The Bar Review

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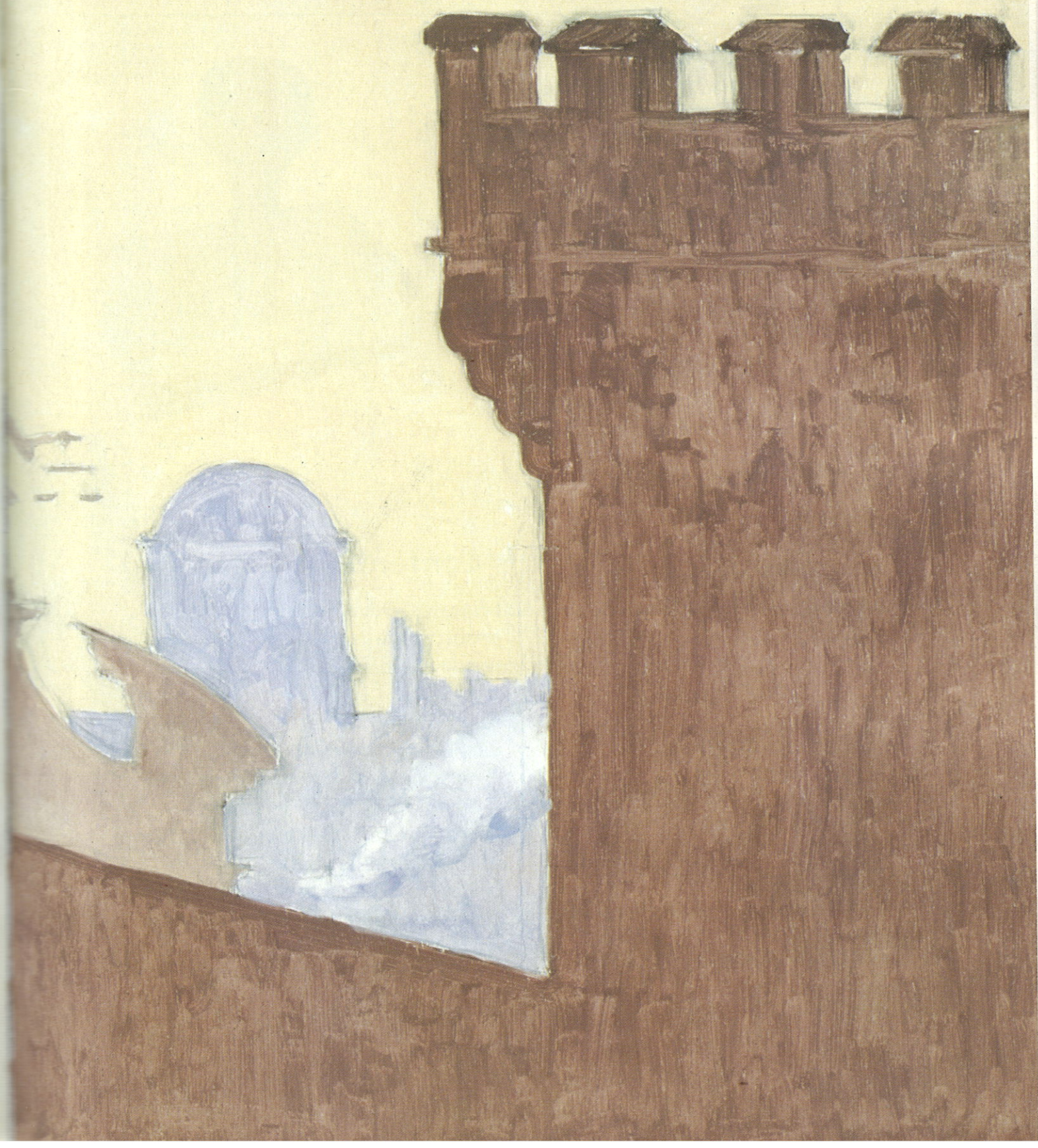

Redmond: Dismissal Law *in* Ireland

By Dr. Mary Redmond, BCL, LLM (N.U.I) PhD9Cantab), Solicitor

This important new book from Butterworths examines in detail the legal minefield that is this particular area of employment law.

- Includes discussion of judgments of the Circuit Court, High Court, Supreme Court and the Employment Appeals Tribunal, from which, guiding principles are extracted.
- Legislation covered includes: The Unfair Dismissals (Amendment) Act 1993, and jurisdictions which have developed recently, e.g. under the European Communities (Safeguarding of Employees Rights on Transfer of Undertakings) Regulations 1980.
- Provides expert advice and guidance for both employer and employees on their respective rights and legal obligations regarding dismissal.

The Author

Mary Redmond is a former Fellow at Churchill College and Christ's College, Cambridge. She is a solicitor specialising in employment law, and has been published extensively on the subject. she is also a member of the Labour Relations Commission and is Adjunct Professor of Employment Law at the National College of Industrial Relations.

Contents:

Historical Development of the law's protection against wrongful termination of employment; The Irish constitution and dismissal; Dismissal at common law termination by the parties; Remedies for wrongful dismissal; Statutory unfair dismissal; Preliminary requirements;
The employer's conduct and decisions to dismiss; Redundancy; Constructive dismissal; Collective aspects of unfair dismissal; Remedies for unfair dismissal; Practice and procedure.

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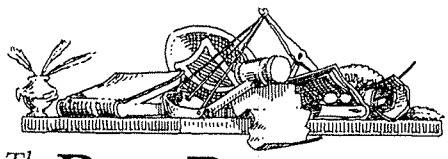

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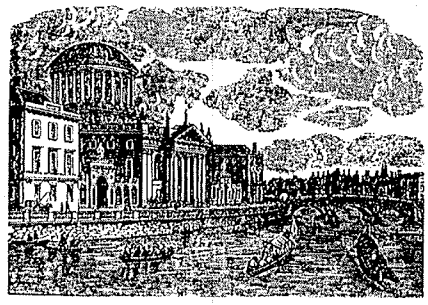
Pat O'Donnell

Pat had been doing security work in the Law Library buildings for the past eighteen months. Everyone who knew him recognised him as a kindly gentle, courteous, helpful and totally conscientious man. These characteristics were evident in all his work and all he did in life.

He actually was the sort of man who was so totally reliable that he arrived 15 minutes early for work - every day. He was the type of person who his colleagues knew would always be a constant source of support and help no matter what the problem.

He was in so many ways a typical man of his generation. He was born in



Tipperary and he still remained faithful to his roots in his native county. He came from a large family to whom he remained constantly loyal. He was too a man of firm but unshowy religious beliefs.

Like so many he left his home at the age of 16 to work on the building sites in England and afterwards in Germany. Ultimately he returned home to Ireland.

He met his wife Ann in Dublin. They were a totally devoted couple who had led a happy life together until this dreadful tragedy struck. We know that there are no words which can be a consolation for Ann's loss.

Pat died while he was carrying out his work with courage and commitment. He was prepared to put himself at risk by assisting the two gardai who were bravely attempting to arrest the intruders in the Distillery building carpark.

Members will by now be aware that there is a tangible way in which they can demonstrate their support for Pat's memory and for his family. We would ask every member to make a significant contribution to this fund.

Paul McCarthy

President Mary McAleese pictured with the finalists in the Bar Council / Moot Court Competition.

Moot Court Competition

The National Finals of the Bar Council/Butterworths Moot Court Competition took place on Friday 12th March in the Supreme Court. President Mary McAleese met with several of the participants on the morning of the event in Aras an Uachtarain. The President had coached teams in the first few years of the competition for Queen's University Belfast, while she was a lecturer in law.

The final took place in the Supreme Court before Mr Justice Barrington, Ms Justice Macken, Mr Justice Girban from Northern Ireland, Judge Linnane and John MacMenamin SC, Chairman of the Bar Council.

The Institute of Professional Legal Studies team, acting as plaintiffs, won the final with their team comprised of Desmond Fahy (who also won Best Advocate), Ethne Harkness, David Sharpe and Michelle Campbell.

The other finalists were The Honourable Society of King's Inns, whose team comprised of Seamus Clarke, Paul Christopher, Carl Hanahoe and Ciara McElholm.

Respect for the Rule of Law must Prevail

The recent murder of solicitor Rosemary Nelson, which appears inextricably linked to her work as a lawyer has lead to many tributes in her memory. All such tributes have borne witness to her courageous and dedicated work on behalf of all her clients. The mixture of mourners at her funeral, from all traditions, religions and professions, acknowledged her ability to circumvent traditional sectarian divides. Representatives of both branches of the legal profession, North and South, bore witness to her efforts to see justice done regardless of the personal cost to herself. The Bar Council, on behalf of members, extends its deepest sympathy to Rosemary Nelson's husband, Paul and to her three young children, Christopher, Gavin and Sarah.

Rosemary Nelson's death appears to carry sinister echoes of the death of Patrick Finnucane ten years ago. On one view, both these murders are individual tragedies. But on the larger canvass, their murders constitute attacks on the rule of law itself.

The rule of law as internationally understood, insists that everyone is entitled, as of right, to have the benefit of legal representation in criminal matters. The constitutional status of such a right in Ireland was recognised in the *State (Healy) v. O'Donoghue,* 1976, Irish Reports.

Lawyers representing clients in criminal, or otherwise unpopular causes, play a vital role in the administration of justice which is essential to a healthy, democratic society. It is quite wrong that any lawyer so acting should be identified with the illegal activities with which their clients are charged.

The murders of Rosemary Nelson and Patrick Finucane are atrocities which were carried out by people who have not got sufficient courage to live by the rule of law. They cannot live in the light of justice – but inhabit the dark world of injustice.

While the immediate reaction of many to Rosemary Nelson's death may be one of despair, ultimately, there must be a realisation that the Good Friday Peace Process is the only way forward and that a lasting and just peace can be the only solution.

One element of that peace is that the rule of law must prevail and must be respected in all its aspects. A second is that lawyers must be permitted to represent their clients and to vindicate their rights without fear or threat. A third aspect is the realisation that the rule of law must be indivisible; it must apply to all groupings and all elements in a community in an equal and fair way.

For respect for the rule of law to prevail, a full, independent and transparent inquiry is required as the only effective and satisfactory means of identifying those responsible for these killings.

Review of Moriarty and Flood Tribunals, to date

DECLAN MCGRATH, Barrister

When they were set up, it was envisaged that the Moriarty Tribunal and the Flood Tribunal would complete their work within a matter of months. However, despite an exhortation in the terms of reference of both tribunals that the inquiry "be completed in as economical a manner as possible and at the earliest date consistent with a fair examination of the matters referred to it", both are still ongoing more than a year after being set up. The purpose of this article is to chart progress and to examine some of the issues which have been raised in the cases generated to date.

Moriarty Tribunal

The Tribunal of Inquiry (Payments to Messrs. Charles Haughey and Michael Lowry) (colloquially known as the Moriarty Tribunal) was established on 26 September 1997[1] to further investigate matters arising out of the report of the McCracken Tribunal[2].

Terms of Reference

Under its Terms of Reference, the Tribunal is required to inquire into the following matters:

(a) Whether any substantial payments[3] were made, directly or indirectly, to Charles Haughey during any period when he held public office between 1 January 1979 and 31 December 1996, or Michael Lowry during any period when he held public office, in circumstances giving rise to a reasonable inference that the motive for making the payment was connected with any public office held by him or had the potential to influence the discharge of such office[4].

(b) The source of any money held in certain bank accounts for the benefit or in the name of Mr. Haughey or Mr. Lowry or any other person who holds or has held ministerial office or in any other bank accounts discovered by the Tribunal to be for the benefit of or in name of Mr. Haughey or Mr. Lowry or for the benefit or in the name of a connected person or in the name of any company owned or controlled by him.

(c) Whether any payment was made from money held in any of these accounts to any person who holds or has held public office.

(d) Whether Mr. Haughey or Mr. Lowry did any act or made any decision in the course of his ministerial offices to confer any benefit on any person making a payment referred to in paragraph (a) or any person who was the source of money of the kind referred to in paragraph (b), or any other person in return for such payments being made or procured, or directed any other person to do such an act or make such a decision.

(e) Whether any holder of public office for whose benefit money was held in any of the accounts referred to, did any act, in the course of his or her public office, to confer any benefit on any person who was the source of that money, or directed any person to do such an act.

(f) Whether the Revenue Commissioners availed fully, properly and in a timely manner in exercising the powers available to them in collecting or seeking to collect the taxation due by Mr. Michael Lowry and Mr. Charles Haughey and any other relevant payments or gifts.

It is also required to make recommendations, in the light of its findings and conclusions, in relation to a number of matters including political contributions, company law reform, tax collection and financial and professional regulation.

Public Hearings

At its first public sitting, the Tribunal set itself a provisional deadline of holding public hearings in early 1998[5] and completing its report by 31 July 1998. There has obviously been considerable slippage in this timetable which the Sole Member has attributed to the breadth of the terms of reference and the extensive investigations necessitated thereby, the volume of documentation involved, and the delays which resulted from the decision of the Supreme Court in *Haughey v Moriarty*[6] (which is examined below)[7]. Public hearings finally commenced on 28th January and the Sole Member has indicated the intention of the Tribunal to conduct these in a number of discrete sittings[8]. Thus instead of assembling all of the material relevant to each and every term of reference and presenting it at one long continuous sitting, the Tribunal will sit at intervals to deal with manageable portions of the evidence.

Details and transcripts of the public sittings of the Tribunal are available on its website at http://www.moriartytribunal.ie/

Flood Tribunal

The genesis of the Tribunal of Inquiry into Certain Planning Matters and Payments (colloquially known as the Flood Tribunal)[9] can be traced back to the revelation that Ray Burke received £30,000 in cash from Joseph Murphy Structural Engineering (JMSE) in 1989 and the allegation by James Gogarty, former managing director of JMSE, that this contribu

tion was linked to the rezoning of certain lands in North County Dublin.

Terms of Reference

Section A of the terms of reference, as originally drafted, required the Tribunal to inquire into the following matters[10]:

1. The identification and beneficial ownership of certain lands in North County Dublin ("the lands").

2. The planning history of the lands.

3. Whether the lands were, on orafter 20 June 1985, the subject of a number of specified applications or resolutions including applications for planning permission or re-zoning resolutions, the out come of such applications and resolutions and the identity of:

(i) any persons or companies[11] who had a material interest in the said lands or who had a material involvement in such matters;

(ii) any members of the Oireachtas, past or present, and/or members of the relevant local authorities who were involved, directly or indirectly, whether by the making of representations or by voting or who received payments from persons or companies referred to in paragraph (i).

(iii) all public officials who considered, made recommendations or decisions on any such matters and to report on such considerations, recommendations and/or decisions.

1. The identity of all recipients of payments[12] made to political parties or members of the Oireachtas or public officials by Mr. Gogarty or Mr. Bailey[13] from 20 June 1985 to date, and the circumstances, considerations and motives relative to any such payment and whether any of the persons referred to at paragraphs 3(ii) and 3(iii) were influenced directly or indirectly by the offer or receipt of any such payments or benefits.

2. In the event that the Tribunal in the course of its inquiries is made aware of any acts associated with the planning process committed on or after the 20th June 1985 which may in its opinion amount to corruption, or which involve attempts to influence by threats or deception or inducement or otherwise to compromise the disinterested performance of public duties, it shall report on such acts and should in particular make recommendations as to the effectiveness and improvement of existing legislation governing corruption in the light of its inquiries.

The Tribunal is also requested to make recommendations in relation to any legislative amendments as it considers appropriate in the light of its findings.

Amendment of the Terms of Reference

During the course of its investigations, evidence came to the Tribunal's attention concerning a number of matters which fell or might have fallen outside its terms of reference. In order to investigate these matters, the Sole Member requested the Government to delete the date "20 June 1985" from its terms of reference. However, the advice of the Attorney General was to the effect that the terms of reference of a tribunal could not be changed once the tribunal had been set up and therefore amending legislation was introduced to facilitate the Sole Member's request. The Tribunals of Inquiry (Evidence) (Amendment) (No.2) Act, 1998

inserted a new s.1A into the 1921 Act which provides that an instrument establishing a tribunal may be amended, pursuant to a resolution of both Houses of the Oireachtas, where (a) the tribunal has consented to the proposed amendment, following consultation between the tribunal and the Attorney General, or (b) the tribunal has requested the amendment[14]. This power of amendment is, however, subject to the caveat that "the tribunal shall not consent to or request an amendment to an instrument to which this section applies where it is satisfied that such amendment would prejudice the legal rights of any person who has co-operated with or provided information to the tribunal under its terms of reference."

The terms of reference of the Flood Tribunal were amended in July 1998[15] by the deletion from paragraph 5 of the words "committed on or after the 20th June 1985" and the insertion of two new terms of reference to enable the Sole Member to pursue in relation to Ray Burke, an analogous inquiry to that being undertaken by the Moriarty Tribunal in respect of Charles Haughey and Michael Lowry, namely:

1. Whether any substantial payments were made or benefits provided, directly or indirectly, to Ray Burke which may, in the opinion of the Sole Member of the Tribunal amount to corruption or involve attempts to influence or compromise the disinterested performance of public duties or were made or provided in circumstances which may give rise to a reasonable inference that the motive for making or receiving such payments was improperly connected with any public office or position held by him, whether as Minister, Minister of State or elected representative.

2. Whether, in return for or in connection with any such payments or benefits, Ray Burke did any act or made any decision while holding any such public office or position which was intended to confer any benefit on any person or entity making a payment or providing a payment referred to in paragraph 1 above, or any other person or entity, or procured or directed any other person to do such an act or make such a decision.

Public Hearings

Public hearings were originally scheduled to begin on 16 November with the evidence of Mr. Gogarty being taken first in a quasi-depositional procedure. However, a number of the parties to the Tribunal applied for a postponement on the basis that they had been given insufficient time to investigate and prepare a defence to the allegations made by him in his sworn affidavit which was only served on them on 20 October.[16] When the Sole Member sat on 10 November to give his decision, he stressed that the timing of public hearings was at the sole discretion of the tribunal and the parties seeking an adjournment did not have a veto over proceedings. Given Mr. Gogarty's age and health, and the public interest in hearing his evidence in public, his evidence should be heard as soon as possible. However, having regard to all the circumstances, especially the furnishing to the Tribunal on 6 November by the Chief State Solicitor's Office of a number of statements taken by the Gardaí in the course of criminal investigations which contained information material to the interests of some of the parties, he granted a postponement until 12 January. The public hearing of Mr. Gogarty's evidence duly commenced on 12 January.

The Case Law

Tribunals have a notable tendency to generate litigation and the two tribunals considered here are no exception, having generated three cases and six written judgments to date[17]. These cases, especially the wide ranging challenge taken by the plaintiff in *Haughey v Moriarty* raise a host of issues, only some of which can be examined here.

Fair Procedures

One of the striking features of the cases has been the emphasis placed on procedural probity. Delivering the decision of the Supreme Court in *Haughey v Moriarty*, Hamilton C.J. endorsed a passage from another landmark decision on fair procedures, *In re Haughey* that:[19]

> The provisions of Article 38.1 of the Constitution apply only to trials of criminal charges in accordance with Article 38; but in proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution, the State, either by its enactments or through the Courts must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights.

It might well be argued that this is to impose too high a standard on tribunals.[20] One of the central conclusions reached by the Supreme Court in *Haughey* was to endorse its decision in *Goodman v Hamilton*[21] that a tribunal is not engaged in the administration of justice. If this is so, then why should procedural standards approaching those applied in judicial

proceedings be required? The answer, as indicated by the Supreme Court, is rooted in the seriousness of the consequences of an adverse finding by a tribunal for the good name and livelihood of a person. As was observed in the *Report of the Interdepartmental Committee on the Law of Contempt as it Affects Tribunals of Inquiry*:[22]

> The whole future of a number of persons depends upon the report of the Tribunal. Their political, commercial and social reputations may be (and sometimes have been) utterly ruined and their careers brought to an abrupt end by the report. The findings of Tribunals of Inquiry are usually of much greater consequence to those concerned than any litigation in which they may ever have been engaged.

Discovery

The rather protean concept of fair procedures received its most concrete application in relation to the orders of discovery made by the two tribunals.

In *Haughey v Moriarty*, one of the main challenges mounted by the applicant to the procedures of the Moriarty Tribunal was in respect of the orders of discovery made by it. In late 1997, the Tribunal had made a large number of orders of discovery and/or production, primarily against banking and other financial institutions. These orders were made in private and no notice of the intention to make the orders was given to the institution to which it was directed or to the persons affected thereby. The orders did provide that the person to whom the order was directed, or any person interested in any of the documents sought, had liberty to apply to the Tribunal for an order varying or discharging the said order. However, the Supreme Court was of the opinion that "[h]aving regard to the time limited in the said orders for compliance therewith and the failure to serve a copy of the order on any person interested...that concession was not of any real use"[23]. It therefore concluded that these orders had been made in breach of the plaintiffs' right to fair procedures:[24]

> Fair procedures require that before making such orders, particularly orders of the nature of the orders made in this case, the person or persons likely to be affected thereby should be given notice by the Tribunal of its intention to make such order, and should have been afforded the opportunity prior to the making of such order, of making representations with regard thereto. Such representations could conceivably involve the submission to the Tribunal that the said orders were not necessary for the purpose of the functions of the Tribunal, that they were too wide and extensive having regard to the terms of reference of the Tribunal and any other relevant matters.[25]

This conclusion had also been reached by Geoghegan J. in the High Court, but he had refused, as a matter of discretion, to quash the discovery orders on the basis that: (i) the Tribunal had acted *bona fide*; (ii) the plaintiffs had been afforded an opportunity to air their legitimate complaints; and (iii) it would be pointless to declare void the discovery orders and force the Tribunal to embark on a new and cumbersome procedure before it would be able to get

back details of whatever bank accounts it then had. The Supreme Court, however, was vigorous in its vindication of the plaintiffs' rights:[26]

> While this approach by the learned trial judge may enjoy the attractiveness of being pragmatic and, indeed, realistic, it does not have regard to the seriousness of the breach of the Plaintiffs/Appellants' right to fair procedures and the courts obligation to defend and vindicate the constitutional rights of the citizen.
>
> The vindication of such rights requires that the impugned orders of discovery made by the Tribunal other than in accordance with fair procedures be quashed and that the Tribunal be deprived of the benefit of such orders and the Court will so order.[27]

Whilst the Court proceeded to quash the orders of discovery made, it did acknowledge the entitlement of the Tribunal to make similar orders in the future if it considered that the making of such orders was necessary for the purposes of its functions and fair procedures were applied.[28]

The decision of the Court to quash the orders of discovery had serious ramifications for the work of the Tribunal. The conclusion that the orders were made in breach of the plaintiffs' right to fair procedures meant that the documentation obtained pursuant thereto was obtained by unconstitutional means. Pursuant to the exclusionary rule with respect to unconstitutionally obtained evidence,[29] the Tribunal had to proceed as if it had never had sight of any of the documentation which was unconstitutionally discovered. Not only could the Tribunal not use this documentation, any lines of inquiry prompted thereby had to be discontinued until such time as that documentation came into the possession of the Tribunal in a constitutional manner.

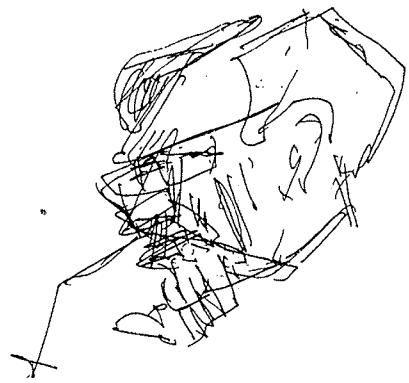
Public Hearings

In light of the confidential information required from financial institutions and other persons, the Moriarty Tribunal decided to conduct the investigative stage of its proceedings in private.[30] It purported to do so in reliance on s.2(a) of the Tribunals of Inquiry (Evidence) Act, 1921 which provides that a tribunal:

> shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the tribunal unless in the opinion of the tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given;

This decision was challenged in *Haughey* on the basis that it breached the plaintiff's constitutional rights to fair procedures. It was submitted that the term "proceedings" as used in s.2(a) related to all activities of the Tribunal including the preliminary investigation of the matters relating to the terms of reference. Thus, the plaintiffs had a *prima facie* right to be present.

For the purposes of dealing with this submission, the Supreme Court identified five stages to the inquiry undertaken by a tribunal of inquiry:



(1) A preliminary investigation of the evidence available;
(2) The determination by the tribunal of what it considers to be evidence relevant to the matters into which it is obliged to inquire;
(3) The service of such evidence on persons likely to be affected thereby;
(4) The public hearing of witnesses in regard to such evidence and the cross-examination of such witnesses by or on behalf of persons affected thereby;
(5) The preparation of a report and the making of recommendations based on the facts established at such public hearing.

