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- The Copyright and Related Rights Act 2000
- Bias and Legal Professional Independence
- Legal Professional Privilege and the Identity of a Client
- Discovery and Strict Compliance with the 1999 Rule

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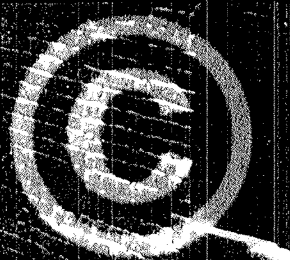

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KING'S INNS NEWS

Representation by Barristers before the Refugee Appeals Tribunal

The Bar Council recently negotiated an agreement with the Legal Aid Board under the terms of which members of the Library would be available to provide representation before the Refugee Appeals Tribunal. Under the terms of this agreement a separate panel is being constituted by the Refugee Legal Service. In order to qualify for inclusion on the panel, barristers must have already carried out this type of work, or attend a training seminar organised jointly by the Bar Council and the Legal Aid Board. The first such seminar took place on Saturday 17th February. To accommodate members who may not have been able to attend, it is intended to hold a further seminar at the beginning of the Easter term. All members interested in attending such a seminar should contact Mary O'Reilly on extension 4614.

DEADLINE FOR KING'S INNS APPLICATIONS

Applications for places on the diploma and degree courses should be lodged in King's Inns by 31 March 2001. This is the last year that places will be available on the degree course without having to take an entrance examination. The first sitting of the new entrance examination will be held in August 2002.

COUNCIL AND COMMITTEES

As usual, Council 2001, has been in place since the beginning of the calendar year. New committees were also elected in January and this year, for the first time, education boards were put in place. These will deal with appeals (Education Appeals Board), examinations (Examination Board) and accreditation of other courses (Accreditation Board).

Continuing Legal Education - Forthcoming Events

27/02/01	Lecture on Regulation of E-commerce
06/03/01	Devils lecture on procedure in Family Law cases
13/03/01	Lecture on recent developments in Pension Law
20/03/01	Devils lecture on civil procedure in the District Court
12/05/01	Junior Barristers Conference, Galway
Easter Term:	Seminar on Planning and Development Act, 200, Cork City
Easter Term:	Conference on the Human Rights Bill, 2001
Trinity Term:	Conference on Revenue Law
Trinity Term:	Conference on new system for financial services regulation

www.kingsinns.ie

Some changes have been made to the web site of The Honorable Society of King's Inns in recent months.

The site has been updated to include information for students and prospective students alike. There is an expanded news section including details of the President's visit to King's Inns as well as views of the recently refurbished King's Inns cottages.

The 4th print in the print series has now been added to the site. King's Inns cuff-links are also on view.

Bar Review readers who might have suggestions and comments on the web site can contact the web site administrator from the link on the kingsinns.ie home-page.

DINING

Easter Dining term will run from Monday 23 April 2001 to Friday 4 May 2001. Guest Night will be on Friday 4 May and will begin at the later time of 7.30 pm for 8.00 pm. Bookings should be made through Claire Hanley at ☎ (01) 8780410.

The Bar and the Refugee Appeals

Refugee law in this jurisdiction is evolving rapidly. The Refugee Act 1996, as amended, was commenced in full on 20 November 2000. The Act, along with the regulations made pursuant to it, places substantive and procedural refugee law on a statutory footing for the first time.

The entry into force of the Act is timely. From a trickle of applicants in the 1980's, by the end of last year Ireland had the highest per capita number of asylum seekers in Europe according to UNHCR statistics. Indeed, the picture has changed so much since 1996 that the procedures initially set up under the 1996 Act were realised to be inadequate to deal with the rapidly increasing numbers seeking asylum and further amendments were required, along with a substantial increase in resources.

Under the new regime, a claim for refugee status is investigated at first instance by the office of the Refugee Applications Commissioner, with the possibility of an appeal from a negative recommendation to the Refugee Appeals Tribunal. The Refugee Advisory Board will advise the Minister for Justice, Equality and Law Reform on asylum policy. The Act also facilitated the entry into force of the Dublin Convention, which embodies the "first safe country" principle among member states of the European Union.

The Bar is at the heart of the new system. An agreement recently signed between the Legal Aid Board and the Bar Council has established a scheme whereby a panel of barristers, assisted by the Refugee Legal Service of the Board, will represent legally aided asylum applicants in appeals before the Refugee Appeals Tribunal. To be on the panel, barristers must have experience in the area or undergo a training course.

The difficulties faced by those taking instructions under the scheme should not be under-estimated. In the first place, the time-limits under the Act are stringent. Barristers, on receipt of papers, will be required to meet and interview the client, often via an interpreter, and draft grounds of appeal in a very short time frame. The drafting of such grounds may well involve recourse to a huge range of documentation, from details on the country of origin of the asylum seeker to the UNHCR handbook on criteria for determining refugee status. Following this, the client will be represented before an oral appeal, if applicable.

The operation of the Act will also introduce practitioners to a number of novel concepts- the definition of a refugee is one which has been considered world-wide over the past half century and involves both subjective and objective aspects. The shared burden of proof, whereby applicants for refugee status and the body determining the application both have a role in reaching the determination, is a concept otherwise unknown in our legal system.

It is to be hoped that the operation of the new Act will result in a consistent line of jurisprudence leading to a greater degree of legal certainty in this often unclear area. Such consistency will also be assisted by the new requirement under the Act for the Commissioner to set out his findings at first instance where a positive decision is taken.

The question remains as to whether adequate provision has been made for legal advice and assistance for asylum seekers at all stages of the asylum procedure. At present, notwithstanding the technical and complex nature of refugee law, an asylum seeker is neither legally represented at interview before the Commissioner, nor is he ordinarily able to avail of legal advice prior to the interview. The absence of legal advice at first instance can only make the Appeal Board's task more difficult.

Notwithstanding the difficulties which will be faced by practitioners under the new scheme, the interest which it has generated is highly encouraging, especially as the vindication of the rights of those seeking refugee status may largely depend on the professionalism and dedication of those involved in the process. The large turn out of members at the first training course demonstrated the genuine interest and commitment of barristers to this field. Let us hope that the scheme is successful in practice and leads to an efficient, clear and, above all, fair system for the determination of refugee applications.●

BIAS & LEGAL PROFESSIONAL INDEPENDENCE

Stephen Dodd BL examines the law governing the duty of judges and other adjudicators to decline to hear and determine disputes on grounds of bias arising from past professional advice and representation.

Introduction

Liam Lawlor's challenge to the ability of Mr Justice Thomas Smyth to hear and determine the contempt motion against him on the grounds that the judge may have been tainted by bias arising from a previous engagement as counsel for a party connected to the Flood Tribunal1 went to the heart of the issue of legal professional independence. The barrister/client relationship, the durability of such connections, the ethos of the Bar, and more generally professional independence (not simply for barristers) are some of the questions which sprang from the challenge. Mr Justice Smyth, on the facts, declined to step aside. His decision appeared to comport with the recent Supreme Court decisions in *Bula v Tara Mines*[2] and *Rooney v the Minister for Food & Agriculture*,[3] which also addressed the issue of claims of bias against judges based on their previous work as barristers. These cases prescribe an onerous test to overcome. Judge Smyth's challenge was on recusal, i.e., before having heard the case, while the challenge in *Bula* was after the judgment. Nevertheless the principles there enunciated have general application to both situations. It also concerned a criminal matter, though there is yet no indication that stricter rules of bias apply in criminal rather than civil matters.

The type of bias in question may be classified as bias by association[4] or bias by pre-judgment. The law of bias has recently undergone significant refinement in the *Bula* decision and also in the Supreme Court decision in *Orange v Director of Telecommunications*.[5] After a brief summary of the law on bias and the facts of the *Bula* and *Rooney* cases, this article will consider these two cases under the headings; recusal and setting aside; independence of the Bar; rational and cogent link; application to facts; and disclosure and setting aside. In the light of these considerations the article will proceed to examine barristers' conflicts of interest; solicitor appointed judges[6]; and the independence of other professionals acting as adjudicators. A further tangential issue is the extent to which the Bar Council rules on conflicts of interest have some expository value in relation to judges and previous work as a barrister.

The Test of Bias

Bias may take the form of actual bias or, more frequently, a reasonable apprehension of bias. The latter is reflected in the ubiquitous formula that justice not only be done but must be seen to be done.[7] Reasonable apprehension is decided on "what a right minded person would think of the likelihood, of the real likelihood of prejudice, and not on the basis of a suspicion which might dwell in the mind of a person who is ill-informed and did not seek to direct his mind to the facts..."[8] Typical examples of bias include where the adjudicator had some pecuniary interest in the outcome[9], some family relationship[10], evidence of pre-judgment by the adjudicator[11] and the promotion of a cause.[12]

The species of bias alleged against a judge based on previous barristerial work could be classified as a combination of bias by association, loyalty or bias by pre-judgment. As regards the scope of bias, in *Orange Communications v Director of Telecommunications*[13] the Supreme Court rejected the notion that cumulative decisions in a decision making process could lead to an apprehension of bias. The Supreme Court held that the adjudicator must be affected by some factor external to the subject matter of his decision, which operated so as to tilt the decision. Barron J distinguished between bias, as always exists before the hearing or process, and unreasonableness, which is ascertained by comparison of the process and the decision.[14] Barron J declared, "Insofar as bias may be found to exist or to have existed, it will always predate the actual decision or contemplated decision. Bias does not come into existence in the course of a hearing. It may become apparent in the course of a hearing."[15]

"The species of bias alleged against a judge based on previous barristerial work could be classified as a combination of bias by association, loyalty or bias by pre-judgment. ... However, insofar as bias may be found to exist or to have existed, it will always predate the actual decision or contemplated decision. Bias does not come into existence in the course of a hearing. It may become apparent in the course of a hearing."

Factual Background

Bula v Tara Mines

The applicant sought to set aside the judgment of the Supreme Court on the ground that two of the judges who heard and determined the appeal in the Supreme Court (Barrington J and Keane J, as he then was) had previously acted as barristers for the respondents. These links were said to be of such a character as to give rise to a perception of bias. The applicants argued that as counsel for Tara or the Minister, they were exposed to the factual matrix of the various cases, its kindred causes and the historical animus between the parties. A list of links were alleged, those concerning Barrington J being more extensive. During 1974 and 1975, Barrington SC had acted for the Minister for Energy and Commerce in *Tara Exploration v Minister for Energy and Commerce,*[16] as well as for the Minister in *Thomas Roche v Minister for Energy and Commerce.*[17] Barrington SC also advised the Minister on fresh compulsory acquisition orders after the defeat of the original order in the Roche proceedings and in 1977 on the Minister's rights and obligations under the Inter Party Agreement. Also Barrington SC had given opinions/advices to Tara in August 1978 regarding proposals for amendments to the law of mineral ownership and in January 1979 in relation to the boundary mining dispute. As regards Keane J, as Keane SC he had been engaged by Tara to fight the oral planning hearing (though he had not carried it out as he was appointed to the bench) and had given advice to Tara in December 1976 on open pit metal mine/exempted development, which was allegedly referable to Bula's planning application.

Rooney v Minister for Food and Agriculture

The Plaintiff, a farmer, claimed compensation from the Minister in respect of animals which had been slaughtered. The Irish Farmers Association was named as one of the defendants, being said to have conspired with the Minister to deprive him of compensation. The action against the IFA was dismissed in the High Court, and this decision was affirmed on appeal by the Supreme Court. The substantive claim was also rejected by the High Court (at which stage the IFA was no longer a party), and this decision was also upheld by the Supreme Court. One of the sitting Supreme Court judges in both cases was O'Flaherty J who as a barrister had advised the IFA on a variety of matters. In 1985, he had advised that there was no constitutional right to compensation. Also, at a consultation O'Flaherty J had advised officers of the IFA on the question of compensation under the Bovine Tuberculosis Scheme.

The Relevant Test: Recusal and Setting Aside

In *Bula,* counsel for one of the respondents urged the Supreme Court to adopt the stricter test of a real danger of bias as stated in the English case of *R v Gough.*[18] The House of Lords had specifically rejected the reasonable apprehension test in the case of alleged bias whether against a judge, other adjudicator or juror, except in the case of pecuniary interest. In support of this, the defendants argued that the test should be more rigorous on appeal or setting aside than in recusal. Several other grounds were advanced[19] for this course including that the decision sought to be set aside was that of the Supreme Court. In *Re Greendale,*[20] it was recently reaffirmed that Supreme Court decisions should only be set aside in very exceptional circumstances.

Denham J however refused to adopt the *Gough* test of real danger.[21] She stated that the test to be applied is objective, namely whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues.[22] McGuinness J, while adopting the same approach, stated that various factors including that the issue was not on recusal, though not relevant to the test, were factors to be weighed in the application of the test to the facts.[23]

In practical terms, the dispute could simply be said to have been an argument over paradigms, i.e., whether to take account of those factors (not being on recusal, a Supreme Court decision, etc.) in the test itself or in relation to the application of the test. In reality there may not be much difference to the outcome of applying the real danger test or the reasonable apprehension test while taking into account those factors in its application. As a principle, however, the approach adopted is perhaps to be preferred, as the alternative would be to create a two tier test of bias which would depend on the circumstances of the challenge to the judge.

Independence of the Bar

Having established that the relevant test was that of reasonable apprehension of bias, Denham J went on to consider the particular context of the independence of the Bar. In this respect she cited with approval[24] the Australian case of *Aussie Airlines Pty. Ltd. v Australian Airlines.*[25] In this case Merkel J had stated that an informed observer can be presumed to have general knowledge that:

(a) When barristers act on clients' behalf they do so in a professional capacity as their client's legal advocate selected to act in the case for that purpose. Any barrister so selected could have been briefed to fulfil the same task for the opposite side;

(b) In accepting a brief to act for a client in a particular commercial case, the barrister does not become part of or identified with the client and has no direct financial interest in the outcome of the case; and

(c)The barrister acts as a member of an independent Bar. The barrister is instructed by a solicitor or a firm of solicitors to present the client's case and in doing so is bound by a professional code of ethics ensuring that the barrister's conduct is in accordance with his or her professional standards.

This passage was also approved in the judgment of McGuinness J, who also cited two additional point referred to by Merkel J which were:

(d)It is commonplace for barristers who are close associates or friends and who may even be from the same set of chambers to fight on opposite sides in a case without compromising their professional duties to act in the interest of their clients; and

(e)As judges are usually appointed from the senior ranks of the profession, particularly the Bar, it is likely that they will be well acquainted, and have formed close associations, with Senior Counsel appearing before them. It is also likely that they will have personal and professional associations with many of the Counsel appearing before them.

Denham J considered that many of the submissions advanced on behalf of the applicants misunderstood the place of the independent bar and of barristers in the State. She proclaimed:

"A barrister in his or her work is an independent sole practitioner. He or she is a legal advisor and advocate. The professional services rendered by the barrister do not establish an affiliation to the client or a sharing of kindred causes and objectives, as submitted on behalf of the applicants. The work is as a professional to give legal advice and or to be an advocate. The work does not espouse him or her to the litigant's cause, no matter how controversial, emotional or hostile the litigation; nor does he or she espouse the ambitions of the litigant, as submitted by the applicants. The work done by barristers is of the nature of a professional service. By advising or advocating for a client a barrister does not become "associated" with the client's cause. Barristers operate what is colloquially called the "cab rank" principle. Having completed a case they move on to the next - who may have been on a opposing side in the previous case."

McGuinness J said that the reasonable person would know that barristers are independent and that in their professional work they do not become associated with their clients in any way other than as legal advisor and advocate.[26]

Denham J did however state that it "may well be that a member of the Bar may engage in activities other than as a practising barrister. In such activities the barrister may become associated with a cause in a way which falls outside the normal legal professional relationship between a barrister and solicitor and client. To that type of activity different considerations apply." Denham J did not elaborate on the nature of these other activities. Although clearly covering the typical categories of bias, it leaves open the possibility of a legal relationship which is outside the normal legal professional relationship. In this respect one may note that in the English case *Localbail Ltd. v Bayfield Properties*[27] Lord Bingham opined that an objection to a judge could not be soundly based on *inter alia* "extra curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers)." This dictum was cited by Murphy J in *Rooney*,[28] and it would seem to follow that similar utterances while a barrister (which would be outside the normal professional barrister/client relationship) would not ground a claim of bias.

Rational and Cogent Link

The formula arrived at when applying the reasonable apprehension test in the context of the independent Bar is that there must be a rational and cogent link between the prior involvement and the decision to be made. In arriving at this conclusion, stress was also placed on the nature of the judicial oath as contained in the Constitution.[29]

The rational and cogent link test comes from the Australian case of *Aussie Airlines Pty. Ltd. v Australian Airlines Pty*[30] which was approved by Denham J and McGuinness J in the *Bula* decision. Denham J stated that the "requirement of a 'cogent and rational link' between the judge's past associations and the capacity of those associations 'to influence the decision to be made' seems to me to fulfil the requirement that the Applicants apprehension should be both reasonable and realistic and I respectfully adopt it as a correct analysis in the present case." Denham J considered the mere fact that a judge had previously acted for a party as a legal adviser or advocate is insufficient to disqualify him from acting as a judge in a case in which that person is a party. Special additional circumstances are required to be present.

Denham J gave two examples of such special circumstances. The first is where the judge as counsel had previously given legal advice on issues alive in the case to be heard by the court.[31] She cited with approval the decision of the High Court of Australia in *Re Polites and Another, ex parte The Hoyts Corp. Pty Limited:* [32]

"...if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court) the erstwhile legal advisor should not sit.....If the erstwhile legal adviser were to sit in a proceeding in which the quality of his or her advice is in issue, there would be reasonable grounds for apprehending that he or she might not bring an impartial and unprejudiced mind to the resolution of the issue. Much depended on the nature of his or her relationship with the client, the ambit of the advice given and the issues falling for determination."

"It may well be that a member of the Bar ma engage in activities other than as a practisin barrister. In such activities the Barrister may become associated with a cause in a way which falls outside the normal legal professional relationship between a barrister and solicitor and client. To that typ of activity different considerations apply."

The second example, referred to by Denham J in less detail, was described "as a long, recent and varied connection"[33] which may disqualify a judge. The circumstances must be cogent and rational so as to give rise to a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the issues in the case

Duty to Enquire

It appears that the nature of the duty to enquire may vary as between the litigant and the sitting judge to recall the details of any prior involvement In *Bula*, Denham J considered that it is not for the parties to search for a connection between a judge and a party, though it is prudent for parties to bring to the attention of the court any relevant matter.[34] McGuinness J considered that as a matter of public policy it was highly undesirable to impose such a duty of enquiry on litigants which would have the effect of encouraging litigants to carry out research into the legal work carried out by judges prior to their appointment to the bench and to raise unfounded and perhaps frivolous and vexatious objections to the Court of trial or to the composition of the appellate Court.[35]

> **"McGuinness J considered that as a matter of public policy it was highly undesirable to impose such a duty of enquiry on litigants. This could have the effect of encouraging litigants to carry out research into the legal work carried out by judges prior to their appointment to the bench and to raise unfounded and perhaps frivolous and vexatious objections to the Court of trial or to the composition of the appellate Court."**

As regards the judge, there may be a significant time gap between the hearing and the work in question, so that a judge may fail to recall the earlier work. In the English case of *Localbail v Bayfield Properties*,[36] Lord Bingham considered that if before the hearing has begun the judge is alerted to a matter which throws doubt on his fitness to sit, the judge should enquire into the facts insofar as they are ascertainable. In Ireland, this would also appear to be the correct course, considering the test is the reasonable apprehension of a member of the public and not the subjective view of the judge. However once the objection is made, as noted by Denham J in *Bula*, a judge has a duty to sit and should not automatically step aside when requested to do so, though the decision to sit or not to sit may be reviewed by a higher court.[37] She noted that it has long been the convention for judges to disqualify themselves and not to sit on cases where they have a real connection.

Disclosure

In *Bula*, McGuinness J implied that the duty of a judge to make disclosure, although good practice, would not necessarily mean that a judgment would be set aside for bias for failure to make such disclosure.[38] She cited with approval another Australian case, *Dovade Pty Limited v Westpac Banking Group* [39] where it was said:

> ".. it would be good practice if judges who may be concerned that some matter or association could possibly give rise to an apprehension of bias ought in those circumstances to disclose the matter or association.....However it is different to elevate a cautious or even good practice into a legal principle that the failure to disclose in such circumstances is itself a ground for setting aside a judgment."

In *Rooney*, whereas Keane CJ noted that it has long been the practice for judges to disclose the existence of factors which may affect the appearance of impartiality, which practice he described as "an entirely proper one," he stressed "the need to ensure the appearance, as well as the reality, of impartiality must be reconciled with the proper functioning of the judicial system."[40] He suggested that this dilemma might be resolved in difficult cases by judges referring the issue to the senior available judge of the court of which he is a member He cautioned that this course would be acceptable in cases of particular difficulty but should not develop into common practice.

Application to the Facts

Bula v Tara Mines

The substantive action decided by the Supreme Court on appeal from Lynch J concerned whether a certain clause in Tara's lease when read in the light of an interparty agreement with the Minister required them to co-operate with the plaintiff owners of the neighbouring mine, instead of allegedly inflicting economic loss and damage on the plaintiffs. The plaintiff also claimed that the Minister was under an obligation to the Plaintiffs to prevent the first fourteen defendants from so acting. Denham J noted that the plaintiff had been involved in extensive litigation for over 25 years and that very few judges would not have had exposure to the conflict. She considered that an impartial court may have some prior knowledge of a dispute.

Denham J considered that even if Barrington SC had acted for a party it was not in relation to an issue to be tried by the court. Denham J went through each of the alleged connections of Barrington SC and Keane SC, finding that none of their connections arose in relation to the essential issues before the Court in *Bula*. For example, although Barrington SC had acted for the Minister in *Tara Exploration v The Minister for Industry and Commerce* and in *Thomas Roche and Bula v The Minister for Industry and Commerce,* the issues for determination in those cases concerned financial matters and the constitutionality of the Minerals Development Act 1940, respectively.

Denham J restated the principle that "if the litigation is between the same parties on an issue or issues upon which as counsel he or she has previously advised or advocated in the cause between the parties then it would not be appropriate for a judge to hear the case. But that does not arise in this case."[41] Denham J noted that the time factor is an important element in this case, in two separate ways. First, Mr Donal Barrington SC and Mr. Ronan Keane SC had acted for the parties over 20

years ago. The time lapse since the work done is an important factor distancing judges from a link. Secondly this application was not brought to seek a recusal of a judge but rather after a full hearing. Whilst the applicants had not waived their right to object, their actions in proceeding with the appeal were part of the overall circumstances to be taken into account in determining the risk of bias.[42]

McGuinness J considered that there was no cogent and rational link between the professional links of the two judges and the issues that were decided by the Supreme Court in the appeal. In relation to Barrington J she considered there was nothing to indicate that he was a standing Counsel for any of the parties or that he held a retainer from any of them. McGuinness J in applying the reasonable apprehension of bias test to the facts took the following factors into account;

- The importance of the judicial oath.
- The independence of the Bar.
- The time factor. All of the professional work was done before 1980.
- The application was not made in advance of the hearing but after the Supreme Court's decision.
- Mr Wymes and through him Bula were aware of the existence of the boundary opinion prior to the hearing of the appeal.
- Mr. Wymes in his affidavits was somewhat less than candid in revealing the advice given to him by Counsel in relation to Mr. Justice Keane and Mr. Justice Barrington.

McGuinness J considered that a reasonable person would be realise that Mr. Justice Barrington would be unlikely to have a clear memory of work done 20 years ago, let alone be influenced by it. It was also noted that Barrington J had been open at all stages. He had consulted with Hamilton CJ on the propriety of sitting in related security of costs proceedings and, in addition, had replied to queries from journalists.

Rooney v The Minister for Agriculture

In *Rooney*, Murphy J found that there was no rational and cogent link between O'Flaherty J's earlier work and the decision. He noted that the advice of O'Flaherty J had been given six years before the hearing of the appeal and that by the time of the substantive appeal hearing, the IFA was no longer involved. The appeal was not determined by reference to the constitutional issue on which O'Flaherty J had advised. In his judgment in the Supreme Court, O'Flaherty J held that the Minister was not obliged to operate a particular statutory scheme since he had in place a reasonable scheme for providing a measure of assistance to herd owners. He expressly stated that it was unnecessary to adjudicate on the constitutional issue. In addition, the motion dismissing the IFA and other defendants from the action turned on the issue of whether pleadings disclosed a cause of action against the defendants. Murphy J concluded that a reasonable bystander would not perceive any cogent and rational link between the involvement of O'Flaherty J with the IFA and his judgment in either appeal.

