the Minister's powers in the Court Officer's Act, 1926 and further, the similarity and importance of the O'Rourke decision.



The procedures for the selection and appointment of persons to the civil service, though not considered in the High Court, were raised by the Appellants in the Supreme Court and merited some observations in the judgment delivered by Keane J. A person holding the grade of an executive officer is qualified for appointment as a District Court Clerk. Standards of entry and recruitment for basic grades in the Civil Service are under the control of the independent Civil Service Commissioners and persons recommended by them are invariably appointed as a matter of formality by the Ministers of those departments to which they are assigned. Notwithstanding that section 2(2) of the Minister and Secretaries Act, 1924 requires all civil servants in a Department to be formally appointed by the Minister of that Department, subject to the power of veto of the Minister for Finance (which is waived in respect of Higher Executive Officers and posts at lower levels) and notwithstanding that most personnel functions in respect of individual civil servants of the State are vested in a Minister for a long number of years, such appointments have been made and such personnel functions have been performed for Ministers by departmental officials acting on their own initiative. The unanimous view of the Supreme Court was that the procedure adopted for the appointment of District Court Clerks was wholly in accordance with the Carltona principle.

The judgment delivered by Denham J. is noteworthy for its expansive view of the Carltona principle and its emphasis on the distinction between the delegation of powers and the devolution of powers under the principle. Denham J. expressly stated that the principle admits of exceptions and that the applicability of the principle will depend on the statute in question. Another significant aspect of Denham J.'s judgment was her observation on the application of the Carltona principle having regard to the provisions of the Constitution.

"It is the application of a principle arising on statutory interpretation of a statutory power of a minister of the executive enabling responsible officials to act "as" the minister in multifarious decisions, yet retaining constitutional responsibility and accountability in the minister who must answer to the legislature. As such it is a thread in the fabric of the operation of the Constitution."[13]

The case law clearly establishes that it is the relationship between a Minister and the officials in his Department that underlies the Carltona principle. A Minister is not only the head of his Department, he personifies the Department and, as corporation sole, bears responsibility in law for its every action.[14] A department official is the alter ego of the Minister subject to the fullest control of the Minister. It is obvious that a Minister cannot personally take every decision himself and that decisions must be taken by officials of suitable seniority for whom the Minister accepts responsibility. The devolution of responsibility is recognised as a practical necessity in the administration of a modern government and there is no reason why a Minister should not authorise officials to take decisions on his behalf provided they do not conflict with or embarrass them in the discharge of their duties and the decisions are suitable to their grading and experience. The official's authority need not be conferred on him by the Minister personally but may be conveyed generally and informally by his hierarchical superior.[15]

Conclusion

In general, a Minister is not obliged to bring his own mind to bear upon a matter entrusted to him by statute but may act through a duly authorised officer of his Department. There are some matters of such importance that the Minister is legally required to address himself to them personally and, therefore, a distinction must be drawn as a matter of law between powers a Minister must exercise personally, and those which can be devolved to an official. There can be no doubt that orders affecting the liberty of an individual, such as deportation orders and detention orders or the property rights of an individual, would require the personal attention of the Minister.[16] If a power is potentially damaging to the rights or freedoms of an individual, it must fall into the category of those decisions that require the personal attention of the Minister, however burdensome that might be to the Minister.

In devolving authority to his department official, a Minister is not only answerable to the legislature but is also susceptible to judicial review in an appropriate case. Such devolution could be challenged on the ground that it was unreasonable or that it contravened the rules of natural or constitutional justice or procedural fairness.[17] Furthermore, it may be that in the absence of the words "I am directed by the Minister" or "the Minister is of the opinion" a decision could be called into question. [18]

The Carltona principle will not apply where it is capable of being negatived, where it is expressly excluded by legislation, where a statute expressly defines the category or categories of officials who may take a decision on a Minister's behalf or when it is clear from the wording and context of the statute that the intention of the legislature in a particular case was that devolution of the Minister's powers would not arise with respect to a particular category of official in a department.