The Court was of the opinion that the public are entitled to be present only at the fourth stage. Thus, the phrase "proceedings of the tribunal" in s.2(a) referred only to the public hearings of the tribunal at which evidence would be given on oath.

There are practical reasons for endorsing the decision of the Supreme Court in relation to this issue because it will permit tribunals to conduct their preliminary investigations in a more expeditious and efficient manner with obvious implications for the length and cost of this phase of the inquiry. At the preliminary stage, a tribunal is merely engaged in an evidence gathering exercise. This has two purposes. First, to ascertain if there is any information which would warrant moving forward to the public hearing stage. Second, to sift the relevant from the irrelevant in preparation for the public hearings. Provided that the procedural safeguards identified by the Court, namely the service of evidence to be adduced at the public hearings upon persons likely to be affected thereby and the availability of cross-examination are afforded, then no prejudice will result to any person from the decision to hold the preliminary investigation in private. Indeed, the Court ventured the view that admission of the public at the first stage could actually result in a breach of fair procedures:[31]

> If these inquiries in this investigation were to be held in public it would be in breach of fair procedures because many of the matters investigated may prove to have no substance and the investigation thereof in public would unjustifiably encroach on the constitutional rights of the person or persons affected thereby.

It is arguable, however, that the Court goes too far in ruling out the possibility of public attendance at sittings held during the preliminary investigation which involve the making of discovery or other orders. As noted, s.2(a) stipulates that the public must be admitted to "any of the proceedings of the tribunal". There is no doubt that in the curial context, the hearing and disposition of a motion for discovery or any other preliminary matter would be regarded as a proceeding. Therefore, it is arguable that pursuant to s.2(a) the public have a *prima facie* right to be present at such proceedings. While it would be open to a tribunal to exercise its discretion to exclude the public for the specified reasons, and it might very often decide to do so, it would, at a minimum, have to direct its mind to this question.

A converse objection to the sittings of the Flood Tribunal was taken in *Redmond v Flood*[32] In this case, the applicant sought, *inter alia*, an order of prohibition prohibiting the respondent from conducting a public inquiry into allegations made about him by Mr. Gogarty. The gravamen of the applicant's complaint was that the allegations were entirely groundless but that if public hearings were carried out into them, his good name would be impugned and neither cross-examination, rebuttal evidence nor a final report from the Tribunal vindicating his good name would be sufficient to undo the damage done to him by a protracted public hearing and airing of the unfounded allegations.

Dealing with the application for leave, the Supreme Court acknowledged that:[33]

> There is no doubt but that an inquiry by the Tribunal into the allegations made by Mr. Gogarty...allied with the exceptional inquisitorial powers conferred upon such tribunal...necessarily exposes the Applicant and other citizens to the risk of having aspects of their private lives uncovered which would otherwise remain private and to the risk of having baseless allegations made against them. This may cause distress and injury to their reputations and may interfere with the Applicant's constitutional right to privacy.[34]

The Court went on, however, to point out that the right to privacy is not an absolute right and that the exigencies of the common good may outweigh the constitutional right to privacy. In this case the exigencies of the common good required that "matters considered by both Houses of the Oireachtas to be of urgent public importance be enquired into, particularly when such inquiries are necessary to preserve the purity and integrity of public life". It was "of the essence of such inquiries that they be held in public for the purpose of allaying the public disquiet that led to their appointment."

Another submission which proved unsuccessful in *Redmond* was that the Tribunal should, in pursuance of fair procedures, have given the applicant an opportunity to be heard in relation to the sufficiency of the evidence against him before proceeding to a public inquiry. The Supreme Court dismissed the contention that its decision in Haughey was authority for the proposition that a tribunal could proceed to public inquiry only if there was a *prima facie* or strong case against a person:

> The Tribunal is not obliged to hold a private inquiry before proceeding with its public inquiry. The allegations made against the Applicant in this case could be false. At this stage we simply do not know. But they are grounded on a sworn affidavit. In these circumstances it appears to this Court that the Tribunal was entitled to decide that they were of sufficient substance to warrant investigation at a public inquiry. Indeed it would have been

> surprising if the Tribunal had decided otherwise.

It is noteworthy that the Court, in dealing with this submission, did not have recourse to the terms of reference of the Tribunal. The relevant section thereof mandates the Tribunal:

> To carry out such preliminary investigations in private as it thinks fit using all the powers conferred on it under the Acts, in order to determine whether *sufficient evidence* exists in relation to any of the matters referred to above to warrant proceeding to a full public inquiry in relation to such matters. (emphasis added)

Thus, the terms of reference themselves lay down a standard which must be met before an allegation can be aired in public and a decision that this standard has been met must be made before the Tribunal can proceed to public hearings. Though preliminary in character, this is a decision which affects rights and interests. It, therefore, attracts the dictates of natural and constitutional justice including the *audi alteram partem* rule.[35] Thus, whilst a form of private hearing would not have been necessary, it is arguable that the Tribunal should have invited and considered submissions before making the decision to proceed to public hearing.

Terms of Reference

The terms of reference of both tribunals are quite lengthy and complex and contain a number of ambiguities. Therefore, the interpretation of them adopted by the tribunals is a matter of considerable importance to the parties affected thereby. In *Haughey*, the Supreme Court was critical of the refusal of the Moriarty Tribunal to provide this information to the legal representatives of Mr. Haughey. The Court was of the view that, having regard to the fact that the terms of reference specifically named Mr. Haughey who was likely to be affected, one way or another, by the findings of the Tribunal, he was entitled to an explanation by the Tribunal of its terms of reference, certainly in so far as they related to him. The Court endorsed the following passage from the *Salmon Report*[36] as a correct statement of the law and practice applicable to tribunals in this jurisdiction:

> The Tribunal should take an early opportunity of explaining in public its interpretation of its terms of reference and the extent to which the inquiry is likely to be pursued. As the inquiry proceeds, it may be necessary for the Tribunal to explain any further interpretation it may have placed on the terms of reference in the light of the facts that have emerged.

It was suggested that such an explanation could be given at an early public sitting of the Tribunal and this duly took place on 24 September 1998, when the Sole Member gave a lengthy exposition of the Tribunal's interpretation of its terms of reference. Following submissions from interested parties, further clarification was forthcoming at a public sitting on 5 November 1998.

Definite Matters of Public Importance

The terms of reference of the Flood Tri-

bunal require it to investigate a number of specific matters set out at paragraphs A1 to A4. In addition, paragraph A5 provides a residuary term of reference to bring within the scope of the inquiry any act of corruption which comes to the Tribunal's' attention in the course of its investigations. Such a provision was deemed to be necessary because of the difficulty of enumerating at the outset all matters to be inquired into by the Tribunal.[37]

In Redmond, the explanation given by the Tribunal of paragraph A5 was challenged as incorrect. In a letter sent to the applicant, the Tribunal had interpreted paragraph A5 as permitting it:[38]

> to investigate any acts associated with the planning process, which may, in its opinion, amount to corruption or which involve attempts to influence by threats or deception or inducement or otherwise to compromise the disinterested performance of public duties in addition to the matters specifically referred to elsewhere in the Tribunal's Terms of Reference.

The Tribunal was thus of the view that the paragraph was a 'stand alone' provision and permitted it to investigate matters which were not covered by the other terms of reference. This interpretation was endorsed by the Supreme Court with Hamilton C.J. stating that the words of the paragraph were clear and admitted only of the interpretation placed upon them by the Tribunal.

The applicant further submitted that paragraph A5 so interpreted was *ultra vires* s.1(1) of the Tribunals of Inquiry (Evidence) Act, 1921 in failing to confine the Tribunal's remit to a definite matter of urgent public importance. He argued that the Tribunal's construction of A5 was sufficiently broad as to enable it to investigate any allegation of corruption associated with the planning process, irrespective of date and place. The matters thus investigated would not be definite matters of urgent public importance in as much as the Tribunal would have a roving commission to investigate such matters of alleged planning corruption as came to its attention. In these circumstances, the Tribunal would effectively be determining its own terms of reference.

These submissions did not find favour with the Supreme Court. The Court rejected the contention that the breadth of the investigation contemplated by paragraph A5 meant that such an investigation would not be a matter of definite public importance. Indeed, earlier in the judgment, the Court opined that it would have been competent for the Oireachtas to establish a tribunal to enquire into "corruption in the planning process in Ireland". The Court also rejected the submission that the Tribunal had been given a 'roving commission'. Its investigation was limited to acts associated with the planning process of which it becomes aware during the course of its inquiries authorised by paragraphs A1 to A4.

It is somewhat surprising that the Court should reach the conclusion that the applicant had not even established an arguable case with regard to this issue. A definite matter is one which is limited, determinate, or fixed precisely and a strong case can be made that paragraph A5 does not meet this standard. It is perhaps worth noting the following passage from the Salmon Report:[39]

> As the agitation for an inquiry is very often the result of nothing more than general allegation and rumour, it is necessary to keep the Tribunal within reasonable bounds. It is not of urgent public importance merely to satisfy idle public curiosity. The Act lays down, rightly in our view, that what is to be inquired into shall be a "definite matter". Accordingly no Tribunal should be set up to investigate a nebulous mass of vague and unspecified rumours. The reference should confine the inquiry to the investigation of the definite matters which is causing a crisis of public confidence.

The merit of paragraph A5 from the point of view of the Oireachtas, namely its ambulatory quality, is precisely its vice when viewed in terms of the requirements of the 1921 Act. This is not to say that the applicant's submission on this issue would ultimately have been successful. However, it would seem, at a minimum, to have possessed sufficient merit for it to overcome the generally undemanding hurdle of the leave stage.

Conclusion

It is clear from the discussion above that the Moriarty and Flood Tribunals and the cases resulting therefrom have made a significant contribution to the jurisprudence of tribunals. Indeed, in view of the tendency, noted above, for tribunals to generate litigation, it will be surprising if the opportunity to contribute further is not offered to the courts. ●

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1 Tribunals of Inquiry (Evidence) Act, 1921 and 1979 (No.2) Order, 1997. The Order was made pursuant to a Resolution passed by the Dáil on 11 September 1997 and the Seanad on 18 September 1997. Mr. Justice Michael Moriarty was appointed Sole Member of the Tribunal.

2 Hon. Mr. Justice Brian McCracken (Sole Member of the Tribunal), Report of the Tribunal of Inquiry (Dunnes Payments) (Pn. 4199) (Dublin: Stationery Office, 1997). The Resolutions passed by the Dáil and Seanad specifically recite as a reason for setting up the Moriarty Tribunal, the "serious public concern" arising from the Report of the McCracken Tribunal.

3 "Payment" is defined as including "money and any benefit in kind and the payment to any person includes a payment to a connected person within the meaning of the Ethics in Public Office Act, 1995".

4 Included are payments used to discharge monies or debts due by Mr. Haughey or Mr. Lowry or due by any company with which either was associated or due by any connected person within the meaning of s.2 of the Ethics in Public Office Act, 1995 or discharged at their direction.

5 See the Interim Report of the Tribunal of Inquiry (Payment to Messrs. Charles

Haughey and Michael Lowry) delivered on 26 September 1997.

6 Supreme Court, 28 July 1998.

7 Public sitting of the Tribunal held on 9 December 1998.

8 At a public sitting on 9th December.

9 Established by the Tribunals of Inquiry (Evidence) Acts, 1921 and 1979, (No.3) Order, 1997 pursuant to a Resolution passed by Dáil Éireann on 7 October 1997 and by Seanad Éireann on 8 October 1997. Mr. Justice Feargus Flood was appointed Sole Member of the Tribunal. The terms of reference were subsequently amended by the Instrument amending the Tribunals of Inquiry (Evidence) Acts, 1921 and 1979 (No.3) Order, 1997 passed pursuant to a Resolution passed by Dáil Éireann on 1 July 1998 and by Seanad Éireann on 2 July 1998.

10 The Tribunal is also requested to make recommendations in relation to such amendments to Planning, Local Government, Ethics in Public Office and any other relevant legislation as the Tribunal considers appropriate having regard to its findings.

11 In relation to companies, the tribunal is also required to identify the identity of the beneficial owners of such companies.

12 The definition of "payment" is identical to that in the terms of reference of the Moriarty Tribunal. See, supra, footnote 3.

13 Or a connected person or company within the meaning of the Ethics in Public Office Act, 1995.

14 It should be noted that the (No.2) Act supersedes the Tribunals of Inquiry (Evidence) (Amendment) Act, 1998 which had been enacted a mere five weeks earlier. The first Act did not make provision for the terms of reference to be amended where the tribunal consented to the amendment following consultation between the tribunal and the Attorney General.

15 Instrument amending the Tribunals of Inquiry (Evidence) Acts, 1921 and 1979 (No.3) Order, 1997 made pursuant to a Resolution passed by Dáil Éireann on 1 July 1998 and by Seanad Éireann on 2 July 1998.

16 The Tribunal convened a special sitting to consider the applications for an adjournment on 4 November.

17 Haughey v Moriarty, High Court, 28 April 1998; Supreme Court, 28 July 1998 (a written judgment on a motion for discovery was also given by Geoghegan J. on 20 January 1998); Bailey v Flood, High Court, 15 May 1998; Supreme Court, 28 July 1998; Redmond v Flood, Supreme Court, 6 January 1999.

18 Supreme Court, 28 July 1998.

19 [1971] I.R. 217 (per Ó'Dálaigh C.J.).

20 See David Gwynn Morgan, "Tribunal is public inquiry, not criminal trial", Irish Times, 25 January 1999 (http://www.irish-times.com/irish-times/paper/1999/0125/opt2.html).

21 [1992] 2 I.R. 542.

22 Lord Justice Salmon (Chairman), Report of the Interdepartmental Committee on the Law of Contempt as it Affects Tribunals of Inquiry (1969) (Cmnd. 4078), para. 18.

23 At p.80 of the transcript.

24 Ibid. at pp.173-74.

25 It was conceded that exceptional circumstances, such as a legitimate fear of destruction of documents if prior notice was given, might justify a dispensation from the requirements of fair procedures (ibid. at p.175).

26 Ibid. at pp.176-77.

27 A similar decision quashing various orders of discovery which had been made in breach of fair procedures was made in Bailey v Flood, Supreme Court, 28 July 1998.

28 New procedures for the making of orders of discovery, incorporating the tenets of the Supreme Court decision were outlined by the Moriarty Tribunal at a sitting on 21 September 1998.

29 Although this exclusionary rule is primarily of importance in the criminal sphere, the recent decision of Laffoy J. in Universal City Studios v Mulligan, High Court, 25 March 1998, confirms its application in civil proceedings..

30 See the Interim Report of the Tribunal of Inquiry (Payment to Messrs. Charles Haughey and Michael Lowry) delivered on 26 September 1997.

31 At pp. 170-71 of the transcript.

32 Supreme Court, 6 January 1998.

33 At p.13 of the transcript.

34 The contents of this passage bear more than a passing resemblance to para. 27 of the Salmon Report (Report of the Royal Commission on Tribunals of Inquiry (Cmnd. 3121) (London: H.M.S.O., 1966)).

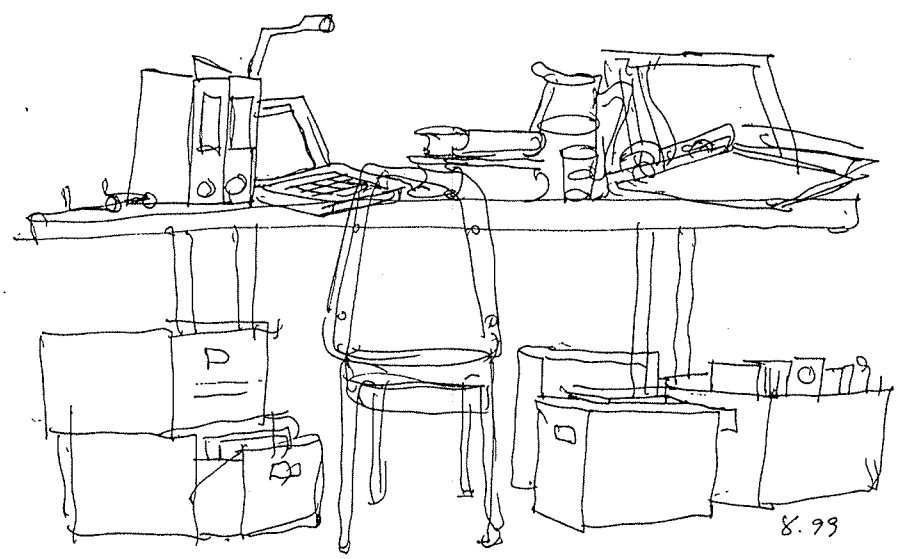
35 State (Shannon Atlantic Fisheries) v McPolin [1976] I.R. 93.

36 Report of the Royal Commission on Tribunals of Inquiry (Cmnd. 3121) (London: H.M.S.O., 1966), para. 79.

37 See the comments of the Minister for the Environment, 481 Dáil Debates 101-102 (7 October 1997).

38 The relevant passage from this letter is set out at p.19 of the judgment in Redmond v Flood.

39 (Cmnd. 3121) (London: H.M.S.O., 1966), para. 78.



Voluntariness, the Whole Truth and Self-Incrimination after *In Re National Irish Bank*

PATRICK DILLON-MALONE, Barrister

Introduction

In its recent decision in *Re National Irish Bank*, the Supreme Court has confirmed that the right not to incriminate oneself in Irish law has a twin basis in the Irish Constitution. As an aspect of the right to remain silent, it can be curtailed in the public interest subject to an overriding test of proportionality. In criminal proceedings, on the other hand, it corresponds to the constitutional obligation of the Courts to exclude involuntary confessions. The result, first signalled by the late Mr Justice Shanley in the High Court decision in this case, is that witnesses are not entitled to refuse to answer questions or to produce evidence on the grounds of self-incrimination in a non-criminal investigation or inquiry in circumstances where they are compelled, under threat of penalty, to provide such evidence (providing always that the statutory measure of compulsion is proportionate to the public interest in obtaining such information). In such investigations or inquiries, they must speak the whole truth, no matter how damning.

This article considers the law relating to self-incrimination following the *NIB* decision, and suggests that, notwithstanding the quite deft approach of the Supreme Court in postponing all incrimination questions to a later criminal trial judge, the position of those seeking to rely on the privilege against self-incrimination remains uncertain. In particular, by conflating the privilege against self-incrimination for all practical purposes with a constitutionally bolstered right to exclude involuntary confessions in any subsequent criminal prosecution, persons co-operating with company inspectors or with any similar investigation or inquiry may face a very real dilemma in demonstrating that they truly are acting *involuntarily* within the accepted meaning of that term. Contrary to the intention of each of the three Courts which considered the matter at the interlocutory and trial stages in the *NIB* case, this might necessitate recourse to the courts by witnesses before non-criminal inquiries or investigations who wish to ensure that their co-operation will later be recognised to have been wholly involuntary.

In addition, the notion of *voluntariness* is a wholly subjective concept which, if it has now replaced the traditionally objective test underlying the risk of self-incrimination, represents a significant diminution in the protection afforded by the common law privilege. Although it can be argued that the *ratio* of the decision could be confined to circumstances where the common law privilege has been abrogated by statute, the constitutional pedigree of the *NIB* test risks eclipsing the more generous standard of protection afforded by the common law, and of creating a chilling effect on possible claims to protection.

The Decision in *Re National Irish Bank*

The relevant statutory background to the *NIB* case is to be found in sections 10 and 18 of the Companies Act 1990. Section 10 provides for the duty of all officers and agents of the company as well as for other persons who may be in possession of information concerning the company's affairs to produce all books and documents relating to the company, to attend before the inspectors and otherwise to give the inspectors all assistance in connection with the investigation as they are reasonably able to give. For this purpose, the inspectors are empowered to examine witnesses on oath. Subsections (5) and (6) then provide that if any such person

> "(5) ... refuses to produce to the inspectors any book or document which it is his duty under this section so to produce, refuses to attend before the inspectors when required so to do or refuses to answer any question which is put to him by the inspectors with respect to the affairs of the company ..., the inspectors may certify the refusal under their hand to the court, and the court may thereupon enquire into the case and, after hearing any witnesses who may be produced against or on behalf of the alleged offender and any statement which may be offered in defence, ...
>
> (6) ... make any order or direction it thinks fit, including a direction to the person concerned to attend or re-attend before the inspector or produce particular books or documents or answer any particular questions put to him by the inspector, or a direction that the person concerned need not produce a particular book or document or answer a particular question put to him by the inspector ...."

Section 18 of the 1990 Act provides that an answer given by a person to a question put to him *inter alia* under section 10 may be used in evidence against him. On its face, section 18 thus appears to be a straightforward statutory abrogation of the common law privilege against self-incrimination in subsequent criminal as well as civil proceedings. In this connection, it may be noted that the grounds for the appointment of inspectors under section 8 of the Act refer to the affairs of the company being conducted with intent to defraud, or for an unlawful purpose or in an unlawful manner, and that the prospect of criminal wrongdoing coming to light, and of subsequent criminal proceedings, was in all likelihood contemplated in framing the legislation. It may be noted too that although the precise parameters of par-

allel investigations by Gardai and other investigative bodies have yet to be teased out in Irish law, it appears at least from the judgments of the High Court and of the Supreme Court in *Desmond v Glackin (N° 2)* that the Courts recognise the public interest in the sharing of information as between State agencies, which cannot be expected to operate in watertight compartments. [i]

Following the appointment of Inspectors under Part II of the Companies Act 1990 to investigate certain alleged interest rate, bank charges and funds movements irregularities at the National Irish Bank, it was therefore quite natural for the employees of the bank to fear that their statements before the Inspectors might be used in subsequent criminal prosecutions against them. Following representations made to the Inspectors by solicitors acting on behalf of the company personnel, the Inspectors applied to the High Court by way of Motion under section 11(1) of the Act for the determination of two substantial issues, the first being the right to refuse to answer questions put by the Inspectors on grounds of possible self-incrimination.[ii] At the interlocutory stage, a question arose as to the appropriateness of proceeding instead, individually, under the special certification procedure for Court directions in section 10(5) of the Act. Kelly J found that those procedures were not tailored to deal with the general questions arising, stating :

> "I am satisfied that these are serious issues and ought to be determined as a matter of urgency. I am also satisfied that it would not be in the interests of an expeditious and efficient conduct of the investigation or indeed in the public interest that these matters be left to be dealt with under the procedures prescribed in section 10(5) of the Act. They would involve a cumbersome, time-consuming and wholly unsatisfactory way of dealing with these matters, particularly in the context of a large number of interviewees. The operation of that subsection would require individuals to be called before the Inspectors and upon refusing to answer questions, the Inspectors in each case certifying that refusal to this Court and a subsequent hearing on the matter."

Kelly J therefore directed that the general questions be tried by way of Motion in the Chancery 2 List. Following the hearing at first instance, the High Court (Shanley J) found, as a matter of construction, that the undoubted effect of section 10 of the 1990 Act was to abrogate the privilege against self-incrimination in the context of company inspections under Part II of the Act. On the first constitutional question, Shanley J held, applying the proportionality test in *Heaney v Ireland*,[iii] that the abrogation was proportionate to the public interest in unravelling commercial and corporate fraud, i.e., the restriction was no greater than was necessary to enable the State to fulfil its constitutional obligations of ensuring equality before the law and of protecting the property rights of every citizen. On the second question, Shanley J stated :

> "I do not believe that in determining that section 10 abrogates the right to silence, I should have regard to the use to which such answers are put. The statutory obligation to answer self-incriminatory questions is not inconsistent with the right to trial in due course of law. When asked questions by an Inspector, the witness does not stand as an accused person. If he becomes an accused person, having answered incriminating questions, his right to a fair trial may not even at that stage have been infringed : it depends on whether the compelled testimony is tendered against him at his trial ; if it is, he may, of course, object to it and it would be a matter for the trial judge to determine its admissibility...No right to a fair trial is infringed at the questioning stage ; the use to which the answers are put is a separate matter and where such threatens to, or does, infringe a constitutional right of the witness that right can be then asserted and vindicated...[W]hether or not there is a constitutional right not to have compelled testimony, or its fruits, used against an accused is an issue which I do not now have to decide because it has not as yet arisen." [iv]

Shanley J therefore ruled that persons (whether natural or legal) from whom information, documents or evidence was sought in the course of the investigation were not entitled to refuse to answer questions put by the Inspectors or to refuse to provide documents to the Inspectors on the grounds that the answers or documents might tend to incriminate them.