The Bar Council Code of Conduct

Much reliance was placed in the above judgments on the professional independence of barristers. Indeed much of the statement on barristers could have been constructed in the light of the Bar Council Rules of Conduct. Of course these Rules do not have the force of law and are not justiciable (though they are enforceable in England). This was recently affirmed in *McMullen v Clancy*,[43] in which McGuinness J as a High Court judge held that the rules were not legally enforceable. Nevertheless the Rules arguably provide some inspiration in elucidating the *Bula* judgment.

In the Rules, there is clearly no general prohibition on counsel acting for or against the same party in different cases. Point 3.12 of the Rules states that a barrister must not accept a brief or instructions where by reason of his connection with the client it would be difficult for him to maintain his professional independence. Professional independence, therefore, as discussed by Denham J, is required to be constantly maintained in a barrister's work. This is buttressed by several conflict of interest rules. The most significant is Point 3.11, which states that a barrister ought not to accept a brief or advise or draw pleadings if he would be embarrassed in the discharge of his duties because he had previously advised, drawn pleadings or appeared for another person "in or in connection with the same matter" or if he is in possession of material information entrusted to him by another client or for any reason. The argument could be made that it would be inappropriate for a judge to hear a case, if as a barrister he would have been in breach of the above rule in taking the brief. It would appear to correspond to Denham J's special circumstances where advice given is a live issue, as the advice would be connected "with the same matter".

The Rule is of course broader than the example given by Denham J. Point 3.13 provides that a barrister may not appear as counsel in a matter in which he is a party or has significant pecuniary interests or concerning a local authority of which he is a member or a firm or organisation of which he is a director, officer, etc. This Rule appears consonant with the situation

"In *Rooney*, Keane CJ suggested that the dilemma might be resolved in difficult cases by judges referring the issue to the senior available judge of the court of which he is a member. He cautioned that this course would be acceptable in cases of particular difficulty but should not develop into common practice."

described by Denham J where the connection is outside the normal professional barrister/client relationship.

Solicitor-appointed Judges

The *Bula* and *Rooney* cases involved the prior involvement of judges in their work as a barrister. A large part of the reasoning for the adoption and application of the test of rational and cogent link was informed by the notion of the independence of the Bar. However, although the requirement of professional distance stressed in relation to barristers applies equally to solicitors, there are certain differences in the relationship of a solicitor with a client which are distinctly material. These include that a solicitor will have a direct relationship with the client, as opposed to the barrister who will only relate to them through the solicitor. Also, unlike a barrister, a solicitor is more likely to have an ongoing relationship with a client. Thus a particular client may have all their legal affairs dealt with by the solicitor as they may arise, which may extend over a long period. Solicitors are perhaps less likely than barristers to act for and against the same party, though this may occur. In the English case of *Locabail (UK) Ltd. v Bayfield Properties*[44] Lord Bingham distinguished the independent, self- employed status of barristers (even under the chamber system in England) from a solicitor who is a partner in a firm of solicitors who is legally responsible for the legal acts of his partners. Though Lord Bingham was speaking in the context of a duty judge, the principle still has validity.

"Arguably, a judge's links as a solicitor are more likely to qualify for the special circumstances of links which Denham J described as "long, recent and varied." There is therefore perhaps a greater likelihood of a finding of a reasonable apprehension of bias because of previous work in the case of solicitor-appointed judges."

While these differences do not mean that the rational and cogent link test should not be applied to solicitor appointed judges, they do make some difference to the application of the test. Arguably, a judge's links as a solicitor are more likely to qualify for the special circumstances of links which Denham J described as "long, recent and varied." There is therefore perhaps a greater likelihood of a finding of a reasonable apprehension of bias because of previous work in the case of solicitor-appointed judges.

Other Professions

The quality of professional independence is not of course unique to barristers. Any professional relationship will relate to specific engagements which will end once this task is completed, though other separate engagements to the same party may arise. This contrasts with the position of an employee or officeholder where the relationship is more fixed and permanent. One of the recognised heads of bias is loyalty to an institution or an office,[45] which would appear absent in the professional relationship.The same reasoning based on professional independence would appear to apply to adjudicators who had carried out work in another profession. This in fact has arisen in the context of arbitration. Thus, an arbitrator who had previously been engaged as an architect by a related party to the arbitration was challenged in *Bord na Mona v Sisk.*[46] The plaintiffs in this case sought to set aside the interim and final awards of the arbitrator on the ground that that he was guilty of misconduct in failing to disclose to the parties that prior to the arbitration he had accepted instructions from and acted for Sisk Properties Ltd, a company associated with the first named defendant. The arbitrator had been retained as an architect by Sisk Properites Ltd in May 1975 in connection with a proposed development. At the time of the arbitration he had not completed his work on this development. Both Sisks and Sisk Properties Limited were wholly owned subsidiaries of Capwell Investments, though they each had separate boards of directors and independent managements. Also the two companies dealt with each other on an arms length basis. Blayney J considered that the real question was not non-disclosure but that of bias. Blayney J stated " Mr. O'Reilly's [the arbitrator] relationship with Sisk Properties Limited is that of an independent professional man with his client. He provides his professional services in return for a fee. His position is very different from that of an employee of the company, or of a director or shareholder. He owes no general duty to the company and has no pecuniary interest in it. His relationship with it is temporary. It will terminate once the professional work for which his services have been retained has been completed." Blayney J considered there would be no reason why Mr. O'Reilly should have had a bias in favour of Sisks simply because one of his professional clients happened to be Sisk properties Ltd.

Conclusion

The onus of showing a reasonable apprehension of bias due to a judge's prior work as counsel is a heavy one. In application, the rational and cogent link test appears very difficult to satisfy. Certain policy reasons could be said to underlie the adoption of such an arduous test. For if the allegations in *Bula, Rooney* or against Judge Smyth were sustained, the implications for the administration of justice could be very great indeed. The policy of necessity therefore arguably underpinned these decisions, springing from a common law system where judges are appointed from among the ranks of barristers, unlike certain civil law systems such as France.

Some doubt may be raised as to whether the test should be applied in precisely the same manner to solicitor-appointed judges. More generally, however, the rational and cogent link test should not be seen as a restatement of the reasonable apprehension test which has general application. Instead, the test would appear to be wedded to the context-specific situation of allegations of bias against judges based on their previous work as a barrister or solicitor.●

1. See *The Irish Times,* 8 January 2001
2. Unreported, 3 July 2000
3. Unreported 23 October 2000
4. This was how it was classified in the Australian case, *Aussie Airlines Pty. Ltd. v Australian Airlines Pty* (1996) 135 ALR 753
5. Unreported , 18 May 2000
6. Under section 28 of the Courts and Court Officers Act 1995, Circuit Court judges of 4 years standing may be promoted to the High Court.
7. *R v Sussex Justices , ex parte McCarthy* (1924) 1 KB 256
8. Murphy J in *Dublin and County Broadcasting Limited v IRTC,* unreported, 12 May 1989
9. *Doyle v Croke,* unreported, 6 May 1989; *Dublin and County Broadcasting Ltd. v Independent Radio and Television Commission,* unreported, 12 May 1989
10. *O'Reilly v Judge Cassidy* (1995) ILRM 306
11. *O'Neill v Beaumont Hospital Board* (1990) ILRM 419. For a survey of the law see *Orange Communications v Director of Telecommunications,* unreported, 18 May 2000. In particular see Geoghegan J at 7 to 14; Barron J at 33 to 48.
12. *Dublin Well Woman Centre v Ireland* (1995) ILRM 408; *Regina v Bow Street Metropolitan Stipendiary Magistrate and other Ex Parte Pinochet Ugarte* (No.2) (1999) 2 WLR 272
13. 18 May 2000
14. Ibid. at 33
15. Ibid. at 34
16. (1975) 242
17. (1978) IR 149
18. (1993) AC 646. She also cited the South African case of *The President of the Republic of South Africa and others v South African Rugby Football Association* (1999) 7 BCLR 725
19. Other reasons are set out at page 28 of McGuinness J's judgment. These include the acquiescence on the part of the applicant and the fact of the judicial oath.
20. 9 December 1999
21. She followed the Australian case of *Webb v The Queen* (1993/1994) 181 CLR 41. The real danger test was also rejected by the Constitutional Court of South Africa in *The President of the Republic of South Africa v South African rugby Football Union* (1999) (7) BCLR 725
22. At 27
23. At 38
24. Ibid. at 31
25. (1996) 135 ALR 753
26. Note however the statement of McGuinness J in *Carroll v Law Society of Ireland,* unreported, High Court, 1 January 1999. Commenting on an English case concerning the impartiality of barristers judging the peers for misconduct, she stated that "the public perception of professional persons is considerably less reverential and more cynical in 1998 than it was perhaps in England in 1981."
27. (2000) 1 AER 65
28 Ibid. at 11
29. Article 34.5.1. This was referred to by Denham J at 74, 75, citing the Australian case *Dovade Pty. Limited v Westpac banking Group* (1999) NSWCA 113
30. (1996) 135 ALR 753
31. At 34
32. (1991) 173 CLR 78 at 87
33. Ibid. at 34
34. Ibid. at 27
35. At 65
36. (2000) 1 AER 65
37. At 27,28, approving *Livesey v The New South Wales Bar Association* (1983) 151 CLR 288
38. At 85
39. (1999) NSWCA 113
40. At 3
41. At 49
42. Ibid. at 53
43. Unreported, 3 September 1999.
44. (2000) 1 AER 65
45. An example is *O'Cleirigh v Minister for Agriculture* (1996) 2 ILRM 12
46. (1990) 1 IR 104

LEGAL PROFESSIONAL PRIVILEGE THE IDENTITY OF A CLIENT

In Miley v Flood[1], Mr Justice Kelly considered the net point of whether a solicitor can claim legal professional privilege in respect of the identity of his or her client. ***Declan McGrath BL*** *examines the decision and appraises its broader ramifications for the development of legal professional privilege in this jurisdiction.*

Background

The Tribunal of Inquiry into Certain Planning Matters and Payments (commonly known as the Flood Tribunal) was established in 1997 to investigate, *inter alia,* any acts of corruption associated with the planning process.2 During the course of its inquiries, allegations were made that monies had been paid to politicians for the purpose of securing the rezoning of lands at Carrickmines, County Dublin, owned by an English domiciled company called Jackson Way Properties Ltd ("the company"). In order to investigate these allegations, the Tribunal sought to discover the identities of the persons who were the beneficial owners of the company. To that end, the applicant, a partner in the firm of solicitors which represented the company, was summonsed to appear before the Tribunal and asked to disclose the names of the persons from whom he had received instructions on behalf of the company. He refused to do so on the basis that this information was confidential and protected by legal professional privilege and that his client had given him specific instructions not to reveal it. The respondent, the sole member of the Tribunal, ruled that legal professional privilege did not cover the identity of the persons providing instructions to the applicant, and it was against this determination that the applicant instituted judicial review proceedings. Because the issue could have implications for the solicitor's profession, the Law Society was joined as a notice party and took an active part in the proceedings.

The Decision

In deference to the elaborate submissions made to him, Kelly J engaged in a comprehensive review of the authorities on the issue. These were generally against the proposition advanced by the applicant and the Law Society but the learned judge said that he ultimately derived little assistance from these authorities. Instead, he decided the issue by reference to the principles laid down by the Supreme Court in the seminal decision of *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd.*[3] In that case, the plaintiff sought disclosure of correspondence and instructions passing between the defendant and the solicitors then acting for it in relation to a charge taken by the defendant over the assets of a third party. The trial judge found that the documents in question did not request or contain any legal advice and were not, therefore, privileged and this conclusion was upheld on appeal by the Supreme Court where a distinction was drawn between 'legal advice' and 'legal assistance'. Finlay CJ set forth the basic principle to be applied in dealing with claims of privilege as follows:[4]

> The existence of a privilege or exemption from disclosure for communications made between a person and his lawyer clearly constitutes a potential restriction and diminution of the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining the truth and rendering justice. Such privilege should, therefore, in my view only be granted in instances which have been identified as securing an objective which in the public interest in the proper conduct of the administration of justice can be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts.

Having regard to the rationale for legal professional privilege, he was satisfied that legal advice satisfied this test but that legal assistance did not because it was not "closely and proximately

linked to the conduct of litigation and the function of administering justice in the courts." [5]

Kelly J viewed the decision in *Smurfit* as authority for the proposition that where communications between a client and his or her lawyer are at issue, privilege can only be claimed for a communication if it seeks or contains legal advice and that, in consequence, the communication of any other information is not privileged. Further, if a claim of privilege is challenged, the onus is placed upon the person invoking privilege to justify the claim. Applying these principles, he was satisfied that the applicant was not entitled to maintain a claim of privilege over the identity of persons who provided him with his instructions on behalf of the company. Neither did the applicant's claim that the information had been given to him in confidence affect the situation. Kelly J pointed out that the confidentiality of information does not, of itself, create a privilege from disclosure. An exemption from disclosure will only apply where the conditions for privilege are met.

"It is clear that a solicitor claiming privilege in respect of the identity of his or her client will face significant difficulties in satisfying a court that the essential prerequisites for a claim of legal advice privilege are satisfied. ... In particular, there is a long line of authority that restricts the privilege to information which passes between a lawyer and client, as opposed to facts which a lawyer may learn in the course of his professional relationship with a client."

A number of the authorities examined by the learned judge declined to lay down an absolute rule that the identity of a client could never be privileged, acknowledging that there might be circumstances where such a claim might be appropriate[6] as for example where naming the client would incriminate him or her or where the identity of the client is so bound up with the nature of the advice sought that to reveal the client's identity would reveal that advice.[7] However, it was not necessary for Kelly J to decide whether such exceptions existed in this jurisdiction because they did not arise on the facts before him.

Analysis

Taking a definitional approach, it is clear that a solicitor claiming privilege in respect of the identity of his or her client will face significant difficulties in satisfying a court that the essential prerequisites for a claim of legal advice privilege are satisfied. It must, first, be established that the communication was made to or by a lawyer during the currency of a professional legal relationship.[8] Obviously, in order to satisfy this condition, it must be proved that a lawyer-client relationship exists and this would seem to require revelation of the identity of the client.[9] Second, it is a fundamental prerequisite for privilege that the communication was intended to pass in confidence[10] whereas, naturally enough, the identity of a client will rarely be disclosed to a solicitor on that basis.[11] Furthermore, even if a court is willing to accept the assertion of a solicitor that he or she acts on behalf of an unnamed client and that the identity of the client has been imparted on a confidential basis, there may still exist formidable difficulties in establishing that the identity of the client is a 'communication' within the rubric of privilege.

In particular, there is a long line of authority that restricts the privilege to information which passes between a lawyer and client, as opposed to facts which a lawyer may learn in the course of his professional relationship with a client.[12] A distinction is thus drawn between facts communicated to a lawyer by the client (whether orally or otherwise) and those which are patent to the senses.[13] In *Brown v Foster*,[14] Baron Martin stated that "what passes between counsel and client ought not to be communicated, and is not admissible in evidence, but with respect to matters which the counsel sees with his own eyes, he cannot refuse to answer." Thus, a lawyer may be required to give evidence as to whether a particular entry had been made in a book[15] or whether he or she saw his or her client execute a deed[16] because this is not information communicated to him or her but, rather, knowledge acquired by his or her own observation. Similarly, the identity of the client is a fact which will often be patent to the solicitor and not a fact actually communicated to him or her. Even if the client is unknown to the solicitor and where it may therefore be said that his or her name is a fact which only becomes known to the solicitor by virtue of his or her professional relationship with the client, there is the further and, in most cases, insurmountable difficulty, that this is not a fact which is communicated to the solicitor for the purpose of obtaining legal advice. As Kelly J makes clear in his judgment, not all communications that pass between a lawyer and client are privileged, only those made for the purpose of giving or receiving legal advice.[17] Thus, no protection will be given to a mere 'collateral fact'[18] imparted by the client to the solicitor which is not relevant to the discharge by the lawyer of his or her professional functions.[19] In the specific context of a client's identity, although the identity of a client may well constitute vital information for the purpose of establishing and maintaining a professional reationship between a solicitor and client, it is only in exceptional circumstances that it will be required by the solicitor in order to give legal advice.

Turning to the broader policy considerations on which the decision of Kelly J in *Miley* was ultimately based, there is a strong argument to be made that the identity of a client is information which should not, ordinarily, be protected from disclosure. In order to justify the extension of privilege to the identity of the client, it would have to be shown that, having regard to the particular context in which he or she consulted a solicitor, knowledge that his or her identity could be disclosed would have dissuaded the client from instructing a solicitor or that the inapplicability of the privilege would have a 'chilling effect' on the relationship.[20] It is only in rare circumstances that this could be shown and these did not arise on the facts in *Miley*. In circumstances where the company instructed the applicant solicitor in relation to proceedings in which it was involved it was hardly likely that, had the promoters of the company been aware of the possibility of future disclosure of their identity, they would have declined to instruct solicitors. It is not surprising that this vague and unquantifiable danger should give way to the very evident public interest in having that information disclosed to a court or, in this case, to the Tribunal.

Status of the Privilege

The most enduring significance of the decision in *Miley* may, perhaps, lie in what Kelly J had to say about the status of the privilege in Irish law. The traditional common law view of the privilege was that it was merely a rule of evidence, the application of which was tied to the curial context. However, recent decisions in England,[21] Canada,[22] Australia[23] and New Zealand,[24] have taken the view that the privilege is more than a rule of evidence and have ascribed to it a substantive content which is capable of application in pre-trial and non-curial contexts. The Canadian courts have perhaps gone the furthest in that regard. Dickson J, delivering the judgment of the Supreme Court of Canada in *Solosky v Canada*,[25] described the right to communicate in confidence with one's legal adviser as "a fundamental civil and legal right, founded upon the unique relationship of solicitor and client."[26]

"Recent decisions in England, Canada, Australia and New Zealand have taken the view that the privilege is more than a rule of evidence and have ascribed to it a substantive content which is capable of application in pre-trial and non-curial contexts ... In *Miley v Flood*, Kelly J referred with approval to those developments and reiterated the view that "[l]egal professional privilege is more than a mere rule of evidence. It is a fundamental condition on which the administration of justice as a whole rests."

In *Miley v Flood*, Kelly J referred with approval to those developments and reiterated the view previously taken by him in *Duncan v Governor of Portlaoise Prison* that "[l]egal professional privilege is more than a mere rule of evidence. It is a fundamental condition on which the administration of justice as a whole rests." [27] These comments echo those of Hamilton CJ in *Quinlivan v Governor of Portlaoise Prison*,[28] that the privilege has "always been regarded by the courts as absolutely essential and of paramount importance in the administration of justice" and of Finlay CJ in *Bula Ltd v Crowley (No. 2)*,[29] who referred to "the important confidence in relation to communications between lawyers and their clients which is a fundamental part of our system of justice and is considered in all the authorities to be a major contributor to the proper administration of justice."

The precise manner in which the privilege is thought to promote the administration of justice is not specified in those dicta but the following may be suggested. First, it can be argued that privilege is crucial to the effective functioning of our adversarial model of justice.[30] This relies heavily on the parties to seek out both the facts and the law that support their case and to undermine that of their opponent. The likelihood that the court will reach the right result and that justice will be done is intimately tied to the quality of those efforts which are, obviously, likely to be much better if the party is represented by a trained lawyer. For example, though cross-examination has been described by Wigmore[31] as the "greatest legal engine ever invented for the discovery of truth", its effectiveness is crucially dependent upon the forensic skills of the cross-examiner. Furthermore, many cases require legal argument and the citation of legal authorities and it is simply unrealistic to expect lay persons to have the requisite skill and knowledge in that regard. Second, the representation of the parties by persons with legal training and knowledge is likely to result in more efficient presentation and, hence, disposal of cases.[32] Third, retaining a lawyer who is emotionally and financially detached from the dispute underlying a case aids a realistic appraisal of its prospects of success and its settlement or proper conduct if the matter comes to trial.[33]

The foregoing considerations are underpinned and reinforced by the ethical obligations which barristers[34] and solicitors[35] owe to the court, ethical obligations which are not owed by lay clients, and which promote the administration of justice.

Once it is accepted that it is desirable in the interests of justice that a client should be legally represented, then it necessarily follows that he or she should be enabled to make full and frank disclosure to the lawyer so that the foregoing benefits may be realised.[36] In the absence of privilege, a client would be discouraged by the possibility of future disclosure from consulting a lawyer and, even if he or she did, the natural temptation would be to hold back facts that he or she considered to be harmful to his or her case. This might well lead a lawyer to advise that the client had a good case when, armed with all the relevant facts, he or she might have advised not to institute or to settle proceedings rather than fight a weak case.