It is impossible to take issue with the principle enshrined in the Carltona case. The principle is a recognition of the need for a practical and commonsense approach to the efficient operation of modern democratic government. The unanimous decisions of the Supreme Court in both Tang and Devanney was a practical, conclusive and decisive endorsement of the principle first expounded by Lord Greene MR in the Carltona case, particularly in view of the multifarious functions of Ministers of State in relation to public business as we approach the millenium. ●

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1 Unreported Judgment Denham J. 28th November 1997

2 Unreported Judgment Supreme Court 28th November 1997.

3 [1943] 2 All E.R. 560.

4 Ibid. at page

5 *Lewisham Metropolitan Borough and Town Clerk v Roberts* [1949] 2 K.B. 608.
Reg. -v- Skinner [1968] 2 Q.B. 700, C.A. *Reg. -v- Holt* [1968] 1 W.L.R. 1942.
In Re Golden Chemicals Products Ltd [1976] Ch. 300.
Oladehinde v Secretary of State for the Home Department
[1990] 3 All ER 393
R v Secretary of State, ex p Doody [1993] 1 All ER 151.

6 [1996] 2 ILRM 46.

7 Ibid at page 60.

8 Unreported Judgment Finlay P. 25th July 1983

9 Unreported Judgment 31st October 1997.

10 The appeal was taken by the D.P.P., Ireland and the Attorney General.

11 O'Flaherty J., Denham J., Barrington J. and Keane J. agreeing.

12 Wade on Administrative Law 7th Edition at page 357.
Lord Donaldson M.R. in *R -v- Home Secretary*, Ex parse Oladehinde (1991) 1 AC 254 at page 282.

13 Unreported Judgment 28th November 1997 page 12.

14 Hogan & Morgan Administrative Law in Ireland at page 57/58.

15 Lewisham Borough v Roberts [1949] 2 KB 608.
Woollett v Minister for Agriculture and Fisheries (1955) 1 QB 103.
Judicial Review of Administrative Action, de Smith, Woolf & Jowell 5th Edition paragraph 6-113.

16 de Smith, Woolf & Jowell Judicial Review of Administrative Action paragraph 6-114.

17 *R -v- Secretary of State for the Home Department*, ex parse Oladehinde R .v. Secretary of State for the Home Department. ex parse Alexander [1991] 1 AC 254

18 *Woollett -v- Minister for Agriculture and Fisheries* [1955] 1 QB 103. This case was concerned with whether it was competent for the Minister for Agriculture to authorise a civil servant in his department to exercise his power to appoint two nominated members of the Agriculture Land Tribunal under the provisions of the Agriculture Act, 1947. Lord Denning stated:

> "I am quite aware that the Act does not require any formalities and that the Minister can act by any servant in his department, at any rate so long as the servant uses the magic words "I am directed by the Minister" to do it; but in this case not even those words were used. and, in the absence of them the procedure was irregular, to say the least about it. There is, I think, some virtue in expecting a civil servant, when duly authorised, to use the words "I am directed by the Minister" and so forth: for that should bring home to him the significance of what he is doing and should make him realise that if he does anything wrong he will be implicating the Minister.

Opening of the Arbitration Centre

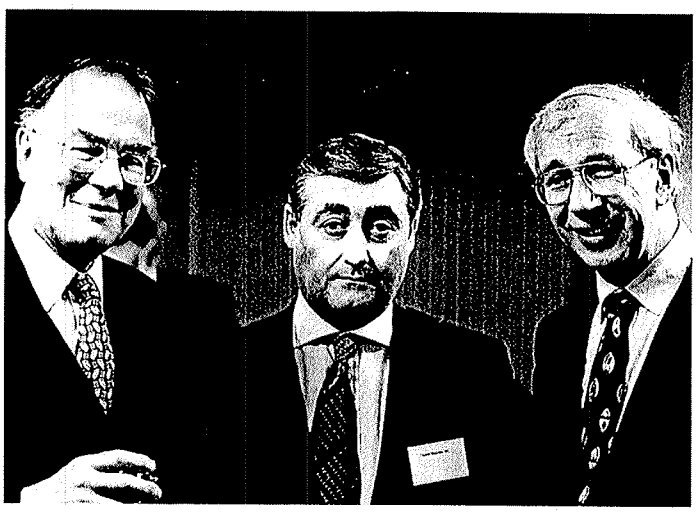
The Bar Council's new Arbitration Centre in the Distillery complex was officially opened by the Chief Justice on Friday 6th February last. The Attorney General, Mr David Byrne S.C. and the Chairman of the International Court of Arbitration in Paris, Mr Christopher Koch also spoke at the opening, which was attended by members of the judiciary, the Bar and senior figures from the Irish Arbitration community. The launch of the centre was co-ordinated by the Bar Council's Arbitration Committee under the Chairmanship of Pat Hanratty S.C.