The Supreme Court agreed with all the conclusions of Shanley J, with the result that it is now established in Ireland that witnesses are not entitled to refuse to answer questions or to produce evidence on the grounds of self-incrimination in a non-criminal investigation or inquiry in circumstances where they are compelled, under threat of a proportionate penalty, to provide such evidence. Instead, that privilege can only be raised in a subsequent criminal trial for the purposes of preventing any reliance by the prosecution on the involuntary statements made. The Supreme Court's decision reflects the approach it had earlier taken in relation to the risk of overwhelming prejudice arising from prejudicial publicity: it is for the criminal court to decide, after the prejudicial events, whether a fair trial is still possible.[v]

As indicated above, the Supreme Court also confirmed that the privilege against self-incrimination is supported by two separate constitutional rights. In the first place, following the Court's own reasoning in *Heaney v Ireland*, it is a reflection of the right to remain silent, deriving from the right to freedom of expression under Article 40.6 of the Constitution. In a non-criminal context including a company inspection or a tribunal of inquiry, the question in any case is therefore whether the curtailment of that right is proportionate to the public object to be achieved. In the present case, the Court agreed entirely with Shanley J's analysis.

The second constitutional element derives from the right of any person charged with a criminal offence to a trial in due course of law, deriving from Article 38.1, as reinforced by Article 40.3 of the Constitution. Here, the Court found that the doctrine of proportionality had no application, the relevant question being rather whether a trial at which a confession was admitted in evidence against the accused could be regarded as a trial in due course of law in circumstances where the confession had been obtained from the accused under penal sanction imposed by statute. In this connection, unlike Shanley J at first instance, the Supreme Court did not deem itself bound to decline to enter on strictly moot questions of admissibility, deciding instead to provide general guidance on the principles applicable. The Court concluded, following a review of those cases in which the question had been considered but

not definitively answered (or found not to be binding),[vi] that the better view was that a trial in due course of law required that any confession admitted against an accused in a criminal trial should be a voluntary confession and that any trial at which an alleged confession other than a voluntary confession was so admitted would constitute a violation of the accused's rights under Article 38 of the Constitution.

In this connection, the Court found that it was immaterial whether the compulsion or inducement used to extract the confession "came from the Executive or the Legislature". However, in the case of statutory provisions such as section 10 of the Companies Act 1990, the presumption of constitutionality required that, if possible, they be construed in the manner favouring their validity and thus in a manner which excluded the admission of involuntary confessions in a criminal trial. On this ground, the Court therefore declined to follow the precedent set by the Constitutional Court of South Africa in *Ferreira v Levin*.[vii] In that case, an equivalent section in South African insolvency laws was found to be unconstitutional as violating an accused person's right to a fair trial. Instead, according to the Supreme Court,

> "... the better interpretation of section 18 in the light of the Constitution is that it does not authorise the admission of forced or involuntary confessions against an accused person in a criminal trial, and it can be stated, as a general principle, that a confession, to be admissible at a criminal trial must be voluntary. Whether however a confession is voluntary or not must in every case in which the matter is disputed be a question to be decided, in the first instance, by the trial Judge."

In so concluding, the Court was concerned to reconcile the different strands of constitutional precedents touching on self-incrimination to date. To this end, it noted that its judgment followed *Heaney v Ireland* insofar as that case decided that there may be circumstances in which the right of the citizen to remain silent may have to yield to the right of State authorities to obtain information. In addition, it was not inconsistent with the decision in *Rock v Ireland* that there may be circumstances in which the Court is entitled to draw fair inferences from the choice of the accused to remain silent when he could have spoken.[viii] Thirdly, the judgment followed The *People v Cummins* insofar as that case decided that for a confession to be admissible in a criminal trial it must be voluntary[ix]

The Court also addressed the position of evidence discovered by the Inspectors as a result of information uncovered by them following the exercise by them of their powers under section 10, i.e., the question of the admissibility of the so-called 'fruits of the poison tree' in Irish law, in the following statement of general principle :

> "It is proper ... to make clear that what is objectionable under Article 38 of the Constitution is compelling a person to confess and then convicting him on the basis of his compelled confession. The Courts have always accepted that evidence obtained on foot of a legal search warrant is admissible. So also is objective evidence obtained by legal compulsion under, for example, the drink driving laws. The Inspectors have the power to demand answers under section 10. These answers are in no way tainted and further information which the Inspectors may discover as a result of these answers is not tainted either. The case of The *People v O'Brien* [1965] IR 142, which deals with evidence obtained in breach of the accused's constitutional rights, has no bearing on the present case. In the final analysis however, it will be for the trial judge to decide whether, in all the circumstances of the case, it would be just or fair to admit any particular piece of evidence, including any evidence obtained as a result or in consequence of the compelled confession."

Finally, the Court concluded by upholding the decision of Shanley J at first instance, with the additional ruling that

> " ... a confession of a Bank official obtained by the Inspectors as a result of the exercise by them of their powers under section 10 of the Companies Act 1990 would not, in general, be admissible at a subsequent criminal trial unless, in any particular case, the trial judge was satisfied that the confession was voluntary."

Summary of the Present Law

Following the High Court and Supreme Court judgments in *NIB*, the law relating to self-incrimination in Ireland is somewhat clearer than it was following other recent decisions of both the Irish Courts and of the European Court of Human Rights.[x] As further discussed below, nonetheless the effect of the decision may be to replace a rule designed to allow for and require prior judicial constraints for the objective protection of the individual by one which depends wholly on the subjective fears of the individual and which can only be invoked after the fact, in criminal proceedings. The unwanted result may be to place those co-operating with investigations and inquiries in a difficult position if they wish to ensure that their statements will be excluded in any subsequent criminal proceedings. Before addressing these criticisms, the following is an admittedly inelegant but hopefully useful checklist of the present law governing self-incrimination following the *NIB* decision:

1. At common law, the test to be applied in determining whether there is a risk of self-incrimination is an objective one. The question is whether there is a "real and appreciable risk of criminal proceedings ... being taken against the witness.[xi] The applicable principles are set out in the recent judgment of the English Court of Appeal in D*en Norske Bank ASA v Antonatus* [1998] 3 All ER 73, which, relying in particular on its own decision in *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1990] 3 All ER 523 and on the judgment of Kirby P in the Australian case of *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412, contains an exhaustive and detailed analysis of the application of the privilege in practice which space does not allow for here.

2. That the test is objective is underlined by the rationale of the privilege at common law. Expressed in various ways, the chief strand of reasoning discernible in the cases is the undesirability of the State compelling a person to convict himself out of his own mouth. There is an instinctive recoil from

the use of coercive power to this end. On one view, the State should not "subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt'.[xii] On another, a person should not be put in a position where he is exposed to punishment whatever he does.[xiii] The right is expressed with varying degrees of width, but the consistent emphasis and the primary purpose of the right is the benefit and protection of the individual, irrespective of the subjective fears of that individual.[xiv]

3. The privilege is now regarded as a right widely respected among civilised nations.[xv] It has been incorporated in many charters enshrining fundamental rights and liberties, such as the International Covenant on Civil and Political Rights, article 14(3)(g), the Fifth Amendment to the United States Constitution, the Canadian Charter of Rights, section 13, and the New Zealand Bill of Rights Act 1990, sections 23(4) and 25(d).

4. The European Court of Human Rights has reiterated in a series of decisions that the right of any person charged to remain silent and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 of the Convention. The underlying rationale again lies in the objective interest in protecting the person charged against improper compulsion by the authorities and thereby contributing to the avoidance of miscarriages of justice. According to the Court, the right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the person charged.[xvi]

5. So far, the European Court of Human Rights has avoided analysing the right in terms of freedom of expression/right to silence under Article 10 of the Convention.[xvii] However, the right not to incriminate oneself has a twin basis in the Irish Constitution, as an aspect of the right to remain silent deriving from Article 40.6, and as a right to have involuntary statements excluded in any criminal trial, under Article 38 of the Constitution.

6. In Ireland, as elsewhere, statutory incursions on the common law right are almost as old as the right itself, and will be lawful unless found to be a disproportionate restriction on the right to silence deriving from Article 40.6 of the Constitution. There are numerous examples of such statutory provisions, old and new, and it is not necessary that the right be expressly abrogated if that is the necessary effect of the legislative provision in question.[xviii]

7. A statement given in answer to a question put in exercise of a statutory power to compel answers will not be admissible if the statute in question expressly provides that any such statement is not to be admitted in any criminal proceedings against the person who made the statement. This legislative device has been used for example in section 21(4) of the Bankruptcy Act 1988 and in two important recent laws, the Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998, section 5 ; and the Committees of the Hopuses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997, section 12.[xix]

8. A statement given in answer to a question put in exercise of a statutory power to compel answers will be admissible if shown to be voluntary. As appears from the terms of the Supreme Court's ruling in *Re NIB*, the burden of proof in seeking to establish that such a statement was voluntary rests on the prosecution in any subsequent criminal trial.

9. By virtue of Article 38 of the Constitution, an involuntary inculpatory statement must be excluded in any criminal trial.[xx] This new, constitutionally entrenched rule goes further than the obligations deriving from Article 6 of the European Convention on Human Rights, if only because the Convention cannot require a mandatory rule to exclude evidence.[xxi]

10. According to the Supreme Court, it is immaterial whether the compulsion or inducement used to extract the statement "came from the Executive or from the Legislature". Thus, it appears that the test of whether a statement is or is not voluntary is the same in respect of legislative threats as it is for executive threats, i.e., an essentially subjective test going to whether the will of the witness was overborne in the particular circumstances.[xxii]

11. It is unclear whether the Supreme Court decision in Re NIB has wholly displaced the objective test of self-incrimination at common law. Arguably, the *ratio* of the decision can be confined to circumstances in which the privilege has been lawfully abrogated by statute, but its constitutional pedigree, and the breadth of some of its reasoning, at least risks discouraging possible claims to protection.

12. In principle, a confession, once involuntary, would appear to be equally objectionable no matter what the nature of the criminal prosecution threatened. Thus, for example, a threat to prosecute for failure to answer questions in a road traffic context may have the same effect as a threat to prosecute for failure to answer questions under the Offences against the State Act 1939 - the importance of the stigma and of the penalties attached to the threatened prosecution will be weighed in each case for the purposes of ascertaining whether the executive/legislative threat is such as to make the statement involuntary.[xxiii]

13. In a criminal trial an adverse inference drawn from the choice of an accused to stay silent when he could have spoken will not constitute a violation of the accused's right to remain silent unless it can be demonstrated that the drawing of such an inference was the sole basis for conviction or was otherwise unfair, i.e., unduly prejudicial, in the circumstances.[xxiv]

14. The *NIB* decision confirms that the privilege against self-incrimination in Irish law does not apply to refusals to produce documents or real evidence. This makes sense, because in such cases the essential rationale of the protection against unreliable evidence is missing, and the interests of fairness are met instead by the discretion to exclude evidence which has been obtained unfairly, for example by means of a fishing expedition pursued in an abuse of the statutory power in question, and also by the mandatory exclusion rule in respect of evidence obtained in deliberate violation of one's constitutional rights. Although the question is not free from doubt, this is probably also the position under the European Convention on Human Rights.[xxv]

15. The *NIB* decision also confirms that Irish law, like most other common law jurisdictions, does not prohibit the admission in criminal proceedings of compelled 'derivative evidence, i.e., the 'fruits of the poison tree'. Instead the admissibility of such evidence is a question of fairness for the discretion of the trial judge.[xxvi]

16. The decision in the *NIB* case is confined by its terms to the privilege insofar as it may be invoked by natural persons, and has no application to legal persons including corporations. In England, as well as under the European Convention on Human Rights, the right extends equally to legal persons, and this probably represents the better view of the position in Irish law.[xxvii] As a matter of first principle, it appears that natural persons could only rely on such a privilege if and to the extent that their answers might represent the controlling mind of the corporation.[xxviii]

17. Proceedings having very serious non-criminal consequences, for example disqualification as a company director, will not be equated with criminal proceedings for the purposes of the rule.[xxix]

18. On balance, it probably remains the case that the risk of incrimination under foreign law is not covered as of right by the common law rule, although a judge who chose to issue directions to protect against the risk of the use of information in a threatened foreign criminal proceeding might not be acting outside jurisdiction.[xxx] It may be noted in this connection that the justification for postponing all consideration of the matter to any subsequent criminal prosecution does not exist in this situation, because the guarantees afforded by the Irish court will no longer be available.

19. It is probable that the principle still holds good, following *NIB*, that the Courts will not make *ex parte* Orders in civil proceedings which might in practice preclude the Defendant from raising the claim to privilege against self-incrimination before the Order is made, as is notably the case with Anton Piller Orders.[xxxi]

20. Furthermore, in circumstances where discovery Orders are made under section 9 of the Proceeds of Crime Act 1996 or in any discovery Order/compelled affidavit raising similar risks of incrimination by the disclosure of information to agencies closely connected to the prosecuting authorities, an undertaking should be given by the DPP to rely only on evidence obtained independently of such Order in any subsequent prosecution.[xxxii]

21. In relation to refusals to answer questions in oral evidence or interrogatories, the privilege has to be claimed on oath by the person who seeks to rely on it, and cannot be claimed by a solicitor on his client's behalf.[xxxiii]

22. It is not proper to refuse to be sworn or to decline to answer any questions at all or to claim a global protection from the privilege. Nevertheless, a point will be reached in questioning where it will be unnecessary to persist with an entire line of questioning which is clearly futile by reason of the invocation of the privilege - to demand a tedious repetition of questions, rebuffed every time by a claim of privilege which is upheld, would be pointless.[xxxiv]

23. Finally, it appears clear that the privilege cannot be invoked in the context of a civil contempt committed in the same proceedings in which the privilege is sought to be asserted.[xxxv]

A general criticism

Despite the welcome clarification in the *NIB* decision of some of the most important aspects of the operation of the privilege against self-incrimination in Irish law, its wide sweep in postponing all consideration of prejudice to the question of voluntariness at a subsequent criminal trial is arguably unsatisfactory in failing to afford greater protection against the essential risk of prejudice which may demand, in appropriate cases, that a Court should have the power to issue prior directions restraining the use to which particular information may be put. In the United Kingdom, and to an even greater degree in the United States, it is recognised that the discretion of the trial judge may often be inadequate to protect the right not to incriminate oneself and may therefore require that the Court issue appropriate directions on the subsequent use on information obtained.[xxxvi] In Canada, the right has been incorporated into section 13 of the Charter of Rights, and makes no distinction between voluntary and compelled evidence : if statements in a civil proceeding are incriminating, they cannot be used in any subsequent prosecution (other than for perjury) and the privilege can be relied on in prior civil proceedings.[xxxvii]

Although, unlike English law,[xxxviii] Irish law provides constitutional protection against statutory incursions on the prohibition on the admission of voluntary statements, in England at least the device of prior directions remains open in circumstances where the privilege can otherwise be invoked.[xxxix] Following the decision in *Re NIB*, it appears that any claim to invoke the privilege in any non-criminal context (and not just one where a statutory abrogation of the right to silence is in issue) can be met by the same type of argument. Thus, although the privilege in Ireland has a constitutional basis which provides a strong defence against both legislative attack and judicial slippage, it does not, on this analysis, provide the same prior procedural guarantee against prejudice as in other common law jurisdictions. The result is a strong but rigid rule which risks producing unintended and unwanted results.

The dangers of this new approach

become clearer when it is considered that voluntariness is a very much narrower concept than the objective risk of self-incrimination. This is because, unlike the wholly subjective test of *involuntariness* applying to the exclusion of confession evidence, the common law privilege against self-incrimination rests on an objective assessment of the risk that a witness may incriminate himself or herself which the Court or judicial officer is bound to apply irrespective of the subjective fears of the witness.[xl] This appears most graphically from the following dictum of Kirby P in *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412, which was very recently approved in *Den Norske Bank v Antonatus* [1998] 3 All ER 73:

> "What is in issue, ultimately, is not the subjective fears of the witness claiming the privilege but the objective tendency of the question to expose that witness to the risk of criminal prosecution. One witness may not perceive such a risk. Unless the judicial officer presiding intervenes, the question will be answered and the privilege lost. One witness may have multiple motives and even *mala fides*. But if the question is such *in fact* as to expose him or her to the risk of future prosecution, it is the duty of the judicial officer to uphold the privilege. It will be easier and more reliable to assess the reasonableness of the apprehension than the genuineness of the sentiment. A court can quite readily speculate upon and judge the possible use of demanded oral testimony. The devil himself knoweth not the mind of man [or woman]."

The particular dilemma

This general criticism leads to a consideration of a particular question which possibly has significant consequences not just for tribunals of inquiry and company inspections, but for any inquiry or investigation where persons are obliged by statute to answer questions under threat of penalty (other than one where the same statute expressly provides for the non-admissibility of such evidence in subsequent criminal proceedings against the person concerned).[xli] The test for any trial judge in any subsequent criminal prosecution arising out of one's testimony before a prior investigation or inquiry is whether the statement when given was *voluntary*, a concept which depends first and foremost on the subjective will of the person making the statement. Therefore, a person who enthusiastically co-operates with an investigation, knowing that he must do so, is nonetheless acting freely, and would probably not be able to plead self-incrimination if subsequently charged. Even a person who grudgingly accepts that he or she must answer questions and indicates that he or she is merely co-operating on that basis can probably be prosecuted on the basis of those answers : in order for statements to be *involuntary*, there must be something more, indicating a greater degree of oppression of the will.

It follows that persons co-operating with investigations and inquiries under a statutory compulsion face a very practical and very important dilemma : should they be advised to refuse to co-operate, to kick and scream, until such time as it is perfectly obvious to everybody that they are not doing so voluntarily? That might frustrate and delay matters, and also possibly result in a separate prosecution for obstruction of justice where provided for. It could also result in certain cases, for example before a Tribunal of Inquiry, in a decision not to award the costs of such a witness or, worse, a punitive award to pay part of the Tribunal's costs. Notwithstanding these risks, such an attitude could at least be good evidence of involuntariness at a later point in time.

Should such witnesses therefore be advised instead to cooly provide a written statement, suitably drafted to exclude any other possible interpretation, to the effect that they are to be understood as acting involuntarily? Such an even-headed approach sits very uneasily with the decided cases on the meaning of *voluntariness*. Although it might be a point worth testing in litigation, it probably offers little security against prosecution at this point in time unless the Supreme Court's recognition of a legislative source of compulsion may be said to create a less strict test of compulsion than that applying to executive threats. In this connection, although certain *dicta* of the Supreme Court in the *NIB* decision may not square entirely with the previously decided cases on the meaning of voluntariness, and although the Courts have indicated that the categories of situation which might render statements involuntary are not closed, there is no indication that it intended to introduce an entirely different and less strict standard for legislative as opposed to executive measures.[xlii]

The third option, perhaps, would be to provoke a situation where one is hauled before the High Court for contempt and, following a short period in jail (for good measure), then to agree to co-operate in order to avoid further punishment. This last approach may seem extreme, and might defeat the policy behind the Supreme Court's decision in the *NIB* case to postpone such questions to any subsequent trial, but it may, possibly, be the only way to protect the interests of persons caught up in inquiries and investigations conducted in the broader public interest to the same extent as suspects of criminal offences generally.

If this fear is a real one, so too is the prospect of multiple applications to the High Court in any particular inquiry or investigation, which Kelly J at the interlocutory stage in *NIB* was quite rightly concerned to avoid. However, there is perhaps an intermediate solution: the risk of self-incrimination could be championed by a single witness among a particular class of witnesses who is prepared to so purge his contempt by answering under protest. Once the attitude of the Court became clear, others faced with the same dilemma could rely on the precedent and co-operate on the express stipulation that they were doing so only in view of the inevitable alternative should they also force the matter further. In the case of inspections under Part II of the Companies Act 1990, for example, the certification procedure under section 10(5) of the Act could be utilised. Thus, to be sure that an answer given in response to a question put by the inspectors is not voluntary, the prudent course would be for the first person who wished to avoid answering to refuse to answer, to be certified to the High Court and to then argue that because the answer was self-incriminating he or she was not obliged to answer. The likely outcome, following the Supreme Court's decision in *Re NIB*, would be for the High Court to find a contempt, following which the witness could purge the contempt by answering the question under protest. This statement would clearly be involuntary, and other persons faced with a similar dilemma could probably rely, in the manner indicated above, on the first

case to demonstrate that their answers too were involuntary.

This concern probably applies equally to those persons who may be called upon to answer questions under compulsion in the *NIB* inspection itself. Because the Supreme Court decision offers only general guidance on the exclusion of involuntary statements in any subsequent criminal trial, it has no peculiar relevance for the voluntariness or otherwise of any statement now made by *NIB* employees: for all the reasons canvassed above, persons who volunteer information on the basis that it is their understanding of the Supreme Court decision in *NIB* that they must do so, cannot be said to be acting involuntarily any more than the person who does so on the basis that they understand the effects of a particular statutory provision. ●

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i (1993) 3 IR 67. Cf. *Marcel v Commissioner of Police* (1992) Ch. 225. It is significant for the purposes of evaluating the fairness of such inquiries or investigations that they may be characterised as primarily investigative in nature, *Chestvale v Glackin* [1993] 3 IR 35; *Fayed v UK (1994)* 18 EHRR 393.

ii The second issue, concerning the fairness of the procedures proposed to be adopted by the Inspectors, was resolved in favour of the Inspectors. The appeal on this point was abandoned before the Supreme Court and is not considered here.

iii [1994] 3 IR 593; [1996] 1 IR 580.

iv Judgment of 13 July 1998, at pp. 28-29 of the transcript.

v *Goodman International v Hamilton* [1992] 2 IR 543; Z v DPP [1994] 2 ILRM 481.

vi *The People (AG) v Cummins* [1972] IR 315; *The People v Gilbert* [1973] IR 383; *The People v McGowan* [1979] IR 47; *The People v Doyle (reported with The People v Madden)* [1977] IR 336; *The People v Quilligan (N° 3)* [1993] 2 IR 305. The Court concluded, on the basis of these authorities, that the decision of the majority of the former Supreme Court in The State *(McCarthy) v Lennon* [1936] IR 485 was no longer a safe guide for any person seeking to establish the rights of the citizen under the Irish Constitution.

vii [1996] 1 SA 484. The essential conclusion of the majority in the Ferreira case was that: "As long as incriminating evidence is not admissible at the criminal trial and the use of 'derivative evidence' at such trial is made dependent on such use being subject to fair criminal trial standards, the rule against self-incrimination is adequately protected."

viii [1998] 2 ILRM 37

ix See note 6 above.

x *See Dillon-Malone, The Privilege against Self-Incrimination in light of Saunders v United Kingdom (1997) Bar Review* 132.

xi *Rank Film Distributors Ltd v Video Information Centre* [1981] 2 All ER 76, 80.

xii *Per Goldberg J in Murphy v Waterfront Commission of New York Harbor* (1964) 378 US 52, 55, cited with approval by the High Court and Supreme Court in *Re NIB*.

xiii *See Reg. v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1, 32, per Lord Mustill, cited with approval by the High Court and Supreme Court in *Re NIB*.

xiv *Brannigan v Davison* [1997] AC 238, 249; *Den Norske Bank ASA v Antonatus* [1998] 3 All ER 73.

xv *Per Bingham* LCJ *in Crédit Suisse Fides Trust SA v Cuoghi* [1998] I.L.Pr.41, 56.

xvi *Funke v France* (1993) 16 EHRR 297, para. 44; *John Murray v UK*, 8 February (1996) 22 EHRR 29, para. 45; Saunders v UK (1997) 23 EHRR 313, para. 68; *Serves v France*, 20 October 1997, para. 46.

xvii But see the Commission decision in *K v Austria*, Com Rep. A 255-B (1993); and Naismith, *Self-Incrimination - Fairness or Freedom* (1997) EHRLR 229.

xviii See the several statutory provisions enumerated by O'Flaherty J in *Heaney v Ireland*; also section 7 of the Criminal Justice (Drug Trafficking) Act 1996; and, on the absence of any need for explicit abrogation of the right, see In *re NIB*; *The People v Madden* [1977] IR 336; *R v Seelig* [1991] 4 All ER 429.

xix For the limits of such provisions, see *R v Hertfordshire County Council, ex parte Green Environmental Industries* Ltd (1997) TLR 496.

xx Although the Supreme Court indicated that it was following The *People v Cummins* on this point, it appears quite clear that the decision in *Re NIB* goes further than previous cases in Irish law governing the admissibility of confessions, see for example *The People (DPP) v Breen*, unreported, CCA, 13 March 1995; *The People (DPP) v O'Brien* [1965] IR 142.

xxi In *Peterson Sarpsborg SA v Norway*, Commission Decision of 27 November 1996, a case which raised issues substantially the same as those at issue in the *NIB* case, the Commission stated : "Whether a particular applicant has been subject to compulsion to incriminate himself and whether the use made of the incriminating material has rendered criminal proceedings unfair will, however, depend on an assessment of the circumstances of each case as a whole." See generally, *Ferrantelli & Santangelo v Italy* (1996) RJD N° 12.