Given the foregoing, the question inevitably arises as to whether the privilege may, at some future date, receive some measure of protection on the constitutional plane.[37] It could, for example, be argued that the right to communicate in confidence with a legal adviser is protected in the civil context by Article 40.3 as a facet of the right of access to the courts[38] and in the criminal context by the right to legal representation.[39]

Alternatively, supra-legal protection may be provided by Article 6 of the European Convention on Human Rights which guarantees the right to fair trial. In *Niemitz v Germany*,[40] the European Court of Human Rights stated that "where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6."[41] In addition, confidential communications passing between a lawyer and client are protected under Article 8 which guarantees privacy of correspondence. In *Campbell v United Kingdom*,[42] the Court held that it is in the public interest "that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion"[43] and, therefore, correspondence with a solicitor is privileged under Article 8. In Miley, Kelly J referred to the decision in *Niemitz* and it may be anticipated that European decisions in this area will assume additional significance with the incorporation of the Convention into Irish law. ●

1. High Court (Kelly J) 24 January 2001.
2. Paragraph 5 of the Terms of Reference.
3. [1990] 1 IR 469, [1990] ILRM 588.
4. *Ibid* at 477, 594.
5. *Ibid* at 478, 594.
6. See *Ontario (Securities Commission) v Greymac Credit Corp* (1983) 146 DLR (3d) 73, 84.
7. *Federal Commissioner of Taxation v Coombes* [1999] FCA 842, (1999) 164 ALR 131; *Police v Mills* [1993] 2 NZLR 292.
8. *Greenough v Gaskell* (1833) 1 My & K 98, 101.
9. *Bursill v Tanner* (1885) 16 QBD 1, 5; *Federal Commissioner of Taxation v Coombes* [1999] FCA 842, (1999) 164 ALR 131. Cf *Forshaw v Lewis* (1855) 1 Jur 263, 264 and *A & D Logging Co Ltd v Convair Logging Ltd* (1967) 63 DLR (2d) 618, 620 where it was held that privilege did not apply to a communication which merely showed the existence of the retainer and *Levy v Pope* (1829) M & M 410 and *Gillard v Bates* (1840) 6 M & W 547 where the view was taken that a litigant was entitled to know the true identity of his opponent.
10. *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd* [1990] 1 IR 469, 473; Webster v James Chapman & Co. [1989] 3 All ER 939, 944; *Ventouris v Mountain* [1991] 3 All ER 472, 475; *R v Dunbar* (1982) 138 DLR (3d) 221, 244, *Zielinski v Gordon* (1982) 40 BCLR 165; *Federal Commissioner of Taxation v Coombes* [1999] FCA 842, (1999) 164 ALR 131.
11. *Bursill v Tanner* (1885) 16 QBD 1, 5; *Re Cathcart, ex parte Campbell* (1870) 5 Ch App 703, 705; *Federal Commissioner of Taxation v Coombes* [1999] FCA 842, (1999) 164 ALR 131; *Ontario (Securities Commission) v Greymac Credit Corp* (1983) 146 DLR (3d) 73, 84. But Cf *Lavallee, Rackel and Heintz v Canada (*Attorney General) (1998) 160 DLR (4th) 508, 525, where Veit J recognised that "in some situations, it may be critically important for a client to be confident that no one will know that she has consulted a divorce lawyer, or a lawyer who specialises in sterilisation claims, or in claims for individuals who contracted AIDS through the blood supply, or in defending drunk driving charges".
12. *Dwyer v Collins* (1852) LR 7 Exch 639, 645-6; *Bursill v Tanner* (1885) 16 QBD 1, 5; *Commissioner of Taxation v Coombes* [1999] FCA 842, (1999) 164 ALR 131; *Coveney v Tannahill* (1841) 1 Hill 33, 35 (NY).
13. *Sandford v Remington* (1793) 2 Ves Jun 189; *Greenough v Gaskell* (1833) 1 My & K 98, 104; Brown v Foster (1857) 1 H & N 736; *Sawyer v Birchmore* (1837) 3 My & K 572; *Kennedy v Lyell* (1883) 23 Ch D 387, 407; *Stevens v Canada* (Privy Council) (1998) 161 DLR (4th) 85.
14. (1857) 1 H & N 736, 740.
15. *Brown v Foster* (1857) 1 H & N 736.
16. *Sanford v Remington* (1793) 2 Ves Jr 189.
17. *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd* [1990] 1 IR 469, [1990] ILRM 488; *Re Cathcart, ex parte Campbell* (1870) 5 Ch App 703, 705; *O'Rourke v Darbishire* [1920] AC 581, 629, [1920] All ER 1, 48; Minter v Priest [1930] All ER 431, 440; Smith-Bird v Blower [1939] 2 All ER 406; R v Bencardino (1973) 2 OR (2d) 351. *Cf Federal Commissioner of Taxation v Coombes* [1999] FCA 842, (1999) 164 ALR 131.
18. A phrase used by James LJ in *Re Cathcart, ex parte Campbell (*1870) 5 Ch App 703, 705, referring to the address of a client.
19. *Calbeck v Boon* (1872) IR 7 CL 32, 36; *Gillard v Bates* (1840) 6 M & W 548.
20. *Cf Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 649 (per Jessel MR); *Greenough v Gaskell* (1833) 1 My & K 98, 103.
21. See *R v Derby Magistrates' Court, ex parte B* [1996] AC 487, 507, [1995] 4 All ER 526, 540-41 and *General Mediterranean Holdings SA v Patel* [1999] 3 All ER 673.
22. See *Stevens v Canada (Privy Council)* (1998) 161 DLR (4th) 85; *Descôteaux v Mierzwinski* [1982] 1 SCR 860, (1982) 141 DLR (3d) 590; *Solosky v Canada* [1980] 1 SCR 821, (1980) 105 DLR (3d) 745; *Re Director of Investigation and Research and Canada Safeway Ltd* (1972) 26 DLR (3d) 745.
23. See *ESSO Australia Resources Ltd v Dawson* [1999] FCA 363, (1999) 162 ALR 79; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121; Baker v Campbell (1983) 153 CLR 52
24. *Rosenberg v Jaine* [1983] NZLR 1.
25. (1980) 105 DLR (3d) 745, 760.
26. *Cf Descôteaux v Mierzwinski* [1982] 1 SCR 860, 871, (1982) 141 DLR (3d) 590, 601, where it was described by Lamer J as a "personal and extra-patrimonial right" and *ESSO Australia Resources Ltd v Dawson* [1999] FCA 363, para. 14, where the Federal Court of Australia said that the privilege "is not merely a rule of evidence but a basic principle of the common law: a principle which transcends the normally predominant principle that all rational means for ascertaining the truth should be employed in the curial process".
27. [1997] 1 IR 558, 575, [1997] 2 ILRM 296, 311 (quoting in both cases the statement to that effect of Lord Taylor CJ in *R v Derby Magistrates' Court, ex parte B [*1996] AC 487, 507, [1995] 4 All ER 526, 540-41. A similar view had been taken by the Supreme Court on appeal in *Quinlivan v Governor of Portlaoise Prison*, Supreme Court, 5 March 1997, with Hamilton CJ saying that the privilege had "always been regarded by the courts as absolutely essential and of paramount importance in the
28. Supreme Court, 5 March 1997.
29. [1994] 2 IR 54, 59.
30. Cf ESSO *Australian Resources Ltd v Dawson* [1999] FCA 363, para. 14, where the Federal Court of Australia opined that the absence of the privilege "would significantly undermine the proper functioning of the adversarial system of justice".
31. Wigmore, *Evidence* (3rd ed.), V, °1367.
32. See *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd* [1990] 1 IR 469, 476, [1990] ILRM 588, 593.
33. Cf the comments of Bingham LJ in *Ventouris v Mountain* [1991] 3 All ER 472, 475: "The doctrine of legal professional privilege is rooted in the public interest, which requires that hopeless and exaggerated claims and unsound and spurious defences be so far as possible discouraged, and civil disputes so far as possible settled without resort to judicial decision."
34. Pursuant to § 5 of the Code of Conduct for the Bar of Ireland, a barrister is, *inter alia*, obliged to act at all times with courtesy to the court before which he or she is appearing and to use his or her endeavours in every case to avoid unnecessary expense and waste of the court's time. In addition, he or she must not knowingly deceive or mislead the court, must not coach a witness and must, in civil cases, ensure that the court is informed of any relevant decision on a point of law or any legislative provision of which he or she is aware immediately in point whether it is for or against his or her contention.
35. In *IPLG v Fry*, High Court (Lardner J) 19 March 1992, it was held that a solicitor is an officer of the court and the court, thus, has an inherent jurisdiction to supervise a solicitor's conduct and to discipline him for misconduct. See further, Patrick O'Callaghan, *The Law on Solicitors in Ireland* (Butterworths: Dublin, 2000), § 1.06 ff.
36. *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 649 (per Jessel MR); *Greenough v Gaskell* (1833) 1 My & K 98, 103.
37. But see the view of Advocate-General Warner in *AM & S Europe Ltd v Commission* [1983] 1 All ER 705, 721, who pointed out that legal professional privilege was not expressly protected in the Convention or in the constitution of any member state and that while it was a right that was generally recognised, he did not think that it was a fundamental human right.
38. See *Macauley v Minister for Posts and Telegraphs* [1966] IR 345 and *Murphy v Greene* [1990] 2 IR 566, [1991] ILRM 404
39. See *State (Healy) v Donoghue* [1976] IR 325.
40. (1992) 16 EHRR 97.
41. Previously, in S. v *Switzerland* (1992) 14 EHRR 670, it had been held that the ability to communicate in confidence with a lawyer of one's choice without those communications being intercepted was one of the basic requirements of a fair trial in a democratic society and was protected by Article 6(3)(c) of the Convention which guarantees the right of a defendant to obtain legal assistance in criminal trials.
42. (1993) 15 EHRR 137.
43. *Ibid* at 160.

AN BORD PINSEAN -
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THE PENSIONS ACT, 1990
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DISCOVERY THE NEED FOR STRICT COMPLIANCE WITH THE 1999 RULES

Ian Kavanagh BL considers the implications of the recent decision of the President of the High Court in Swords v. Western Proteins which insists upon early and strict compliance with the new requirements of RSC Order 31 rule 12

Introduction

The huge increase in the role of discovery in the litigation process has not been without problems: most notably the growth in the number of unnecessary court applications making exorbitant claims for irrelevant documentation. These difficulties have served to undermine both the original purpose of discovery and the effectiveness of the process. Express recognition of this fact by the courts precipitated changes in the Rules of the Superior Courts in 1999 in an attempt to control these developments. The effectiveness of those changes, however, is clearly dependant on how they are applied and interpreted by the courts. The recent decision in *Swords v. Western Proteins*[1] offers the first real opportunity to see the effect of the new provisions. It is argued here that the decision in that case, while in the long term providing a strong incentive to comply with the rules, goes too far in that it creates uncertainty as to the courts' jurisdiction to deal with discovery applications, undermines the role of the Master of the High Court and, in the short term, militates against the original purpose of the discovery process.

Background: The Growth in Discovery

While a motion for discovery is now usual in most litigation it is arguable that the usefulness of such motions has in fact diminished as the original purpose of the process has been lost sight of. In *Allied Irish Banks PLC v. Ernst and Whinney*,[2] O'Flaherty J described the purpose of discovery as being "to help to define the issues as sharply as possible in advance so that the actual hearing is allowed to take its course as smoothly as possible." Clearly this implies a saving of time and costs. Applications now, however, are frequently either ill-considered or poorly prepared. Unnecessary applications to court have served to draw attention away from the issues in a case and to prolong and protract preparations for hearing. In addition there are instances where discovery has been used as an opportunity to mount fishing expeditions or simply as a delaying tactic. These have served to clog the courts, have added hugely to the cost of litigation, and have failed signally to advance the cause of justice.

There has also been a huge increase in the scale and density of discovery. There exists a natural urge to err on the side of caution in drafting applications for discovery and to seek as much documentation as one reasonably can. Furthermore there is a peculiar brand of paranoia which accompanies any attempt to narrow down the documents requested. Consequently, the job of identifying the discovery sought can appear somewhat unattractive. This initial reluctance can be paralysing to the extent that the requisite time and thought are not given over to drafting the application and isolating what is strictly required. As a consequence, the volume of documents increases and difficulties frequently arise, while the parties avoid each other in attitudes of mutual mistrust. It falls ultimately to the courts, at the cost of considerable time, to decide the outcome.

The courts have sought to curtail, as Kelly J. puts it, "this tendency towards excess in discovery",[3] holding that a party cannot claim discovery which could prove oppressive for the party against whom discovery is ordered, say, for example, by placing an excessive demand on its time or manpower, and, in the *Allied Irish Banks* decision, that to use discovery to swamp an opposing party with masses of material is as much an abuse of the process as it is to withhold relevant information.[4]

The Superior Courts Rules Committee has also made efforts to check such developments and to reduce the amount of the courts' time taken up by discovery, most notably in 1993.[5] But notwithstanding those attempts the problems have continued to increase. As remarked by Kelly J, "the trend in recent years has been for discovery to become increasingly protracted, expensive and cumbersome. It would appear that the saving of costs, which was one rationale underpinning the development of the discovery procedure, has been occasionally overlooked in the evolution of the procedure."[6]

These remarks followed the decision in *Brooks Thomas Ltd v. Impac Ltd*[7] where Lynch J observed that "the delay in obtaining a trial from 1990 to not before 1999 all stems from the parties seeking discovery of documents, which seems to me to have been quite unnecessary, instead of getting on with the case and achieving finality in the High Court in 1990."[8] He went on to state that "in view of the trend in modern times to seek

discovery in almost every case, the Superior Court Rules Committee might consider changing Rule 12 (1) so as to require an affidavit before discovery is ordered."

The Changes to the Rules

The Rules Committee acted on this invitation to change the rules though they went beyond the recommendation of Lynch J. The Rules of the Superior Courts (No 2) (Discovery), 1999, S.I. No. 233 of 1999 require the following.

(1) A letter requesting voluntary discovery must specify the precise categories of documents required and must furnish the reasons why each category of documents is required.

(2) The Notice of Motion for Discovery must specify the precise categories of documents required.

(3) The Notice of Motion shall be grounded on affidavit of the party seeking discovery verifying that the discovery is necessary either for disposing fairly of the cause or matter or for saving costs[9], and furnishing the reasons why each category of documents is required.

This was a clear attempt to adjust the rules so as to compel applicants to give greater thought to the drafting of discovery applications and, in so doing, to encourage agreement being reached without the need for the intervention of the courts. Two other matters are noteworthy. First, the main emphasis of the changes seemed to be on the requirement to file an affidavit[10] identifying precise categories of documents[11] and giving reasons why such documents were necessary. Secondly, the changes themselves were seen as indicative of something of a shift in the attitude of the judiciary to the discovery process.[12] The full effect of these changes was at first slow to make itself clear. Non-compliance did not seem fatal, even at the cost of redrafting a Notice of Motion or Grounding Affidavit. It proved difficult, however, to predict with confidence what reception an application for an order for Discovery would receive before the Master notwithstanding the fact that, in terms of the problems the Rules Committee were trying to address, some advance seemed to have been made.

The Decision in *Swords v. Western Proteins*

Swords v. Western Proteins came before the President of the High Court on appeal from an order of the Master requiring Discovery to be made, *inter alia*, of "... Accident report form and all documents relation to the reporting and investigation of the accident in which the Plaintiff was involved up to the 1 st October 1997 when the Defendant was made aware of the Plaintiff's intention to bring legal proceedings arising out of the accident."

The case concerned personal injuries allegedly sustained in an accident at work. There had already been some correspondence between the parties. The plaintiff's solicitors had written seeking voluntary discovery, *inter alia*, of the 'accident report book/record details' relating to the incident. The defendant's solicitors responded pointing out that "the Master of the High Court has indicated that the is not prepared to make orders for discovery herein (sic) unless the person seeking the Discovery has outlined, not only the precise nature of the documents he or she requires but the reasons he or she requires them. Accordingly any application for Discovery brought by you in this regard will be resisted."

In replying, the plaintiff's solicitors stated that they would have assumed that the reason for discovery was 'self evident' and informed the defendants that they were preparing a court application. The motion for discovery was dated 9 June 2000 and was grounded on an affidavit sworn by the plaintiff's solicitor on 10 March 2000. At the hearing the Master adjourned the case so as to allow the plaintiff's solicitors to file a supplementary affidavit. In that supplementary affidavit the documents required were further specified and the reasons why discovery was required were stated to be so as "to prove the Defendant's state of knowledge at the time and its negligence as particularised in the second, third, and fourth paragraph of the Particulars of Negligence."

The main point before the High Court was whether or not the Master could make an order for discovery if Order 31 rule 12 (4) (1) (a)-(c) was not complied with. Order 31. r. 12 (4) (1) reads as follows:

> An order under subrule 1 directing any party or under rule 29 directing any other person to make discovery shall not be made unless:
> (a) the applicant for same shall have previously applied by letter in writing requesting that discovery be made voluntarily, specifying the precise categories of documents in respect of which discovery is sought and furnishing the reasons why each category of documents is required to be discovered; and
> (b) a reasonable period of time for such discovery has been allowed; and
> (c) the party or person requested has failed, refused or neglected to make such discovery or has ignored such request.
>
> Provided that in any case where by reason of the urgency of the matter or consent of the parties, the nature of the case or any other circumstances which to the Court seem appropriate, the Court may make such order as appears proper, without the necessity for such prior application in writing.[13]

The President began by examining the purpose of the Statutory Instrument, saying:

> "...I am satisfied that the amendment to Order 31 Rule 12 was made for the purpose of addressing a problem which had given rise to delays and potential injustices over a number of years. A practice had developed whereby Orders for discovery were obtained unnecessarily and such orders delayed litigation. As has been pointed out by the Courts on a number of occasions discovery before the advent of the photocopying machine, fax, e-mail and word processors would probably involve the discovery of a dozen documents. In recent yeas the number of documents discovered can amount to many thousands and the process has become unmanageable." [14]

He then identified what was required of an applicant seeking discovery under the changed rules:

> "...Statutory Instrument 223(sic)[15] of 1999 imposes a clearly defined obligation upon a party seeking discovery to pinpoint the documents or category of documents required and requires that party to give reasons why they are required. Blanket discovery is a thing of the past. The new rule was brought into being to ensure in the first

instance that the party against whom discovery was being sought, upon receipt of the preliminary letter, be in a position to know the document or category of documents referred to and be able to exercise a judgement on whether the reasons given for requiring these documents to be discovered was valid. He would then be in a position to know if he was required to comply with the request. If he disputed his obligation to make discovery the court would know by reference to this letter precisely why the moving party sought the documents in question and the grounds upon which the moving party believed that the documents sought to be discovered, might help to dispose fairly of the cause or save costs."

Morris P then turned his attention to the effect of non-compliance with the rules:

"In my view if the letter of application does not comply with the rules then the issue is not identified and there is no power vested in the Master to make a determination on any issue. This is so even where an elaborate Affidavit is filed in support of the application. I am satisfied that in the particular circumstances in which this Statutory Instrument came into existence that the Master derives his jurisdiction to determine the issues which arise between the parties from the identification of the issues in the Applicant's originating letter or letters." [16]

On the facts the President was satisfied that there had 'not been any effort made to specify the precise category of documents sought' and that any elaboration in the Master's order was 'not justified'. Moreover, he was equally satisfied that there had been a failure to furnish reasons why each of these categories was required to be discovered, both in the original letter of the 29th November and in the reply to the letter from the Defendants bringing the problem specifically to their attention. Morris P concluded:

"It follows from the foregoing that the jurisdiction to make an Order for Discovery is confined to circumstances in which the Master is of the opinion that there has been a compliance by the Applicant with Order 31.12.(4)(1). On appeal to this court the jurisdiction is so limited. I am of the opinion that there has been a failure on the part of the Applicant[17] to comply with the Orders and Rules and accordingly there is no jurisdiction vested in me to make the Order sought and I accordingly refuse the application." [18]

The Basis of the Decision

While the result of the decision in Swords seems wholly desirable given the apparent failure on the part of the applicants to comply with the rules, there may be some concern over the reasoning employed by the High Court. In effect the President found that as a matter of law the jurisdiction of the Master to order discovery is founded upon compliance with Order 31.12. (4)(1) or, in other words, that the letter seeking voluntary discovery setting out the required documents and the reasons why they are necessary is a condition precedent to the Master having jurisdiction "to make a determination on any issue."[19] This is all the more evident as it would seem from the judgment that no efforts made in the grounding affidavit will be able to cure any defect in the letter.[20] It is submitted here that this finding is unsustainable given the final paragraph of Order 31 r.12. (4)(1), not adverted to by the President in the course of his judgement, which provides:

Provided that in any case where by reason of the urgency of the matter or consent of the parties, the nature of the case or any other circumstances which to the Court seem appropriate, the Court may make such order as appears proper, without the necessity for such prior application in writing.

It is submitted that it is impossible that a requirement be a condition precedent to jurisdiction where the instrument imposing that requirement goes on to set out four distinct circumstances in which that requirement can be waived and the relief requested granted.

The Effects of the Decision

The *Swords* decision affirms the need when seeking discovery to specify precise categories of documents and to give reasons. It also makes clear that it is crucial in an application for this to be done at the very outset: the grounding affidavit cannot cure a defect in the voluntary-discovery letter. If this is not done it seems that the Master has no jurisdiction. Notwithstanding the clear rationale of Morris P's decision and its appreciation of the problems accompanying the growth in discovery, it is submitted that the reasoning employed goes too far and, in practice, will do little to alleviate the present situation.

In its aftermath the main affect of the decision was that the Master found that he was deprived of jurisdiction where the voluntary discovery letter failed to comply with the rules. Accordingly, he declined to hear numerous applications for discovery and instead sent them on for hearing to the Judges' Motions List. At hearing in the Judges' List, however, the matters were heard in the normal manner and the jurisdiction to make an order was assumed to exist. As a consequence the net effect was little more than that the applications were delayed by the time it took to move from the Master's List to the Judges' List and then dealt with in the 'usual' way.

The *Swords* case itself was an appeal from a decision of the Master. Having found that the Master had acted without jurisdiction Morris P held that his jurisdiction was also so limited. However, even in the ordinary run of things there is little to suggest that the High Court enjoys any jurisdiction beyond that of the Master in relation to applications to discovery: in fact, the position is quite the opposite.[21] The effect of this would be to suggest that a considerable number of orders for discovery made by the High Court were made without jurisdiction to do so. This raises a genuine question as to whether they would now be vulnerable to challenge. At the very least it leaves uncertain the origin of jurisdiction to deal with discovery matters.

Clearly a balance has to be struck between, on the one hand, attacking the growth in unnecessary discovery applications by enforcement of the rules and, on the other, ensuring that the discovery procedure is made as serviceable as possible. The purpose of the letter seeking voluntary discovery is to encourage the parties to agree the terms of discovery without

the necessity of the Court's participation or, where this proves impossible, to narrow the issues so as to allow a realistic assessment of the view a court might take and thereby expedite matters towards settlement. At the very least it isolates the dispute between the parties so as to allow the Court to reach a decision without having to spend time unnecessarily answering wholly unrealistic applications. While there is a growing trend for the terms of discovery to be more carefully considered in the affidavit grounding the application, the letter ensures that this be the case from the very outset. Yet for all its value, it seems inappropriate that the letter seeking voluntary discovery should go to the issue of jurisdiction.

Irrespective of the significance of this potential uncertainty the *Swords* case has the additional effect of undermining the role of the Master of the High Court in the discovery process. This is regrettable bearing in mind the traditional function of the Master's Court in reducing the pressure on the Judges' List by dealing with various applications. This is particularly so in the light of the comparatively recent extension of the Master's powers.[22] Taking one rationale behind the changes to the rules as being to reduce the need for intervention by the courts, it seems paradoxical that the position of the Master, formerly a line of defence for the courts in avoiding quasi-administrative decisions, should be compromised. It can only have the effect of increasing the burden of discovery applications falling to be decided by the courts. In addition, in the short term, by-passing the Master to get to the Judges' list will surely lead to further costs, delay and waste of time for the parties to litigation. Consequently, by virtue of the manner chosen to enforce the rules the discovery procedure has been made less effective and more time consuming.

It is submitted here that where the letter seeking voluntary discovery is inadequate, then no order should be granted save where the application can be brought within one of the four categories set out in the final paragraph of rule 12 (4)(1). Non compliance, however, should not go to the issue of jurisdiction as this, in effect, binds the hands of the judge hearing the application and, as a consequence, goes no farther to resolving the matter of discovery as between the parties. If, however, the letter is to go to jurisdiction, it is contended that faulty applications of this kind should not be forwarded to the Judges List but should be returned to the applicants until they can show that compliance has taken place. As things stand the main result is that the role of the Master of the High Court in such applications has been severely undermined. This seems to ignore the rationale, not just behind discovery, but behind the function of the Master.

Practice & Procedure

In practice *Swords v. Western* Proteins represents a significant incentive to comply with O.31 r.12.[23] It is hard to see how the Master may avoid applying the decision and where the rules are not complied with motions for discovery are destined for the Judges' List. The effect of compliance is that lawyers are required to give consideration to discovery matters long before any motion seeking an Order from the Master. The advantage of this is, however, that any subsequent motion and grounding affidavit should be in the same terms as the original letter.

It should also be noted that where voluntary discovery is agreed between the parties and is not made within the time agreed this agreement will have the same effect as if directed by an order of the Court, provided that,[24]

(a) voluntary discovery was being sought pursuant to Order 31 rule 12 sub-rule 4,

(b) the agreement required voluntary discovery to be made in like manner and form and to have such effect as if directed by order, and

(c) failure to make discovery might result in an application pursuant to rule 21.[25]

In these circumstances one can overcome the need to apply to the courts: the assent of the other side to voluntary discovery may prove to be as effective as, and less time consuming than, a court order.

Where discovery is being sought in a situation where the letter seeking voluntary discovery fails to comply with the rules it would seem arguable that the Master may still make an order where the application can be shown to fall between the four situations set out in the final paragraph of rule 12(4)(1), namely: the urgency of the matter; the consent of the parties; the nature of the case or; other circumstances which to the court seem appropriate. From a procedural point of view an argument to this effect might perhaps be best deposed within the grounding affidavit though there is no reason why it should not be made orally. While the grounds appear narrow, the consent of the parties may perhaps be able to eliminate something of the delay and uncertainty created by the judgement in *Swords*. The fact that this paragraph was not considered in the judgment at least leaves open to the Master a finding as to whether he may grant a 'consent' order in this fashion.

There remains, however, a procedural stumbling block, which principally raises a question over the jurisdiction of the Master to make an order, and secondly, leaves some uncertainty as to the corresponding jurisdiction of the High Court in such matters. Ultimately this may leave applicants powerless to prevent further delay and additional applications.