The Centre has 20 serviced meeting rooms, including 4 large, purpose-built arbitration hearing rooms.

It houses state-of-the-art technology, including video-conferencing, digital projection equipment, digital sound systems and access to e-mail and network services. Stenographic, secretarial and catering facilities can also be arranged.

It is intended that the Centre be used as a venue for domestic and international arbitrations as well as seminars, conferences and consultations.

Details on the Centre and it's facilities are available from Mary O'Reilly at 817.4614



Christopher Koch, Chairman of the International Court of Arbitration, Patrick Hanratty, S.C., Chairman of the Arbitration Committee, Roderick Murphy, S.C.

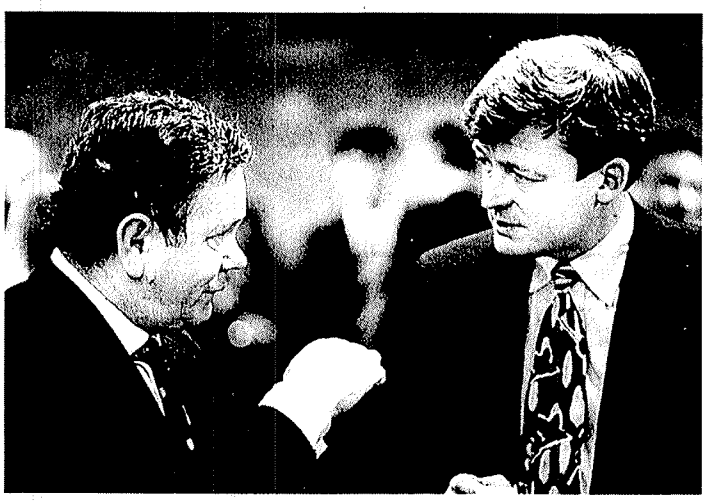
Vincent Martin, Damien Ó Muiri

Kevin darcy, Paul Fogarty, Geraldine Griffiths, John McCoy

John Dowling, Claire Byrne, Cian Ferriter

Pat Hanratty, S.C., Mr. Justice Liam Hamilton, the Attorney General, Mr. David Byrne.

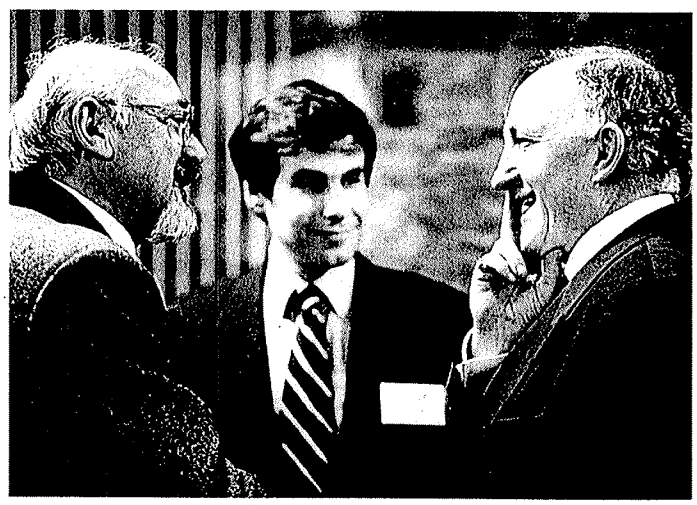
Mr. Justice Liam Hamilton, John MacMenamin, S.C., Chairman of the Bar Council.



Mr, Justice Peter Shanley, Pat O'Connor, Senior Vice-President, Law Society

Christopher Koch, Chairman of the International Court of Arbitration, Pauline Marrnian-Quinn, Insurance Ombudsman.