xxii See the cases cited at note 6 above. Further, *R v Priestley* (1967) 51 Cr. App. R. 1; *Shaw v The People* (DPP) [1983] IR 1; *The People (DPP) v Egan* [1989] IR 681; *The People (DPP) v Buckley* [1990] 1 IR 14.

xxiii Supreme Court decision in *Re NIB*, at page 29 of the transcript.

xxiv *Murray v UK* (1996) 22 EHRR 29; *Rock v Ireland* [1998] 2 ILRM 37; see Ring, *The Right to Silence: Rock v Ireland & Others* (1998) Bar Review 225.

xxv See Dillon-Malone, note 9 above; and Stessens, T*he Obligation to Produce Documents versus the Privilege against Self-Incrimination: Human Rights Protection Extended Too Far?* (1997) 22 ELR (HRC) 45.

xxvi The same is true of Canada, *Thompson Newspapers v Canada* [1990] 1 SCR 425, and South Africa, *Ferreira v Levin* [1996] 1 SA 484; and probably also of the position under the European Convention on Human Rights, *Saunders v UK*, para. 74. The United States is the only common law jurisdiction which prohibits the use of such derivative evidence, but this will not be the case if it can be established that the evidence would in any event have been located by the prosecuting authorities, *Nix v Warden of Iowa State* (1984) 467 US 431. This rule has given rise to the phenomenon of prosecutors sealing the fruits of their investigations by seal of the Court on a date prior to interviewing suspects.

xxvii *AT&T Istel Ltd v Tully* [1993] AC 45; *Dombo Beheer v NL* (1994) 18 EHRR 213. The ability of corporations to plead the privilege has been denied by the highest courts of the United States, Canada and of Australia, although the precedents from the US and Canada are explicable in terms of the inability of statutes to abrogate the privilege, see Tapper, *Corporations and the Privilege against Self-Incrimination* (1994) LQR

352.

xxviii See *Walkers Snack Foods Ltd v Coventry County Council* [1998] 3 All ER 163.

xxix *R v Secretary of State for Trade and Industry, ex parte McCormick* [1988] 2 BCLC 18.

xxx *Crédit Suisse Fides Trust SA v Cuoghi* [1998] I.L.Pr.41, 56; and, more generally, *Brannigan v Davison* [1997] AC 238 (PC).

xxxi *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 126; *Tate Access Floors Inc v Boswell* [1991] Ch. 512, 530. The statutory modification of this rule in respect of intellectual property matters effected in England has not been duplicated here.

xxxii *MM v DD*, High Court (Moriarty J), 10 December 1996. See also, most recently, *AG for Gibraltar v May* (1998) TLR 719; *R v Martin and White* (1998) 2 Cr App R 385.

xxxiii *Downie v Coe* (1997) TLR 606.

xxxiv *Per* Kirby P in the Australian case of *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412, approved by the English CA in *Den Norske Bank ASA v Antonatus* [1998] 3 All ER 73.

xxxv *Cobra Golf Inc v Rata* [1998] Ch. 111, 158. The exhaustive examination of decided cases by Rimer J in this case includes a consideration of *O'Shea v O'Shea and Parnell, ex parte Tuohy* (1890) 15 P.D. 59.

xxxvi See *Istel (AT&T) Ltd v Tully* [1993] AC 45; *IBM United Kingdom Ltd v Prima Data International Ltd* [1994] 1 WLR 719. In the United States, see *US ex rel. Vajtauer v Commissioner of Immigration at Port of New York* (1927) 273 US 103; *Graham v US* (1938) 99 F 2d. 746; and, generally, Antieau, *Modern Constitutional Law* (1997), Vol. 1, chapter 18.

xxxvii *Caisse Populaire Laurier d'Ottowa Ltee v Guertin (N° 2)* (1983) 150 DLR (3d) 541; *Saccomanno v Swanson* (1987) 34 DLR (4th) 462; *Dubois v The Queen* [1985] 2 SCR 350, 360; and, generally, Hogg, *Constitutional Law of Canada* (3rd ed, 1992), chapter 51.

xxxviii See *R v Scott* (1856) Dears & B 47; *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch. 1; R v Seelig [1991] 4 All ER 429; *Re London United Investments plc* [1992] Ch 578; *Bank of England v Riley* [1992] Ch 475.

xxxix See for example In *Re C* (1995) TLR 230; *United Norwest Co-Operatives Ltd v Johnstone & Others* (1994) TLR 104;

xl *Den Norske Bank ASA v Antonatus* [1998] 3 All ER 73; *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412.

xli The practical importance of the decision is perhaps underlined, as recent events at the Flood Tribunal have demonstrated, by the almost complete absence of any immunity bargaining in Irish law. On the legal value of a promise not to prosecute, see Prosecution of Offences Act 1974, section 6; *Creagh v Gamble* (1877) 24 L.R.Ir. 458, 472-73; Nova *Media Services Ltd v Minister for P&T* [1984] ILRM 161, 169; *R v Croydon JJ, ex parte Dean* [1993] 3 All ER 129.

xlii See *The People (DPP) v Oscar Breathnach*, 2 Frewen 554-56.

Legal The Bar Review Update

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A directory of legislation, articles and written judgments received in the Law Library from 25th January 1999 to 25th February 1999.
Judgment Information compiled by the Legal Researchers, Judges Library, Four Courts.
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Administrative Law

Carroll v. The Disciplinary Tribunal of the Law Society of Ireland
High Court: **O'Higgins J**
15/12/1998

Declaration; disciplinary tribunal; alleged misconduct; unlawful discrimination; complaint made to the respondent; respondent dismissed the matter as no *prima facie* case had been established; allegations of perjury on the part of the notice party; whether the decision made by the respondent was irrational; whether the standard of proof required to establish a *prima facie* case of perjury is proof beyond a reasonable doubt; whether respondent acted with integrity and independence.
Held : Application granted.

Brosnan v. South Western Regional Fisheries Board
High Court: **Quirke J.**
04/09/1998

Judicial Review; *certiorari; mandamus;* appointment of waterkeeper; respondent board refused to grant applicant Certificate of Suitability for appointment as waterkeeper; decision based on consideration of applicant's criminal record together with comments made by a District Judge in the course of sentencing applicant; decision made without giving applicant opportunity to make submissions; failure to give reasons for refusal prior to court proceedings; fair procedures; constitutional justice; whether Board in exercising its statutory power to issue a certificate was subject to a guarantee of fair procedures in favour of the applicant; whether in considering a request for a certificate, the Board was engaging in a quasi-judicial process; whether principles of constitutional justice required that applicant should have been given an opportunity to make submissions to the Board before final decision on the application was made; S.294, Fisheries (Consolidation) Act, 1959 as amended by S.17, Fisheries (Amendment) Act, 1991.
Held: Orders granted.

O'Ceallaigh v The Fitness to Practise Committee of an Bord Altanais
Supreme Court: **Murphy J.,*** **O'Flaherty J., Barron J.**
(*dissenting)
11/12/1998

Judicial review; statutory inquiry; midwife; professional conduct; procedure to be adopted by the respondents; private inquiry; allegations of professional misconduct; discretion of the respondents as to who may be present at the inquiry; exclusion of certain persons from hearing; whether applicant is entitled to have certain persons attend hearing; whether exclusion of witnesses is a breach of constitutional justice; whether transcript of witness sufficient for the purposes of the hearing; whether applicant afforded a fair opportunity to present an accurate defence.
Held: Appeal allowed; the applicant is entitled to have any person present who may be able to assist them in their defence to the matters of complaint; it would not be a fair hearing if the required witnesses which form part of the defence were excluded at any time; it is far more desirable for the witnesses to attend in person rather than a transcript being made available.

Article

A Tribunal of Enquiry or an Investigation by Dail Committee?
Rabbitte, Pat
4 (3) 1998 BR114

Library Acquisitions

Hewitt, Desmond J
The control of delegated legislation - being a study of the Doctrine of *Ultra Vires* in relation to the legislative powers of the executive government, with special reference to Great Britain, Australia, New Zealand and Canada
M82.

Animals

Statutory Instruments

Control of Animal Remedies and their Residues Regulations, 1998
SI 507/1998
(DIR 96/22, 96/23)
(DIR 81/851)

Diseases of Animals Act, 1966 (First Schedule) (Amendment) Order, 1999
SI 1/1999

Diseases of Animals (Notification of Infectious Diseases Order) 1992 (Amendment) Order, 1999
SI 8/1999

Diseases of Animals (Carriage of Cattle by Sea) (Amendment) (No 2) Order,1998
SI 506/1998

Diseases of Animals (Notification of Infectious Diseases) Order, 1992 (Amendment) (No 2) Order, 1998
SI 479/1998

Arbitration

Vogelaar v. Callaghan
Supreme Court: **Keane J., Murphy J., Lynch J.** (*ex tempore*)
13/07/1998

Arbitration; building contract; costs

incurred out of all proportion to the sums involved; open offer made by plaintiff; costs awarded to defendant; amount of open offer in excess of sums awarded to defendant; whether arbitrator failed to take into account the open offer made by the plaintiff in awarding costs; whether the High Court judge was correct in setting aside so much of the arbitrator's award as actually awarded costs to the defendant against the plaintiff; whether the arbitrator had erred in applying the judgment of the High Court; whether there was an error on the face of the award; whether the matter should be remitted to the arbitrator.
Held : Appeal dismissed.

Banking

Statutory Instruments

Central Bank Act, 1998 (Commencement) (No 2) Order, 1998
SI 526/1998

Economic and Monetary Union Act, 1998 (Certain Provisions) (Commencement)
(No 2) Order, 1998
SI 527/1998

Bankruptcy

Boyle, A Bankrupt
Supreme Court: **O'Flaherty J., Lynch J., Barron J.** *(ex tempore)*
27/12/1998

Application to have adjudication as a bankrupt set aside; whether goods had been purchased by the bankrupt personally or by a limited company.
Held: Appeal was unstateable and dismissed.

Children

Articles

Hague conference on Private International Law and the Children's Conventions
Duncan, William
1998 (2) IJFL 3

Towards the establishment of a Children's Ombudsman: Champion of Children's rights or Unnecessary Interloper?
Martin, Frank
1998 (1) IJFL8 [Part 1]
1998 (2) IJFL15 [Part 2]

Statutory Instruments

Child Abduction and Enforcement of Custody Orders Act, 1991 (Contracting States) (Hague Convention) (Revocation) Order, 1998
SI 477/1998

Child abduction and Enforcement of Custody Orders Act, 1991 (Contracting States) (Hague Convention) (Section 4(1)(b)) Order, 1998
SI 478/1998

Citizenship

Library Acquisition

O'Leary, Siofra
Citizenship and Nationality Status in the new Europe
London Institute for Public Policy Research 1998
London S & M 1998
W142

Civil Liberties

Article

Freedom of Information Act - part 1
Fennell, David
12 (1999) ITR 45

Statutory Instruments

Freedom of Information Act, 1997 (Sections 6(4), 6(5), and 6(6)) Regulations, 1998
SI 516/1998

Freedom of Information Act, 1997 (Section 6(9)) Regulations, 1998
SI 517/1998

Freedom of Information Act, 1997 (Section 17) Regulations, 1998
SI 518/1998

Freedom of Information Act, 1997 (Section 18) Regulations, 1998
SI 519/1998

Freedom of Information act, 1997 (Section 26(6)) Regulations, 1998
SI 520/1998

Freedom of Information Act, 1997 (Section 28(1)) (Amendment) Regulations,1998
SI 521/1998

Freedom of Information Act, 1997 (Section 47(3)) (Amendment) Regulations,1998
SI 522/1998

Freedom of Information Act, 1997 (First Schedule)(Amendment) Regulations,
1998
SI 523/1998

Freedom of Information Act, 1997 (Third Schedule) (Amendment) Regulations, 1998
SI 524/1998

Commercial Law

Articles

Key Grounds for Challenging Finance Transactions
Downey, Conor
1998 IBL298

The Investment Services Directive: the Single Market in Investment Services Impacts on Ireland
Moloney, Niamh
1998 IJEL140

Company Law

C.H.A Limited, In re
High Court: **Laffoy J.**
25/01/1999

Winding up; order granted for recovery of rent for occupation of premises after the commencement of a winding up; money lodged in court with leave of the liquidator; recovery of the sum together with the taxed costs of the proceedings; whether the balance of the order owed is to be regarded as a debt contracted for the purposes of the winding up of the company; whether the applicant is entitled to be paid the taxed costs of the proceedings in priority to all other claims in the liquidation; whether the fact that the applicant is a successful plaintiff who commenced an action against the company and not a successful defendant to an action brought by a company in liquidation after the commencement of the winding up is relevant.
Held: Applicant is entitled to be paid in full the taxed costs in priority to all claim; the distinction between a successful applicant and successful defendant is immaterial in such an action.

Articles

Director's Duties - A Review of the Current Irish law
Carberry, Lynn
1998 IBL268

Statutory Instrument

Stock Transfer (Forms) Regulations, 1998
SI 546/1998

Constitutional Law

Riordan v. An Taoiseach
Supreme Court: Hamilton CJ, O'Flaherty J., **Barrington J.**, Lynch J., Barron J.
19/11/1998

Judicial Review; Constitutional validity of Nineteenth Amendment to the Constitution Act, 1998; application for injunction to restrain holding of referendum on nineteenth amendment to Constitution dismissed; amendment approved in referendum; appeal against order of High Court; application to stay order of High Court; application for leave to amend grounds of appeal; whether case was an appropriate case for judicial review; whether applicant was entitled to amend proceedings in the manner sought; whether the People can approve conditional amendment to Constitution; whether terms of nineteenth amendment amounted to a delegation by the People to the Government of right to amend Constitution; Articles 29 and 46 of the Constitution.
Held: Claim rejected; Appellant attempting to make a case, which had not been made at first instance; The People can approve a conditional amendment to Constitution.

Riordan v. An Taoiseach
Supreme Court: Hamilton CJ, O'Flaherty J., **Barrington J.**, Lynch J., Barron J.
19/11/1998

Constitutional validity of Fifteenth Amendment to the Constitution Act, 1995; constitutional validity of Family Law (Divorce) Act, 1996; challenge to appointment of a Minister; constitutional validity of appointment of a Judge as Chairperson of the Commission on Nursing; constitutional validity of appointment of a Judge as sole member of a Tribunal of Inquiry; constitutional validity of establishment of office of Tánaiste; whether a 'law' promulgated by the President in accordance with Article 46.5 falls within the scope of Article 15.4; whether there is any constitutional or legal difficulty with appointment of a Judge to a committee or tribunal of inquiry; whether establishment of Office of Tánaiste was unconstitutional in the absence of legislation legalising its establishment; whether expenditure of money on office of Tánaiste was illegal; whether Family Law (Divorce) Act, 1996 is constitutional; Articles 6, 14, 15, 28, 35, 41, 42, 46 and 47 of the Constitution.
Held: All claims dismissed.

Byrne v. Governor of Mountjoy Prison
High Court: **Peter Kelly J.**
21/12/1998

Habeas corpus; legal fees; murder; extradition; legal representation; Attorney General's scheme; applicant claims that as he cannot afford legal representation in the extradition proceedings before the District Court and there being no scheme to assist him, his detention is unlawful; practice existed of applying Attorney General's scheme to extradition cases in District Court; office of Attorney General considered; nature of the Attorney General's Scheme considered; whether the applicant was entitled to avail of Attorney General's Scheme; whether application for *habeas corpus* was premature.
Held: Application for absolute order of *habeas corpus* dismissed.

Todd v. Judge Murphy
Supreme Court: Hamilton C.J., O'Flaherty J., Murphy J., **Lynch J.**, Barron J.
20/11/1998

Judicial review; Constitution; fair procedures; publicity; road traffic offence; mandamus; certiorari; two pedestrians killed by the dangerous driving of a car allegedly driven by appellant without consent of the owner; Circuit Court refused application for transfer of trial from Cork Circuit to Dublin Circuit; whether there was a serious risk that the jury would be prejudiced; whether refusal to transfer trial was irrational and contrary to fundamental reason and common sense; s. 32(1), Courts and Court Officers Act, 1995.
Held: Decision of Circuit Court Judge was not contrary to fundamental reason or common sense; application rejected.

Todd v. Judge Murphy
Supreme Court: Hamilton C.J., O'Flaherty J., Murphy J., **Lynch J.**, Barron J.
20/11/1998

Constitution; invalidity; unappealability; decision under s. 32(1) concerning transfer of trials to Dublin Circuit Court not appealable; whether Constitution infringed; whether presumption of constitutionality was rebutted; s. 32(1) Courts and Court Officers Act, 1995; Arts 34,38,40 Constitution.
Held: If s. 32(1) was found to be constitutional, no power would exist for transferring trial to Dublin Circuit Court; appellant has no *locus standi* to challenge constitutionality; appeal dismissed.

Article

Discerning the Philosophical Premises of the Report of the Constitution Review Group: An Analysis of the Recommendations on Fundamental Rights
Whyte, G F
1998 CIILP 216

Criminal Law

Bolger v. Commissioner of an Garda Síochana
High Court: **O'Higgins J.**
15/12/1998

Habeas corpus; extradition; bail; application to have a conditional order of *habeas corpus* discharged; applicant had been detained on foot of extradition warrants; conditional order of *habeas corpus* was made; applicant was admitted to bail pending the determination of the extradition proceedings on condition that he surrender his passport; whether, because the applicant was on bail, the habeas corpus procedure did not apply; whether the matters raised by the applicant - that the proceedings were m*ala fide* and *res judicata* - were proper matters to be determined on an application for *habeas corpus*.
Held: Conditional order of habeas corpus discharged.

Bolger v Commissioner An Garda

Siochana
Supreme Court: **O'Flaherty.**, Barrington J., Keane J. *(ex tempore)*
02/11/1998
Extradition; arrest; detention; sergeant certified to the grounds of detention; submission had been made in the District Court that the applicant wanted to bring a *habeas corpus* application to the High Court; whether unlawful detention; whether the certificate justifying the man's detention was inappropriate; whether matter was at hearing; whether formality required for the certificate in writing of the prison governor sufficient; Article 40.4.2 , Constitution.
Held: Appeal dismissed; detention was lawful; no formality required for the certificate in writing.

Graham v. The President of the District Court
Supreme Court: **Barrington J.**, Lynch J., Barron. (*ex tempore*)
14/12/1998

Sentence; incorrect; term of imprisonment of twelve months where maximum sentence for the offence committed was three months; whether a serious miscarriage of justice had occurred; whether appellant entitled to costs of the High Court proceedings and those relating to the appeal.
Held : Appellant granted costs.

Greally v. Minister for Education
High Court: **Geoghegan J.**
29/1/1999

Religion; breach of constitutional rights; Catholic school system; plaintiff claimed that the operation of a supplementary panel scheme effectively prevented him from pursuing a career as a secondary school teacher in the catholic school system; whether there was power to establish that scheme; whether the scheme infringed Art. 44.2.3 of the Constitution; whether the scheme was haphazard, arbitrary and unfair; whether the Minister for Education had infringed the Constitutional right to earn a livelihood and had done so without statutory authority.
Held: Claim dismissed as it was ill-founded.

Ward v. Minister for Justice
Supreme Court: **O'Flaherty** J., Murphy J., Lynch J. *(*ex tempore*)
03/12/1998

Imprisonment; penal servitude; sentence; remission; sentence of imprisonment imposed; complaint regarding distinction between remission of sentences of penal servitude of men and women; whether complaint was well-founded; Rules for the Government of Prisons, 1947.
Held: Remission same for sentences of imprisonment; question of penal servitude academic; appeal dismissed.

Articles

Dutch drugs policy, ecstacy and the 1997 Utrecht CVO report
Misuse of drugs: Netherlands
Murphy, Tim
O'Shea, Marie
1998 ICLJ141

From Colonial Policing to Community Policing
Connolly, Johnny
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Reflections on In Re Pinochet Ugarte
Dillon-Malone, Paddy
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White, John P M
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Braiden, Olive
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Damages

Smith v. Minister for Defence
Supreme Court: O'Flaherty J., **Lynch J.**, Barron J.
04/11/1998

Hearing loss; appeal against award of damages; respondent exposed to gun fire noise without adequate hearing protection while serving in army; case heard before passing of Civil Liability (Assessment of Hearing) Act 1998; whether gun fire noise caused respondent any hearing loss; whether there was any evidence of extent to which respondent's hearing was above average before exposure to gun fire noise; whether possible to measure a fair, just and reasonable figure for damages in absence of assistance afforded by 1998 Ac.
Held: Re-trial ordered.

Murphy v. Lyons
Supreme Court: **O'Flaherty J.**, Barrington J., Barron J. (*ex tempore*)
11/12/1998

Negligence; motor vehicle accident; respondent's car struck from behind; damages; whether there was any contributory negligence on the part of the respondent; whether damages awarded were so high as to be disproportionate; whether damages awarded could be justified.
Held : Appeal dismissed

Simcox v. The Minister for Defence
High Court: **O'Donovan J.**
04/02/1999

Hearing loss; plaintiff exposed to gunfire noise while in the army; claim for damages for noise-induced hearing loss and tinnitus; whether hearing loss was noise-induced; whether hearing loss was induced by exposure to noise from gunfire during period in army service.
Held: Claim dismissed.

Cody v. Hurley
High Court: **McCracken J.**
20/01/1999

Damages; medical negligence; personal injuries; defendants mis-diagnosed plaintiff's complaints of pain in her knee, causing her pain, suffering and physical disabilities and restrictions, including back pain and a limp; assessment of damages considered; whether compensation for Plaintiff's parents for caring for her is recoverable; whether transport costs of the parents are recoverable; whether compensation for future care should be awarded; future loss of earnings considered; level of general damages considered.
Held: Plaintiff awarded general damages of £190,000 and special damages of £390,975.

Education

Crossan v. The Council of King's Inns
High Court: **Smyth J.**
15/01/1999

Judicial review; education; *certiorari*; *mandamus*; natural and constitutional justice; *ultra vires*; bias; duty to give reasons; legitimate expectations; applicant was denied the right to defer the annual examinations at the respondent institution; whether this refusal breached the requirements of fair procedures; whether the appeal procedure was fair; whether the respondent acted unreasonably; whether natural and constitutional justice were complied with; whether there were procedural irregularities.
Held: Application for judicial review refused.

Employment

Charlton v. H.H. The Aga Khan's Studs Societe Civile
High Court: **Laffoy J.**
22/12/1998

Employment; interlocutory injunction; discipline; fair procedures; sick pay; inquiry held as to disciplinary matters concerning the plaintiff as employee of the defendant; allegation of improper use of the resources of the defendant; whether there was a denial of fair procedures; whether it is an investigation or a disciplinary process; whether a hearing in compliance with natural and constitutional justice can be assured; whether damages would be an adequate remedy; whether balance of convenience favours granting an injunction to restrain the inquiry; whether there was an implied term that the plaintiff was entitled to sick pay while absent from work on medical grounds.
Held: Injunction granted; plaintiff entitled to sick pay, on condition that she produce a medical certificate.

Article

The Enforcement Provisions of the Safety, Health and Welfare at Work Act 1989
MacNamee, Michael
2 (1998) IILR70

Statutory Instruments

An Foras Aiseanna Saothair Superannuation Scheme 1998
SI 514/1998

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Employment Regulation Order (Provender Milling Joint Labour Committee)
1999
SI 2/1999

Employment Regulation Order (Shirtmaking Joint Labour Committee) (No 2),
1998
SI 508/1998

Employment Regulation Order (Women's Clothing and Millinery Joint Labour
Committee)(No2), 1998
SI 509/1998

Industrial Training Levy (Food, Drink and Tobacco Industry, 1999 Scheme) Order, 1998
SI 470/1998

Industrial Training Levy (Clothing and Footwear Industry, 1999 Scheme) Order, 1998
SI 471/1998

Industrial Training Levy (Chemical and Allied Products Industry 1999 Scheme) Order, 1998
SI 472/1998

Industrial Training Levy (Engineering Industry, 1999 Scheme) Order 1998
SI 473/1998

Industrial Training Levy (Textiles Industry, 1999 Scheme) Order, 1998
SI 474/1998

Occupational Pension Schemes (Funding Standard (Amendment) (No 2)
Regulations, 1998
SI 568/1998

Parental Leave (Notice of Force Majeure Leave) Regulations, 1998
SI 454/1998

Safety, Health and Welfare at Work (Night Work and Shift Work) Regulations, 1998
SI 485/1998

Safety, Health and Welfare at Work (Children and Young Persons) Regulations, 1998
SI 504/1998

European Union

Campbell v. Minister for Agriculture, Food and Forestry
Supreme Court: O'Flaherty J., **Murphy J.**, Lynch J.
08/12/1998

European law; milk quota; notification; procedures; legitimate expectation; application for milk quota rejected under new Community regulations, which were publicised by the respondent in the national press; whether there was an obligation to lay down procedures which would be adequate and appropriate to give notice of the making of the Regulations and the right to apply for milk quotas; whether national measures had to be adopted before regulations could be effective; whether regulations had direct effect; whether there was an obligation on the respondent to give individual notice of the regulations; whether information published was adequate and accurate; whether respondent was bound to adopt fair procedures in giving notice of the Regulations; whether notice published in national press was misleading; Council Regulation (EEC) No 1639/91; Council Regulations 856/84, 857/84 1078/77; s.2, European Communities Act, 1972.
Held: No duty to notify individual citizens of the making of the regulations by the European Council; advertisement not inaccurate; cross-appeal allowed.