Conclusion

The growth in discovery cannot be underestimated. In order to preserve its usefulness this growth must be closely monitored so as to reduce unnecessary and excessive claims and to minimise the necessity for the courts to be involved in what should be almost an administrative process. The changes in the rules attempt to do this by encouraging parties to agree voluntary discovery and, to that end, require that discovery now be of specific categories of documents for which reasons for discovery are given. The reasoning employed in *Swords* seems, however, to lose sight of the original purpose of discovery. The issue of jurisdiction serves only to create uncertainty in the process. Depriving the Master of the High Court of jurisdiction appears to play counter to the aim, as evidenced by the rules, of streamlining the procedure. Furthermore, in the short-term, the decision will create further delay and additional expense for the parties and obscure the substantive disputes. It may only be when the Judges' List becomes swollen with applications for discovery that the reasoning may fall to be re-examined. From a practical point of view, it is submitted, the sooner this happens the better.[26]●

1. Unreported, High Court (Morris P.), 29 November 2000
2. [1993] IR 275, at 398
3. *The New Discovery Rules of the Superior Courts* - A Talk Delivered by Mr Justice Peter Kelly to the Dublin Solicitors Bar Association, 22 March 2000 at page 3 of the typescript
4. [1993] 1 IR 375, at pp.395-397 (Kelly J's original footnote)
5. S.I. No. 265 of 1993 introduced a requirement that, before applying to the Court for discovery: (i) a party seeking discovery seek voluntary discovery, (ii) that a reasonable period of time for discovery be allowed, and (iii) the party or person requested has failed, refused or neglected to make such discovery or has ignored the request.
6. At page 2 of the typescript
7. [1999] ILRM 171
8. At page 177 of the report
9. The 'old' R.12 (3) of O. 31 stated 'An order shall not be made under this rule if and so far as the court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.' This, coupled with the requirement that documents be relevant, now seems to be the test as to whether or not an item may be discoverable: see the judgement of Lynch J. in *Brook Thomas v. Impac* (supra).
10. This brings inter-party discovery into line with non-party discovery under O.31, r.29, inter-party discovery of specific documents under O.31, r.20(3) and applications for further and better discovery. It should be noted that the changes in the rules only apply to inter-party discovery.
11. Thus it is no longer open to a party to seek blanket discovery of 'all relevant documents in the possession, power and control of the respondent, his servants or agents'. It is, however, still possible to seek an order of general discovery where a category of documents can be identified though their specific contents or composition is unknown to the applicant.
12. See Brady, *The New Discovery Rules*, Bar Review, November 1999 at page 58.
13. It seems that in *Swords* counsel for the Respondent conceded that, on the facts of the case, this proviso was not applicable. As a consequence, its effect did not fall to be considered and it is not referred to in the judgment of Morris P. The decision of McKechnie J on 19 February 2001 in Greene v Instrulec Services Ltd, in which an approved judgment is awaited, now seems to indicate that the proviso does confer jurisdiction where the Court chooses to so exercise its discretion.
14. At page 7 of the judgment
15. This seems to be a misprint in the judgment. Reference should be to S.I. 233 of 1999.
16. At page 9 of the judgment
17. Reference here is to the original applicant. An appeal of this kind from the Master to the High Court Judges List is an appeal de novo. It can also be noted that as a consequence, procedurally, the original applicant, as opposed to the 'appellant', goes first.
18. At page 12 of the judgment
19. At page 9 of the judgment
20. *supra*
21. Part V Section 25 of The Courts and Courts Officers Act, 1995 states that '...the Master of the High Court may, in all such applications made *ex parte* or by motion on notice whether interlocutory or otherwise and in all such applications for judgment by consent or in default of appearance or defence as may from time to time be allocated for hearing by the Master of the High Court by the President of the High Court, exercise all the functions, powers and jurisdiction which a judge of the High Court exercises from time to time.'
22. *Supra*
23. It is to be remembered that in the Circuit Court there is no requirement to write seeking voluntary discovery: Order 29. r.1 of the 1956 Rules. In the District Court such a letter is now required by virtue of S.I. 285/99, however one does not have to set out reasons why discovery is sought.
24. Ord.31 r.12 (4)(3).
25. Ord. 21 renders a party who fails to comply with an order liable to attachment; beit a plaintiff to have his action dismissed for want of prosecution; beit a defendant to have his defence struck out.
26. My thanks are due to Cormac Clancy BL for his views on the *Swords* decision.

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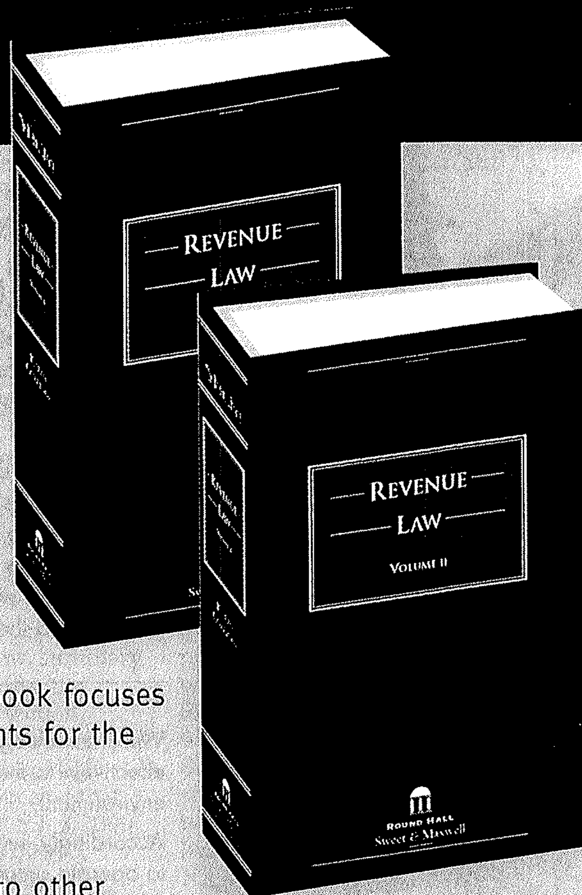
Kieran Corrigan



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Legal Update

The BarReview
Journal of the Bar of Ireland. Volume 6, Issue 5

A directory of legislation, articles and written judgments received in the Law Library from the 16th January 2001 to 9th February 2001.
Judgment information compiled by the Legal Researchers, Judges Library, Four Courts.

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Jason Stewart, LL.B, B.C.L (Oxon.)

Administrative Law

Brennan v. Director of Public Prosecutions
High Court: Ó Caoimh J.
01/12/2000

Administrative; judicial review; applicant had been charged under the Larceny Act; at preliminary examination to take depositions in District Court applicant's solicitor had withdrawn from the case; applicant had been refused adjournment to obtain fresh legal representation and not allowed consult with witness subpoenaed by co-accused; applicant seeks order of prohibition and/or injunction directed at DPP prohibiting further prosecution of the applicant; whether District Court Judge had acted improperly in not allowing applicant consult with witness; whether the applicant had in all circumstances been deprived of a fair trial.
Held: Application refused.

Eastern Health Board v. Farrell
High Court: **Geoghegan J.**
14/12/1999

Administrative; judicial review of coroner's inquest; deceased died from aspirational pneumonia; deceased's family contended that this cause of death arose from the deceased's mental handicap which was in turn caused by an encephalopathic reaction to the three-in-one vaccine he received as a child; no death certificate was completed and the respondent directed an inquest; whether the respondent, in carrying out an investigation into a possible indirect link between the death and the three-in-one vaccine administered at infancy, was in breach of s.30, Coroner's Act, 1962.
Held: Declaration granted; coroner should investigate what is the real and actual cause of death.

Gorman v. Minister for the Environment
High Court: **Kelly J.**
07/12/2000

Administrative; road traffic; High Court had quashed S.I. 3/2000 on certiorari in earlier proceedings [see below, summary of **Humphrey v. Minister** for the Environment, Road Traffic section, *infra*]; first and third applicants, who had been respondents in the earlier High Court *certiorari* case, had appealed that order to the Supreme Court; S.I. 3/2000 had been replaced by S.I. 367/2000, which itself revoked S.I. 3/2000; application for leave to apply for judicial review; application made *inter partes* by order of the Court; whether S.I. 367/2000 improperly interfered with applicants' entitlement to have their appeal disposed of, since there was nothing left to be dealt with by Supreme Court; whether new S.I. amounted to an impermissible interference with the judicial power; whether new S.I. constituted an unlawful interference with property rights; whether new S.I. was unreasonable or irrational; whether new S.I. had been made without sufficient compliance with the rules of natural justice.
Held: Leave granted; quaere whether a higher standard of proof than that described by Supreme Court in G. v. D.P.P. [1994] 1 I.R. 374 should apply to an inter partes application for leave to apply for judicial review; per curiam grant of leave does not hinder, impede or prevent the continued operation of impugned S.I.

O'Ceallaigh v. An Bord Altranais
Supreme Court: Denham J., **Murphy J., Barron J., Hardiman J., Geoghegan J.**
17/05/00

Judicial review; natural justice; preliminary decision; four stage disciplinary procedure under s. 38, Nurses Act, 1985; whether there is an obligation to apply the requirements of natural justice at the first stage; whether a decision to hold an inquiry affects the person the subject of the complaint; whether the decision to hold an inquiry is analogous to the decision of the DPP whether or not to prosecute; whether the disciplinary procedure would be stultified if there was an obligation to notify persons against whom complaints had been made at the initial stage; s.44, Nurses Act, 1985 permits the Board to short circuit the normal s. 38 procedure and to apply to the High Court for an order in relation to the person against whom the complaint has been made with a view to protecting public against immediate danger posed by the person; whether person entitled to hearing before application to High Court is made.
Held: Relief in relation to s. 38 granted; decision whether or not to hold an inquiry into the fitness to practice of a professional person is in itself a very serious matter which can affect the person and as a result the principles of natural justice apply; relief in relation to s. 44 refused; Board is entitled to decide to apply to the High Court for an order without reference to the particular nurse in question.

Kennedy v. Law Society of Ireland
High Court: **Kearns J.**
05/10/1999

Administrative; judicial review; investigation of applicant solicitor's practice by the Law Society pursuant to Article 29, Solicitors' Accounts Regulations (SI No. 304 of 1984); applicant became aware that the investigating accountant was seeking a large number of files rather than simply sampling on a random basis for verification and vouching of financial records; evidence disclosed that the Law Society had another agenda, namely the investigation of the possibility of fraudulent claims; whether the Solicitors' Accounts Regulations, 1984, contain authority for such an investigation; whether the Charter of the Law Society provides authority for such an investigation; whether the investigation of fraudulent claims is either the dominant purpose of the investigation or, in the alternative, an irrelevant consideration prompting the investigation.
Held: Where an instance of fraud is uncovered in the accounts and records of a solicitor, the investigation accountant has the right and duty to explore any area of possible fraud which may be reasonably connected with the fraud found in the books; an investigation under the 1984 Regulations should not be impugned unless it can be shown that the investigation of the books and records was merely a colourable device or cover for the pursuit of some unauthorised or improper considerations; a reasonable connection does exist in this case; the extended investigation is a proper one within the meaning of the Solicitors' Accounts Regulations, 1984; the Charter of the Law Society does not authorise this form of investigation; the power can only come from regulations and the general law; there is no requirement that the Law Society must establish a *prima facie* case before it can commence an investigation of a solicitor under the 1984 Regulations; the evidence does not disclose an absolute duty of disclosure to the subject matter of an investigation where fraud is suspected; as the investigation was authorised by the 1984 Regulations, no claim of client privilege can be raised; as the investigation is still at the preliminary stage, no issue can arise concerning the Applicant's rights under *In Re Haughey* [1971] IR 217; the Respondent did not usurp the jurisdiction of the Disciplinary Committee of the Law Society; the investigating accountant did have adequate qualifications and experience within the meaning of the 1984 Regulations; the investigating accountant was properly approved and appointed by the Respondent; the investigating accountant was not, in her report, guilty of any behaviour which could invalidate her report on the grounds that it lacked objectivity to independence; relief refused.

Sheriff v. Corrigan
Supreme Court: Keane C.J., **Denham J.**, Barron J.
15/02/2000

Administrative; judicial review; applicant had been assistant chief prison officer; applicant had written letter in official correspondence; letter had referred to colleague as "scab"; apology had been made by applicant after two years; assistant prison governor had made recommendation to Minister for Justice that applicant be demoted; applicant had been asked for his representations as to proposal of demotion; applicant had been downgraded to prison officer; High Court had refused relief; applicant appeals to Supreme Court; whether requirements of natural justice complied with; whether recommendation by assistant governor a breach of fair procedures.
Held: Appeal dismissed.

Toner v. Ireland
High Court: **Kinlen J.**
11/02/2000

Judicial review; natural justice; continuance in service of men of the Permanent Defence Force on completion of contract; conduct rating of good or higher required to meet standard required for continuance; on the basis of his rating a decision had been taken to allow applicant to continue in service; subsequently applicant convicted of offence; applicant's conduct rating revised down and on completion of applicant's contract his conduct did not meet standard required for continuance; whether initial decision to permit the applicant to continue in service could be revoked; whether respondents should have notified applicant of revision of rating; whether applicant should be allowed to amend his statement of grounds; Defence Force Regulations.
Held: Relief refused; continuance in service was processed before completion of the contract for administrative reasons; however, continuance did not come into effect on date it was issued but on completion of the contract; conduct rating could validly be revised in the intervening period.

Article

No minister!
O'Hanlon, Niall
13 (2000) ITR 559

Statutory Instruments

Appointment of special adviser (no. 5) order, 2000
SI 376/2000

Place-names (Irish forms) (transfer of departmental administration and ministerial functions) order, 2000
SI 413/2000
Public enterprise (delegation of ministerial functions) order, 2000
SI 399/2000

Roads regulations, 2000
SI 453/2000

Agency

Article

The liability of agents
Walsh, Anthony
Galvin, Turlough
13 (2000) ITR 582

Agriculture

Statutory Instrument

European communities (introduction of organisms harmful to plants or plant products) (prohibition) (amendment) (no. 3) regulations, 2000
SI 434/2000

Aliens

Iordache v. The Minister for Justice
High Court: **Morris P.**
30/01/2001
Aliens; judicial review; immigration; respondent seeking discharge of granting to applicant of leave to apply for judicial review of deportation order made by respondent against applicant; whether fact that a case has been considered on an *ex parte* basis and a view thereon has been formed should be a bar to respondent's application; whether failure on respondent's part to comply with terms of Convention Relating to Status of Refugees 1951; whether respondent obliged to determine the applicant's application in the light of the status of Romania and its alleged failure to protect rights guaranteed under the Convention; whether granting of an order of *Mandamus* compelling the State to

bring proceedings against Romania under the Convention contravenes principle of separation of powers.
Held: Order granting the applicant leave to apply for judicial review discharged; claim discloses no reasonable cause of action and proceedings are frivolous and vexatious.

Kanaya v. Minister for Justice, Equality and Law Reform
High Court: **Murphy J.**
21/03/2000

Administrative law; immigration; applicant, a Japanese national, purportedly intending to study in Ireland, refused leave to land in Dublin and detained pending deportation on foot of two notices issued by respondent's agent; first notice asserted applicant's intention to take up employment in the State without a valid work permit; second notice stated that the applicant was not in a position to support himself and that he was to be detained pending deportation; applicant seeks order of *certiorari* quashing the orders of the immigration officer contained in the two notices, an injunction restraining the respondent from deporting the applicant from the State, an order of mandamus requiring the respondent to release the applicant from detention and damages for wrongful detention; applicant released pending current hearing; whether discretionary powers granted to immigration officer by ministerial order so "wide and unfettered" as to be *ultra vires* the powers granted to the respondent by the relevant legislation and comprised an unconstitutional delegation of legislative power; whether agent of respondent had acted reasonably in issuing notices; whether failure of respondent to make any regulation or give any direction in relation to the information which every person landing or embarking in the State shall furnish to an immigration officer denied the applicant natural and constitutional justice and deprived him of fair procedures; respondent admitted that a. 5, Aliens Order, 1946, is invalid as having been made under s. 5(1)(a), Aliens Act, 1935, and thereby constitutes an unconstitutional delegation of legislative power; Art. 15.2 of the Constitution; a. 14(2) of the Aliens Order, 1946.
Held: Relief refused.

Aviation

Statutory Instruments

Consumer information (advertisements for airfares) order, 2000
SI 468/2000

Irish aviation authority (fees) order, 2000
SI 433/2000

Banking

Statutory Instrument

ICC bank act, 2000 (commencement) order, 2000
SI 396/2000

Building and Construction

Article

Liability in negligence for defective buildings: accrual of the cause of action
Stack, Siobhan
2000 ICPLJ 87

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Consumer Law

Statutory Instrument

Consumer information (advertisements for airfares) order, 2000
SI 468/2000

Contract

Bergin v. Farrell
High Court: **Carroll J.**
17/12/1999

Contract; specific performance; plaintiffs claim specific performance of four agreements; plaintiffs agreed with the defendant that for securing planning permission for the development of the defendant's land they would be paid for their professional services; whether plaintiffs are entitled to be paid on a professional basis.
Held: First named plaintiff would be adequately compensated for all work undertaken by a further payment of £20,000 plus £6,000 plus VAT; second named plaintiff would be adequately compensated by a further payment of £10,000 plus £6,000 without VAT.

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13th edition
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Copyright and related rights (librarians and archivists) (copying of protected materials) regulations, 2000
SI 427/2000

Coroners

Statutory Instrument

Coroners act, 1962 (fees and expenses) regulations, 2000
SI 429/2000

Costs

Bula Limited v. Taxing Master of the High Court
High Court: **McGuinness J.**
07/03/2000

Administrative; judicial review; motion to review; taxation of costs; whether open to applicants to bring judicial review proceedings where alternative remedy was available; whether a self-contained administrative scheme with regard to the taxation of costs had been provided under Order 99 RSC, Rule 38(3); whether duplication had occurred in the apportionment of costs; whether the first-named defendant had erred in his various decisions; whether decisions were unjust; s.27 Courts and Court Officers Act 1995.
Held: Reliefs refused; manner of taxation suitable matter for judicial review; expenses of the twelfth named defendant also a witness in the action to be returned to the first-named defendant for recalculation; no fault in assessment of costs of State defendants as against Bula plaintiffs.

Criminal Law

D.P.P. v. R. O'D.
Court of Criminal Appeal: **Geoghegan J.**, O' Sullivan J., Finnegan J.
25/05/2000

Criminal; sexual offences; applicant pleaded guilty to 10 counts of rape, buggery and indecent assault perpetuated upon his sisters; victims requested that accused not be given custodial sentence; D.P.P. applies for review of sentences on ground of leniency; defendant appeals against custodial aspects of sentences imposed; both matters dealt with together; whether fact that defendant receiving effective rehabilitative treatment should be considered when imposing sentence; whether there was a public interest in converting defendant into a permanently law abiding citizen where that seemed highly probable; whether appropriate to suspend sentences unconditionally.
Held: Appeal allowed; application for review refused; entirety of each of sentences imposed suspended conditionally; maintenance of family harmony to some extent a public interest especially having regard to value which Constitution places on the family; application refused strictly on condition that defendant complete rehabilitation course.

People (D.P.P) v. Corbally
Supreme Court: Keane C.J., Denham J., Murhpy J., Hardiman J., **Geoghegan J.**
15/12/2000

Criminal; bail; appellant seeking bail pending the hearing of an application for leave to appeal against conviction; point of law certified as to the appropriate principles upon which the Court of Criminal Appeal should grant bail to a convicted person who has sought leave to appeal or being granted leave to appeal; whether there is a discrete ground of appeal in the case, the strength of which can be assessed in advance of a full hearing.
Held: Bail should be granted to convicted persons where the interests of justice require it; appeal dismissed.

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Statutory Instrument

Extradition act, 1965 (application of part II) order, 2000
SI 474/2000

Customs and Excise

Statutory Instrument

Customs-free airport (extension of laws) regulations, 2000
SI 430/2000

Damages

Sherry v. Smith
High Court: **Johnson J.**
20/12/2000

Assessment of damages; road traffic accident, for which plaintiff 75% liable and defendant 25% liable; plaintiff suffered cuts and soft tissue injury in accident and developed mallet finger; plaintiff continues to suffer pains in shoulder, right forearm and back and is unable to avail of recommended physiotherapy due to nature of his occupation.
Held: general damages of £25,000.00 together with £3,610.00 special damages awarded; plaintiff entitled to 25% of award, together with costs.

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Education

Statutory Instrument

Education act, 1998 (commencement) (no. 3) order, 2000
SI 495/2000

Employment

Harkins v. Shannon Foynes Port Company
High Court: **O'Sullivan J.**
29/01/2001

Employment; injunctions; plaintiff claims that position of Harbour Engineer advertised by defendant has been his own job with defendant for several years; whether plaintiff has made out a case for trial that defendant's proposal would entail him having to accept less beneficial conditions of service within the contemplation of s.39(1) Harbours Act, 1996; whether on balance of

convenience it would unduly frustrate the legitimate purposes of defendant to set out a description of position, which demonstrates clearly that position will not intrude on plaintiff's functions.
Held: Order granted prohibiting the defendant from advertising the position unless and until such advertisement makes clear that the position involves no overlap with the functions of the plaintiff's position.

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SI 428/2000

Employment regulation order (hotels joint labour committee), 2000
SI 400/2000

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Article

Fiscal state aid
Craig, Adam
13 (2000) ITR 573

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W86

Goyder, Joanna
EU distribution law
3rd edition
Bembridge Palladian Law Publishing 2000
W110

Evidence

Browne v. Tribune Newspapers Plc.
Supreme Court: **Keane C.J.**, Denham J., Geoghegan J.
24/11/2000

Evidence; defamation; libel; defendants published an article purporting to give an account of circumstances surrounding shooting incident which occurred when court order being enforced; plaintiff was detective superintendent of the garda siochßna in charge of district in which incident occurred and unsuccessfully issued proceedings against defendants claiming damages for libel in the High Court; whether trial judge erred in law in permitting cross-examination by counsel for defendant on matters which were not relevant to the assessment of damages or to credit, but which could have been seriously prejudicial to plaintiff; whether trial judge adequately directed jury in relation to whether plaintiff neglected to take steps which might have averted incident; whether trial judge fully and fairly put plaintiff's case to jury; whether trial judge failed to fairly and adequately direct jury following the asking of questions by foreman prior to their retirement; whether trial judge's intervention in cross-examination by plaintiff's counsel was legitimate and had a critical effect on jury's deliberations.
Held: Appeal allowed; new trial on all issues ordered.

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Hollander, Charles
Documentary evidence
7th edition
London Sweet & Maxwell 2000
N392

Extradition

Quinlivan v. Conroy
High Court: **Kelly J.**
14/04/2000

Extradition; conspiracy; escape from custody; four warrants issued in United Kingdom; warrants issued prior to 5th April 1994; District Court had ordered that applicant be delivered into custody of relevant police forces; applicant now seeks relief by way of special summons and by way of judicial review; whether warrants related to political offences or to offences connected with a political offence; whether there was correspondence of offences; whether request for extradition defeated by delay; whether there were other exceptional circumstances which would render it unjust to deliver the applicant under the Act; Extradition Act, 1965; Extradition (European Convention on the Suppression of Terrorism) Act, 1987; whether 'Good Friday' agreement made extradition redundant.
Held: Applications dismissed.

Statutory Instrument

Extradition act, 1965 (application of part II) order, 2000
SI 474/2000

Family Law

McA v. McA
High Court: **McCracken J.**
21/01/2000

Judicial separation; divorce; whether parties have "lived apart from one another" for the period required by the Family Law (Divorce) Act, 1996; whether parties could be said to be living apart from one another even though they live in the same house; whether intention or mental attitude of parties is a relevant matter; financial matters including periodical payments and a lump sum payment.
Held: Decree of Divorce granted; financial orders made.

Statutory Instrument

Maintenance allowances (increased payment) regulations, 2000
SI 394/2000

Fisheries

Maxwell v. The Minister for the Marine and Natural Resources
High Court: **McCracken J.**
13/12/2000

Fisheries; action for annulment of fishing bye-law; whether necessary to hold enquiry or consultation before enactment of bye-law; whether failure to hold such consultation was unfair and failed to take into account the constitutional right to earn a livelihood.
Held: Action dismissed.