Frank Murphy, Roderick Murlhy, S.C., Desmond Miller, Dublin Chamber of Commerce.



Mr, Justice Peter Shanley, Pat O'Connor, Senior Vice-President, Law Society

THE CHILD CARE ACT 1991

Annotated by Paul Ward.
Round Hall, Sweet and Maxwell, 1997, Paperback £19.95

Paul Ward's annotated edition of the Child Care Act 1991 is the first title in the Round Hall annotated legislation series. It deals with each section of the Child Care Act 1991. It firstly recites each section, which is then followed by annotations which fall into three categories. The first of these is definitions which cover the actual words used in a particular section. The next section is a general note on the meaning of the section in question and finally, under the heading of commencement, the relevant commencement date and statutory instrument is given.

In terms of presentation the book comes in a handy-sized paperback volume which runs to a total of 112 pages including the index. The price listed above is very reasonable particularly in the context of the usual price of legal texts.

The first thing to be said about the book is that it is of course an annotation of the statute. It is not and does not purport to be a textbook covering this area of law. However in my view it is a very useful, and indeed an essential starting point for any practitioner, or indeed any other professional involved in the area of childcare who is about to embark on work in this area.

The book is laid out in the same format as the statute itself. It commences with the arrangement of sections and after reciting them, there is a useful introduction and general note. For those familiar with this legislation, I think it is important to point out that although the act was passed on the 10th July 1991, Section 1(2) provides that the Act should come into operation by ministerial order.

The Act has been implemented piecemeal in the years since 1991. For example Section 3 of the Act which confers a statutory duty upon Health Boards to promote the welfare of children in its area, who are not receiving adequate care and protection, came into force on the 1st December

1992 by virtue of S. I. No. 349 of 1992. Various other sections have been implemented at different times since then.

The provisions of Part III and Part IV that deal with care proceedings in the District Court came into force as of the 31st October 1995 by virtue of S. I. No. 258 of 1995. Throughout the book, in the course of the annotation of the various sections, the relevant commencement order and statutory instrument number are given. However at the end of the general introduction note on page four, there is an entire list of the statutory instruments and commencement orders.

Prior to this publication it was necessary to trawl through the various statutory instruments and cross reference them to the sections of the Act, with a view to finding which sections of the Act were in force at that particular time. The book under review provides a very handy ready reckoner in this regard, which will be an enormous time saver for any busy practitioner.

As stated above, this book is not a textbook on the area of childcare law. However one criticism I would make of the book is that there is very little reference to case law. Although it would clearly be impossible to discuss case law in depth, in a book of this kind, there would appear to be some very obvious omissions. Section 5 of the Act, deals with the duties of a Health Board to provide accommodation for homeless children within its area. The general note paraphrases Section 5.

This is followed by a brief reference to the Seanad debates which resulted in the word "suitable" being inserted into the section. The last paragraph in the general note states by way of illustration, that the Eastern Health Board accommodates child drug abusers in a specialist short term residential unit, rather than providing Bed & Breakfast.

It goes on to add that voluntary bodies also co-operate in the provision of accommodation, notably Focus Point with it's "Off The Streets" project. The commentary on this section entirely fails to make any reference to the litigation concerning this section that has taken place in recent years, and the decisions handed down by the Superior Courts in this regard. While obviously the nature of the publication would not allow for a detailed discussion of those cases, in my view it is unfortunate that they were not at least referred to in the note.

Perhaps the above criticism merely points to the need for a legal textbook dealing with this area of law, which would contain a discussion and analysis of the case law. Notwithstanding the above, this reviewer has no hesitation in recommending that all practitioners in this area should equip themselves with a copy of this book.

—Carmel Stewart, Barrister

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SHATTER: FAMILY LAW

4th Edition by Alan Shatter,
Butterworths, £80.00

Two weeks ago I arrived outside Dun Laoghaire District Court to deal with an aspect of a family law matter that was becoming, as the attitudes of the protagonists hardened towards one another, more and more complex by the day. I was sure that I had detected a certain scepticism entering into my client's voice at our consultation the previous day, as she closely cross examined me about her rights and obligations vis-à-vis her former partner. Having been put under severe pressure to explain the merits of the dissenting judgement in some obscure case or

another, I was not relishing the ordeal ahead of me.