Articles

Challenging State Aid Decisions - the Right of Complainants Revisited
Maguire, Conor
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Barrett, Gavin

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O'Leary, Siofra
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Law the new Private International Law of Intellectual Property in the United Kingdom and the European Community
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Groarke, Patrick J
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Extradition

Article

Human Rights Considerations in Extradition and Expulsion cases: the European Convention on Human Rights Revisited
Egan, Suzanne
1998 CIILP188

Family

O'D v. B
High Court: **Quirke J.**
31/07/1998

Child abduction; children habitually resident in the United States; children removed by respondent to Ireland; plaintiff on probation in United States following violation of protection order; allegations of threatening and irrational conduct on the part of plaintiff towards respondent; application for return of children; whether there was a grave risk that return of children to the United States would expose them to psychological harm or would otherwise place them in an intolerable situation; whether there was a likelihood that defendant would refuse to return to the United States if Court ordered return of children; Article 13(b) Hague Convention on the Civil Aspects of International Child Abduction.
Held: Order granted.

N v. N
High Court: **Mc Guinness J.**
15/01/1999
Divorce; ancillary financial orders; couple separated for over twenty years; respondent in second relationship with two dependent children; previous Separation Deed wherein applicant waived her succession rights to respondent's estate; existing maintenance orders in favour of applicant; pension scheme for benefit of respondent and present partner; whether proper provision existed or would be made for applicant and respondent; whether present maintenance position should be varied; whether applicant should be granted lump sum payment order; whether provision should be made for applicant out of respondent's pension fund in the event that respondent should predecease applicant; whether order should be granted pursuant to S.18(10) of the Family Law (Divorce) Act, 1996; SS.5(1), 17, 18(10), 20 and 32, of the 1996 Act.
Held: Decree of Divorce granted; Pension Adjustment Order granted entitling the applicant to half of the respondent's annual pension in the event that he should predecease applicant; Order granted pursuant to S.18(10) of the Act.

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Horgan, Rosemary
1998 (1) IJFL2 [Part 1]
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Breakdown in the two jurisdictions
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(Revocation) Order, 1998
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States) (Hague Convention) (Section 4(1)(b)) Order, 1998
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SI 530/1998

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SI 531/1998

European Communities (fishing vessel safety) regulations, 1998
SI 549/1998
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SI 544/1998

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SI 550/1998

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(No 2) Order, 1998
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Garda Siochana

Article

From Colonial Policing to Community Policing
Connolly, Johnny
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Health

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Infectious Diseases (Maintenance Allowances) (Increased Payment) Regulations, 1998
SI 525/1998

St. James's Hospital Board (Establishment) Order, 1971 (Amendment) Order, 1998
SI 538/1998

Housing

Article

A New Home For Your Nest Egg
Bale, Norman
12 (1999) ITR 80

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Housing (Miscellaneous Provisions) Regulations, 1998 (Amendment) Regulations, 1998
SI 537/1998

Human Rights

Article

Human Rights considerations in Extradition and Expulsion cases:
the European Convention on Human Rights Revisited
Egan, Suzanne
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Information Technology

Article

First Come First Served: Assigning Domain Names
Zockoll -v- Telecom Eireann
Murray, Karen
4 (3) 1998 BR 163

Injunctions

Donnelly v. Texaco Ireland Limited
High Court: **Macken J.**
17/12/1998

Interlocutory relief; landlord and tenant; plaintiff asserted he was a tenant of certain parts of a commercial premises owned by the defendant; plaintiff claimed the defendant had interfered with the exercise of his rights and sought interlocutory relief in relation to the hours of opening of his business, the precise areas to be occupied by him and car parking arrangements; whether plaintiff entitled to interlocutory relief.
Held: Relief granted.

Aerospares Ltd v Thompson

High Court: **Kearns J.**
13/01/1999

Mareva injunction; continuance; world wide effect sought; allegations of fraud in breach of contract and breach of fiduciary duty; parties involved in international aviation supplies; defendant has assets in this jurisdiction and other jurisdictions; specific undertakings given to the court; whether a specific evidence of risk of dissipation is required to grant relief where a good arguable case in support of an allegation of fraud or dishonesty has been established; whether the requirements for a mareva injunction have been met.
Held: Mareva injunction discharged subject to satisfactory clarification of undertakings by the defendants; the plaintiffs established a good arguable case in respect of the allegations; damages are an adequate remedy and the amount recoverable would be limited; no specific risk of dissipation where there is an allegation of fraud or dishonesty.

Intellectual Property

Article

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Scales, Linda
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Licensing

Statutory Instrument

Intoxicating Liquor Act, 1988 (Age Card) Regulations, 1999
SI 4/1999

Local Government

Statutory Instrument

Local Government Act, 1998 (Commencement) Order (No 4) Order, 1998
SI 490/1998

Negligence

McHugh v. Minister for Defence
High Court: **Budd J.**
28/01/1999

Negligence; post traumatic stress disorder; duty of care owed by employer to employee; while on duty in the Lebanon the plaintiff soldier had been exposed to a life-threatening incident involving the negligent discharge of a rifle as a result of which he suffered shock and distress; plaintiff further traumatised by three operations which involved gruesome sightings of bodies; plaintiff manifested obvious symptoms of post traumatic stress; whether the defendants had negligently failed to recognise and treat these symptoms; whether, if the symptoms had been treated, the plaintiff would not have suffered from chronic post traumatic stress disorder which was resistant to therapy and rehabilitation.
Held: defendants had negligently failed to take appropriate care for the health of the plaintiff; damages of £218,900 awarded.

O'Sullivan v. Bórd Gais Éireann
Supreme Court : O'Flaherty J., Murphy J., Barron J.

07/12/1998

Accident; hole in pavement; plaintiff tripped and damaged her arm; whether trial judge correct in apportioning liability between the two defendants; whether second named defendant complied with contractual obligations owing to the first named defendant; whether the negligence on the part of the second named defendant overrides the negligence of the first named defendant.
Held : Appeal allowed; liability apportioned entirely to the second named defendant.

Nursing

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Planning

Palmerlane v. An Bord Pleanála
High Court: **McGuinness J.**
28/01/1999

Judicial review; planning; unauthorised use; warning notice; incidental use; mandamus; certiorari; warning notice served in respect of the sale of hot food at a retail premises; applicants seek orders of *mandamus* and *certiorari* in respect of refusal of respondent to determine reference under s. 5; whether the sale of hot food could be a development or exempted development; whether there was a proper and valid reference under s.5; whether this was a proper issue for determination under s.5; whether the fact that sale of hot food commenced on the same date as the opening of the business, disentitles applicant from seeking reference under s.5; s. 5(1) Local Government (Planning and Development) Act, 1963; s. 26, Local Government (Planning and Development) Act, 1976; Local Government (Planning and Development) Regulations, 1994.
Held: Applicant entitled to reference under s.5; declaration and order of *certiorari* granted.

McGovern v. Dublin Corporation
High Court: **Barr J.**
22/01/1999

Judicial review; default planning permission; development plan; zoning; application for planning permission for alterations and extensions to a guesthouse; whether applicant entitled to planning permission by default; whether proposed development was 'normally permissible' or 'open for consideration' within zoning objectives of the development plan; whether proposed development was a guesthouse within the meaning of the development plan; whether development was a material contravention of the development plan; s. 26(4), Local Government (Planning and Development) Act, 1963.
Held: Development not 'normally permissible' or 'open for consideration' in the relevant area; no right to default planning permission.

Molumby v. Kearns
High Court: **O'Sullivan J.**
19/01/1999

Planning; nuisance; intensification of use; planning permission; covenant; locus standi; noise; company began to use premises in industrial estate for distribution as well as warehouse; plaintiffs claim this caused an increase in noise and traffic of large vehicles; entrance to the site widened for this purpose; whether there was a breach of the conditions of the planning permission; whether there was an intensification of use, amounting to a material change of use; whether use as a distribution centre was an unauthorised use for which planning permission should have been obtained; whether the defendant is obliged to restore gate pier at the entrance to site; whether plaintiffs have locus standi to bring action in nuisance; whether there was nuisance; s. 27, Local Government (Planning and Development) Act, 1976.
Held: No breach of planning condition; was a material change of use; unauthorised use of the lands; plaintiffs have *locus standi*; order made limiting hours of access to site.

Practice and Procedure

C, In re
High Court: **McGuinness J.**
15/1/99

Family Law application; costs; adoption; prospective adopters of C had obtained an order dispensing with the consent of the natural mother to the adoption; application by the natural mother for the return of C to her custody had been unsuccessful; natural mother did not have the resources to meet an order for costs; which party should bear the costs of the proceedings; s.3, Adoption Act, 1974; s.11, Guardianship of Infants Act, 1964.
Held: It was neither just or effective to make an order for costs against the natural mother; costs awarded to the prospective adopters against St. Louise's Adoption Society.

Egan v. Murphy
Supreme Court: **Murphy J.**, Lynch J., Barron J. *(*ex tempore*)
30/11/1998

Notice of trial; delay; notice of trial served in error, as plaintiff intended to have case tried by a judge sitting with a jury and not by a judge alone; motion to set aside the notice of trial refused on basis of delay; whether notice of trial should be set aside; s.1(3)(i) Courts Act, 1988.
Held: Plaintiff should not be deprived the right to have trial by jury due to the error made by his solicitors; appeal allowed.

Brennan v Judge Smith
High **Court: Morris J.**
01/02/1999

Judicial review; *certiorari*; civil bill stamped but not issued in accordance with Circuit Court Rules; dispute over possession of lands; second named respondent is entitled to lands; interim injunction; the injunction was to give affect to previous orders; applicant in breach of the order; open to the applicant to apply to have the injunction removed; whether respondent acted *ultra vires*; whether an equity civil bill had been validly issued; whether the civil bill was a nullity.
Held: Relief refused; an alternative relief was available to the applicant; no benefit will accrue to the plaintiff if the

relief granted; applicant ignored all court proceedings to date by failing to comply with previous orders made.

Glennon v. Mc Morrow
Supreme Court: Barrington J., Lynch J.,Barron J *(ex tempore)*
14/12/1998

Defence; amendment; refusal of leave to amend defence; plea of qualified privilege omitted from defence; defamation; allegations of sexual abuse; whether the plaintiff should be allowed to make the amendment of the defence to include qualified privilege; whether such an amendment would cause injustice to the plaintiff; O 28, r 1 , Rules of the Superior Courts.
Held: Defendant granted leave to amend defence.

Kennedy v. The Law Society of Ireland
Supreme Court :O'Flaherty J.,Murphy J., Lynch J
20/01/1999

Discovery; privilege; investigation into the accounts of the appellant's practice; consent of appellant to third party verification; accountant appointed by respondent for the purposes of the investigation; whether privilege attaches to documents or copies of documents transmitted to the respondents from the accountant.
Held : Appeal granted; discovery of certain documents allowed.

Harris v. Fagan
Supreme Court : Hamilton C.J., **Lynch J.**, Barron J.
22/12/1999

Discovery; alleged slander; plea of justification; whether documents which are sought bear on the issues of the case; whether discovery should be ordered solely for the purposes of cross-examination as to credit; whether the plea of justification is wide enough so as to allow the discovery sought.
Held : Appeal dismissed.

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Property

Fortin v Delahunty
High Court: **Quirke J.**
15/01/1999

Injunction; public right of way; adjoining land to residential property; ownership of the land; whether there was a dedication to the public of the land; whether this dedication created a public right of way to which the defendant is entitled to; whether the criteria for a lawful dedication had been complied with; whether there was an intention on the part of the beneficial owner to dedicate the lands; whether there was an acceptance by the public of that dedication.
Held: Relief granted; the land did not form part of the roadway; the beneficial owner was empowered to dedicate the disputed area; proof that the local authority had taken charge of certain lands is insufficient to prove that has been lawfully dedicated; whether a dedication has occurred is entirely dependent upon the evidence as to whether or not the lands have been dedicated and whether the dedication has been accepted by the public.

Fairleigh Limited v. Temple Bar Renewal Limited
High Court: **Morris J.**
18/12/1998

Judicial Review; tax relief; premises purchased by applicant from Temple Bar Properties Limited; premises used as bar and restaurant; respondent refused to approve premises for the purposes of Chapter VII Finance Act, 1991; approval considered detrimental to suitable mix of uses and activities in the area; guidelines set out in May 1997 relating to grant of approval; natural and constitutional justice; fair procedures; legitimate expectations; whether respondent's decision was irrational and unreasonable; whether respondent in applying guidelines fettered the discretion granted to it by Temple Bar Area Renewal and Development Act, 1991; whether applicant's right to natural and/or constitutional justice and fair procedures was breached; whether applicant's dealings with Temple Bar Properties Limited gave rise to a legitimate expectation that approval would be granted; Part II and Second Schedule, Temple Bar Area Renewal and Development Act, 1991.
Held: Application dismissed.

Article

Stamp Duty on Contracts for Sale
Goodman, Aoife
12 (1999) ITR

Records and Statistics

Statutory Instruments

Registration of Births and Deaths (Ireland) Act, 1863 (Section 18) (South Eastern) order, 1998
567/1998

Statistics (Services Inquiries) Order. 1998
SI 464/1998

Road Traffic

D.P.P. v. Byrne
High Court: **O'Sullivan J.**
04/02/1999

Case stated; road traffic offence; driving under the influence of intoxicating liquor; caution; charge of driving while under the influence of intoxicating liquor; respondent seen urinating against car; charge dismissed on the ground that the respondent should have been cautioned; whether the Garda had made up his mind to prosecute when he asked a question of the respondent; whether there was an obligation to caution the respondent before questioning him; whether the Garda was entitled to establish who had been driving the car; s. 107, Road Traffic Act 1961; s. 49, Road Traffic Act 1961
Held: Charge should not have been dismissed; no duty to caution the respondent

Denton v. D.P.P.
Supreme Court: **O'Flaherty J.**, Murphy J., Barron J. *(*ex tempore*)
29/10/1998

Case stated; road traffic offence; custody record; charge of driving while under the influence of alcohol; time of arrest given by Garda and time recorded on custody record differed; High Court found that decision of District Court Judge to dismiss case was incorrect in law; custody record not put to Garda; whether dismissal was correct in law; whether question put to accused by prosecution as to correct time of arrest should be inadmissible; whether Garda formed opinion of drunkenness of accused before arrest; s. 49 Road Traffic Act, 1961; s. 10, Road Traffic Act, 1994; s.2, Summary Jurisdiction Act, 1857; s. 51, Courts (Supplemental Provisions) Act, 1961; Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations, 1987.
Held: Appeal dismissed.

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Failure by a Member State to fulfil its obligations - Dir.85/337

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Children Bill, 1996
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Criminal Justice (No.2) Bill, 1997
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Criminal Justice (United Nations Convention Against Torture) Bill, 1998
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Local Government (Planning and Development) Bill, 1998
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2nd stage - Dail **[p.m.b.]**

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Abbreviations

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

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

KING'S INNS NEWS

Moot Court Competition At The Chartered Institute Of Arbitrators (London, March 1999)

A team of students from King's Inns recently won fist prize in the Chartered Institute of Arbitrator's Moot Court Competition, which was held in Regent's College in London on 1 March 1999. The students represent the Inns were Nessa Cahill, Gillian Reid, Ronan Kennedy and Edmund Sweetman.

There were eight teams invited to participate in the event with King's Inns as the only representative from Ireland. Each team was required to submit written memoranda on behalf of both the claimant and the respondents in a contractual dispute. On the day of the competition, there were preliminary rounds, a semi-final and a final in which the teams presented oral submissions. These hearings were adjudicated by three-member panels from the Chartered Institute of Arbitrators. The Right Hon. Lord Goff, The Right Hon. Lord Mustill and His Hon. Judge James Fox Andrews QC were among those who judged the performances of the two teams in the final of the competition. First prize was awarded to King's Inns.

This was an excellent result and again, we offer our heartiest congratulations to students who are doing so much for the reputation of the Society.

●

Dining During Easter and Trinity Terms

The dates for the last two dining terms of the Law Year are:

Easter: Monday 12 April to Friday 23 April (excluding Tuesday 20 April)

Trinity: Wednesday 2nd June to Wednesday, 16th June

No benchings are scheduled to take place but there will be a spouses guest night on Friday 11 June. Dinner costs IR£18 per person and begins at 7.30 for 8.00 pm.

Print No 2: The Library At King's Inns

So far, almost 200 subscribers have taken up Print No. 2. Because of demand, we have now put it on general release. As you are aware, an entire series is of much greater interest to a collector than an assortment of prints.

The 3rd print in the series has been commissioned (the Round Hall in the Four Courts) and we hope to have this ready in November/December. A little trade has already begun with regard to Print No. 1 (The Dining Hall by Robert Ballagh). We have been informed that an unframed copy was recently resold for IR£140. Unfortunately, no copies of Print no 1 prints are available for sale at King's Inns.

●

Presentation By Mrs Brenda Haugh

On Thursday 25 February 1999, Mrs Brenda Haugh, widow of the late Judge Kevin Haugh, presented King's Inns with a beautiful silver tray that was presented to her husband by the cabinet of 1941 on the occasion of their wedding. At that time, the late Judge Haugh was Attorney General. The silversmith took the signatures of Judge Haugh's colleagues and was able to engrave them onto the tray. The signatories include Eamon de Valera, Sean T O Ceallaigh, Sean Lemass, Sean MacEntee, Frank Aiken and Oscar Trayor. An interesting and historical glimpse of the time and a most welcome item for display in the Inns. The Society and the Benchers are most grateful to Mrs Haugh and to her family for this very generous gesture.

●

The Irish Times Debating Competition

The final of the annual Irish Times Debating Competition was held in Cork at the end of February. We are very pleased to report that Rossa Fanning (Degree 2) took the individual award and is off to the US as part of his award. Eoin Mac Giolla Ri (Degree 2) was runner-up. We offer our congratulations to both of them.

●

Camilla McAleese
Under-Tresurer, King's Inns

The Irish Association of Law Teachers Annual Conference on the theme of

"The Leading Cases of the Twentieth Century"

will be held from 9-11 April 1999, in the Killarney Park Hotel, Killarney, Co. Kerry.

The keynote papers will be delivered by the Hon. Mr. Justice Ronan Keane, Judge of the Irish Supreme Court, Advocate General Niall Fennelly of the European Court of Justice, and Prof. Sir John Smith of the University of Nottingham (who with Prof. Brian Hogan wrote a leading text on criminal law). More than 20 papers will be delivered over the course of the weekend looking afresh at the facts and holdings of this century's leading cases, each of which represents a crucial legal development which has exercised a profound influence on the law since it was decided.

FURTHER DETAILS, AND BOOKING FORMS, ARE AVAILABLE FROM:
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EMAIL: EODELL@TCD.IE).

Restraining the Publication of Allegedly Defamatory Material

KEVIN FEENEY, SC

On the 11th December 1998 Mr. Justice Kelly delivered a judgment in an application seeking an interlocutory injunction restraining the publication of an article in a magazine called 'Patrick'. The title of the action was *'John Reynolds, Plaintiff, and Elio Malocco trading as 'Patrick', Declan Murray, Frank White and Peter Laur and, by Order, Fanville Limited, Defendants'*.

There are relatively few decided cases relating to injunctions seeking to restrain the publication of alleged defamatory material. There are even fewer written judgments. Against that background, the reasoned judgment of Mr. Justice Kelly is of considerable importance in identifying the principles which will apply to interlocutory injunctions in defamation.

The reason for the relative lack of precedent in relation to interlocutory injunctions in defamation can be explained by the passage in the Law Reform Commission's Consultation Paper on the Civil Law of Defamation dealing with interlocutory injunctions. That passage states (at page 129): -

> *"A plaintiff in a defamation case seeking to obtain an interlocutory injunction will be met with more stringent standards than a plaintiff in any tort case. In the ordinary case, the Court considers whether the plaintiff has raised a fair or serious question, whether damages will adequately compensate the plaintiff and whether the balance of convenience favours the granting of the interlocutory injunction. The defamation plaintiff must show, however, that it is highly unlikely that the defendant will succeed in the main action. An interlocutory injunction will not be granted if (a) there is any doubt that the words are defamatory, or (b) the defendant intends to plead justification or, probably, any other recognised defence."*

Given that statement of the law, it is not surprising that interlocutory injunctions in defamation are relatively rare. Indeed the difficulty in obtaining interlocutory relief in alleged defamation has been recognised, in practice, in recent years by the fact that interlocutory attempts to restrain publication have either been wholly or mainly based upon an allegation of breach of confidence. There has been a number of reported cases both in Ireland and in England dealing with the granting of interlocutory relief in cases of alleged breach of confidence. There is a detailed and extensive review of the principles and of the case law in the Supreme Court in *National Irish Bank Limited and Another v. Radio Telefis Eireann* [1998] 2 ILRM at 196. The main cases reported in Ireland and in England, prior to the Supreme Court judgment, are referred to in the Judgments and are listed on page 198 and 199 of the report.

The issue of an interlocutory injunction in the case of an alleged defamation was briefly considered in a written judgment of the High Court in the case of *Connolly v. RTE* [1991] 2 IR at 446. The facts of that case were that in a television programme broadcast to highlight a Christmas police clampdown on drunk driving offences, the plaintiff's distinctive motor car appeared intercut with voice-overs of people submitting to breathalyser testing. The broadcast was repeated notwithstanding a request for an undertaking from the plaintiff's solicitors to the defendant to desist from further publication by repeat broadcasts of the material. It was common case that the plaintiff had not been stopped or questioned on suspicion of drunken driving at the time that the defendant filmed her. The defence of the case was on the ground that it was not defamatory and that the plaintiff was not identifiable. There was no consideration of previous authorities and Miss Justice Carroll refused the interlocutory injunction sought - although the plaintiff had shown that there was a fair question to be tried and that damages were not an adequate remedy - on the basis that the balance of convenience favoured an injunction not being imposed where there was little danger that the defendant would repeat broadcasts pending an early trial and were moreover it was desirable that any issue of liability be determined by the jury.

It was against the above background of the absence of any detailed recent authorities within this jurisdiction that Mr. Justice Kelly came to consider the law in the *Reynolds v. Malocco* and Others case. The Judgment sets out the legal principles applicable in such cases. In part of the section dealing with the legal principles applicable, Mr. Justice Kelly deals head-on with two existing and contradictory Irish authorities from the 1920's. The two authorities were *Gallagher v. Tuohy* [1924] 58 ILTR 134 and *Cullen v. Stanley* [1926] IR 73. Those two differing and apparently contradictory approaches were considered by Mr. Justice Kelly in the light of the Supreme Court authority in *Sinclair v. Gogarty* [1937] IR 377 which had identified a principle that interlocutory injunctions should only be granted to restrain publications in the clearest cases where any jury would say that the matter complained of is libellous, and where - if the jury did not so find - the Court would set aside the verdict as unreasonable. In *Gallagher v. Tuohy*, Murnaghan, J. stated: -

> *"The Court should not readily restrain the publication of any matter which is not obviously a libel. I would have no difficulty at all in deciding that the statement was defamatory but for the plea of justification. That plea, having been read, it seems to me that I cannot prejudge the issue and decide that the plea of*

justification is erroneous. That would be the effect of the injunction sought."

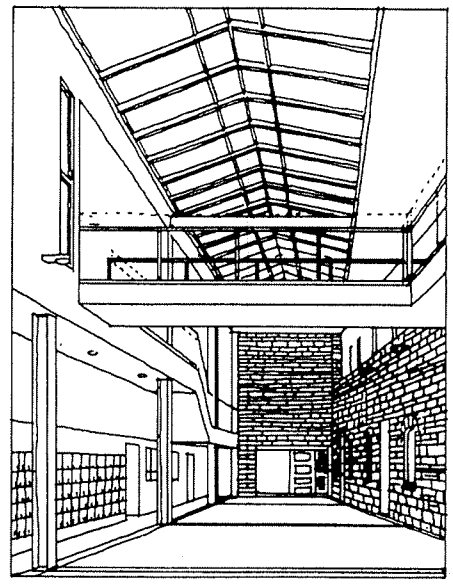
In those circumstances no injunction was granted.