Statutory Instruments

Blue whiting (prohibition on fishing) (revocation) order, 2000
SI 466/2000

Celtic sea (prohibition on herring fishing) (no. 2) order, 2000
SI 467/2000

Cod (prohibition on fishing) order, 2000
SI 482/2000

Cod (restriction on fishing) (no. 11) order, 2000
SI 481/2000

Common sole (prohibition of fishing in ices divisions VIIF and VIIG) (no.2) order, 2000
SI 484/2000

Common sole (restriction of fishing in the irish sea) (no.3) order, 2000
SI 485/2000

Fisheries acts, 1959 to 2000 (payment in lieu of prosecution) regulations, 2000
SI 463/2000

Haddock (prohibition on fishing) order, 2000
SI 483/2000

Hake (prohibition on fishing)order, 2000
SI 479/2000

Hake (restriction on fishing) (no. 9) order, 2000
SI 478/2000

Mackerel (restriction on fishing) (revocation) order, 2000
SI 465/2000

Monkfish (restriction on fishing) (no. 12) order, 2000
SI 477/2000

Plaice (control of fishing in ICES divisions VIIf and VIIg) (no. 3) order, 2000
SI 480/2000

Wild salmon and sea trout tagging scheme (amendment) regulations, 2000
SI 464/2000

Gaming and Betting

Statutory Instruments

Greyhound race track (totalisator) (operating) amendment regulations, 2001
SI 3/2001

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SI 442/2000

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SI 454/2000

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Information Technology

Article

A new tax package
Bale, Norman
13 (2000) ITR 603

Injunctions

Murphy v. ACC Bank
High Court: **O'Sullivan J.**
04/02/2000
Interlocutory application; plaintiff dismissed on grounds that his activities were in breach of normal banking practice; plaintiff contends that he was dismissed in breach of fair procedures; whether plaintiff entitled to interlocutory injunction restraining dismissal until question of fair procedures is decided; whether substantial case to be tried; whether balance of convenience lies in favour of granting relief; undertaking as to damages.
Held: Interlocutory relief granted

Insurance Law

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SI 472/2000

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SI 473/2000

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Negligence

Geoghegan v. Harris
High Court: **Kearns J.**
21/06/2000

Medical practitioner's duty of disclosure of risks attending operative procedures; whether risk was a known or reasonably foreseeable consequence of the operative procedure; whether there was a requirement to warn, regardless of the remoteness of the risk and the views of medical experts that a warning was not required; if the appropriate warning had been given would the patient have elected to undergo the procedure; whether the test of causation is objective or subjective; whether the plaintiff was in the category of 'inquisitive patient' to whom a special duty was owed.
Held: The risk was a 'known complication' and as a result a warning was required; the test of causation is generally objective; however, where there is clear and convincing evidence as to what the particular patient would have elected to do the Court should take a subjective approach; there is no category of 'inquisitive patient' in Irish law because of the onerous obligations already imposed on practitioners.

Wolfe v. St. James's Hospital
High Court: **Barr J.**
22/11/2000

Medical negligence; plaintiff died while in-patient in respondent hospital; had been discovered in post-mortem examination that cause of death was species of abdominal tumour; plaintiff had been suffering from tumour at all material times; plaintiff had undergone treatment in hospital at various times from March 1989 until death in April 1991; whether in light of the evidence the tumour ought to have been diagnosed or discovered; whether a medical practitioner of equal status and skill if acting with ordinary care would have diagnosed tumour; whether cluster of symptoms which were known or ought to have been ascertained by the team of doctors in the respondent hospital should have put them on notice of tumour and required further investigation; whether hospital procedures were such as to give rise to vicariously liability.
Held: Treating doctor not negligent, hospital negligent in failing to fully investigate symptoms of plaintiff.

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Davies, Anton
13 (2000) ITR 543

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Coras Iompair Eireann pension scheme for regular wages staff (amendment) scheme (confirmation) order, 2000
SI 428/2000
Occupational pension schemes (external schemes) (United Kingdon) regulations, 2000
SI 469/2000

Occupational pension schemes (schemes with external members) (United Kingdom) regulations, 2000
SI 470/2000

Planning

Costigan v. Laois County Council
Supreme Court: Denham J., Murphy J., **Hardiman J.**
07/04/2000
Planning; judicial review; respondent had provisionally decided commercially to zone land owned by applicant; having taken legal advice from counsel, respondent had decided not to proceed to amend draft development plan; High Court had dismissed applicant's claim for various reliefs; whether respondent had unlawfully delegated its decision making power to counsel; whether decision of respondent vitiated by certain alleged misdeeds of County Manager; whether High Court had been misled by respondent's evidence on affidavit.
Held: Appeal dismissed.

Mongan v. South Dublin County Council
High Court:**Ó Caoimh J**.
13/10/2000

Planning; judicial review; local authorities; thirteen horses belonging to the applicant were seized by the respondent within its functional area, but detained in a pound outside it; whether the detention of horses was in accordance with s.37(3) of the Control of Horses Act, 1996; whether, having regard to s.39(2) of the Act, certain charges in respect of horse's upkeep levied by respondent in excess of those which may be imposed by it on applicant, where respondent has not shown charges in accordance with bye-laws made by another local authority, in whose functional area the horses were held.
Held: Relief refused; charges levied by respondent in excess of permitted limits.

Village Residents Association Limited v. An Bord Pleanala
High Court: **Laffoy J.**
05/05/2000

Planning; judicial review; development plan; respondent had granted planning permission to McDonalds for development of a standard McDonalds restaurant; permission had originally been refused by planning authority on ground, inter alia, that grant would have amounted to a material contravention of development plan; respondent had not invoked its powers under s. 14 (8) of the Local Government (Planning and Development) Act, 1976; whether respondent had given adequate reasons for decision.
Held: Application dismissed.

Waddington v. An Bord Pleanala
High Court: **Butler J**.
21/12/2000
Planning; judicial review; planning permission had been granted for a 100 metre riverside quay in 1996; site of development abutted a special protection area under European regulations; environmental impact statement had accompanied application for development; quay had been built; respondent had granted planning permission for extension of quay; applicant seeks order of *certiorari* quashing respondent's decision to allow extension; whether respondent ought to have required submission of additional environmental impact statement for extension; whether respondent had acted irrationally.
Held: Application refused.

Article

The provision of emergency accommodation for travellers
Hughes, Edward C
2000 ICPLJ 90

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SI 1/2001

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SI 458/2000

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SI 449/2000

Planning and development (no. 2)regulations, 2000
SI 457/2000
Roads regulations, 2000

SI 453/2000

Practice and Procedure

Minister for Agriculture, Food and Forestry v. Alte Leipziger
Supreme Court: **Keane C.J.***(*dissenting), **Barron J**., Murray J., McGuinness J., **Hardiman J.**
14/04/2000

Practice and procedure; final or interlocutory order; if order is interlocutory a party is entitled to adduce further evidence by way of affidavit without special leave; contract of insurance dispute; jurisdiction of court contested; High Court held that court had jurisdiction; appealed to Supreme Court and further affidavits filed without leave of court; whether judgment and/or order of High Court on question of jurisdiction was an interlocutory order or a final order; O. 58 r. 8.
Held: Order of High Court on question of jurisdiction is a final order; further affidavits can be admitted only on special grounds with leave of court.

Charlton v. H.H. The Aga Khan's Studs Société Civile
High Court: **Budd J**.
22/02/2000

Practice and procedure; contempt; allegations had been made against plaintiff about improper use of defendant's resources; injunction had been granted to restrain enquiry into disciplinary matters until trial; plaintiff had received letter requesting discussion into missing files; plaintiff granted order restraining defendant from attempting to conduct any such discussion; plaintiff had reported for work; despite High Court orders, defendant's agent had raised issue of

files; agent had made it clear that he intended to suspend plaintiff in absence of innocent explanation for file deletion; whether contempt of court; whether use of words "attempted" or "intended" in plaintiff's affidavits indicated that no actual contempt alleged; whether plaintiff had delayed in bringing case to trial; whether suspension of pay on grounds of delay could be justified.
Held: Defendants in breach of court orders; both orders to remain in place; defendant responsible for majority of delay; court expressed strong disapproval of defendant's conduct.

Hot Radio Co. Limited v. I.R.T.C.
Supreme Court: **Keane C.J.**, McGuinness J., Geoghegan J. (ex tempore)
14/04/2000

Practice and procedure; High Court had granted an order of security for costs in favour of respondents against applicant, a limited company with no assets; costs had been measured at full estimated amount of costs; applicant's appeal to Supreme Court; whether High Court had erred in considering that although applicant had no assets those who were associated therewith did; whether applicants could be equated with public service litigants in the matter of security for costs; whether High Court had power to order that full measure of projected costs be paid by way of security; Companies Act 1963, s. 390.
Held: Appeal dismissed; while security sufficient in all the circumstances to be just will not necessarily be complete security, complete security may be ordered where to do so will not stifle the action.

Simple Imports Ltd. v. Revenue Commissioners
Supreme Court: Barrington J., **Keane J.**, Barron J.* (*dissenting).
19/01/2000

Judicial review; *certiorari;* validity of warrants issued by District Court judges; claim had been dismissed in High Court; appeal to Supreme Court; whether there was evidence before the District Judge to justify the issue of the several warrants; whether customs officer had reasonable grounds for suspicion that goods were on premises; whether warrants disclosed that District Judge had reasonable cause for believing that customs officer had such suspicion; whether exercise of jurisdiction to issue warrants had been properly conveyed in words of warrants, i.e, whether warrants good on their face.
Held: Appeal allowed; warrants did not indicate that suspicion of customs officer that goods were on premises was a reasonable suspicion.

Swords v. Western Proteins Limited
High Court: **Morris P.**
29/11/2000

Practice & Procedure; discovery; appeal from order of Master to make discovery within six weeks; plaintiff's solicitors had written asking for discovery of a class of documents; defendant had responded stating that letter did not state precise nature of the documents required and the reason for which they were required; motion for discovery had been initiated by plaintiffs based on affidavit sworn by plaintiff's solicitors; Master had adjourned case for the purpose of allowing plaintiff's solicitors to file a supplemental affidavit; whether plaintiff's solicitor's letter had properly identified category of documents and reasons required pursuant to SI 223 of 1999; whether within jurisdiction of Master to give plaintiff an opportunity to file a supplemental affidavit to enable him to comply with the Rules of Court; whether Master had jurisdiction to adjourn matter for purpose of filing supplemental affidavit.
Held: Application refused.

Article

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Stack, Siobhan
2000 ICPLJ 87

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SI 416/2000

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SI 418/2000

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SI 419/2000

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SI 420/2000

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SI 421/2000

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SI 422/2000

District court districts and areas (amendment) and variation of days and hours (Bunclody and Enniscorthy) order, 2000
SI 423/2000

District court districts and areas (amendment) and variation of days and hours (Wexford) order, 2000
SI 424/2000

District court districts and areas (amendment) and variation of days and hours (Mhuine Bheag) order, 2000
SI 425/2000

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SI 426/2000

Killarney urban district boundary alteration order, 2000
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Killarney urban district boundary alteration (supplementary) order, 2000
SI 452/2000

Property

Library Acquisition

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Records and Statistics

Statutory Instrument

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SI 436/2000

Refugees

Library Acquisition

Refugee acts and regulations 1996-2000
Compiled by Victoria Wray
Updated to December 2000
C205.C5.Z14

Road Traffic

Humphrey v. Minister for the Environment
High Court: **Murphy J.**
13/10/2000

Administrative law; European Community law; road traffic; licensing of small vehicles for hire; first and second-named respondents had proposed by Statutory Instrument 3/2000 to increase number of taxi licences in Dublin and Dundalk by granting an extra licence to each existing licence holder; first-named respondent had conferred power on fifth-named respondent (Dundalk UDC) to vary fees and to vary taximeter boundaries within its functional area; fifth-named respondent had purported to vary fees in relation to taximeter area of that Council; applicants seek a declaration that proposed Statutory Instrument is *ultra vires* the first and second-named respondents, a declaration that conferral of power on fifth-named respondent to vary fees and taximeter boundaries was *ultra vires* the first-named respondent and a declaration that decision of fifth-named respondent to vary fees and taximeter boundaries was *ultra vires* that body; orders of *certiorari* and injunctive relief also sought; whether delay had precluded challenges to statutory instruments predating S.I. 3/2000; whether "control and operation", as appears in parent Road Traffic legislation extended to numerical or quantitative control; Road Traffic (Public Service Vehicles) Regulations, 2000; ss. 5 and 82, Road Traffic Act, 1961, as amended by s. 57, Road Traffic Act, 1968.
Held: Reliefs granted; delay precluded challenges to pre-S.I. 3/2000 instruments; "control and operation" extends to numerical or quantitative control, but Minister could not fetter his discretion in the exercise of that control; Minister could not exclude persons from working in an industry for which they may be perfectly well qualified; per curiam, proposed scheme infringed Articles 12 and 86 EC.

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Statutory Instrument

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Social Welfare

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Taxation

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Bale, Norman
13 (2000) ITR 603

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13 (2000) ITR 569

No minister!
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Howarth, D H
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Kelly, Gillian
Post traumatic stress disorder and the law
Dublin Round Hall Sweet & Maxwell 2000
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Tribunals

Sole Member of the Tribunal of Inquiry into Certain Planning Matters and Payments v. Lawlor
Supreme Court: **Keane C.J.**, Murphy J., McGuinness J., Geoghegan J., Fennelly J. (ex tempore)
24/11/2000

Tribunal of inquiry; Tribunal of inquiry into planning matters had made on order of discovery against defendant which required, inter alia, that defendant attend before the Tribunal at a sitting in public to give evidence in relation to documents and records mentioned in the order; High Court had upheld Tribunal's order; defendant appeals to Supreme Court; whether Tribunal, in an investigative phase of its tasks, should sit in public; whether defendant was sufficiently on notice of matters in respect of which questions would be put to him publicly before the Tribunal; s. 2, Tribunals of Inquiry Evidence Act, 1921.
Held: Appeal dismissed; Tribunal must respect constitutional rights but, subject to that rider, courts must afford it a significant measure of discretion to ensure that its aims are not frustrated.

Wills

Library Acquisitions

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Hawkins on the construction of wills
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Sunnucks, J H G
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Tristram and Coote's probate practice
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SI 393/2000
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[DIR 89/107, 94/34, DIR 94/35, DIR 96/83, DIR 94/36, DIR 95/31, DIR 98/66, DIR 95/45, DIR 99/75]
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European communities (internal market in electricity) regulations, 2000
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Information compiled by Damien Grenham, Law Library, Four Courts.

1/2000 Comhairle Act, 2000
Signed 02/03/2000
1. SI 167/2000 = *(Commencement)*

2/2000 National Beef Assurance Scheme Act, 2000
Signed 15/03/2000
1. SI 130/2000 & SI 415/2000 *(Commencement)*

3/2000 Finance Act, 2000
Signed 23/03/2000

4/2000 Social Welfare Act, 2000
Signed 29/03/2000

5/2000 National Minimum Wage Act, 2000
Signed 31/03/2000
1. SI 95/2000 / SI 201/2000 = (Rate Of Pay)
2. SI 96/2000 = *(Commencement)*
3. SI 99/2000 = *(Courses/Training)*

6/2000 Local Government (Financial Provisions) Act, 2000
Signed 20/04/2000

7/2000 Commission To Inquire Into Child Abuse Act, 2000
Signed 26/04/2000
1. SI 149/2000 = (Establishment Day)

8/2000 Equal Status Act, 2000
Signed 26/04/2000
1. SI 168/2000 (Section 47 *Commencement)*
2.SI 351/2000 (Brings Into Operation Whole Of The Act)

9/2000 Human Rights Commission Act, 2000
Signed 31/05/2000

10/2000 Mulilateral Investment Guarantee Agency (Amendment) Act, 2000
Signed 07/06/2000

11/2000 Criminal Justice (United Nations Convention Against Torture) Act, 2000
Signed 14/06/2000

12/2000 International Development Association (Amendment) Act, 2000
Signed 20/06/2000

13/2000 Statute Of Limitations (Amendment) Act, 2000
Signed 21/06/2000

14/2000 Merchant Shipping (Investigation Of Marine Casualities) Act, 2000
Signed 27/06/2000

15/2000 Courts (Supplemental Provisions) (Amendment) Act, 2000
Signed 28/06/2000

16/2000 Criminal Justice (Safety Of United Nations Workers) Act, 2000
Signed 28/06/2000

17/2000 Intoxicating Liquor Act, 2000
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18/2000 Town Renewal Act, 2000
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Signed 05/07/2000

20/2000 Firearms (Firearm Certificates For Non-Residents) Act, 2000
Signed 05/07/2000

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23/2000 Hospitals' Trust (1940) Limited (Payements To Former Employees) Act, 2000
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Signed 10/07/2000

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Signed 10/07/2000
1. SI 404/2000 *(Commencement)*
* See Iris Oifigiuil 02/02/01*

29/2000 Illegal Immigrants (Trafficking) Act, 2000
Signed 28/08/2000
1. SI 266/2000 (Commencement)**30/2000** Planning And Development Act, 2000
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38/2000 Wildlife (Amendment) Act, 2000
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Signed 20/12/2000

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Signed 20/12/2000

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Signed 20/12/2000
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Signed 20/12/2000
1. SI 472/2000 *(Commencement)*

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1/2000 The Trinity College, Dublin (Charters And Letters Patent Amendment) Act, 2000
Signed 06/11/2000

ABBREVIATIONS

BR= Bar Review
CIILP= Contemporary Issues in Irish Politics
CLP= Commercial Law Practitioner
DULJ= Dublin University Law Journal
GLS= Gazette Society of Ireland
IBL= Irish Business Law
ICL= 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

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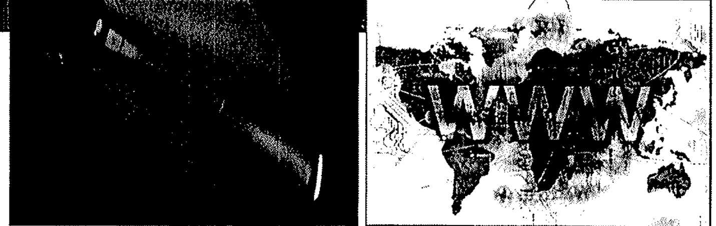

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Prospective tenders shall submit the following:

- Details of relevant training courses delivered over the last twelve months including details of course title, duration and numbers involved.
- Details of the organisation's turnover and capacity to deal with large volumes of training at short notice.
- Details of the organisation's management structure, the background and experience of trainers.
- Confirmation of ability to deliver training at your facilities, our premises, or at locations outside Dublin.
- Evidence of Tax Clearance Certificate.

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The address to which the application should be sent to is:

Mr Eugene Lucey,
Training Manager,
Training Branch,
3rd Floor, D'Olier House,
D'Olier Street,
Dublin 2.

Website http://www.revenue.ie

THE COPYRIGHT RELATED RIGHTS ACT 2000

Terence Coghlan BL reviews the principal provisions governing the scope of protected works under the new consolidated copyright code.

Introduction

The Copyright and Related Rights Act 2000 ("the Act"), virtually all of which came into force on 1 January 2001 (SI 404 of 2000), provides a comprehensive and state of the art legal framework for the protection of copyright in this jurisdiction. Protection under the Act for literary, dramatic, musical and artistic works which were previously governed by the now repealed (save for s.59) Copyright Act 1963 ("the 1963 Act") are principally considered below as well as some new protections for computer programs and original databases.

Subsistance of Copyright

Section 17 of the Act states that copyright is a property right, which provides statutory confirmation of the position of the Irish courts that copyright falls within the provisions governing private property contained in the Constitution. As stated by Keane J (as he then was) in considering the 1963 Act, which was silent on the point, in *PPI .v. Cody & Princes Investment Limited*:-

> "The right of the creator of a literary, dramatic, musical or artistic work not to have his or her creation stolen or plagiarised is a right of private property within the meaning of Articles 49.3.2 and 43.1 of the Constitution". [1]

It appears that section 17 of the Act, in affirming that copyright is a property right, duplicates the provisions of the recent U.K. Copyright Designs & Patents Act 1988 ("the U.K. Act").[2] It is thus the protection of rights and not the protection of objects whether tangible or intangible which is important. For instance the owner of a picture or a book is not necessarily the owner of a right to reproduce or publish the work. Even if a painting is destroyed it cannot subsequently be copied without permission. It is submitted that both the legislature and the Courts would be better served to treat copyright as a *sui generis* right quite independent of property rights and not subject to compliance and conformity with other legal or constitutional obligations relating to private property.

Originality

Under the Act copyright will subsist in "original literary, dramatic, musical or artistic works."[3] As in the 1963 Act the word "original" is undefined and we are left to rely on case law.

Even prior to its inclusion in copyright legislation originality was held to be an essential requirement by the Courts although the threshold for establishing originality is not high. For example, in a case concerning a reporter who took notes of a speech delivered in public by the Earl of Rosebury which were then published in a newspaper, very little original thought or intellectual creation went into compiling the report of the speeches but the Law Lords were of the opinion that an original work had been created. It has since been held that the requirement of originality introduced by the 1911 Copyright Act and subsequent legislation did not herald a change in the law.[4] Original skill or labour in the execution of the work is the requirement rather than originality of thought. Copyright is given to the works rather than the ideas.

Literary Works

The Act states that copyright will subsist in "original literary works". A literary work is defined as "a work, including a computer program, but does not include a dramatic or musical work or an original database which is written, spoken or sung".[5] Thus, a computer program is expressly included as a literary work for the first time.

The Courts in the U.K. and Ireland have consistently held that the standard required for a work to be considered as a "literary work" is an extremely low one and is indeed a work which is expressed in print or writing, irrespective of the question of whether the quality or style is high. The word "literary" seems to be used in a sense somewhat similar to the use of the word "literature" in political or electioneering literature and refers to written or printed matter. [6]

The matter of originality has proved particularly contentious in relation to literary works. It has been held that both the selection and contents of a diary information section consisting of various tides and sunrise/sunset tables were held not to be original:

"One of the essential qualities of such tables is that they be accurate so that there is no question of variation by way of skilled labour or judgment in what is selected". [7]

In Ireland it has been held that in the case of a T.V. Guide, if the materials were assembled in an original composition involving time, labour and skill on the part of the author, copyright would flow therefrom. In such case where the Defendants were publishers, etc., of a magazine which published details of the Plaintiff's radio and television schedules it had been argued that the list of times and titles were simply information about programmes and not capable as being the subject matter of copyright and which had been put into the public domain by publication of the RTE Guide. The Judge rejected this argument holding that any list of times and titles of programmes which originated from and were created by RTE were released to the press and to some magazines on certain defined conditions which in the Judge's words were "designed to sustain their claimed copyright". [8]

The U.S. Supreme Court has considered the question of whether there is copyright in facts in the *Feist* case. In this case, Rural Telephone Company published a Telephone Directory which was given out free but earned income in advertising. Feist, a publisher, produced alternative directories and was able to license subscriber information from 11 companies but was unsuccessful in its approach to Feist. Both companies were competing for the same advertising and the advantage of the Feist Directory was that it covered larger areas than those supplied by the phone company. Although Rural had refused permission Feist went ahead and copied Rural's Directory.

The U.S. Supreme Court refused to grant copyright protection and stated that "to a Court copyright protection (to facts) distorts basic copyright principles in that it creates a monopoly in public domain materials."

The *Feist* case is hard to reconcile with decisions in the U.K. and Ireland. The U.S. Supreme Court has made the distinction between creation and discovery. For original literary works to subsist for the purpose of attracting the protection of copyright, they must be "founded in the creative powers of the mind...they are the fruits of intellectual labour."

In the recent case of *Gormley.v. EMI Records (Ireland) Limited* the Irish Supreme Court had to decide a case involving a contribution on a tape recording in which it was disputed as to whether the contribution constituted an original literary work. The Plaintiff had been a pupil at a school in the 1960's where a teacher had recited stories from the Bible to the children. The teacher then asked individual children to recount various stories which were recorded on tape. Many years later the teacher was persuaded to allow the tape recording to be used on a commercial recording made by the Defendant. The Plaintiffs contribution was not sought and she claimed entitlement to copyright as a literary work under Section 8 of the 1963 Act. The Plaintiff also submitted that the trace on the magnetic tape amounted to a notation.

Barron J. refused to hold that the contribution amounted to a "literary work":

"Nevertheless, proper construction of the provision must allow other material form to apply also to literary work. Nor is there any distinction in principle between taking down speech in shorthand and recording it on tape. Yet in my view the symbol which comprises the notation must be capable without more of being understood. This is not so with a magnetic trace. As a result it is not entitled to protection as a literary work. Nor does such a conclusion based as it is on the absence of material form breach the provisions of the Berne Convention."

This finding appears to be a rather restrictive interpretation of the 1963 Act which provides in Section 3(4) that literary work be reduced to "writing or some other material form" and "writing" is defined by Section 2(1) of that Act as including "any form of notation." Following the passing of the Act, the Gormley decision might be decided differently as the Act states that copyright subsists in a "literary work" which means "a work...which is written, spoken or sung."