I had one Act, one case, and a scribbled page of notes with me. My counterpart was armed in a similar light manner and also apparently dreading what lay ahead of him. Why? I'll tell you. After the first teapot was thrown in anger, both our clients had rushed to their local bookshop and bought themselves a copy of 'Shatter: Family Law'. They had been reading it by torchlight under the covers each night, in the hope of gaining some inestimable advantage over the other in Court.

My colleague and I were met outside the courthouse with the sight of our clients deeply immersed in their respective copies of the book and its discussion of "The (Domestic Violence) Act, 1996 and the Principles Previously Enunciated in Earlier Judgements" (Para. 16.61 et seq)!

What is a Junior Counsel to do? How can we hope to maintain the aura of mystery that surrounds Family Law when this man (as if he wasn't already busy enough) has recklessly and apparently without any regard for my ilk and me, gone and written a completely lucid, detailed and comprehensive account of Family Law? A book so accessible to the lay reader, that soon every client will arrive to Court armed to the teeth with knowledge that frankly, is best left in the hands of the professionals.

Alan Shatter has been to the forefront of every major development in Family Law since the mid 1970's. One can trace the evolution of this area of law, by reference to the manner in which the various editions of his book have grown in size since it was first published in 1977.

This is the first edition since 1986 and thus the first since the introduction of ground breaking legislation such as The Status of Children Act, 1987, The Judicial Separation and Family Law Reform Act, 1989, The Domestic Violence Act, 1995, and the Family Law (Divorce) Act, 1996, to name but a few.

In parallel, the past fifteen years have witnessed an explosion in reporting of judgements from the Superior Courts particularly in the area of Nullity and Adoption Law. A further area of growth has been in the, often very complex, machinery for enforcement and recognition of EU and world-wide obligations and orders.

As a consequence, this book is a most ambitious undertaking, yet it succeeds in never losing its authority or eye for detail, in spite of its breadth. The book opens with a discussion of the generic family, the married family and its place at the heart of the 1937 Constitution and thus much of our early legislation and judicial thinking.

It ends with a discussion of the 'Family outside Marriage' a fact of post-modern 1990's Ireland, and reflected in much of the legislation on the topic in the last fifteen years. In the pages between, there follows an analysis of the legal consequences of the assembly and disassembly of a family and a marriage. Almost every chapter ends with a thoughtful discussion of the need for reform, many of which reflect Mr. Shatter's political as well as legal wishes.

Some chapters are necessarily less comprehensive than others as the issues they discuss stem from very recent legislation and this have not been the subject of much, if any, judicial interpretation. Similarly the final chapter dealing with Social Welfare and Family Law is likely to date quicker than any other chapter in the book as entitlements and definitions seem to change from year to year.

The Appendices are particularly useful and thoughtful, containing in many cases, the identities of parties to various international conventions and treaties.

If I was to make a criticism of the book, it is slight. The chapters are laid out in numbered paragraphs, but this is not reflected in either the Table of Contents or the Index.

I do not pretend to have read the book from cover to cover; therefore I cannot say it is infallible. However, in the months since its publication, I have had constant recourse to it for both the obvious and obscure. Each time it has proved itself an authoritative general text which either answers one's enquiry or immediately points one towards an Act, case or text which will provide it.

I have little doubt that this book, like its predecessors, will quickly establish itself as the leading textbook in this field.

—Paul McCarthy, Barrister

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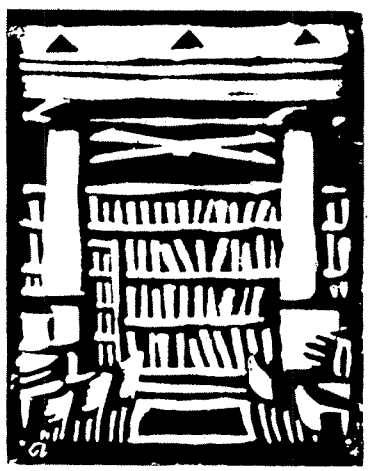

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