However, the Supreme Court in *Cullen v. Stanley* adopted a different approach and O'Connor, J., in considering the Court of Appeal's decision in *Bonnard v. Periman* [1891] 2 CH. 269 stated: -

"I do not think that the Court of Appeal intended to lay down a rule which should be rigidly applied in every case, because the judgment of Coleridge, C.J. wound up with the observation that, on the whole, the Court thought that it was wiser in that case, as is generally, and in all but exceptional cases, must be, to abstain from interference until the trial of a plea of justification."

O'Connor, J. examined the Affidavit of the plaintiff and contrasted it with the baldest Affidavit of the defendant and held that on the evidence before the Court there was nothing to support the plea of justification. Mr. Justice Kelly in his judgment indicated that he preferred the approach adopted by the Supreme Court and stated that he did not think that a rule, which permits a defendant to in effect oust the ability of the court to intervene by way of injunction in an appropriate case by the simple expedient of expressing an intention to plead justification at the trial of the action, is consistent with the obligations imposed on the Court under the Constitution. Mr. Justice Kelly went on to hold that he was satisfied it was open to the Court to examine the evidence adduced by the Defendant in support of a justification plea so as to ascertain whether it has any substance or prospect of success.

The first and most important principle, therefore, identified by Mr. Justice Kelly is that even though the legal position is that where a defendant contends that the words complained of are true, and swears that he will plead and seek at trial to prove the defence of justification, a Court will not grant an interlocutory injunction, unless, exceptionally, the Court is satisfied that such a defence is one that cannot succeed. However, the approach identified by Mr. Justice Kelly is that notwithstanding such statement of the law the Court



must examine the evidence adduced by the defendant in support of a plea of justification and not merely consider whether or not a bald statement of a plea of justification will be raised. The approach therefore identified by Mr. Justice Kelly places on onus on the defendant purporting to raise a plea of justification to do more than merely indicate such an intention but also to identify sufficient evidence to show that it cannot be claimed that the plea of justification is bound to fail.

The fact that it is only in exceptional cases that a court might be satisfied that such a defence is one that cannot succeed is illustrated by a footnote in the recent 9th edition of Gatley on Libel and Slander at footnote 21 in paragraph 25.6 on page 636 where it is stated: -

"There is no reported English case where an injunction has been granted despite an intended plea of justification, because the court decided that the plea would fail."

The fact that Mr. Justice Kelly has identified that it is open to the Court to examine the evidence adduced by the defendant in support of a plea of justification must be viewed, as indeed he does, against the well established legal principles. The examination is to see if the evidence shows that a plea of justification must fail if put before a jury on the grounds that such a plea is perverse.

In the *Reynolds v. Malocco and Others* case, the plaintiff complained that the article in question defamed him in two respects. The plaintiff claimed that the words in their natural and ordinary meaning or by innuendo alleged that he had been charged with permitting the sale of drugs in his night-club and/or that he permitted the sale of drugs on the premises and was benefiting therefrom or, alternatively, was turning a blind eye to the sale of drugs on his premises and, secondly, complained that the article meant that he was a homosexual. In respect of the first of the complaints, Mr. Malocco contended that the words did not bear the meaning ascribed to them and went on to claim that if they did that he would plead justification. In relation to the second complaint by the plaintiff that the article meant that he was a homosexual Mr. Malocco also contended that the words complained of did not bear such meaning and a further plea that if the words had such a meaning that the allegation that a person is gay is not harmful to reputation.

In relation to the drug dealing allegation, Mr. Justice Kelly came to the conclusion that looking at the parts of the article which were complained of as a whole, there was present an innuendo to the effect contended for by the plaintiff. He went on to hold that he was of the view that such an innuendo was clear and that in the absence of a successful plea of justification a jury would say that the matter complained of was libellous. If they did so, Mr. Justice Kelly did not believe that the Supreme Court would set aside the verdict as unreasonable and also held that if the jury did not do so its decision would be likely to be set aside. That approach appears to place a slightly higher onus on defendants in relation to meaning than adopted in previous cases or as outlined in the Law Reform Report quoted above. The test being applied by Mr. Justice Kelly in relation to the disputed meanings and, in particular, the meaning contended for by the defendant, is if a jury agreed with the defendant's claimed meaning, would the jury's decision be likely to be set aside?

The Supreme Court considered the appropriate approach to meaning in defamation cases in the case of *Barrett v. Independent Newspapers Limited* [1986] IR 13. A majority of the Supreme Court held that if an appellant court could set aside the verdict of a jury finding words not to be defamatory on the ground that it was perverse and unreasonable, it followed as a necessary consequence that a Trial Judge had a right and duty in an appropriate case to prevent such a perverse or unreasonable

result by directing a jury. Therefore it would appear that if the *Reynolds v. Malocco* case were to be tried before a jury, in the light of the *Barrett v. Independent Newspapers Limited* decision, the Court would have to leave the question of meaning to the jury unless the meaning contended for was perverse or unreasonable. However, at the interlocutory stage in the *Reynolds v. Malocco* case, the test applied appears to some extent to be a lesser test in that the test was would a jury finding such a meaning be likely to be set aside. It therefore could be argued in relation to meaning that Mr. Justice Kelly applied a test which is possibly higher than the test which would be applied by a court at trial when faced with an application by a defendant to withdraw a case from the jury on the basis that there was no defamatory meaning.

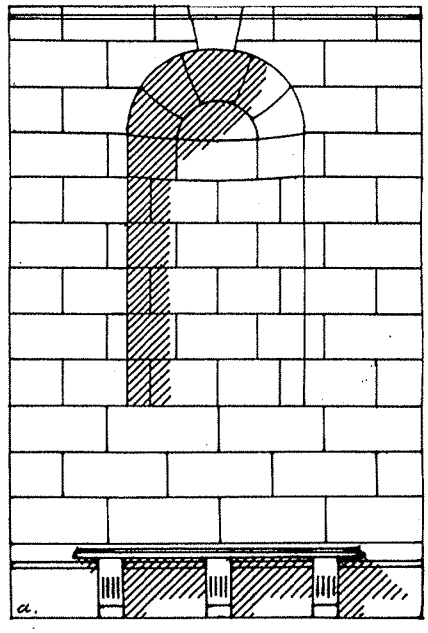
In questions of disputed meaning at an interlocutory stage there would appear to be a sound logical basis for adopting the slightly lower test followed in the *Reynolds v. Malocco* case. A dispute as to meaning arises where the parties suggest that particular words have different meanings. The party seeking to restrain publication will claim that the meaning he contends for is defamatory whilst the defendant contends that the words do not have such a meaning. It would follow that the defendant does not intend to convey the meaning argued for by the plaintiff and, in those circumstances, it would not necessarily be a restraint of the defendant's right of freedom of expression to restrain publication. It would still be open to the defendant to publish words concerning the plaintiff which were clearly limited to the non-defamatory meanings contended for by the defendant. In other words, even if a defendant was injuncted from publishing the words which he desired to publish, it would still be open to him to publish alternative words which did not contain the meanings or innuendoes contended for by the Plaintiff but did contain the meanings or innuendoes contended for by the defendant.

It would seem that a case can be made out that the Court might well adopt differing approaches in relation to interlocutory relief in cases where there is an issue as to whether or not the words are defamatory as opposed to cases where the defendant intends to plead justification to the words contended for by the plaintiff.

In the *Reynolds v. Malocco* case, in determining whether that case was an exceptional case which warranted interlocutory relief notwithstanding a plea of justification, the Court went on to consider whether the defendants had a prospect of success in their plea of justification and held, having looked at the admissible evidence, that the defendants had gone nowhere near demonstrating such a prospect. In his judgment, Mr. Justice Kelly indicates that he did not think that the defendant's averments went anywhere near demonstrating the existence of an arguable prospect of making out a defence of justification. If that sentence were taken out of context it might appear that a different approach was being adopted than that identified from previous cases but the judgment, taken as a whole, is clearly predicated upon accepting the existing authorities that restraint is only granted in the most exceptional cases.

The fact that Mr. Justice Kelly appears to have adopted a slightly lower test in relation to meaning is highlighted in his approach to the allegation of homosexuality. In relation to that matter there was no plea of justification and therefore the issue was one of meaning. Having examined certain authorities, Mr. Justice Kelly held that it seemed to him that it would be perfectly open to a jury to hold that the use of the word 'gay' in relation to the plaintiff - either in its natural or ordinary meaning or by innuendo - was an allegation of homosexuality and went on to hold that a jury would be entitled to hold that an allegation of homosexuality was defamatory and that such a verdict could not be regarded as perverse. The judgment pointed out that there was no plea of justification in respect of the complaint of homosexuality and it followed that the plaintiff had made out a sufficiently strong case to satisfy the test required for the grant of an interlocutory injunction. By adopting an approach where the court tested the plaintiff's contended for defamatory meaning on the basis that a jury finding such meaning would not be acting in a perverse manner, would appear to be a clear indication that the lesser test is being applied. However, it must be recognised that one of the main reasons identified for the reluctance of the courts to grant interlocutory relief in defamation cases is a recognition of the importance of free speech. That was expressly stated by Lord Coleridge in *Bonnard v. Periman* [1891] 2 CH. 269 where he said : -

> *"The importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."*



However, where a defendant contends that the use of the word 'gay' is not for the purposes of saying that the plaintiff was homosexual it would still be open to such a defendant, notwithstanding an injunction, to say what he claimed he intended to say about the plaintiff using alternative wording. The defendant contended that the word *'gay'* was an adjective used to describe a person's demeanour as in lively, cheerful, vivacious, light-hearted and fond of pleasure and gaiety. If any of those words were used as an alternative to *'gay'*, then the Plaintiff would have no complaint and the defendant would be free to publish words meaning what he intended to publish.

In the portion of the judgment dealing with the allegation of homosexuality, the Judge held that a jury would be entitled to find that an allegation of homosexuality was defamatory of the plaintiff. Mr. Justice Kelly expressly points out that it does not appear a sound argument to suggest that merely because an activity is no longer prohibited by the criminal law that an allegation of engaging in such an activity cannot be defamatory. Once the words are capable of being defamatory, the decision as to whether or not they

are defamatory is for the jury. Henchy, J. in *Barrett v. Independent Newspapers* at page 606 stated: -

> *"If the judge rules that the words complained of are capable of bearing the defamatory meaning alleged, it is then for the jury to say whether the words do in fact carry that meaning. Because the community standard represented by the jury may differ radically from the individual standard of the judge in determining what was defamatory, it would be a usurpation of the jury's function in the matter if the judge were to take upon himself to rule exclusively that the words were defamatory."*

It is that concept of '*community standard*' which is of importance in considering whether or not an allegation of homosexuality is defamatory. It is not just a question as to whether or not an activity is legal or illegal, even though that is clearly one of the matters to be taken into account in considering '*community standard*'. As pointed out by Mr. Justice Kelly, the commission of adultery is not a criminal offence but nobody could seriously suggest that an allegation of adultery could not be defamatory. Once the concept of community standard is incorporated into the law, as it is in the law of defamation, one is also faced with a standard which is not fixed or permanent but which moves and alters. For instance, in Ireland of the 1950's it would have unquestionably, in my view, been defamatory to say that a couple were living together whilst unmarried but in the 1990's, given the statistical prevalence of unmarried couples living together, it might well be that '*community standard*' has moved to such an extent that it would no longer be defamatory to suggest that a couple were living together whilst unmarried. The Law Reform Commission in its report on defamation at page 7 pointed out that '*the adoption of an objective standard encounters problems when the statement challenged touches on matter in relation to which there are sharply divided community viewpoints, whether political, social, religious or moral.*' This difficulty has been touched upon in two Irish cases, *Quigley v. Creation Limited* [1971] IR at 269 and *Berry v. Irish Times* [1973] IR 368. Walsh, J. in the *Quigley v. Creation* Limited case stated that words are defamatory '*if they injure the plaintiff's reputation in the eyes of a considerable and respectable class of the community, though not in the eyes of the community as a whole*'.

An allegation of homosexuality is a classic example of the difficulty which the law of defamation finds when faced with changing community standards and the approach which the courts have ultimately adopted has invariably been to leave the matter to a jury and only interfere with their determination as to meaning if it could be regarded as perverse.

Mr. Justice Kelly concluded his judgment by considering the issue of discretion in relation to injunctive relief based upon the facts of the case and the obvious lack of financial substance on the part of the defendants led Mr. Justice Kelly to being quite satisfied that his discretion should be exercised in favour of granting an injunction. •

The Power of Shareholders to Remove Directors Under S.182 of the Companies Act, 1963

BERNARD DUNLEAVY, Barrister

Introduction

The proposition that ultimate control of a company rests with the members of the company, is perhaps most clearly illustrated in the statutory right of shareholders under Section 182 of the Companies Act 1963, to remove a Director. Section 182 (1) stipulates that:

> "A company may by ordinary resolution remove a Director before the expiration of his period of office notwithstanding anything in its Articles or any Agreement between it and him, so, however, that this subsection shall not, in the case of a private company, authorise the removal of a Director holding office for life".

The corresponding English provision[1] has been described as "one of the most important principles of modern Company Law"[2], because it, in common with Section 182, allows the shareholders, should it be necessary, to effectively assert themselves against the Directors of a company. While shareholders have, in practice, little power to intervene in the day to day management of a company, they can insist on retaining on the Board only those Directors whom they believe are best able to run the affairs of the company, through the effective sanction of removal which Section 182 gives them. That this power of shareholders has been limited by a recent decision of the Supreme Court constitutes a significant development in commercial jurisprudence which will considerably restrict the circumstances in which the statutory right of removal of a Director under Section 182 may be exercised.

Remedies

The remedies available to a Director facing a resolution calling for his dismissal at a general meeting of the shareholders, held pursuant to Section 182, have traditionally been quite limited. In the case of a Director facing dismissal contrary to the terms of a contract, or contrary to the manner set out in a Company's Articles, damages are the most basic remedy. It might appear that Section 182 confers on a company a statutory authority to break a contract where a Director is concerned. In fact this provision merely places a company in the same position as any other employer by giving it "the discretion of removing a manager and of accepting the consequences of this act by paying compensation or damages to him".[3] Section 182 (7) of the Companies Act 1963 provides that:

> "Nothing in this Section shall be taken as depriving a person removed thereunder of compensation or damages payable to him in respect of the termination of his appointment as Director or compensation or damages payable to him in respect of the determination of any appointment terminating with that as Director or as derogating from any power to remove a Director which may exist apart from this Section".

In other words, where a Company seeks to terminate a Director's service contract without such justification, as for example, that they have behaved dishonestly, or failed to carry out their duties properly, or even that their term of employment has ended, the Director will normally be entitled to damages for wrongful dismissal.[4] Indeed, it has been held by the Irish Courts [5] that even in circumstances where grounds justifying the dismissal of a Director have arisen, a company may still be liable to damages if they have failed to observe the requirements of natural justice in relation to the dismissal.

Of course shareholding Directors may attempt to insulate themselves from the effects of Section 182, through the use of what is known as a *Bushell v Faith* Clause in the Articles of Association[6]. Such Clauses can give certain members of a company loaded voting rights which can apply generally or simply where it is proposed to dismiss a Director. In this manner the Articles of Association may provide that on any vote to dismiss a particular shareholding Director, his vote is loaded allowing him to defeat any such resolution which comes up for consideration before the members. [7]

A Director who claims that a dismissal pursuant to Section 182 is oppressive or results from oppressive conduct may also seek a remedy in Section 205 of the Companies Act 1963. Section 205 (1) provides that :

> "Any member of a company who complains that the affairs of the company are being conducted or that the powers of the Directors of the company are being exercised in a manner oppressive to him or any of the members (including himself) or in disregard of his or their interests as members, may apply to the Court for an Order under this Section".

Section 205(3) goes on to state that;

> "If, on any application under subsection (1) or subsection (2) the Court is of the opinion that the Company's affairs are being conducted or their Directors' powers are being exercised as aforesaid, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether directing or prohibiting any act or cancelling or varying any transaction or for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the

company and in the case of a purchase by the company for the reduction accordingly of the company's capital, or otherwise".

Although only a member may petition for relief under Section 205, it has been established by the case of *In re Murph's Restaurants Limited*,[8] adopting the principles laid down by the House of Lords in *Ebrahimi v Westbourne Galleries Limited*,[9] that where a member's complaint is of oppression, he need not have suffered *qua* member but may instead have suffered in some other capacity, for example *qua* Director.[10] In that case Gannon J cited with approval the Judgment of Lord Wilberforce:

"No doubt, in order to present a petition, he (the Petitioner) must qualify as a shareholder, but I see no reason for preventing him from relying upon any circumstances of justice or equity which affect him in his relations with the company, or in a case such as the present, with the other shareholders".

The Irish Courts have recently had to consider whether the principles established in these two cases can be extended to justify the granting of interlocutory relief restraining the removal of a Director, in effect overriding the statutory entitlement of shareholders to remove a Director by virtue of Section 182. In other words, are there circumstances in which the application for relief by a Director under Section 205 can serve as a basis for injuncting the members of a company at meeting from exercising their statutory authority to remove that Director?

Feighery v Feighery & Others

The decision of Ms Justice Laffoy in *Feighery v Feighery & Others*[11] sets out many of the considerations which have been regarded as governing the application of Section 182, and sets that particular provision into context.

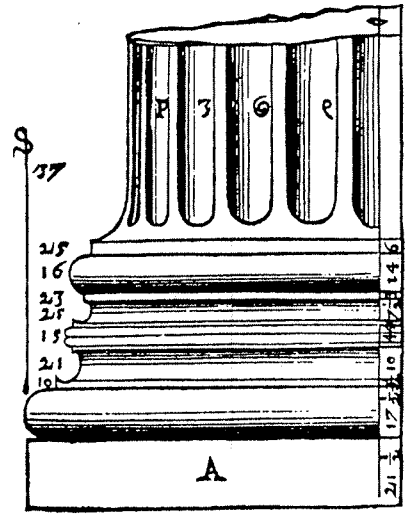
Facts

The Petitioner was a member of a family who owned a successful construction company and was a shareholder in the company. He was employed in the Company for the 16 year period prior to the Petition, being the Company Secretary for 15 years and a Director for over 11 years. He alleged that he had been the object of oppression within the company culminating with an extraordinary general meeting being called to consider a resolution removing him as a Director of the Company. The Petitioner sought Section 205 relief and, pending the determination of these proceedings, an interlocutory injunction preventing the extraordinary general meeting being convened or his being removed as a Director. While the Petitioner alleged that he had been led to understand that he would be employed as a Director by the company for the remainder of his working life and that the company was a quasi-partnership between himself and the other family members, no evidence was adduced that there was any express agreement between the shareholders that they were all entitled to participate in the management of the company, or that the company was to be run as a partnership between them.

The High Court

The Petitioner's application was refused by Ms. Justice Laffoy on the basis that, even were it to be proved that the Petitioner's allegations were correct, the Court had no jurisdiction to interfere with the statutory authority of the shareholders to remove Director.

The learned Judge considered the dicta of Plowman J in the case of *Bentley-Stevens v Jones*[12] which arose from a situation where there was a dispute between one of three shareholders in a nursing home, who was also a Director, and the other two shareholder/Directors. An extraordinary general meeting having been convened by the majority shareholders to remove the other shareholder/Director (the Plaintiff), the Plaintiff sought a Declaration that his removal was void by reason of procedural irregularities in the extraordinary general meeting. The portion of the Judgment considered was as follows:



" (The Plaintiff) submitted that this was what is popularly known as a 'quasi-partnership' case and that on the principles enunciated by the House of Lords *In re Westbourne Galleries Limited*, the Court should restrain the first and second Defendants, as two of the three partners in the quasi-partnership, from expelling the third partner, namely the Plaintiff....In my judgment, even assuming that the Plaintiff's complaint of irregularities is correct, this is not a case in which an interlocutory injunction ought to be granted. I say that for the reason that the irregularities can all be cured by going through the proper processes and the ultimate result with inevitably be the same.....However, that still leaves the *Westbourne Galleries* point. But in my judgment there is nothing in the case which suggests that the Plaintiff is entitled to an injunction to interfere with the Defendant's statutory right to remove the Plaintiff from its board. What it does decide is that if the Plaintiff is removed under a power valid in law then he may, in appropriate circumstances, be entitled to a Winding-up Order on the just and equitable ground.[13] For these reasons the Plaintiff is not, in my Judgment, entitled to the relief that he seeks on this Motion and I must dismiss it".

In her Judgment Laffoy J summarised her views in relation to Section 182 as follows:-

"In my view, even assuming that the Petitioner has an arguable case for relief under Section 205 and an arguable case that the Respondents as shareholders and Directors, owe him fiduciary duties and are in breach of those duties, I must nonetheless be satisfied that I have jurisdiction to override the shareholders' statutory power under Section 182 to remove the Petitioner from the board. I am not satisfied that I have such jurisdiction and none of the cases cited by Mr. Gallagher support a contrary

conclusion. In particular the relief granted by this Court (Gannon J) in the *Murph's Restaurants* case, in which the principles laid down by the House of Lords in the *Ebrahimi* case were applied, and in which it was held that the purported exclusion of the Petitioner by his co-shareholders and Directors in an irregular and arrogant manner was undoubtedly oppressive, was a Winding-up Order under Section 213 of the 1963 Act.....In substance, what the Petitioner seeks is an injunction to restrain the company in general meeting resolving to remove him as a Director, that is to say, to restrain the exercise of its statutory right under Section 182. As I have indicated, I consider that the Court has no jurisdiction to grant such relief".

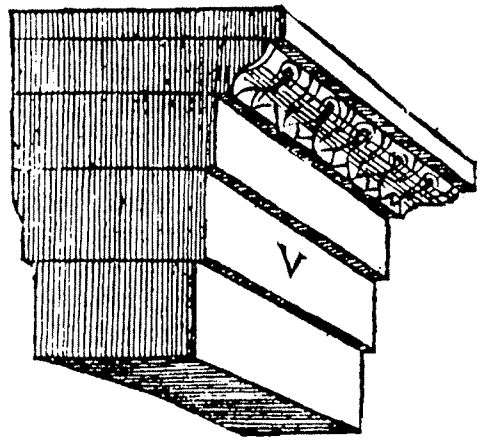
In neither the instant case, nor in *Bentley-Stevens v Jones* did the Plaintiff seek to rely on any express agreement. Indeed the facts briefly outlined above illustrate, the Plaintiff in *Feighery v Feighery & Others* sought to rely on little more than "an understanding" that he would continue to participate in the management of the company. In those circumstances Laffoy J had no hesitation in deciding that the application of the principles in *re Westbourne Galleries* and *re Murph's Restaurants* did not extend to the granting of interlocutory relief restraining the removal of a Director.

McGilligan & Bowen v O'Grady, Thornton, Premier International Merchandising Limited, and Premier International Trading House Limited

Feighery v Feighery & Others was considered in the recent High Court and Supreme Court decisions in the case of *McGilligan & Bowen v O'Grady & Others*.[14] The Judgments arising out of this case resulted in a significant development of the law in this area.

The Facts

The first named Plaintiff was a non-executive Director of the third and fourth named Defendants Premier International Merchandising Limited and Premier International Traading House Limited (hereinafter PIM and PITH) respectively. The Plaintiff sought Section 205 relief alleging that the affairs of the company were being conducted oppressively and sought an interlocutory injunction restraining his removal as a Director of PIM and PITH or the holding of extraordinary general meetings to consider his removal as a Director of either company. The first named Plaintiff was, in addition to being a Director and Shareholder in PIM and a Director of PITH, the managing Director of a company called Business and Trading House Investment Company Limited whose business involved the organisation of BES Scheme Funds (hereinafter BTH). By virtue of an agreement of 25th July 1989 between BTH, the Bank of Ireland and PITH, the Bank applied for shares in PITH on behalf on some BES Investors represented by the investment house. One of the provisions of the agreement was that the first named Plaintiff would be appointed a non-executive Director of PITH and would be appointed to the executive sub-committee of the board of directors of that company. When, some years later, the shareholders of PITH accepted an offer by PIM to exchange their shareholding for an equivalent shareholding in PIM, together with a loan note, PITH became a wholly owned subsidiary of PIM and the first named Plaintiff was appointed a non-executive Director of PIM, and the Bank accordingly became an investor in PIM. Relations between the parties broke down and following accusations of bad faith by both the Plaintiffs and the Defendants extraordinary general meetings were called to consider resolutions to remove the first named Plaintiff as a Director of PIM and PITH.



The High Court

The Plaintiffs submitted that by virtue of the provisions of the agreement, the first named Plaintiff was on the board of each company, not merely in his own interests as a shareholder, but representing the interests of the BES investors through their nominee, the Bank. The provision of the agreement providing that Mr. McGilligan was to be a Director of PITH, it was argued, was to ensure that the interests of the BES investors would be protected at board level, and that this was equally true of both companies, as PIM had stepped into the shoes of PITH.