Barron J. also held that there was copying of material and that the necessary skilled labour and judgment necessary to create a truly new work had not been shown. He found that there could be no copyright in a well known plot or story because there was nothing original in it and though the treatment of the original by copying same might result in protection being granted he could not so find on the facts of the case before him:-

"In the present instance where does originality lie? It does not lie in the story. It lies in the way the story is being explained. Assuming that the language of the child is different it is still the telling of the same story in the same way. It does not in so doing change the original nature of the story nor add anything which is original. The child has copied what she has been told albeit that she has put some or all of it into her own language."

In deciding that there was no originality the learned Judge seems to be departing from existing case law in these Islands which have held that, providing always that work is not copied, originality will be held to exist even though there is very little creative input by the author.

The case also raises questions as to the use of the Plaintiffs voice on tape without any authorisation. It may be that if a case were taken today the Plaintiff might be protected under chapter 7 of the Act which deals with moral rights. (Paternity rights, etc).

Computers and Databases

The directive on the legal protection of computers[9] gives protection to a computer program if it is the author's own intellectual creation and furthermore specifies that no other criteria particularly qualitative or aesthetic merits of the program shall go towards determining whether or not a computer program is an original work. We have seen that literary work is defined as "a work, including a computer program... which is written spoken or sung." A "computer program" is itself defined as "a program which is original in that it is the author's own intellectual creation and includes any design materials used for the preparation of the program."[10] The extent of the intellectual creation necessary to provide copyright protection will no doubt be tested before the Courts. Most programmes are derived in part from an existing computer programme. The EC Directive on the legal protection of databases provides that copyright protection should be accorded to databases. Again, the Directive stipulates that the only criteria to be applied in determining whether protection would be allowed is that the selection or arrangement of the contents of the database constitute the author's own intellectual creation. The Act provides that

copyright subsists in original databases. An original database is defined as meaning "a database in any form which by reason of the selection or arrangement of its contents constitutes the original intellectual creation of the author." [11]

Authorship

The Act defines "author" as "a person who creates a work."[12] No definition of this expression is given.

Included as "author" are various other categories such as the producer in the case of a sound recording and the principal director in the case of a film.[13] In the case of a work which is computer generated the author is "the person by whom the arrangement is necessary for the creation of the work undertaken."[14] Thus, a human author is sought for computer generated works whereas in reality this does not appear to be practical. A computer programme may arise from a complex interchange of software products used by a company and, therefore, to seek to give copyright entitlement in respect of such works to a human author does not really seem appropriate. As has been pointed out "not only is the question of authorship and thus ownership affected but also there is the problem understanding how a computer generated work could satisfy the requirement of originality under the Act". 15 The Act does appear, however, to be in compliance with the EC Computer Software Directive which provides that:-

> "The Author of a computer programme shall be the natural person or group of natural persons who have created the program." [16]

Dramatic Works

The Act provides that copyright subsists in original dramatic works.[17] A dramatic work is not defined specifically but it is stated that such a work "includes choreographic work or a work of mime" and interestingly unlike the 1963 Act does not require such works to be reduced to writing in the form in which the work or entertainment is to be presented.

A case dealing with the interpretation of a dramatic work within the meaning of the U.K. Act involved circumstances where a Plaintiff had sent a film of a man dancing to music making extensive use of "jump cutting" which is an editing process whereby the editor removes pieces from the original film to give the viewer the impression of the actor engaging in successive movements which in reality could not have been performed. Neither the film or the actor were used but the Defendant used the technique in making a Guinness advertisement. It was held that the film per se could not be a dramatic work which was something that existed apart from the film even if the film was the only formula in which it was recorded. Because of the drastic editing process "it was not a recording of anything that was, or could be performed or danced by anyone." The submission had been made by the Defendants that "to be a dramatic work a work had to be or be capable of being physically performed." [18]

This decision seems a rather restrictive interpretation of a "dramatic work" and it is possible that an Irish Court might well decide such a case differently as coming within a "choreographic work or a work of mime."

Musical Work

A "musical work" in the Act is defined as "a work consisting of music but does not include any words, or action intended to be sung, spoken or performed with the music." Mutual exclusivity of "literary work" and "musical work" should be noted. However, a "dramatic work" which includes a work of dance or mime does not exclude "a musical work" in its definition. We are thus left contemplating what constitutes "music." The following would appear to be an accurate description of an original musical work:-

"An original musical work is in general the product of the mind of a human author which is intended to be performed by the production of a combination of sounds to be appreciated by the ear for reasons other than linguistic content, the originality of the work resulting from the exercise of substantial independent skill, judgement, or creative labour expended on its creation as opposed to its mere interpretation". [19]

In the past the Courts have given a liberal interpretation to "music" and this practice would be expected to continue as the Act does not make any significant changes.

Artistic Works

The Act gives a greater definition to "artistic work" than to literary, dramatic, or musical works by including under the heading of "artistic works" such works as "photographs, paintings, drawings...etchings, lettergraphs...collages, or sculptures." Consequently there is a broader range of subject matter than under the 1963 Act. Also included are (a) works of architecture, (b) either buildings or models for buildings and (c) works of artistic craftsmanship.

Provisions in both the Irish and British legislation relating to artistic craftsmanship have exercised the Courts in the U.K. and Ireland. The 1963 Act along with the English legislation held that there should be some unspoken criteria of artistic quality. This is because the words "irrespective of artistic quality" have not heretofore been used in relation to "artistic craftsmanship" whereas they are used in respect of paintings, sculptures, photographs, architecture and buildings, etc. The difficulties were exemplified in a case before the House of Lords in which the Law Lords, although unanimously deciding that a particular suite of furniture could not constitute a work of artistic craftsmanship took entirely different methods individually to reach such a conclusion. [20]

The Act in its definition of artistic work states that it "includes the work of any of the following descriptions, irrespective of their artistic quality." Included unlike the U.K. legislation or the 1963 Act are "works of artistic craftsmanship." Therefore, a different form of reasoning will have to be used in deciding what constitutes a work of artistic craftsmanship irrespective of artistic quality. The Act may create more problems than those it seeks to solve in this regard.

A Work

The Act does not define what constitutes a "work." It is important to remember, however, that the subsistence of copyright derives

in an "original literary work" or "original artistic work." In other words, it is the complete composite phrase that must be used when seeking to establish whether work can be afforded the protection of copyright.
It is particularly in relation to literary works that problems may arise as to what constitutes a work. A literary work is "written, spoken or sung." The word "Exxon" is written and spoken but was held not to be a "work" as it conveyed no "information, instruction or pleasure." [21]

The Courts have used expressions such as "skilled judgement and labour" or "labour, skill and capital" as requirements to be expended by an author in creating a work. These phrases have been used to show that "not only must creative intellectual activity produce the right kind of work but the input must satisfy a certain minimum standard of effort." [22] There is surely an argument for suggesting that sufficient labour, skill and time, etc., went into creation of the word "Exxon" and it may well be that an Irish Court might decide such a case differently. The same could be said for cases involving titles and slogans.

Fixation

Copyright does not subsist in any work until that work takes some material form. The requirement of fixation is necessary to provide certainty as to the actual subject matters so as one is able to prove both the existence of the work and what is actually comprised in that work. The principle of fixation is referred to in both the Berne Convention and the Rome Convention. The requirement of fixation under the 1963 Act is expressed in the definition of what constitutes an original, literary, dramatic or musical work. owever, the Act acknowledges fixation for those works as a separate requirement:-

> "Copyright shall not subsist in a literary, dramatic or musical work or an original database until that work is recorded in writing or otherwise by or with the consent of the author". [23]

As can be seen, this is a wide definition to include "writing or otherwise." Artistic works do not have a specific requirement as to fixation but the nature of an artistic work and indeed its definition in the Act require in actual fact that it be in a material form. The Act differs from the U.K. Act in that a recording in writing or otherwise under the Act is "with the consent of the author." The U.K. Act makes it clear that the work may be recorded for the purposes of fixation by someone other than the author whether the author has consented or not. It would appear to fix copyright once the copyright is recorded in order that anyone claiming any form of copyright interest in the work can be granted immediate protection on publication.

Conclusion

The Act seems to harmonise the law of copyright particularly having regard to EU Directives particularly relating to the protection of computer programs and databases. The duration of copyright which exists until "seventy years after the death of the author, irrespective of the date in which the work is first lawfully made available to the public" is also in conformity with EU law. Further Conventions such as the Berne Convention for the protection of literary and artistic works are adopted, subject to qualification, in the Third Schedule of the Act.The Act should go a long way towards achieving a statutory framework for copyright suitable for the needs of the 21st century. In particular the provisions which relate to information technology should be of great assistance in letting people know their entitlements to protection or otherwise. However, in relation to literary artistic works, etc. we should still be left with a great deal of reliance by the Courts on interpretation of what will be deemed worthy of protection. Phrases such as "skill or labour expended in its creation" and "information, instruction or pleasure" will still be important criteria. The Courts will have to wrestle with finding a threshold for a work of artistic craftsmanship irrespective of artistic quality. We should bear in mind that copyright by its very nature is both constantly changing and ephemeral and therefore consequently not suited to statutory exactitude. There would also appear to be several interests to be considered such as the rights of the individual to exclusive use of his or her creation, economic rights including fair use and competition, moral rights, and the rights of the public to enjoy literary works and works of art, etc., in the public domain for social and recreational purposes. A rigid statutory framework could result in injustice, and it is consequently preferable to retain the law of copyright in a loose statutory form subject to development and refinement of the law by decision of the Courts in accordance with the common law tradition from which our law of copyright has developed to date.●

1. [1994] ILRM 241
2. Copyright Designs & Patents Act 1988, section 1
3. Section 17(2)(a)
4. *Express Newspapers Plc. .v. News (U.K) Limited*
5. Section 2
6. *University of London Press Limited .v. University Tutorial Press Limited* [1916] 2 CH 601.
7. *University of London Press Limited .v. University Tutorial Press Limited* [1916] 2 CH 608.
8. *RTE .v. McGill TV Guide Limited* [1999] ILRM 534
9. Council Directive 91/250/EEC
10. Section 2
11. Section 17(2)(d)
12. Section 2
13. Section 21
14. Section 21(f).
15. Copinger & Skine James on Copyright (1999), vol. 1
16. Article 2(1)
17. Section 17(1)
18. *Norowzian .v. Arks Limited,* The Times, 17 July 1998.
19. Laddie Prescott & Vitoria, The Modern Law of Copyright & Designs (2nd Ed.), 43
20. *Hensher .v. Restawhile* [1976] AC 64
21. *Exxon Corp. .v. Exxon Insurance Consultants International Ltd.* [1981] 3All ER 241
22. *Express Newspapers Plc. .v. Liverpool Daily Post & Echo Plc.* [1985] FSR 306.
23. Section 18(1)

HE PROTECTION OF TRADE MARKS AGAINST CYBERSQUATTERS

Anne Bateman BL * *outlines new international procedures for tackling cybersquatters by ensuring a speedy transfer to the trade mark owner of internet site domain names which have been registered for parasitic or abusive motives*

Introduction

The domain name is that part of an Internet address that identifies a web site to the computer and to the user, e.g. "*http://www.nike.com*", "*nike*" being the second level domain name which identifies the web site of the particular user. As with the example given, companies often use their trademarks as their second level domain name (or as part of that domain name) in order to enhance the use of their web sites or to promote the product or service in question. Some companies, however, were slow to catch on to the new Internet market. Before they could register their trademarks as domain names, they found that others had pre-empted them in the hope of later selling the domain name to the rightful trademark owner at a premium. This act of domain name registration, if undertaken in bad faith by third parties who have no legitimate right to that trademark, is known as "cybersquatting". Due to the technical infrastructure of the Internet, this has the effect of preventing the rightful trademark owner from registering an identical domain name. Further, if the cybersquatter uses the domain name, trade may be diverted from the lawful trademark owner and damage to the owner's business reputation may occur.

Trademark laws are currently evolving to deal with the cybersquatter. Generally, the courts will apply pre-existing doctrines of trade mark infringement law. They will enjoin the use of domain names that are identical or confusingly similar to an earlier right holder's trade mark or where the registration of the domain name results in the tarnishment or dilution of the trade mark. Notwithstanding these developments, there are countries (including Ireland) in which the case law is in its infancy, thus making the law relating to such disputes uncertain. Moreover, litigation is an expensive process and thus an unsatisfactory proposition for most potential disputants.

In most cases, the legitimate trade mark owner simply wants the cancellation or transfer to them of the disputed domain name. They are not looking for damages. In such circumstances, one would think that all that would be required to get the domain name back would be a successful plea to the relevant domain name registry to resolve the dispute. However, until recently, the domain name dispute resolution procedure of the generic top level domain system operators has been unsatisfactory. If a trade mark owner required the transfer of the disputed domain name to them, they were obliged to obtain an order from the relevant court and enforce this against both the cybersquatter and the domain name registry. Hence, litigation was almost inevitable. However, an alternative avenue has now opened up to the trademark owner, one which has the advantage over formal legal proceedings of being both cost-effective and efficient. An aggrieved trademark owner now has the option of filing a complaint under a new dispute resolution procedure specially incorporated for this purpose.

The Uniform Domain Name Dispute Resolution Procedure

In late 1999, The Internet Corporation for Assigned Names and Numbers (ICANN) - the body which bears responsibility for key functions for the Internet including management of the domain name system - adopted a Uniform Domain Name Dispute Resolution Policy (UDRP) for the speedy resolution of disputes concerning domain names. All registrars in the top level domain names of *.com*, *.org* and *.net* subscribe to the UDRP in addition to the managers of certain country code top level domains (*.ag, .as, .bs, .cy, .gt, .na, .nu, .tt, .tv, .ve* and *.ws*). The UDRP is incorporated by reference into the registrant's domain name registration agreement. In other words, no entity will be granted a domain name registration in *.com*, *.org* or *.net* or in the identified country codes unless they agree to be bound by the UDRP.

The procedure is initiated by the filing of a complaint with an approved dispute resolution provider, one of whom is the World Intellectual Property Organisation (WIPO) based in Geneva. The respondent is given 20 days to defend the complaint, (which period is not extendible), after which the panel of UDRP will make its decision.

There are three elements necessary to establish a claim under the UDRP:-

1. the respondent's domain name must be identical or confusingly similar to a trade mark or service mark in which the complainant has rights; and
2. the respondent must lack rights or legitimate interests in the name as registered; and
3. the respondent must have registered and used the domain name in bad faith.

The third requirement of "use" of the domain name appears to pose a problem. In the classic case, the cybersquatter makes no use of the domain name, but rather warehouses it until the trademark owner offers to purchase. If the cybersquatter does not activate a web site, the UDRP would not appear to be open to the legitimate trademark owner. Whilst there is no active web site diverting trade from the trademark owner, the owner is still prevented from obtaining the identical domain name for itself.

This problem is however addressed in the UDRP by provisions which set forth a non-exhaustive list of circumstances which will satisfy the "registration and use" requirements outlined at (3) above. Basically, the complainant can get around the "use" issue in one of two ways. If the complainant can provide an indication that the respondent has registered or acquired the domain name primarily for the purpose of selling or otherwise transferring the domain name to the complainant or a third party (usually the complainant's competitor) for a consideration in excess of the actual costs of registration, then the use requirement is deemed fulfilled. Alternatively, if the complainant can prove that the respondent has registered the domain name primarily for the purposes of disrupting the complainant's business, or, that by using the domain name, the respondent has initially attempted to attract users to its web site for commercial gain by creating a likelihood of confusion with the complainant's mark, then the case also fulfils the relevant criteria in order to be heard before the UDRP panel.

The respondent may defeat the complaint if it can prove that it has a legitimate interest or right to the domain name. It can do this by showing:-

(a) demonstrable preparations to use the domain name in connection with the bona fide offering of goods and services before any notice of the dispute;

(b) that it (the respondent) has been commonly known by the domain name even if it has not obtained formal trade mark rights;

(c) that it is making legitimate non-commercial or fair use of the domain, without intent for commercial gain to misleadingly divert consumers or tarnish the trade mark in issue.

True cybersquatters will not normally defend the complaint, in which case it is deemed upheld.

The UDRP proceedings are decided by a panel comprised of one or three individuals. Both the complainant and the respondent are given the opportunity to elect the type of panel. Where a three person panel is chosen by the respondent, the applicable fees are divided evenly between the parties. In all other cases, the complainant bears the fees. The available remedies are limited to cancellation of the domain name or its transfer to the complainant. The cost of filing a complaint is as low as US$1,000 and the average turnaround time from application to final determination is usually between 45 to 60 days.

Another feature of the UDRP is that the parties are not precluded at any time from submitting the dispute to the courts. Pursuant to the UDRP rules, the panels are given the discretion to suspend, terminate or proceed to a decision in the event that a parallel lawsuit concerning the trade mark in issue is initiated by a party to the dispute. Of course, if the case is factually complex or is one which additionally relates to trademark infringement, passing off or false advertising, or if the complainant wishes to seek monetary relief, then it is not suitable for UDRP and formal court proceedings should be instituted at the outset.

First Irish Cases

A number of complaints involving Irish complainants and/or respondents have already been determined by the UDRP. In *ESAT Digifone Limited v. Michael Fitzgerald t/a TELCO-Resources,* the respondent had registered the domain name digifone.net. The complainant (the Irish mobile telephone service provider) claimed ownership of a substantial reputation in Ireland for the trademark *DIGIFONE,* and that the disputed domain name digifone.net was identical or confusingly similar to this trademark. The respondent did not formally defend the complaint. There was no evidence that the respondent was actively engaged in supplying services relating to digital telephony, nor, indeed, that the respondent had any legitimate claim to the ownership of the disputed domain name. On this basis, the URDP panel determined that the domain name was identical/confusingly similar to the complainant's trademark and that the disputed domain name was registered in bad faith. In the circumstances, the panel ordered that the domain name be transferred to the complainant.

In *Jordan Grand Prix Limited v. Gerry Sweeney*, the complainant submitted that the domain name jordanf1.com in the name of the respondent was confusingly similar to their Community Trade Mark registration for *JORDAN GRAND PRIX.* The respondent had approached the complainant with an offer to sell the domain name to them before he put it up for auction. This suggestion was turned down and the case went before a WIPO dispute resolution panel, who held that the public could be easily confused into thinking that *JORDAN GRAND PRIX* and "jordanf1" were the same, allowing for faulty recollection and careless speech on the part of the relevant public. Moreover, by offering to sell the name for commercial gain, it was implied that the respondent had registered the name in bad faith. Accordingly, the panel ruled that the registration of *jordanf1.com* be transferred to the complainant.

Appraisal

In clear cut cases of cybersquatting, ICANN's dispute resolution service is proving to be an effective weapon, providing trademark owners with a cheaper and quicker remedy than litigation through the courts. Further, the procedure has also proven advantageous for celebrities who have similarly been held to ransom by cybersquatters (witness the recent decisions in favour of Madonna and Julia Roberts). Cases have also been submitted for determination in relation to "hate sites" and "suck sites", e.g. in relation to domain names such as "guinnesssucks.com", clearly not intended as a reference to a web site operated by the Guinness company but which nonetheless would operate in use to tarnish the reputation of the GUINNESS trademark.

To date, over 700 cases involving over 2,000 specific domain names have been submitted for adjudication. Many more cases are pending. In four out of five cases the complainants have been successful in having the disputed domain names transferred to them. Whilst the procedure does not provide a solution to all possible domain name disputes, in the era of the cybersquatter, whose activities are potentially the most damaging to trademark owners, the facility of UDRP represents a welcome alternative to potentially expensive court proceedings.[1]●

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1. The panel's rulings in the cases referred to above, and all other decided and pending decisions under the ICANN policy, can be found at http://www.icann.org/urdp/proceedings-list.htm. General information about the UDRP policy, rules and procedures can be found at "http://www.icann.org/udrp/"

ECENT DEVELOPMENTS IN FORCE MAJEURE LEAVE - PARENTAL LEAVE ACT, 1998

WESLEY FARRELL BL

Employees are entitled to force *majeure leave*, which is paid leave where, for urgent family reasons, owing to injury to or illness of an employee's family member, the employee's immediate presence with that person is indispensable.[1] Such a family member includes a child, spouse or partner, brother or sister, parent or grandparent.[2] Neither a mother-in-law nor a father-in-law is included in these categories.[3] The Minister for Justice, Equality and Law Reform may provide for other categories of person in future.[4]

Force majeure leave is provided for in S.13 Parental Leave Act, 1998 (hereinafter the 1998 Act) implementing European Council Directive 96/34/EC, which in turn implemented a Framework Agreement reached between the European Social Partners on Parental Leave.

This article is written in light of the recent High Court decision of Carroll J. in *Ann Carey v. Penn Racquet Sports Limited*[5]. Prior to this decision, the provision for *force majeure* leave had not been the subject of any interpretation by the High Court. Equally, Clause 3.1 of the Framework Agreement which concerns *force majeure* leave had not been substantially litigated before the European Court of Justice.[6]

ENTITLEMENT TO FORCE MAJEURE LEAVE

Employees are entitled to a maximum of three days *force majeure* leave per twelve-month period or five days per thirty-six-month period.[7] While on *force majeure* leave none of an employee's rights relating to his or her employment are affected by the leave[8] nor is the leave treated as part of any other leave from employment to which the employee is entitled[9]. Employees are required to provide their employer with a notice containing a statement of the grounds on which *force majeure* leave was taken as soon as reasonably practicable after the leave is taken.[10] The Parental Leave (Notice of *Force Majeure*) Regulations, 1998 [hereinafter the 1998 Regulations] prescribe the form of that notice.[11]

There is no requirement, either in the 1998 Act or the 1998 Regulations, that an employee seeking *force majeure* leave produce a medical certificate to an employer. In the original text of the Parental Leave Bill, employees who sought *force majeure* leave were required to supply a medical certificate. This requirement was later removed from the Bill as it was anticipated that it would lead to problems regarding patient confidentiality: the medical certificate would concern someone other than the employee.

The 1998 Act amends The Unfair Dismissals legislation to include dismissal on grounds of the exercise or proposed exercise of *force majeure* leave as unfair dismissal.[12] The taking of *force majeure* leave does not break the continuity of service required for the purpose of the Redundancy Payments Act 1967.[13] However, force majeure leave is not to be included for the purpose of calculation of 'reference periods' under the Organisation of Working Time Act, 1997.[14]

Employers are obliged to keep and retain for eight years records of *force majeure* leave showing the period of employment and the dates and times of *force majeure* leave.[15]

DISPUTE RESOLUTION

If any dispute arises as to entitlement to *force majeure* leave between an employee and his or her employer, it may be referred by either party to a Rights Commissioner within six months after its occurrence[16]. This procedure is provided for in The Parental Leave (Disputes and Appeals) Regulations 1999.

The Rights Commissioner's decision may be appealed to the Employment Appeals Tribunal within four weeks of being made.[17] The Employment Appeals Tribunal may extend this time period if it considers it reasonable.[18]

A party may appeal the determination of the Employment Appeals Tribunal to the High Court only on a question of law.[19] The Employment Appeals Tribunal may also refer a point of law to the High Court[20].

Decisions of Rights Commissioners and determinations of the Employment Appeals Tribunal may be enforced by the Circuit Court on application of the other party or the Minister for Justice, Equality and Law Reform.[21]

ANN CAREY V. PENN RACQUET SPORTS LIMITED

Ms. Carey was a single mother caring for an eight-year-old child. On 11th June 1999, she took leave from work to look after her sick child. During the very early morning she noticed that her daughter was sick and when she woke up for work she noticed that her daughter had a rash on her two legs. Ms. Carey decided to stay at home from work, which was eighteen or twenty miles away, to observe her child. As the rash was getting worse, she took her to the doctor three miles away who advised her that her daughter did not have meningitis. The doctor also advised that the rash was not serious and advised her to get calomine lotion and to keep an eye on her daughter. Ms. Carey then had to travel ten miles to a chemist. She felt it was best to stay with her child and that her presence was indispensable.

"It is impermissible to judge with hindsight the urgency of the family reasons and the question of whether the employees's presence with her child was indispensable. The matter should have been looked at from the Plaintiff's point of view at the time the decision was made not to go to work."

Four days later, Ms. Carey applied to her employer for *force majeure* leave. Her employer requested a medical certificate, which is not a statutory requirement. The employer said that he did not believe a rash could be termed immediate and indispensable, rather that it was normal in bringing up children.

The dispute was referred to a Rights Commissioner, whose decision was appealed to the Employment Appeals Tribunal. The Employment Appeals Tribunal, by a majority,[22] determined that the case did not fall within the meaning of the 1998 Act as urgent, immediate and indispensable. Mr. Clark, in his dissenting opinion, said that the employer's refusal to grant paid *force majeure* leave was because the child's rash turned out not to be serious. He said that this view was tantamount to saying that parents must be equipped with the same level of medical knowledge as a medically qualified person before making a decision to stay with a sick child. The employer took no issue with the employee's absence from work, nor was there any contention that there was abuse of the situation; however, the employer objected to paying her for the day. Mr. Clarke found that Ms. Carey was entitled to one day of paid *force majeure* leave.

The Employment Appeals Tribunal's determination was then appealed on a point of law to the High Court. On appeal, Carroll J. held that it was a mistake of law to decide the issue on the basis of the ultimate outcome of the illness in this case. Carroll J. held that Ms. Carey was entitled to one day of paid *force majeure* leave. Carroll J. held:

> "While it is not spelt out in the determination of the Tribunal it seems clear that the reason the *force majeure* leave was refused was that the rash turned out to be not serious. In my opinion the Tribunal should not have approached the matter on that basis. This was judging with hindsight the urgency of the family reasons and the question of whether the employees's presence with her child was indispensable. The matter should have been looked at from the Plaintiff's point of view at the time the decision was made not to go to work. Also the Plaintiff could not be assumed to have medical knowledge which she did not possess."

This decision confirms that a less restrictive approach should be taken when considering entitlement to *force majeure* leave.

FUTURE IMPLICATIONS OF THE HIGH COURT DECISION IN CAREY

Carroll J., in Carey, found the view of the Employment Appeals Tribunal to be overly restrictive, considering the purpose of force majeure leave.[23] Carroll J. determined that the test for the entitlement to force majeure leave is subjective. This decision overrules the Employment Appeals Tribunal's determination of an objective test. When assessing an entitlement to force majeure leave, Carroll J. determined that:

1. Force majeure leave should be looked at from the employee's point of view at the time the decision was made not to go to work;
2. The urgency of the family reasons and the question of whether the employee's presence with a family member was indispensable should not be judged with hindsight;
3. The employee cannot be assumed to have medical knowledge not possessed.

There have been approximately ten Employment Appeals Tribunal determinations regarding *force majeure* leave since the commencement of the 1998 Act.[24] In light of the Carey decision, some of these decisions may have been made in error of law. In future, Rights Commissioner's decisions and Employment Appeals Tribunal's determinations should not be as restrictive as the Carey Employment Appeals Tribunal determination. There may be fears amongst employers that the force majeure leave provisions are now open to widespread abuse as a result of the High Court decision in Carey. However, there is a limit to the number of days of *force majeure* leave that may be taken, as set out above. In all respects, *force majeure* leave provides fair treatment of employees who suffer family crises. The Minister for Justice, Equality and Law Reform is due to conduct a review of the operation of the 1998 Act and produce a report later this year.[25]●

1. S. 13(1) Parental Leave Act, 1998

   An employee shall be entitled to leave with pay from his or her employment, to be known and referred to in this Act as "force majeure leave", where, for urgent family reasons, owing to an injury to or the illness of a person specified in subsection (2), the immediate presence of the employee at the place where the person is, whether at his or her home or elsewhere, is indispensable.

2. S. 13(2) Parental Leave Act, 1998
3. *Chris Herbert v. Kostal Ireland Limited,* Employment Appeals Tribunal Case No. PL 22/99, 31st July 2000
4. S. 13(2)(f) Parental Leave Act, 1998.
5. Unreported, High Court, 24th January 2001 (Carroll J). Appealed on a point of law from Employment Appeals Tribunal Case No. PL 11/1999, 3rd April 2000
6. The application for annulment of Directive 96/34/EC was found inadmissible in *Union européenne de l'artisanat et des petites et moyennes entreprises (UEAPME) v Council of the European Union* (Case T-135/96 17 June 1998)
7. S. 13(4) Parental Leave Act, 1998
8. S. 14(4) Parental Leave Act, 1998
9. S. 14(5) Parental Leave Act, 1998
10. S. 13(3) Parental Leave Act, 1998
11. This form, or a form to the like effect containing the information and declaration referred to in this form, must be completed by an employee who takes force majeure leave as soon as reasonably practicable after the leave is taken:

"Name of employee
RSI Number
Figures Letters
Name and address of employer
Name and address of injured */ill* person during force majeure leave
Relationship to employee
Nature of injury*/illness*
Date(s) of force majeure leave
I confirm that I have taken force majeure leave on the above mentioned dates because for urgent family reasons, owing to the injury to*/illness of* the person specified above, my immediate presence at that person's address was indispensable.
DECLARATION
I declare that the information given above is true and complete.
Signature of employee
Date
* Delete as appropriate"

12. S. 25 Parental Leave Act, 1998
13. Ibid
14. Ibid
15. S. 27 Parental Leave Act, 1998
16. S. 18 Parental Leave Act, 1998
17. S. 19 Parental Leave Act, 1998
18. S. 23(5) Parental Leave Act, 1998
19. S. 20(2) Parental Leave Act, 1998
20. S. 20(1) Parental Leave Act, 1998
21. S. 22 Parental Leave Act, 1998
22. Ms. M. Harewood (Chairman), Mr. J. Redmond; Mr. P. Clarke (dissenting)
23. Although not included in the judgement of Carroll J. in *Ann Carey v. Penn Racquet Sports Limited*, the dicta of Hamilton C.J. in the Supreme Court decision of *Nathan v. Bailey Gibson* [1998] 2 IR 162, at 174, are of note:

    "It is also well established that national or domestic courts in interpreting a provision of national law designed to implement the provisions of a directive, should interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result envisaged by the directive."

24. *David Quinn v. J. Higgins Engineering Limited trading as APW Enclosures Systems,* Employment Appeals Tribunal Case No. PL3/99, 6th December 1999;

    Angela McKnight v. Mallinckrodt Medical Employment Appeals Tribunal Case No. PL7/99 9th March 2000;

    Seamus Kearns v. Eve Holdings Limited Employment Appeals Tribunal Case No. PL9/99 8th March 2000;

    Geraldine O'Halloran v. Tillotson Limited Employment Appeals Tribunal Case No. PL13/99, 27th March 2000;

    Diane Crowe, Teresa Fitzpatrick and Gerry McKiernan v. Boxmore Plastics Limited Employment Appeals Tribunal Case Nos. PL14/1999, PL15/1999, PL16/1999 24th July 2000;

    Kevin McGaley v. Liebherr Container Cranes Limited Employment Appeals Tribunal Case No. PL18/1999 27th March 2000;

    David Munnelly v. Warners (Eire) Teoranta Employment Appeals Tribunal Case No. PL 19/99 15th March 2000;

    Chris Herbert v. Kostal Ireland Limited Employment Appeals Tribunal Case No. PL 22/99 31st July 2000;

    Mary Gill v. Fruit of the Loom International Limited Employment Appeals Tribunal Case No. PL1/2000, 17th July 2000

25. S. 28 Parental Leave Act, 1998. This report is due by 3rd December 2001.

FROM IRELAND TO STRASBOURG: FORM SUBSTANCE OF THE CONVENTION SYSTEM

Anna Austin, of the Registry of the European Court of Human Rights, provides an update on procedural and substantive issues under the European Convention on Human Rights which are likely to interest Irish lawyers considering the implications of the forthcomimg incorporation of the Convention into Irish law.

Introduction

The aim of this article is to focus on those matters that have been, that are or that risk becoming issues before the European Court of Human Rights (ECHR), as well as to revisit the procedures for making an application to Strasbourg in light of the changes introduced by Protocol No. 11 to the Convention.

As is the case with most international judicial bodies, there are two clearly distinct stages of an application before the European Court of Human Rights - the admissibility and merits. One of the most problematic admissibility requirements for Irish applicants is the requirement to exhaust the constitutional remedy, and this question is explored in detail in the first section below. In the second section, by way of demonstrating the potential breadth of issues which the ECHR is competent to consider, brief consideration is given to those decisions of the Convention organs which have already had a particular impact (sooner or later) on Irish law. Finally, I make some comments on the possible application of Convention case law with reference to a matter of some current legal commentary in Ireland, that is, the recently adopted substantive and procedural provisions now regulating asylum applications in Ireland.

Admissibility: the requirement to exhaust the constitutional remedy

The consistent application of the requirement

In principle, Article 35(1) of the Convention requires an individual applicant to have raised the substance of his or her complaints in domestic proceedings which are likely to be adequate and effective to provide redress for the alleged wrong. In keeping with its subsidiary nature, the Court's role is not to provide applicants with their fundamental rights but rather to ensure that the Contracting States do. Consequently, through the requirement to exhaust all effective domestic remedies, the State's judicial system has the first opportunity and role to right the wrong and it is only when that system cannot or has failed to intervene that the ECHR will consider the merits of the case.

In an Irish context, this means that, where there exists a relevant constitutional right, the constitutional courts must, if they have not pronounced on the issue previously, be requested by the applicant to respond to his complaints in properly constituted proceedings. The Commission has consistently held that, in a legal system which provides protection for fundamental rights, it is incumbent on the aggrieved individual to test the extent of that protection and, in a common law system, to allow the domestic courts to develop those rights by way of interpretation.[2] In this way, a declaratory action before the High Court, with the possibility of an appeal to the Supreme Court, constitutes the most appropriate method under Irish law of seeking to assert and vindicate constitutional rights.[3]

The exhaustion requirement in this context therefore means that the ECHR will not consider a complaint of an applicant prior to he or she having pursued, probably as far as the Supreme Court, a constitutional remedy within the scope of which the complaints fall. The Convention organs have been quite firm about this. *Holland v Ireland*[4] is probably the clearest recent example. Mr Holland, in prison, complained that his letters (including his mail from the former European Commission of Human Rights and from certain legal advisors) were being opened by prison authorities. Indeed there was no doubt that the letters had been opened - the prison authorities had stamped each letter. Furthermore, Rule 63 of the 1947 Prison Rules provides that every piece of correspondence must be opened. The case-law of the Court is clear:[5] Article 8 allows the opening of a prisoner's correspondence with his/her lawyer

only in clearly exceptional circumstances and, further, there is no compelling reason to open correspondence from the European Commission of Human Rights. However, the Commission found that the constitutionality of Rule 63 of the Prison Rules had been tested only as far as the High Court by another individual[6] and that the absence of a more recent ruling on the constitutionality of that rule by the Supreme Court was sufficient basis to reject the application as inadmissible on grounds of a failure to exhaust the constitutional remedy.[7]

The ECHR has pursued this line consistently,[8] not accepting arguments as to the lack of legal aid and the complexity of the proceedings,[9] the existence of doubts that the potentially effective remedy will prove successful[10] or as to the existence of counsel's opinion advising against pursuing that remedy.[11]

When it is not necessary to exhaust the constitutional remedy?

The decision in *Mary O'Reilly v Ireland*[12] arose from the involuntary detention of the applicant in a psychiatric institution on the basis of her husband's and father's evidence to a doctor and of the same doctor's certificate. The latter had signed the certificate on the basis only of his presence outside the applicant's house unknown to the applicant when he had seen her react violently to the presence of her husband at the door of the family home. She was released three days later as she was found not to be suffering from mental illness. In order to take proceedings in relation to her committal against the doctor and the admitting psychiatric institution, she had to first obtain the consent of the High Court.[13] The High and, on appeal, the Supreme Court refused to consent to the institution of such proceedings, on the grounds that they considered that the above-described examination by the doctor prior to committal was a sufficient "examination" for the purposes of the Mental Health Act 1945. The applicant complained to Strasbourg about the lawfulness of her detention under Article 5 of the Convention.

"The question of the necessity of pursuing a constitutional remedy is not a simple one and can involve a difficult assessment for the practitioner as to whether to introduce the application to Strasbourg or continue with the matter domestically. The six-month time-limit which runs from the date of the final effective remedy does not make this assessment any easier."

The Government argued that the applicant, after the failure of her consent proceedings, should have issued proceedings challenging the constitutionality of the relevant section. The Commission considered that, since she had already been released, the possibility of obtaining damages further to those constitutional proceedings would be necessary for those proceedings to constitute an effective remedy for her. Those damages had to be obtained by way of a damages action ancillary to a constitutional action. Following an oral hearing, the Commission found that the applicant was absolved from pursuing the constitutional and ancillary damages actions for a number of reasons, as follows:

- The applicant's and Government's representatives disagreed on the limitation period applicable to the ancillary damages action (the Government only being able to refer to one 1995 Irish judgment to support their view);
- The Government could not provide any case-law indicating or establishing the liability of the State to pay damages pursuant to a finding of unconstitutionality of a legislative provision which had been enacted years beforehand;
- Given the inability of either party (and particularly the Government since the onus is on the Government to demonstrate the effectiveness of a remedy which they claim has not been exhausted) to point to any case-law or to be clear as to the limitation period applicable, the Commission recognised the relative novelty of a claim in damages from the State in proceedings ancillary to the constitutional proceedings proposed by the Government;
- The Commission also found that the applicant had been reasonable in proceeding with her action against the doctor and institution first (the precursor to which were the consent proceedings) and in requesting the Supreme Court to rule on the arguably surprising interpretation of the word "examination" by the High Court;
- Even assuming that she could have taken her constitutional proceedings after the consent proceedings had terminated, this would have involved complex proceedings almost five years after her initial detention.

Without specifying which element was conclusive, the Commission considered that in all of the above circumstances, Mrs O'Reilly was absolved from exhausting her constitutional remedies.[14]

The question of the necessity of pursuing a constitutional remedy is not a simple one and can involve a difficult assessment for the practitioner as to whether to introduce the application to Strasbourg or continue with the matter domestically, the six-month time-limit which runs from the date of the final effective remedy not making this assessment any easier. However, it is clear that, in so far as there exists a constitutional right possibly covering the Convention complaint, the constitutional remedy is to be pursued unless (a) it is shown to be ineffective in the circumstances or (b) the applicant can, on the facts of the case, be absolved (it being accepted that it can be difficult, in certain cases, to distinguish between an issue which could lead to a conclusion that an applicant is "absolved" or that a remedy is ineffective).[15]

Incorporation and the continued requirement to exhaust the constitutional remedy?

Will incorporation change this exhaustion requirement? The answer will plainly depend on how the Convention will be incorporated into Irish law and thus what follows is based on presumptions. However, even if the Convention rights are incorporated at a level lower than the Constitution (which seems to be foreseen as a referendum appears to be excluded), incorporation will arguably not change the requirement to exhaust constitutional remedies and it may, if anything, reinforce the requirement.

Even if, in a particular case, the ordinary courts (in a criminal

case, for example) consider a provision of domestic legislation or State action to be compatible with the Convention, there will remain the question as to whether the Constitution would, nevertheless, provide the protection sought. In consequence, whether or not the constitutional courts take on board Convention principles post-incorporation, the constitutional route will have to be exhausted as a possible source of a remedy in Ireland.

"Incorporation will arguably not change the requirement to exhaust constitutional remedies and it may, if anything, reinforce the requirement ... Whether or not the constitutional courts take on board Convention principles post-incorporation, the constitutional route will have to be exhausted as a possible source of a remedy in Ireland."

In any event, certain commentators[16] have suggested that, while the orthodox position of the constitutional courts has been that the Convention lacks the force of domestic law as a result of Articles 15(2) and 29(6) of the Constitution, certain judicial statements would imply that the Convention has already had some impact on the reasoning of the constitutional courts in Ireland: the Convention arguably provides "belts and braces" to those courts' reasoning on matters of Irish law (in which case the Convention is put at the same level as any other international human rights' instruments) or those courts construing Irish legislation so as to be compatible with the Convention provisions where there is no contrary indication in the legislation.

In the end, with such judicial statements and the pending incorporation of the Convention even at a lower level than the constitution, the constitutional courts, post-incorporation, will have to resolve the question of the role of the Convention principles in its own jurisprudence. Importantly, until this question has been resolved domestically and definitively, it is arguable that any such period of uncertainty would constitute a further reason for the Court to insist that an applicant fully investigates the constitutional remedy first. [17]

Conclusion

The Convention system therefore requires, and will probably continue to require after incorporation, individuals to exhaust the constitutional remedy prior to the consideration of the merits of their cases. It is only if the constitutional courts do not provide the remedy (and if the applicant meets no other technical admissibility obstacle) that the ECHR can consider the merits of the complaints in an application to Strasbourg.

Previous Irish cases before the Commission and Court

Violations found by the ECHR,[18] just satisfaction awarded, and consequent or subsequent legislative changes in Ireland

The Court in its *Airey* judgment[19] found that the lack of legal aid for Mrs Airey's separation proceedings denied her effective access to Court in violation of Article 6(1) of the Convention. The parties subsequently agreed on the amount to be paid by the Government as regards her legal costs and expenses, the Court approving the Government's offer to also pay just over £3,100 in compensation. Subsequently, the Government introduced a non-statutory scheme of civil legal aid and advice in 1980. Essentially providing a restricted family law service, the scheme was overhauled in 1995 with the Civil Legal Aid Act 1995.

The *Johnson*[20] case led to the Court's finding of a violation of Article 8 as regards the unequal treatment in Irish law of children born to couples outside marriage. The Court awarded £12,000 in legal costs and expenses. The Status of Children Act 1987, which effectively abolished the legal status of illegitimacy, was expressly introduced by the Government in response to the Convention violation established.

Mr Norris[21] had unsuccessfully challenged Irish law which had criminalised certain sexual acts between men. His case before the Strasbourg Court led to a finding of a violation under Article 8 of the Convention, the Court rejecting the Government's argument that the restrictions in the impugned legislation were necessary for the protection of "health and morals" and not accepting that the Government should be afforded the wide margin of appreciation claimed. The Court awarded the applicant £14,000 approximately in legal costs and expenses. Five years elapsed before the entry into force of the Criminal Law (Sexual Offences) Act 1993 which decriminalised most forms of homosexual activity and provided for the same age of consent as for heterosexuals.

In 1982 the Government introduced planning legislation which retrospectively validated grants of planning permission which had been found by the courts to have been originally granted ultra vires the local authorities' powers. However, the void outline planning permission originally granted to *Pine Valley Developments Ltd*[22] was not covered by that legislation. Pine Valley Developments had sold the property to Healy Holdings Ltd which was, in turn, essentially owned by Mr Healy. In answer to the complaints of the two companies and of Mr Healy, the Court found that the difference in treatment by the legislation was discriminatory and constituted a violation of Article 14 in conjunction with Article 1 of Protocol 1 as regards Healy Holdings and Mr Healy. The Court awarded Healy Holdings Ltd and Mr Healy jointly £1,200,000 in pecuniary damage, £42,655.11 for domestic legal costs and expenses and £70,000 for the legal costs and expenses of the Strasbourg proceedings. Mr Healy was awarded IR£50,000 in non-pecuniary damage.

The Court's finding of a violation of Article 10 of the Convention in the case of *Open Door and Others*[23] led to an award of just satisfaction in the amount of £25,000 in pecuniary damages in favour of Dublin Well Woman Centre. Approximately £68,000 was awarded to Open Door and £100,000 to Dublin Well Woman Centre in respect of their legal costs and expenses. However, it did not result in the immediate lifting of the injunction against the applicants (from providing information on abortion).[24] The consequent constitutional amendment is well known, permitting as it does the imparting of information on abortion services lawfully available in other countries.[25]

Mr Keegan[26] successfully argued before the ECHR that the lack of any need in law for his consent as a "natural father" for the adoption of his child and his lack of access to court in this respect constituted violations of Articles 6 and 8. He was awarded £12,000 in pecuniary and non-pecuniary loss and approximately £38,000 in respect of his domestic and Strasbourg legal costs and expenses. The Adoption Act 1998, in amending the 1952 Adoption Act, introduced consultation procedures for natural fathers in the adoption process and also sets out the circumstances when such procedures need not be followed.

Cases decided by the Committee of Ministers under the former procedure

Looking further than judgments of the ECHR, other cases have rendered some satisfaction to Irish applicants and, in so doing, have had their own impact. The Commission has found, in two Irish cases, that the length of civil and criminal proceedings violated the reasonable time requirement of Article 6(1) of the Convention and these findings were confirmed by the Committee of Ministers.

"Certain cases have been settled by the Irish Government either before or after admissibility ... The details of the settlement are dictated in part by the need to respond to what will be the supervising eye of the Court under Article 37(1) of the Convention. In general, the settlement involves compensation and/or an undertaking to introduce amending legislation to parliament."

The murder and burglary proceedings against *Patrick O'Reilly*[27] took almost 8 years to conclude and he was awarded £3000 damages by the Committee of Ministers together with almost £10,000 legal costs and expenses. The Government also undertook to the Committee of Ministers to circulate to the relevant authorities involved the Commission's report in order to prevent the repetition of the violation found in the case.

Mr McMullen took negligence proceedings against three Irish firms of solicitors, the proceedings took almost nine years to resolve (ending in a finding in favour of the applicant against one firm). The interim resolution of the Committee of Ministers awarded the applicant £1,000 in compensation. Its supervision of the Government's implementation of the Commission's findings not being complete, there is no final resolution of the Committee of Ministers on the case, although it is likely, based on previous similar cases, that, as well as payment of the compensation, an undertaking to notify the relevant authorities of the problem will be found to be sufficient implementation of the Commission's report.

Settlements

Certain cases have been settled by the Irish Government either before or after admissibility. While the former Commission and Court, and the present Court, retain the right to nevertheless continue the examination of the application "if respect for human rights" so requires (Article 37(1) of the Convention), as a general rule settlements lead to the striking out of a case. The details of the settlement are obviously dictated by the perceived strengths of the respective positions, but also by the need to respond to what will be the supervising eye of the Court under Article 37(1) of the Convention.

In general, the settlement involves compensation and/or an undertaking to introduce amending legislation to parliament. I have mentioned above the settlement of the *Mary O'Reilly* case for £14,000 compensation and almost £52,000 in legal costs and expenses.[28] *Mary Stoutt* complained about the absence of a right of succession on intestacy as regards the estates of her natural father and of her relatives on her natural mother's and father's sides. The case was declared admissible and, subsequent to a meeting between the parties with representatives of the Commission in Dublin in 1987, the Government agreed to make an *ex gratia* payment of £10,000 to the applicant, recalling that the Status of Children Bill 1986 was pending before parliament.[29]

Not all cases require payment of compensation to achieve settlement. *Mr Jörg Dreher*, a German national, became the registered owner of land in Ireland in 1965 and contested its compulsory acquisition by the then Land Commission. Subsequent to the introduction of his application to the Commission, the parties began negotiations which terminated with the restoration of his land to him. He therefore withdrew his application to the Commission.[30] The Government also settled a case introduced in 1991 by an Irish citizen in Germany who had submitted her Irish passport to the Irish Embassy in Bonn but had not received it back. The return of her passport led to her case being struck out by the Commission.[31]

A most unusual settlement was reached in a relatively recent Irish case involving the length of proceedings about an official liquidator's fees. The applicants, three members of the Flattery family, had been required, pending the delivery of the High Court judgment on the level of those fees, to lodge a significant sum of money in court, that being a condition of their being discharged from bankruptcy. The judgment took over seven years to deliver. The case was settled prior to admissibility on the basis of the parties' agreement to submit the matter to domestic arbitration.[32]

Refugees: the new Irish system and the Convention

It is clear that the Irish courts' protection of the right to liberty of asylum seekers is stronger than that offered by the ECHR, but there are other refugee matters which risk falling foul of the Convention provisions, notably related to the question of the domestic definition of a "*refugee*".[33] In particular, it appears

possible that there may be certain incompatibilities between the applicable European (as opposed to the 1951 Geneva Convention on which the Irish legislation is based) Convention standards and the procedures and substantive provisions put in place by recent legislation.[34]

What is the role of the Convention in asylum cases?

Although the ECHR has had a big impact in asylum cases, the European Convention on Human Rights does not provide any right, as such, to reside in another country either for asylum or other reasons. However, as far back as the *Soering* judgment,[35]a Contracting Party to the Convention is, in principle, responsible under the Convention if, on expelling an individual to another country, he or she runs a real risk of treatment contrary to Article 2 (unlawful killing) and Article 3 (torture, inhuman or degrading treatment) in the country of destination. In other words, the very act of expelling the individual can give rise to a violation of those Articles by the expelling country, even though the treatment contrary to those Articles is, as a matter of fact, potentially to be carried out in the country of destination.