The Defendants submitted that following the judgement of Laffoy J in *Feighery v Feighery* the shareholders in PITH and PIM could not be prevented from voting on whether they wished the first named Plaintiff to continue as a Director of both companies. They argued further, that since the first named Plaintiff was not a party to the agreement in question, he certainly could not rely on it to defeat the shareholders' rights under Section 182.

Mr. Justice O'Donovan, in granting the injunction sought, clearly distinguished the situation from that which pertained in *Feighery v Feighery:*

> "There is no doubt in my mind but that, in the absence of the said agreement of the 25th July 1989, having regard to the decision of Laffoy J in *Feighery v Feighery*, these Plaintiffs have no right to the injunctive relief sought herein. In this regard, I am satisfied that, were he a Director of PITH and PIM in the ordinary sense in which one might be on the board of a limited company, I have no jurisdiction to deprive the shareholders of either company of the opportunity of considering resolutions to remove him from their respective boards. However, I think that there is substance to Mr. Shipsey's submission that, by virtue of the terms of that agreement, Mr. McGilligan is a Director of each company; not merely in his own interests, but also representing the interests of BTH and the BES investors and in this regard, by the way, I think that there is also substance to the argument that, after the takeover of PITH by PIM in 1995, the rights and interests of BTH and the Bank under the said agreement of 1989 were transferred to

PIM. At least, I am satisfied that there is a fair issue to be tried in relation to both of these matters and the fact that Mr. Shipsey and Mr. O'Neill were respectively able to advance so many arguments for and against them is, I think, eloquent testimony to the fact that they are matters which require resolution and that the outcome to that resolution is anything but certain. In this regard, I think that, in the event that a Court were to conclude that BTH and the BES investors, through their nominee, the Bank, were entitled to be represented on the boards of PITH and PIM by Mr. McGilligan, the decision of Laffoy J in *Feighery v Feighery* is of no relevance in this case because she was only concerned with the rights of shareholders to remove a Director who had no such special entitlement to be on the Board of the company with which she was concerned. In arriving at this conclusion, I have also been influenced by the *dicta* of Lord Wilberforce in the case of re *Westbourne Galleries*, in which, in effect, His Lordship said that a limited company is more then a mere legal entity and that, in company law, there is room for recognition that, within the company, there are individuals with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure".

The Supreme Court

On appeal to the Supreme Court the Defendants argued that the granting of an injunction to restrain the removal of a Director was irreconcilable with Section 182, regardless of whether it was claimed that such a removal would constitute oppressive treatment entitling the Director to relief under Section 205. This was countered by the Plaintiffs' submission that Section 182 meant no more than that a Director of a company could not rely on an agreement between himself and the company or a provision in its Articles to prevent the company from removing him: his only remedy was in damages. Section 182 was silent in the present situation where the company's actions were in breach of an agreement made between it and some of its shareholders.

In refusing the appeal, the Supreme Court seemed to go even further than was urged by the Plaintiffs. The Court noted that in this case, unlike the situation which pertained in either *Bentley-Stevens v Jones* or *Feighery v Feighery & Others,* the Plaintiffs sought to rely on an express agreement. However, what seemed to weigh most heavily with the Court were the legal principles relevant to any application for an interlocutory injunction,[15] and a consideration of what was the intended purpose of Section 205.

Mr. Justice Keane in his judgment noted that prior to the enactment of Section 205 a majority of shareholders in a company could use their powers in a manner which was harsh and oppressive to the minority. Unless the minority could point to some illegality in their treatment they were afforded no remedy. The enactment of Section 205 was to provide such a remedy. As a result, the fact that shareholders, in Mr. Justice Keane's opinion, were entitled to remove a Director even where such amounted to a breach of contract between them, was not a relevant factor in considering whether that removal was a ground for relief under Section 205. Keane J went on to state:

> "Why then should the Court, on an application for an interlocutory injunction, be unable to restrain the company from removing a Director pending the hearing of a Petition under s.205 where he has established that there is a serious question to be tried as to whether his exclusion from the affairs of the company constitutes conduct which would entitle shareholders to relief under s.205?
>
> It should be noted that in *Bentley-Stevens v Jones* there does not appear to have been any proceedings in existence under the English equivalent of s.205 at the time the application for interlocutory injunction was made. However, apart from that consideration, I am bound to say, with all respect, that I do not understand why it should be thought that, because the relief sought in the interlocutory proceedings is not the same as the relief which will ultimately be sought in the s.205 proceedings, an interlocutory injunction should not be granted on that ground alone. If it is desirable, in accordance with the principles laid down in the American Cynamid Company and Campus Oil cases, to preserve the Plaintiff's rights pending the hearing of the s.205 proceedings and the balance of convenience does not point to a different conclusion, I see no reason why interlocutory relief should not be granted to cite but one example, the relief in many Mareva cases is very often not the relief which is sought in the substantive proceedings. I am satisfied that, to the extent that *Bentley-Stevens v Jones and Feighery v Feighery & Others* suggest a different view of the law, they should not be followed".

In upholding the Plaintiff's entitlement to an interlocutory injunction restraining his removal as a Director of PIM and PITH, the Supreme Court has done more than merely confirm the decision of the High Court.

In the High Court Mr. Justice O'Donovan came to his conclusion on the basis that the was in a position to distinguish the facts before him from these in *Feighery v Feighery & Others*. In the instant case the Plaintiff held his position as a Director not merely in his own interests but as the representative of a particular category of shareholders by way of special entitlement, which special entitlement had its form in an express agreement. This was sufficiently different from a situation where a Director merely has an understanding that he will remain on the board for O'Donovan J. to draw a distinction from the position maintained by the Court in *Feighery v Feighery & Others*.

In rejecting the appeal the Supreme Court did not seek to rely on the same grounds as Mr. Justice O'Donovan. Rather than distinguish this case from *Feighery v Feighery & Others*, the Court sought instead to depart from the earlier decision of Laffoy J. The appeal was decided by way of an application of the *Campus Oil* test, in other words. whether a shareholding Director could satisfy the requirements for an interlocutory injunction in an application for Section 205 relief. While *Campus Oil* principles ensure that the Court will always have regard to the wishes of shareholders regarding the removal of a director, the Supreme Court seems to suggest that *Feighery v Feighery & Others* was wrongly decided in holding that the Court had no jurisdiction to grant an injunction restraining shareholders from exercising their statutory

rights under Section 182. In travelling this far the Supreme Court seems to set up Section 205 as a balancing provision against which - in this instance - the rights of shareholders pursuant to Section 182 can be balanced by way of the *Campus Oil* principles.

Conclusions:

All practitioners will need to be aware of the practical implications of the Supreme Court decision in *McGilligan and Bowen v O'Grady & Others*. The Court has held that in circumstances where a shareholding director faces oppression which may entitle him to Section 205 relief, that the additional remedy of an injunction may be available, to prevent his removal from the Board.

The scope of this decision will have particular resonance for BES investors who often appoint a "representative to the Board of a company by virtue of the sort of agreement in the *McGilligan case*. Both PIM and PIT however, were companies in which the respective boards consisted of a reasonably large number of directors, and so the Court were able to reach their decision in the McGilligan case, without necessarily causing too much difficulty to the orderly running of the company. Many small Irish companies however will only have two directors, and this will obviously be a consideration for the Court in deciding where the balance of convenience lies in an application such as that in the *McGilligan* case. Practitioners should consider that the Court will probably be slow to grant an injunction restraining the removal of a shareholding director where that would cause commercial chaos for the company in question or even where it would substantially interfere with the effective business of the company.

Finally, practitioners advising shareholders contemplating the removal of a shareholding director pursuant to Section 182, will need to ensure that, in the light of the Supreme Court's decision, shareholders are careful to exercise their authority in a reasonable fashion.. ●

1 Section 302 Companies Act 1985
2 Palmer, "Company Law" 24th edition (1987) page 898
3 *Ibid*
4 For a fuller discussion see Keane, "Company Law in the Republic of Ireland", 2nd edition (1991) page 297
5 *Glover v BLN Limited* (1973) IR page 388
6 Bushell v Faith (1970) AC page 1099
7 Courtney, "The Law of Private Companies" (1994) page 169
8 In the matter of *Murph's Restaurants Limited* (1979) ILRM, 141 at 153
9 *Ebrahimi v Westbourne Galleries Limited* (1973) AC, 360 at 374
10 McCann ed. "Companies Acts 1963 to 1990" (1993) page 203
11 Unreported decision of Ms Justice Laffoy in the High Court delivered on the 25th February , 1998.
12 Bentley-*Stevens v Jones* (1974) 1 WLR, 638
13 For an Irish consideration of these circumstances see the Judgment of Gannon J in the matter of *Murph's Restaurants Limited* (1979) ILRM, 141
14 Unreported decision of Mr. Justice O'Donovan in the High Court delivered on 24th July, 1998 and Unreported decision of the Supreme Court delivered on 5th November, 1998.
15 The principles established in *American Cynamid Company v Ethicon Limited* (1975) AC, 396 adopted in this jurisdiction in *Campus Oil Limited v Minister for Industry and Energy* (2), (1983) IR, 88.

Recognition of Foreign Divorces in Ireland in Light of *McG v. DW and AR*[1]

CAROL CORBETT, Barrister

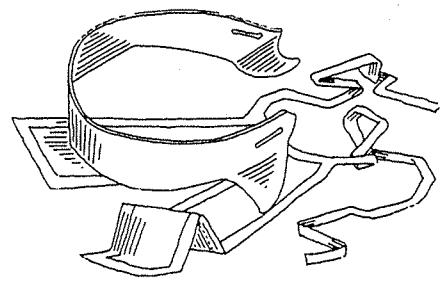
The law relating to foreign divorces is governed by the Domicile and Recognition of Foreign Divorces in Ireland Act, 1986, which sets out the rules governing recognition of foreign divorces granted after the 2nd of October 1986. The Act abolished the presumption of dependent domicile which was held to be unconstitutional in *CM v TM*[2] and in WvW[3] and provides at sections 1 to 3, that while formerly a married woman's domicile was deemed to be that of her husband, she is now entitled to an independent domicile. Section 5(1) of the 1986 Act states : "For the rule of law that a divorce is recognised if granted in a country where spouses are domiciled, there is hereby substituted a rule that a divorce shall be recognised if granted in the country where either spouse is domiciled." Under Section 5(1) of the 1986 Act a foreign divorce will be recognised in Ireland if either party, whether petitioner or respondent, husband or wife was domiciled in the country where the divorce was obtained. Section 5(3) of the 1986 Act stipulates that if either spouse is domiciled in England, Wales, Scotland, Northern Ireland, the Isle of Man or the Channel Island, a divorce granted in any of those jurisdictions will be recognised in Ireland if either spouse is domiciled where the divorce was obtained. Section 5(4) of the Act stipulates that where neither party is domiciled in Ireland, their divorce will be recognised in Ireland if, although not granted in the country where either spouse is domiciled, it is recognised in the country where either spouse is domiciled. Thus, for example, if both parties are domiciled in Switzerland and they obtain a divorce in France which is recognised in Switzerland then their French divorce will be recognised in Ireland. However, if one party is domiciled, e.g. in Spain and the other in Italy and they obtain a divorce in France which is recognised in Spain but not in Italy, then their divorce will not be recognised in Ireland.

Both the statutory abolition of the rule of dependent domicile and the amendment of the recognition rule set out in section 5(1) apply only from the 2nd of October 1986 onward. The 1986 Statute has no application to divorces granted before that date and the question of recognition of such divorces falls to be dealt with under the common law.

Prior to the very recent judgment of Mrs. Justice McGuinness in *McG v DW and AR*, delivered on the 14th of January 1999, the common law rules were as set out in the Supreme Court case of *WvW*.

In *WvW* the plaintiff had obtained a decree of Divorce absolute in October 1972 in England. The plaintiff subsequently married the defendant in Ireland and had four children but due to difficulties in the marriage between the parties, the plaintiff issued Judicial separation proceedings. The defendant husband however submitted that the parties were never legally married owing to the fact that the plaintiff was not domiciled in England when the divorce proceedings were initiated.

In a case stated to the Supreme Court, the Supreme Court held that the common law rule of dependent domicile of a married woman ceased to be part of Irish law by virtue of Article 50 of the Constitution, being inconsistent with Article 40, s.1 and did not survive the Constitution's enactment.



The Supreme Court in *WvW* considered two English decisions, *Indyka v Indyka*[4] and *Travers v Holley* [5] which modified the common law rule in England. In his judgment, Blaney J. acknowledges that although these cases were decided in a very different legal and factual context to WvW, he states that

> "They are of great assistance because they involve looking at the nature and origin of the rule and the reason for it's adoption. Because of this much guidance can be obtained from them."

Having considered these decisions, the Supreme Court held that common law rules are judge made law and may be modified depending on the current policy of the court. The Court, therefore, felt it ought to consider the present rule contained in the Act of 1986 when deciding on the modification of the common law rule regarding the recognition of foreign divorces in this jurisdiction.

The Court held that the common law rule applicable to pre '86 Divorces, is that such divorces will be recognised if granted by the court of a country in which either of the parties to the marriage was domiciled at the time of the proceedings for divorce.

Therefore, in effect, the same recognition rules apply to pre and post '86 foreign divorces. The decision in *McG v DW and AR* changes this in that domicile is no longer the determining factor in recognising foreign divorces.

In proceedings in *McG v DW and AR* came before Mrs. Justice McGuinness in the form of a petition by the husband for a decree of Nullity based on the invalidity of a foreign decree of Divorce. When the proceedings came before the court, however, it was submitted that, while the proceedings were in the form of a nullity petition, the real concern of the Petitioner was to ascer-

tain his true marital status according to Irish law. The Petitioner had obtained a decree of divorce in England in February 1985 based upon the English domicile of his first wife, or alternatively, her residence in England for more than one year. In the present proceedings, an issue arose as to whether such a Decree of Divorce could be recognised in Ireland as a valid Divorce decree.

It was agreed by all the parties to the action that the court would treat the petition for a declaration of nullity as if it were an application pursuant to section 29(1) (d) or (e) of the Family Law Act, 1995 i.e. a declaration as to the marital status of the Petitioner and the Notice party.

In considering her judgment, Judge McGuinness reviewed the authorities in relation to the recognition rules based on domicile. She referred to the emphasis that had been placed both in England and in Ireland to avoid "limping marriages". The concept of "limping marriages" would amount to a situation where an individual is married in one jurisdiction but unmarried in another. Judge McGuinness mentions in her judgment a reference made in the *Le Mesurier*[6] case to "the scandal which arises when a man and a woman are held to be man and wife in one country and strangers in another."

The learned Judge goes on to refer to *Indyka v Indyka* where Diplock L.J. in the Court of Appeal set out the policy of the English Courts:

> " It is, I apprehend, a well established principle of public policy applied by English Courts that so far as it applies within their part to ensure, the status of a person as married or single should be the same in every country which he visits, that is , that there should not be "limping marriages" : and if marriages are to be dissoluble at all, this involves deciding what courts we should recognise as having jurisdiction to dissolve them."

She refers to *WvW* and quotes extensively from Blaney J's decision in that case and his analysis of the leading English authorities of *Indyka and Indyka* and *Travers v Holley*. She lays particular emphasis on Blaney J's conclusions that the avoidance of limping marriages was one of the main objects of the common law recognition rule and was public policy.

The judgment of Blaney J. observes that:

"Two additional conclusions can be drawn from the passage cited from the judgments in *Travers v Holley* and *Indyka v Indyka*: firstly, that the common law rule is judge made law and is not immutable : and secondly, that the question of whether or not a foreign divorce should be recognised should be answered by the court in the light of its present policy."

In *McG v W*, it was submitted by Counsel, that the constitutional, legal and factual context of this jurisdiction had changed dramatically since the decision of the Supreme court in *WvW*. He stated that the changes in the law relating to divorce in Ireland had brought about a dramatic shift in public policy. Counsel went on to state that in the light of the principles put forward by the Supreme Court in *WvW* that the common law rules are judge-made law and may be modified by the present policy of the court, that the court should now consider further development of the common law recognition rule.

That Irish public policy had changed radically since the *WvW* case was accepted by Justice McGuinness. She accepted that up until and including *WvW* that Irish case law dealt solely with a recognition rule based on the domicile of the parties. The learned Judge agreed that the law in Ireland regarding divorce had changed since 1993 with the enactment of the Family Law Divorce Act 1996. The learned Judge continued by stating that as a result of the new Article 41.3.2 of the Constitution and because of the 1996 Act, the State now possessed a divorce jurisdiction. Section 39(1) of the Act of 1996, sets out the basis for the exercise of the courts jurisdiction in relation to divorce as follows :

Section 39(1) The Court may grant a decree of divorce if, but only if, one of thefollowing requirements is satisfied :

(a) either of the spouses concerned was domiciled in the State on the date of the institution of the proceedings concerned.

(b) either of the spouses was ordinarly resident in the State throughout the period of one year ending on the date.

It is, therefore, now possible for the Irish Courts to grant divorces on the basis of either domicile or residence because the Irish Courts can now grant Divorce decrees based on residence. The learned Judge goes on to say that this

> "demonstrates a clear policy of the legislature that jurisdiction in matrimonial matters is not limited to a basis of domicile, but extends to a basis of ordinary residence for one year prior to the issue of the relevant proceedings."

One of the questions posed by Judge McGuinness, in considering whether residence could be the basis for recognising pre'86 Divorces, is that if the Court extends the common law rule of recognition to reflect the jurisdiction set out in the 1995 and 1996 Statutes, is it usurping the function of the Oireachtas to enact an amendment to the 1986 Act? The learned Judge stated that while section 5(1) of the 1986 Act limits itself to amending the then existing common law rule based on domicile it does not purport to deal with any other form of recognition. She did not believe that the 1986 Act prevented the court from developing the rules of recognition in reliance on the decision in WvW, that such common law rules are judge-made law and therefore may be modified depending on the current policy of the Court. Justice McGuinness in considering what the present policy of the courts should be, stated that she could not leave out of account the provisions of the Act of 1996.

Judge McGuinness then considered the Supreme Court authority of *K.D.(otherwise C) v M.C.*[7] where the Supreme Court dismissed an appeal brought by the Respondent against Carroll J's judgment where she found that the respondent was domiciled in Ireland at the time of the divorce, which was granted before 1986, and that the divorce could not be recognised in this jurisdiction. Judge McGuinness held that this decisions was decided prior to the statutory changes which now permit divorce in this jurisdiction.

In *McG v DW and AR*, Judge McGuinness stated that the case had not been presented as "a fully fought case" in that both counsel for the Petitioner and for the Notice party had

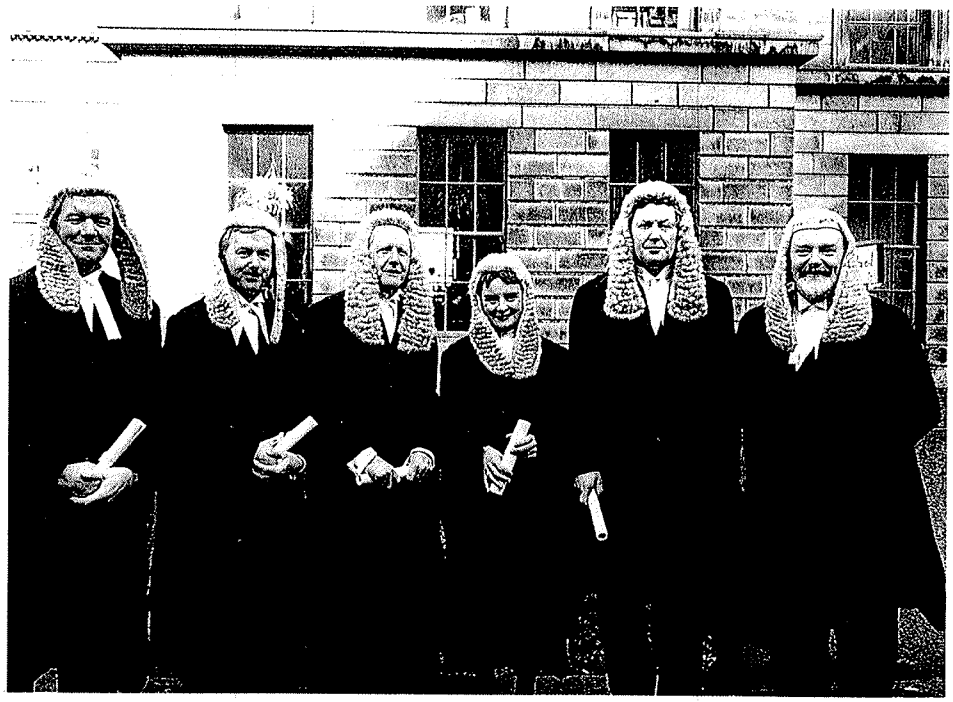
urged the court to extend recognition of the divorce in question and that the opposite contention had not been canvassed. The learned Judge held, however, that both counsel, through oral and written submissions, had "very fully and fairly opened the authorities to me and have laid out their arguments in a fair and responsible way."

The Judge concluded that when the divorce was granted, the parties had separated for at least six years and that proper provision had been found by the English court to be made for the children and for the spouse. The learned Judge held that the notice party, at the time of the decree of divorce, had been resident in the jurisdiction of the English Court for more than one year. The learned Judge stated that "one cannot but note on these facts the parties could now under the Constitution and under the 1996 Act obtain a divorce in this country." The judge therefore held that the decree of divorce granted by the English court to the Petitioner and the notice party on the 12th of February 1985 was entitled to recognition under Irish law.

Conclusion

The Judgment in *McG v DW and AR*, concerned itself primarily with the changes of the common law rule from domicile to residence. In so doing, however, the court did not lay down a definitive test for the recognition of foreign divorces in this jurisdiction. The learned Judge did hold that in the circumstances of *McG v DW and AR* that the parties would have been entitled to obtain an Irish divorce. It is not clear from the judgment, however, whether merely being a resident in a foreign jurisdiction for one year will suffice, or whether, in order to obtain recognition, the parties must be able to show that they were eligible and would have obtained a Divorce in Ireland, under the present legislative framework. The full meaning and extent of this Judgment will have to be explored in future cases. ●

1 Unrep., H.C., 14th January, 1999.
2 (1991) ILRM 268
3 (1993) 2 IR 476.
4 (1969) 1AC 33
5 (1953) 2 All E.R. 794
6 (1895) AC 517
7 (1985) IR 697



New Silks

Six barristers took Silk at a ceremony conducted by the Chief Justice in the Supreme Court on Friday 5th March. They included (l. to r.), Rory McCabe, Paul McDermott, Eamonn Cahill, Miriam O'Riordain, Vincent Foley, and Donagh McDonagh.

Colleagues and other well wishers pictured with Miriam O'Riordain upon her call to the Inner Bar.

Recent Decisions of the Court of Justice on Sex Equality

NIAMH HYLAND, Barrister

Introduction

There have been a number of important judgments of the Court of Justice in the field of equality within recent months. The first of these, *Levez* (1 December 1998) has an importance going beyond sex equality law, dealing as it does with national remedies for breach of EC law. In particular, it examines in detail what is required by the principle of "effectiveness". Surprisingly, given its growing importance in the national courts, the Court of Justice has only handed down one judgment in relation to sexual harassment (Case T-549/93 D v. Commission [1995] ECR SC I-A 13) and that concerned a staff member of the European Commission, thus limiting its relevance. The Court's judgment in *Coote* (22 September 1998) deals not with sexual harassment but with the related area of victimisation and represents a new development in this area of the law. Both *Boyle* (27 October 1998) and Pedersen (27 October 1998) are concerned with maternity leave and are noteworthy in that they constitute the first application of Directive 92/85 on Pregnant Workers by the Court of Justice. The judgments demonstrate the continued applicability of existing equality legislation to maternity situations despite the fact that Directive 92/85 is exclusively concerned with pregnancy and maternity.

Case C-326/96 Levez, Judgment of 1 December 1998

Introduction

Under a rule of UK law a person could only make an equal pay claim for arrears of pay in the period two years before the date that the claim was made. Mrs Levez's employer had misled her as to the pay of her male predecessor.

Findings

The Court of Justice repeated the, by now well established, principle that Member States are free to lay down detailed procedural rules governing actions based on rights conferred by Community law but that such rules must:

> "- not make it virtually impossible or excessively difficult to exercise the rights conferred by Community law ("the principle of effectiveness");
>
> - not be less favourable than the procedural rules governing similar domestic actions ("the principle of equivalence").

The Court pointed out that it is compatible with Community law to lay down reasonable limitation periods. However, to allow an employer who had misled the employee about the pay of a predecessor to avail of the UK limitation rule would make it excessively difficult for Mrs Levez to exercise the right to equal pay conferred on her by Article 119 and would therefore not comply with the principle of effectiveness.

In determining whether another domestic action was in fact similar for the purpose of applying the principle of equivalence, account must be taken of the action's purpose and essential characteristics. Importantly, the Court held that:

(a) the principle of equivalence was not to be interpreted as requiring Member States to extend their most favourable rules to all actions brought in the area in question;

(b) it was for the national court which had direct knowledge of the procedural rules governing actions in the field of employment law to consider whether another action was in fact similar;

(c) when determining whether a procedural rule of national law was less favourable than those governing similar domestic actions, the national court was obliged to take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts;

(d) when assessing whether procedural rules governing an action for equal pay complied with the principle of equivalence, a comparison should not be made with other actions for equal pay. Instead, a comparison might possibly be made with other actions such as those related to, unlawful deductions from wages or sex discrimination in matters other than pay.

Case C-185/97 Coote v. Granada Hospitality Ltd. Judgment of 22 September 1998

Introduction

Mrs Coote was dismissed by her employer because of her pregnancy. She brought a sex discrimination case against her former employer but ultimately settled the case. She then tried to register with a job agency in order to find new employment but her former employer refused to supply her with a reference. UK law prohibited retaliatory action by an employer because an employee took a sex discrimination case. However, the national court interpreted the relevant law as meaning that retaliatory action was only prohibited if it occurred during the employment relationship and not once the employment relationship had ended, as in the present case.

Findings

The Court of Justice pointed out that a directive could not impose obligations on an individual, such as a private sector

employer, until it was fully implemented into national law. However, national courts were obliged, so far as possible, to interpret national laws in the light of the directives they implement. The Court went on to point out that Article 6 of Directive 76/207 obliged Member States to put in place effective judicial remedies against breaches of the right to equal treatment. This meant that workers had to be protected against victimisation even when, as in the present case, they had left their employment. Otherwise workers might be deterred from pursuing sex discrimination claims and the right to equal treatment would be jeopardised.

This case emphasises that the principle of equal treatment means that workers, who bring sex discrimination cases, must have legal protection against being victimised by their employers. That includes protection against victimisation that might occur after workers leave their employment. The reason for this ruling was simple: if workers did not have proper judicial protection against victimisation they might be afraid to take sex discrimination cases.

Case C-411/96 Boyle v. EOC, Judgment of 27 October 1998

Introduction

Mrs Boyle and the other five plaintiffs in this case were employed by the UK Equal Opportunities Commission. Their employment contracts contained the following clauses:

1. A woman was eligible for supplementary maternity pay over and above the statutory payment from her employer during maternity leave provided that she gave an undertaking that she would return to work for at least one month. If, subsequently, she did not return to work for at least one month, she had to repay this additional pay.

2. A woman who expressed an intention to commence maternity leave during the six weeks preceding the expected week of childbirth and
-who was on sick leave with a pregnancy related illness immediately before that date and
-who gave birth during the period of sick leave, was obliged to bring forward the date on which her paid maternity leave started to either the beginning of the period of sick leave or to the beginning of the sixth week preceding the expected week of childbirth, whichever was the later.

3 A woman could not take paid sick leave during maternity leave unless she first returned to work and thus terminated her maternity leave.

4. For the purpose of calculating a woman's entitlement to annual leave, the statutory 14 weeks maternity leave was treated as weeks worked. However, any additional maternity leave offered by the employer was not treated as weeks worked for the purpose of calculating annual leave entitlements.

5. Periods of maternity leave were only reckonable for the purposes of the employer's occupational pension scheme if the woman met the length of service requirements for statutory maternity pay.

Mrs Boyle and the other plaintiffs argued that these clauses in their employment contracts were contrary to Directive 92/85.

Findings

The Court of Justice firstly observed that Article 8 of Directive 92/85 requires Member States to ensure that workers are entitled to maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation. The UK had implemented this Article by a statute which required the employer to give a minimum of 14 weeks maternity leave with a minimum level of maternity pay.

The Court then turned to analyse each of the contested clauses of the employment contract:

1. Regarding the first clause, the Court noted that Article 11(2)(b) and (3) of Directive 92/85 required that a female worker received, during the period of maternity leave provided for by Article 8, income at least equivalent to the sickness allowance provided for under national social security legislation in the event of a break in her activities on health grounds. However, it was not intended to guarantee her any higher income which the employer may have agreed to pay her. It followed that a clause in an employment contract according to which a worker who does not return to work after childbirth is required to pay any additional maternity pay received by her above the statutory minimum was compatible with Directive 92/85.

Moreover, such a clause did not constitute discrimination on grounds of sex contrary to Article 119 or Directive 75/117. The Court explained that a woman on maternity leave was not comparable to a man on sick leave. A clause in an employment contract which made the application of a more favourable set of rules than that prescribed by national legislation conditional on the pregnant woman, unlike any worker on sick leave, returning to work after childbirth therefore did not constitute discrimination.

2. Regarding the second clause, the Court noted that while Article 8 of Directive 92/85 provided for a continuous period of maternity leave of at least 14 weeks, it left it open to the Member States to determine the date on which maternity leave is to commence. It followed that national legislation could provide for maternity leave commencing in the manner set out in the second clause.

3. Regarding the third clause, the Court recalled again that Article 8 of Directive 92/85 provided for a continuous period of maternity leave of at least 14 weeks. Thus, if a woman became ill during the period of maternity leave referred to in Article 8 and placed herself under sick leave arrangements and that sick leave ended before the period of maternity leave, she should not be deprived of the right to continue her maternity leave. However, Article 8 did not apply to any supplementary period of maternity leave her employer granted her. Thus, a woman could be required to terminate her period of supplementary maternity leave to qualify for sick leave. This did not violate Directive 76/207 since Directive 76/207 did not require a woman to be able to exercise simultaneously both the right to supplementary maternity leave and sick leave.

4. Regarding the fourth clause, the Court noted that under Article 11(2)(a) of Directive 92/85, the

rights connected with the employment contract of workers had to be maintained during the maternity period provided for in Article 8. Thus, while the 14 weeks maternity leave had to be treated as weeks worked for the purpose of calculating annual leave, any supplementary maternity leave provided by the employer did not have to be treated as weeks worked.

Moreover, this was not discrimination against women contrary to Directive 76/207 since supplemental maternity leave was a special advantage over and above the protection provided for by Directive 92/85 and was available only to women. Thus, the fact that the period of supplemental maternity leave did not count as weeks worked for calculation of pensions could not amount to discrimination against women.

5. Regarding the fifth clause, the Court held that the accrual of pension rights during the period of maternity leave provided by Article 8 was a right connected with the employment contract as referred to in Article 11(2)(a) of Directive 92/85. This right could not be limited by a length of service requirement.

The importance of this case lies mainly in the distinction drawn by the Court between maternity schemes which cover the minimum maternity leave period provided for in Article 8 of Directive 92/85 and those schemes covering supplemental periods of maternity leave. The obligations under Directive 92/85 which attach to "Article 8" maternity leave do not apply to supplemental or additional maternity leave.

Case C-66/96 Pedersen, Judgment of 27 October 1998

Introduction

Ms Pedersen and three other women were pregnant but had not yet taken maternity leave. They challenged the following rules of Danish law that affected them:

* Under Danish law, a woman who was unable to attend work because of a pregnancy related illness was not entitled to full pay from her employer. Instead, she was only entitled to state benefits. By contrast, a worker unable to attend work because of an illness unrelated to pregnancy was entitled to full pay from his employer.

* Under Danish law, a woman who was unable to attend work because of:

  -routine pregnancy related inconveniences
  or
  - a medical recommendation intended to protect the unborn child but not based on an actual pathological condition or on any special risks for the unborn child

was not entitled to full pay from her employer. Again, by contrast, a worker unable to attend work because of an illness unrelated to pregnancy was entitled to full pay from his employer.

* Under Danish law, an employer could send home a woman who was pregnant, although not unfit for work, without paying her salary in full if he considered that he could not provide work for her.

Findings

The Court of Justice first pointed out that pregnancy is a period during which disorders and complications may arise. Those disorders and complications, which may cause incapacity for work, are part of the risks inherent in pregnancy. The Court then noted that a worker unable to work before her maternity leave because of a pregnancy related illness would not receive full pay from her employer under Danish law. By contrast, a worker unable to work because of a non-pregnancy related illness would be entitled to pay from her employer. The Court concluded that this difference was due to pregnancy and was therefore discrimination contrary to Directive 75/117. The Court added that this discrimination could not be justified by the aim of sharing the risks and economic costs connected with pregnancy between the pregnant worker, the employer and society as a whole.

The Court of Justice then considered the Danish rule that a woman who was unable to attend work because of (a) routine pregnancy related inconveniences or (b) a medical recommendation intended to protect the unborn child but not based on an actual pathological condition or on any special risks for the unborn child, was not entitled to full pay from her employer. The Court drew a distinction between:

- on the one hand, a woman absent from work due to a pathological condition or any special risks for the unborn child giving rise to an incapacity for work attested by a medical certificate and

- on the other hand, a woman absent from work due to routine pregnancy related inconveniences or a mere medical recommendation, without there being any incapacity for work.

The Court of Justice pointed out that women in the latter category were not absent from work due to incapacity. Instead, they chose not to work. The Court therefore concluded that it was not discriminatory that a woman in the latter category did not receive full pay from her employer whereas a worker absent due to incapacity caused by illness unrelated to pregnancy was entitled to full pay from his employer.

Finally, the Court of Justice considered the Danish rule allowing an employer to send home a woman who was pregnant, although not unfit for work, without paying her salary in full if he considered that he could not provide work for her. The Court pointed out that although Directive 76/207 required that women enjoy the same working conditions as men, Article 2(3) of Directive 76/207 allowed measures to be taken to protect a woman's biological condition during pregnancy. However, the Court held that the Danish rule was aimed not so much at protecting a woman's biological condition as at preserving the interests of her employer. It was therefore contrary to Directive 76/207. The Court also referred to Articles 4 and 5 of Directive 92/85. Those Articles oblige employers to assess workplace risks to pregnant workers. The Articles only allow an employer to oblige a pregnant worker to take leave if it is not feasible to protect the worker's safety by adjusting working hours or conditions. The Court held that the Danish rule did not meet these requirements. The rule was therefore also contrary to Directive 92/85. ●

The Barrister's guide to buying the right PC

COLM O'DWYER, Barrister

The first choice most barristers face when buying a computer is whether to buy a desktop or a laptop (also called a notebook computer). The great advantage of a laptop is its portability which means it can be used whenever and wherever it is convenient to do so. The disadvantages are that they are more expensive than desktops and tend to lag behind in technological developments. Barristers who don't have an office at one of the Law Library sites and are in a position to buy a computer are advised to try to stretch their budget to a laptop which can then be used at home, at a desk in one of the Library's sites, and at other locations.

Once you have decided on the form of computer you want, you need a set of criteria by which to compare different models. The key components of PC, be it a desktop or a laptop, are listed below with a brief explanation of their function and recommendations as to the minimum specification necessary for a typical barrister's practice.

1. The Processor

The processor or 'chip' is like the computer's brain. The speed of processor is measured in Megahertz (MHz). Although there are many other factors at play, as a general rule of thumb, the higher the MHz figure, the faster the computer should operate. Several companies manufacture processors, the best known being Intel, AMD and Cyrix. AMD and Cyrix chips are cheaper to buy than those manufactured by Intel and are usually to be found in budget machines. While it is difficult to compare the different chips directly, it is safe to say that Intel's Pentium II processor is the fastest chip that is currently available and the best for running Windows and Windows based software applications.The Pentium III chip, which is just about to be released, is probably slightly faster than the Pentium II but is unnecessary for standard requirements of a barrister's practice. A Pentium II 350 MHzprocessor is more than capable of running any software that the average computer user is likely to utilise now and in the foreseeable future.

Laptop computers are more expensive to manufacture than desktop machines and savings are generally made on the processors utilised. A Pentium II 233MHz chip is the minimum recommended specification in a laptop.

Intel's Celeron chip is a sort of slimmed down Pentium II processor produced to compete with AMD and Cyrix in the budget sector. This chip has been heavily criticised for not having adequate memory (or cache) on board. This has the effect of slowing the computer down when running advanced software applications.

2. The Drives

a) The CD-ROM/DVD ROM Drive

A CD-ROM is a compact disk that can store up to 650 megabytes (Mb) of data. This data can take the form of music, computer games, software etc.. The faster the laser in the CD-ROM drive can read data from a disc, the better for running multimedia applications such as games. A modern desktop machine should have a 32 speed drive while a laptop should have a 20 speed drive. A CD-ROM drive has now become essential to loadsoftware applications onto your computer.

Many computers now come with Digital Versatile Disk (DVD) Drives. These drives can read standard CD-ROMs which means that you don't need both a DVD Drive and a CD-ROM Drive. Very little software is available on the high capacity DVD disks and the DVD format is of currently of little practical use.

b) The Hard Disk Drive

The Hard Disk is the permanent storage area for folders, files and documents. The capacity of the hard disk is measured in gigabytes (Gb). A gigabyte represents 1000 megabytes (Mb), which may seem like a lot of storage space (a megabyte is enough to store a copy of the Bible), but applications such as Microsoft Office now swallow upwards of 150 Mb so don't buy anything smaller than 3 Gb for a desktop machine and 2 Gb for a laptop.

c) Floppy Disk Drive

The so-called 'floppy' disk is used for storing files and documents or for transferring these to another computer. The technology is aged and, because the disks can only store about 1Mb of data, it is not unusual to find that a document will not fit onto a floppy.

d) Removable Data Storage Drive

A hard drive can easily be wiped clean by the accidental touch of a key or corrupted beyond repair by a computer virus downloaded from the Internet or an innocuous floppy disk. This could potentially mean the loss of all documents, correspondence and accounts produced over the preceding couple of years. In order to avoid this catastrophe, it is possible to add an extra hard drive to your computer but this quite a complicated job. A Iomega Zip drive is a far more straightforward proposition. The drive, which is easy to attach to the computer, uses proprietary Zip data storage disks which are about the same size as a floppy disk but with a far greater storage capacity (100 Mb). These drives are widely available and cost about £140.

3. The RAM or Memory

A computer's random access memory (RAM) or 'memory' provides a temporary storage area for information when the machine is switched on. The speed

with which the computer can deal with instructions from power hungry software applications such as Word or Word Perfect largely depends on the amount of RAM available. To run Windows 95 or 98 applications at a reasonable pace you will need a minimum of 32 Megabytes (32 Mb) although 64 Mb or even 128 Mb is recommended. A RAM upgrade of 32 Mb should cost only £50 or £60.

4.The Monitor

The monitor or screen serves as the main interface with a computer. Today's most common models feature 15 inch (15") wide picture tubes. However, 17", 19" and even 21" models are growing in popularity. For normal computer use, a 15" monitor is fine. If you use Computer Aided Design (CAD) software, or like to play computer games, a 17" monitor is recommended. Remember that these monitors take up a lot more space than the 15" variety unless they are of the expensive flat screen variety. Laptop screens should be at least 12 wide although some models now come with 13" or 14" screens. With laptops, Thin Film Transistor (TFT) screens have the sharpest definition, resolution and clarity but these generally make the model cost a little more.

6. The software

Computer hardware is completely useless without software to exploit the processing power. Most new machines only come with Windows '95 or '98 which are operating systems software and manage the actions of different parts of your PC such as the screen, key board etc. Once you have an operating system, you then need application software such as a word processor or accounts package. Every barrister is going to need a word processor to produce documents. Microsoft Word is by far the most popular available, although not necessarily the best. Some computers are sold with Word 'bundled' with the machine. This can result in substantial savings as the software is actually quite expensive to buy separately. Many people now opt for a suite of office applications which includes a word processor, spreadsheet, database and presentation/graphics software. 'Office'is the name of Microsoft's application software suite which includes the software packages Word, Excel (spreadsheet), Powerpoint (graphics) and Access (database).

7. The Peripherals

a) Printer

There are two main classes of computer printer available for PCs: inkjet and laser. In simple terms, a laser printer will produce better quality and faster reproduction, but will cost more than an inkjet printer. Inkjet printers are often capable of printing colour images whereas only the most expensive laser printers have this capability. For a barrister's practice, which relies so much on producing printed text , a laser printer is recommended for reasons of print quality. Unfortunately, a basic mono laser printer will cost a minimum of £250, while a really good colour inkjet printer can cost less than £150. When buying a printer, check the price of ink and/or toner cartridges for that model. These can be incredibly expensive. Beware of the 'free' colour inkjets that come bundled with cheaper computers; these tend to cost a fortune to run yet produce printed documents of a very low standard.

b) Modem

A modem is a communications device used to access the Internet to send and receive electronic mail and browse the World Wide Web. Most PCs now ship with internal modems. The standard speed is 56kb per second (56Kb/sec). Desktop computers should come with a modem built in. Laptops usually require a PC card type modem which slip neatly into the side of the machine. These are often sold separately at about £120 - £150.

To summarise, the following is the minimum hardware specification recommended for a desktop computer:

Intel Pentium II 350 Mhz Processor
64 Mb SDRAM
3.2 Gb Hard Disk Drive
32 Speed CD-ROM
(or a DVD Drive)
4MB AGP Graphics Card
Floppy Drive
15" Colour Monitor
56k Modem

You should pay approximately : IR£1000 - IR£1100 for a machine of this type.

The minimum recommended specification for a laptop computer:

Intel Pentium 266 Mhz MMX Processor
(or a Pentium II 233 Mhz)
32 Mb SDRAM
2.1 GB Hard Disk Drive
20 Speed CD-ROM Drive
12.1" TFT Monitor
Lithium-ion long life battery
Floppy Drive
Touchpad Mouse

Price you should pay: £1400 - £1600 (including a modem).

As an alternative to the mainstream IBM compatible PCs, Apple has been enjoying something of a resurgence with the Apple 'i-Mac'. This is their latest consumer PC and is the first Apple to retail for less than £1000. It is stylish, fast and easy to use, the only drawbacks being that it has no floppy disc drive and, should you wish to use peripheral devices such as printers or scanners, these must be universal serial bus (USB) compatible. Unfortunately, USB compatible devices are relatively expensive as the standard is still in its infancy.

There is a popular misconception that you cannot use Microsoft software on an Apple computer. This is not the case. Apple computers come with their own proprietary operating system (OS) which is not the same as Windows but almost all the major software applications that Microsoft produce now come in Mac compatible versions. Bill Gates is actually a now major shareholder in Apple Computers, which is what you call hedging your bets.

There are also Apple laptops available called Powerbooks, which look fantasic but cost twice the price of an IBM compatible machine.

Finally, when choosing a computer, remember to find out about the warranty available on the machine. One year, all parts, return to base (i.e. to the supplier) is now the standard. Some vendors offer 3 years and some even offer 3 years with the first year on-site (i.e. they will come to you to fix the machine) and it is worth looking for these warranties. Also remember that in six months time the computer that you buy now will be considered dated and probably worth half what you paid for it. This is the nature of the market and don't let it put you off buying a PC now. Moore's law dictates if you buy in six months, the machine will still be out of date six months later, so why wait? ●

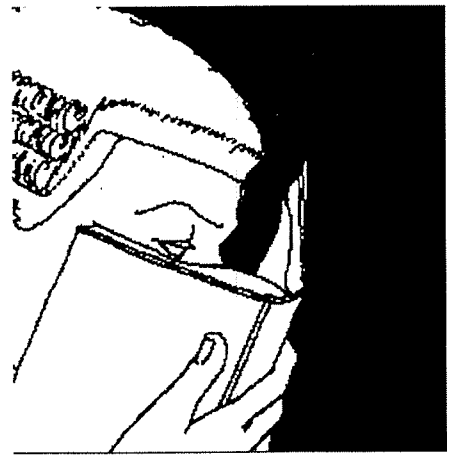
LANDLORD AND TENANT LAW
SECOND EDITION
BY J.W.C.WYLIE
Butterworths, £110.00

"It should also be mentioned at this stage that the subject of responsibility for repairs and maintenance will become a very live issue as we approach the year 2000" (Wylie:- Landlord and Tenant Law, Second Edition, Paragraph 15.02)

Thus it is that Professor Wylie introduces the law of Landlord and Tenant into the 3rd Millenium. The author was addressing the consequences for property owners and occupiers of the 'millenium bug'. The potential failure of plant and equipment at midnight on the 31st December next. It is feared that plant and machinery related to the heating, lighting, air conditioning, telephone, switchboards, lifts and escalators in buildings, will grind to a halt as a result of their in built microprocessors not being able to count past '99'. The author therefore expects that serious questions will arise as to the legal (and financial) responsibility for tackling such problems as between Landlords and Tenants. It is suggested that a Landlord who fails to take steps to make his building 'year 2000 compliant' may be in breach of his covenant for Quiet Enjoyment or indeed be held to have derogated from his Grant.

This paragraph rather vividly illustrates the depth of thought that Professor Wylie has put into this revision of his work, first published in 1989. This book follows precisely the format of the First Part of the original volume, with the same chapter titles and for the most part the same paragraph numbering . As with the First Edition this book is full of very many practical guides and advice to both Landlords and Tenants and their advisors, who seek to avoid many of the pitfalls that bedevil the relationship of Landlord and Tenant. The book deals comprehensively with the significant number of new Irish cases which have clarified and distilled the law in this area.

Notwithstanding that the law of Landlord and Tenant is very much rooted in past history, the overlay of modern Statutory entitlements, the ever changing nature of property transactions and now the advent of technology, have meant that many areas of Landlord and Tenant law, are in fact innovative and have not yet been tested in the Courts of this jurisdiction. In those areas the Author has relied upon case law from the English Courts, which may be of guidance when such



matters do come before our Courts.

The first Volume of this work was a thorough and sound analysis of the subject, and it is not surprising therefore, that very many of the paragraphs did not require to be altered. However, as might be expected, significant additional cases are to be found in the footnotes. The earlier chapters of the book, dealing with the history and context of the subject are for that reason substantially the same. Indeed in the first four chapters there appear to be significant amendments to only about 10 paragraphs. However, from the fifth chapter onwards there are more significant revisions. In particular the chapters dealing with the entitlement to 'contract out' given by the 1994 Act and the changes in Private Rented Dwellings legislation have had to be reworked. In addition the chapters dealing with 'lease versus licence', rent review, repairs, user, options, forfeiture and re-entry, new tenancies and acquisition of the fee simple have been thoroughly revised.

Of some significance is Professor Wylie's view that the English Courts have, of recent times, tended to treat the Landlord and Tenant relationship as being one of contract and thus doctrines of 'frustration of contract' 'waiver', and 'disclaimer' have been held by English Courts to be applicable to the relationship. Such opinions should hold good in Irish Law, particularly because the relationship of Landlord and Tenant has, since Deasy's Act, 1860, been 'expressly' founded in contract. Although, as Professor Wylie, points out the Irish Courts were slow in the past to hold that this made any difference to the incidents of the contract. The precise significance of Section 3 of Deasy's Act has in this regard troubled the Courts very little but, if Professor Wylie's view of the English decisions is adopted in this jurisdiction, much of the mystique of Landlord and Tenant Law may be removed.

One small criticsm of Professor Wylie's style of writing must be made, which carried over from the first volume. Some of the paragraphs are excessively long, to the extent that, when one has completed reading such a paragraph, and its associated footnotes, it is often difficult to get a full sense of what he is saying, without having to re-read it. I readily recognise his intention of dealing with a particular topic in a single paragraph but a sub pargraph would not go amiss. This problem has, in my view, been exacerbated in the book under review because the revision has been achieved, in the main, by extending the relevant paragraphs from the first volume.

That brings me to the question of the overall format of the book as compared to the first volume, which was loose leaf. This new book is published in hardback and is the first in a new series of Irish law topics by the publishers entitled 'Butterworth's Irish Law Library'. It is unfortunate that Butterworths ever considered publishing such a book in loose leaf format. It is an unwieldy and impracticable format and despite their supposed advantage, of being amenable to frequent updating, this has proved to be an expensive and unworkable formula. The return to a hard bound book is therefore welcome

The realdraw back of this book compared to the first edition is that the Annotated Statutes section is omitted. It is proposed that a separate volume containing the revised Annotated Statutes will be published later. This is unfortunate, because in my view one of the most useful features of the first volume was the Annotated Statutes. Practitioners may now find that they will need to keep the First Volume for reference to the Annotated Statutes and refer to the Second Edition for the text. The Annotated Statues comprised a little more than 25% of the First volume and it is difficult to see why they should now have to be the subject of a separate volume. Particularly as that separate volume is not simultaneously available.

These criticisms apart, this book is a thorough and complete work on the subject and will appeal, not only to Lawyers to whom it is clearly addressed, but it will be of use to many in the Property Management, Surveying, Auctioneering. Accountancy, Engineering, Architectural professions, and indeed anyone who has an interest in property.

–Gavin Ralston, Barrister

To all members of the legal profession

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