There are no exceptions to Article 3 of the Convention; the prohibition on torture and on inhuman or degrading treatment constitutes an absolute prohibition and is non-derogable. In addition, those countries (including Ireland) that have ratified Protocol No. 6 to the Convention are arguably potentially in violation of Article 2 of the Convention if they expel an individual to a country where he or she faces the death penalty even after lawful conviction by a court.

Substantive differences between the 1996 Act (as amended) and the requirements of the European Convention of Human Rights

Turning to the Irish provisions, it is noted that the Irish legislation is quite naturally based on the criteria laid down in the "specialist" 1951 Geneva Convention. As a result, however, there are potentially significant differences between the test applied in asylum cases under Articles 2 and 3 by the Court and those to be applied by the Refugee Applications Commissioner and the Refugee Appeals Tribunal in Ireland. Such possible differences all stem from the absolute nature of the prohibitions in Article 3 and, to a lesser extent, in section 2 of the Convention.

In the first place, Section 2 of the 1996 Act provides that one must have a well-founded fear of persecution for a particular reason of "race, religion, nationality, membership of a particular social group or political opinion" (mirroring Article 1 of the 1951 Geneva Convention) in order to be considered to be a refugee entitled to protection. Articles 2 and 3 of the ECHR contain no such limitations. Consequently, the ECHR supervision through Articles 2 and 3 can apply to extradition cases.[36] In addition, Articles 2 and 3 do not require an applicant to demonstrate that he fears persecution for any particular reason; accordingly, Articles 2 and 3 could apply, in principle, to a real fear of persecution as a result of previous criminal activity with now unhappy and dangerous criminal associates.

Secondly and importantly, Section 2 (a)-(e) of the 1996 Act (again reflecting Article 1 of the 1951 Convention) together with Section 17 of that Act (as amended), provide that, whatever the well-founded fear of persecution, an individual, who has for example committed a war crime or is found to constitute a threat to national security, can be expelled. However, the ECHR's consistent case-law provides that the finding of a real risk of treatment contrary to Article 3 excludes expulsion and that no exceptions whatsoever are allowed. In other words, once an applicant establishes that there is a real risk of torture or inhuman or degrading treatment on expulsion, his or her expulsion will be in violation of Article 3, the Court's reasoning being that no one, not even war criminals or other such persons, can in any circumstances be subjected to such treatment.

Thirdly, the lack of exceptions to Article 3, means that the nationality of the asylum applicant is irrelevant for the purposes of the ECHR's consideration of the case whereas there are certain conditions in this respect applied by Section 2 the 1996 Act.

Fourthly, the manifestly ill-founded procedure is not novel in the Contracting States' systems. However, it is not specified in the legislation that the defined matters (see Section 12 (4) - for example, the giving of false and misleading information to the authorities) which can lead to a conclusion by an Refugee Applications Commissioner that an application is manifestly ill-founded, do not and cannot outweigh the fact of a well-founded fear of persecution. If therefore giving false information to an immigration officer prejudges or excludes a conclusion as to a real fear of persecution (as opposed to constituting as element in the overall assessment of credibility), arguably a consequent expulsion could constitute a violation of Article 3 of the Convention again because that Article admits of no such exceptions.

Finally, certain countries interpret Article 1 of the 1951 Convention (mirrored in Section 2 of the 1996 Act) as meaning that a refugee must establish a real fear of persecution from agents of the receiving State - the ECHR makes no such distinction. Whatever the source of the danger claimed by the applicant (for example, a criminal element of society in the receiving State or because of the unavailability of adequate medical services required by the individual in that State), the obligation under Article 2 and/or 3 not to expel remains once the "real risk" of such danger is established.

In the above circumstances, it is not difficult to envisage situations where an expulsion order would be lawful under the terms of the 1996 Act (as amended), but in violation of Articles 2 and/or 3 of the Convention.

Procedural exigencies of Article 13 of the Convention

As well as the protection accorded to asylum seekers by Articles 2 and 3, the Convention lays down some procedural requirements with which the asylum procedures themselves must comply. However, it is important to bear in mind that Article 6 of the Convention, which provides the most comprehensive procedural protections before tribunals, does not apply to asylum procedures. However, once one has established an arguable claim under Articles 2 and 3 of the Convention, Article 13 of the Convention can apply. Article 13 of the Convention provides the right to an effective domestic remedy as regards violations of the Convention provisions. In an asylum context, it essentially requires that an asylum seeker in Ireland must have access to tribunals which are independent of the executive and of the parties to the matters at issue; which have the power to review the asylum case on its merits, applying criteria similar to those applied under Article 3 of the Convention; and which can render a binding decision.

As to the power to apply similar criteria, I have highlighted above possible differences between the criteria set down by the 1996 Act (as amended) upon which the authorities will consider asylum applications and those developed by the Court in its jurisprudence under Articles 2 and 3 of the Convention. As to the power to make a binding decision, the *ordre public* provisions of Section 17 of the 1996 Act (as amended) allow the Minister to effectively set aside a decision of the Refugee Appeals Tribunal. The risk that the tribunal would therefore fall foul of the procedural requirement of Article 13 that it must have competence to make a binding decision could therefore fall to be examined in an appropriate case.

In addition, any failure of the Refugee Applications Commissioners to provide detailed reasons at first instance may undermine the effectiveness of the onward appeal to the Refugee Appeals Tribunal. Furthermore, if an application is rejected using the manifestly ill-founded procedure provided for by Section 12 of the 1996 Act (as amended), the absence of an oral hearing could prove to be problematic under Article 13 of the Convention.

Interim Measures in asylum cases by the Strasbourg Court

It is envisaged that, when the full benefits of the new full-time Court are felt, an application from Ireland should be first considered by the Strasbourg Court within the first 6-9 months of its introduction and any subsequent examination will take place within at least the following 12 months. Even with these improvements, clearly this time-frame is of little benefit to an applicant who claims that on expulsion the following day, his or her life is at risk in the country of destination. The applicant is hardly interested in finding out whether the ECHR considered he or she was right a number of years later. The Court has therefore developed, along with its *Soering* jurisprudence, the use of interim measures pursuant to Rule 39 of the Rules of Court. It essentially allows an applicant to complain under Articles 2 and/or 3 about his proposed expulsion from Ireland to the Court in Strasbourg and to have a decision within a number of hours, if necessary, as to whether the relevant Court Chamber or the President of that Chamber considers that he or she has demonstrated a real risk of treatment on expulsion contrary to Articles 2 and or 3 of the Convention.

If the Court so decides, the respondent State, Ireland, will be immediately requested pursuant to Rule 39 not to expel the individual pending the Court's consideration of the admissibility and, if relevant, the merits of the case. Although the Rule 39 request is not obligatory, in the vast majority of cases, the respondent State in question complies with the request. If the case is declared admissible and is considered on its merits, that can mean the retention (and not necessarily the detention) of a rejected asylum seeker in Ireland for a number of years pending the final decision of the Court.

Incorporation and domestic procedural and substantive asylum provisions

No Rule 39 requests and applications from rejected asylum seekers have been received in Strasbourg. However, the flux of asylum seekers is a relatively recent phenomenon in Ireland and, given the possible differences highlighted above between the domestic and Convention position, it is arguably an area where the Court will potentially have some impact.

Incorporation clearly entails the incorporation into domestic law, perhaps even at a higher level than the 1996 Act (as amended), of the above-described substantive and procedural principles of Articles 2, 3 and 13 of the Convention. Post-incorporation, some thought therefore will have to be given as to how the above procedural and substantive Convention principles can be reflected in the already elaborate and intricate asylum procedures in Ireland and in the substantive consideration by the relevant authorities' of asylum applications. The aim should be, of course, to enable the Irish authorities to respond to asylum seekers who invoke those Convention principles during their asylum applications in Ireland rather than being obliged to so respond to the ECHR in Strasbourg. ●

"It is envisaged that, when the full benefits of the new full-time Court are felt, an application from Ireland should be first considered by the Strasbourg Court within the first 6-9 months of its introduction and any subsequent examination will take place within at least the following 12 months.Even with these improvements, clearly this time-frame is of little benefit to certain applicants ... The Court has therefore developed the use of interim measures pursuant to Rule 39 of the Rules of Court."

1. Anna Austin, Lawyer in the Registry of the European Court of Human Rights. An earlier version of this paper was prepared for the human rights conference of the Incorporated Law Society of Ireland on 14 October 2000. All views expressed are the speaker's own.
2. No. 18679/91, *E.N. v. Ireland,* Decision 1.12.1993
3. No. 15141/89, Decision 15.2.1990; No. 23156/94, Decision 31.8.94; and No. 28154, Decision 2.7.1997
4. No. 24827/94 *Patrick Holland v. Ireland* Decision 14.4.1998
5. *Campbell v. the United Kingdom* judgment of 25 March 1992, Series A no. 233
6. *Kearney v. the Minister for Justice* [1986] IR 116
7. See No. 15404/89 *Purcell and Others v. Ireland* (concerning section 31 of the Broadcasting Act 1960 as amended), Decision of 16.4.1999 where a previous Supreme Court decision in other proceedings was sufficient to absolve the applicant from taking further proceedings to the Supreme Court
8. No. 23156/94 *O'H v. Ireland* (a prisoner's complaints about the failure to transfer him to prison closer to his home) Decision of 31.8.1994; *Callaghan v. Ireland* (the effects of a preservation order on the applicant's property) Decision 3.3.1986; *L.F v. Ireland* (the denial of a birth certificate recording the applicant transsexual's female sex) Decision of 2.7.1997
9. No. 8154/78, *C. v. Ireland (*conditions of detention) and No. 9596/81 *W&W v. Ireland* (the occupation by travelers of certain sites) 10. No. 18679/91, *E.N. v. Ireland* Decision 1.12.1993
11. No. 18670/91 *X. v. Ireland* (her surveillance by private investigators employed by the defendants in personal injury proceedings taken by her)
12. No. 24196/94 *Mary O'Reilly v. Ireland* Dec 22.1.96
13. Section 260 of the Mental Health Act 1945
14. After her case was declared admissible, it was settled by the Government, the applicant being paid £14,000.00 in compensation together with £51,950.40 in legal costs and expenses (Comm. Report 3.12.1996.
15. The Court found in *Pine Valley Developments Ltd, Healy Holdings Ltd and Healy v. Ireland* that a remedy which would not bear fruit in sufficient time or which did not permit total recovery of the applicants' losses was not a remedy to be exhausted. Neither was the remedy of an action against a private party appropriate when the State itself had caused the loss to the applicant.
16. See Donncha O'Connell in "The European Convention on Human Rights - The impact of the ECHR in the legal and political systems of member states over the period 1953-2000" (published in association with the Council of Europe).
17. See the Commission's reference in the above-cited Holland case to the Irish High Court's description in the *Kearney* judgment of the relevant Convention case-law and to the fact that 12 years had passed since the Kearney judgment during which the Convention case-law had developed. See also *McHugh v. Ireland* (concerning a prisoner's temporary release and correspondence) Decision 16.4.1998.
18. Of the seven judgments on the merits, six led to a finding of violation. Five of those six cases involved questions of family or private life.
19. *Airey v. Ireland judgment* of 9.10.1979 (merits), Series A no. 32 and 6.2.1981 (former Article 50) Series A no. 41
20. *Johnston and Others v. Ireland* judgment of 18.12.1986, Series A no. 112
21. *Norris v. Ireland* judgment of 26.10.1988, Series A no. 142
22. *Pine Valley Developments Ltd and Others v. Ireland* judgment (Merits) of 29.11.1991, Series A no. 222 and judgment (former Article 50) of 9.2.1993 Series A no. 246-B
23. *Open Door and Dublin Well Woman v. Ireland* judgment of 29.10.1992, Series A no. 246-A
24. See the unsuccessful follow-up application by Dublin Well Woman as regards the failure to immediately lift the injunction against them, No. 28177/95, Decision 9.4.1997
25. The Regulation of Information (Services Outside the State for the Termination of Pregnancies) Act 1995
26. *Keegan v. Ireland* judgment of 26.5.1994, Reports of Judgments and Decisions 1998
27. No. 21624/93 *Patrick O'Reilly v. Ireland* Commission report of 22.2.95
28. Comm. Report 3.12.1996
29. No. 10978/84 *Stoutt v. Ireland* Commission report of 17.12.1987
30. No. 11048/84 *Dreher v. Ireland,* Decision of 6 July 1987
31. No. 19429/92, *I.Z. v. Ireland* Decision 7 July 1992
32. No. 28995/95 *Barry, James and Noelle Flattery v. Ireland* Decision 8.7.1998
33. This part of the paper does not attempt to deal with applications for residence other than asylum applications in which cases different domestic and Convention provisions are relevant. In addition, although not referred to here, the Court's jurisdiction in asylum cases where the asylum applicant demonstrates a real risk of a "flagrant denial" of the rights guaranteed by Article 5 and/or 6 of the Convention (See *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, # 113 and *Drozd and Janousek v. France and Spain judgment* of 26 June 1992, Series A no. 240, ° 110
34. Apart from the administrative procedures in place since December 1997 (the "Hope Hanlan" letter as modified in March 1998), the Refugee Act 1996 (together with the Statutory Instruments made there-under), the Immigration Act 1999, the Dublin Convention (as implemented by the Dublin Convention (Implementation) Order 1997) and the Illegal Immigrants (Trafficking) Act 2000 (the constitutionality of which was upheld, further to its reference by the president of Ireland, by judgment of the Supreme Court of 28.8.2000
35. *Soering v. the United Kingdom* judgment of 7.7.1989, Series A no. 161
36. The *Soering* case related to extradition of an individual who faced the "death row phenomena" and led to a finding by the Court that his extradition would, in those circumstances, constitute a violation of Article 3 of the Convention, the experience of that phenomena being considered to amount to "inhuman treatment"

EFUSALS TO ATTEND AND GIVE EVIDENCE AT INQUESTS: THE UNCONSTITUTIONALITY OF SECTION 38(2) OF THE CORONER'S ACT 1962

Jim O'Callaghan BL outlines recent developments confirming the present inability of coroners, by virtue of the unconstitutionality of the relevant governing provisions, to respond effectively to recalcitrant witnesses or persons who refuse to attend inquests.

INTRODUCTION

Although, historically, a Coroner's Court had power to commit witnesses for contempt[1], it is probable that this power did not survive the introduction of the 1937 Constitution. In this regard, it is plain that a Coroner is not exercising the judicial power of the State within the meaning of Article 34 of the Constitution. The function of a Coroner's inquest is simply to ascertain facts and not to make legal determinations as to fault or liability.[2] Accordingly, an inquest conducted by a Coroner's Court is roughly comparable to a tribunal of inquiry and, for the reasons set out by the Supreme Court in *Goodman International -v- Hamilton* (No.1) [1992] 1 IR 542, it is evidently not a body exercising judicial powers but rather comes within the ambit of Article 37 of the Constitution which relates to the exercise of limited functions and powers of a judicial nature. It appears, therefore, that a Coroner's Court is not a Court of record which can commit witnesses for contempt committed in *facie curiae*.[3] The absence of any existing common law power on the part of a Coroner dictates that he/she must rely upon the Coroner's Act 1962 for the purpose of securing the attendance of a witness at an inquest.

THE CORONER'S ACT 1962

The statutory law governing the summoning of witnesses before a Coroner's Court is set out in Sections 26, 37 and 38 of the Coroner's Act 1962. Section 26(1) provides:

> "A Coroner may, at any time before the conclusion of an inquest held by him, cause a summons in the prescribed form to attend and give evidence at the inquest to be served on any person (including in particular any registered medical practitioner) whose evidence would, in the opinion of the Coroner, be of assistance at the inquest."

Section 37 is specifically concerned with the non-attendance of witnesses at inquests. It provides:

> "Every person who, having been duly served with a summons to attend an inquest as a juror or witness, fails to attend at the time and place specified in the summons shall be guilty of an offence under this Section and shall be liable on summary conviction thereof to a fine not exceeding £5."

The statutory remedy for a recalcitrant witness who fails to obey a witness summons is provided in Section 38(2):

"Any person who-

(a) being in attendance as a witness at an inquest refuses to take an oath legally required by the Coroner holding the inquest to be taken or to answer any question to which the Coroner may legally require an answer; or

(b) does any other thing which would, if the Coroner had been a Court having power to commit for contempt, have been contempt of that Court,

shall be guilty of an offence and the Coroner may certify the offence under his hand to the High Court, and that Court may thereupon inquire into the alleged offence and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of that Court."

Section 38(2) is very similar to Section 3(4) of the Committee of Public Accounts of Dail Eireann (Privilege and Procedure) Act 1970, which was declared unconstitutional in *In Re. Haughey* [1971] IR 217. Section 3(4) provided:

"If any person -

(a) on being duly summoned as a witness before the

Committee makes default in attending, or

(b) being in attendance as a witness before the Committee refuses to take an oath or to make an affirmation when legally required by the Committee to do so, or to produce any document in his power or control legally required by the Committee to be produced by him or to answer any question to which the Committee may legally require an answer, or

(c) fails or refuses to send to the Committee any document in his power or control legally required by the Committee to be sent to it by the person, or

(d) does anything which would, if the Committee were a Court of Justice having power to commit for contempt of Court, be contempt of such Court,

the Committee may certify the offence of that person under the hand of the Chairman of the Committee to the High Court and the High Court may, after such enquiry as it thinks proper to make, punish or take steps for the punishment of that person in like manner as if he had been found guilty of contempt of the High Court."

Subsequently, in *Desmond -v- Glackin (No.2)* [1993] 3 IR 67, the Supreme Court held, following *Haughey,* that Section 10(5) of the Companies Act 1990, concerning the production of documents and evidence to High Court Inspectors, was also unconstitutional. The relevant part of that subsection was in the following terms:

"If any officer or agent of the company or other body corporate or any such person as is mentioned in Subsection (2) 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 of the affairs of the company or other body corporate as the case may be, 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, punish the offender in like manner as if he had been guilty of contempt of Court."

Although there are some differences between the two above mentioned sections and section 38(2), they all share the same statutory origins. Moreover, in *Desmond* the Supreme Court carefully considered, but emphatically rejected, the argument that the differences of language enabled the Court to distinguish the 1990 Act from the subsection declared unconstitutional in *Haughey*. As Finlay C. J. stated:

"The Court has considered these differences and it is satisfied that they do not constitute any ground for distinguishing the crucial effect of the provisions of Section 10(5) of the Act of 1990 from the provisions of Section 3(4) of the Act of 1970. The fact that whereas in the Act of 1970 what was to be certified was the "offence" and what was to be certified in the 1990 Act was a "refusal", makes no material difference to the jurisdiction vested in the High Court."

An examination of section 38(2) of the Coroner's Act 1962 indicates that there is no material difference between it and the two statutory provisions declared to be unconstitutional. Section 38(2), just as with Section 3(4) of the 1970 Act, appears to empower the Coroner to find the contemptnor guilty and then to send him forward to the High Court for sentence. Even if that construction is avoided by virtue of the "double construction" test and Section 38(2) presupposes a trial de novo of the alleged contemptnor before the High Court, this construction is equally unconstitutional since, if the offence is a summary one, it authorises a trial before a Court which is not a Court of summary jurisdiction. Such a method of trial infringes Article 38(2) since:

"under our law that jurisdiction is exercised only by the District Court. In accordance with the provisions of Article 38.5, the jurisdiction of the High Court to try criminal offences is a jurisdiction to try them only with a jury."[4]

Further, despite the fact that in *Haughey* the Supreme Court ruled that while the identical language of Section 3(4) "can be stretched, by presumption of constitutionality" to contemplate trial by a High Court Judge or Judges, O'Dalaigh C. J. stated:

"it is, in the opinion of this Court, beyond the reach of the presumption of constitutionality to read into the simple inquiry formula of the subsection an intention to authorise trial by jury. The Statute in this case created an offence which was not prohibited by the common law. It indicated the particular manner of proceeding against the alleged offender by express referes indicated clearly excludes that of indictment. This interpretation is re-enforced by the express provision that the charge is laid by the Certificate of the Chairman of the Committee."

"It should be noted that Section 38(2) is not the only statutory provision still operative which provides for the certification of an offence to the High Court for punishment in like manner as if the offender had been guilty of contempt of Court. These other statutory provisions are also, it is submitted, constitutionally frail to the same extent as section 38(2), and are in substance indistinguishable from the sections struck down in the *Haughey* and *Desmond* decisions."

On any view, therefore, it seems almost impossible to avoid the conclusion, in light of both *Haughey* and *Desmond,* that, on any tenable construction of the operative parts of Section 38(2), this subsection would be found to be unconstitutional.

It should be noted that Section 38(2) is not the only statutory provision still operative which provides for the certification of an offence to the High Court for punishment in like manner as if the offender had been guilty of contempt of Court.[5] These other statutory provisions are also, it is submitted, constitutionally frail to the same extent as Section 38(2), and are in substance indistinguishable from the sections struck

down in the *Haughey* and *Desmond* decisions. An examination of the sections still operative, and those which have been repealed[6], illustrates their identical nature and supports the contention that they all share the same statutory provenance. There are at least two examples of where such sections have been amended from what was an apparently unconstitutional version to a constitutional one.[7] It should also be noted that the occurrence of such a provision is not limited to primary legislation as it was incorporated into a number of statutory instruments made between 1965 and 1971.[8]

ATTORNEY GENERAL -V- LEE

In *A.G. -v- Lee* (Unrep.), Kelly J., 14th February, 2000,[9] the Attorney General sought, as guardian of the public interest, a mandatory interlocutory injunction directing the Defendant to comply with the provisions of the Coroner's Act 1962, and to obey the witness summons addressed to her by the Dublin City Coroner pursuant to Section 26 of the Coroner's Act 1962, for the purpose of compelling her to attend as a witness at the hearing of an inquest.

In granting the Attorney General's application, Kelly J. outlined that it arose from the failure of the legislature to revise the provisions of the Coroner's Act 1962. He noted that the penalty of £5 prescribed pursuant to Section 37 was now so small as to be derisory. More significantly, he ruled that it was a matter of near certainty that Section 38 was unconstitutional having regard to the previous decisions in the Haughey and Desmond cases.

The decision of Kelly J. was subsequently appealed to the Supreme Court which agreed with his analysis of Section 38(2) of the Coroner's Act 1962. In delivering the judgement of the Supreme Court on the 23rd October, 2000, Keane C. J. stated:

> "It is clear that, if in the present case, the Coroner were to invoke the powers purportedly conferred on him and on the High Court by Section 38(2) of the 1962 Act, against the Defendant, he would be met with the contention that the provision in question is clearly unconstitutional, having regard to the decision in *In Re. Haughey*. Not surprisingly, the Coroner is not disposed to adopt what would appear to be a futile course."

CONCLUSION

The existing procedures in place to deal with witnesses who refuse to give evidence before a Coroner's Court are manifestly inadequate and reveal an unacceptable level of legislative inertia. The review of the Coroner's Act which is to be undertaken in the near future will no doubt seek to remedy the manifest constitutional flaw in the Act. Further, the penalty for failure to attend an inquest should be increased from the minuscule fine of £5. Finally, it is to be welcomed that, since 1990, the type of statutory provision as found in Section 38(2) is no longer evident in our legislation. Nonetheless, a number of operative statutes still contain such a provision and these should also be repealed.●

1. See Umfreville's Office of Coroner (First Edition, 1761) 303, 512 and 513.
2. See Section 31 Coroner's Act 1962.
3. In a Canadian case, *R. v. Little and Miller* (1926) 2 WWR 762, it was held that a Coroner had power to commit for contempt a witness who refused to testify. Curran J. stated that "under the common law it was admitted, I take it by both Counsel, that a Coroner could not fine a witness being in contempt for refusing to be sworn or to testify, but had the power to commit."
4. In *Re Haughey* (1971) IR 217, 254, *per* O'Dalaigh C. J.
5. Companies (Amendment) Act 1990, section 8(5); Companies Act 1990, section 117(9); Road Traffic Act 1968, section 66(6); Land Act 1965, section 8(4); Petroleum & Other Minerals Development Act 1960, section 31(2); Gas Regulation Act 1957, paragraph 11(4) of Second Schedule; Defence Act 1954, section 196(4); Harbours Act 1946, section 164(2); Trade Union Act 1941, section 37(2); Electricity (Supply) (Amendment) (No.2) Act 1934, Paragraph 4 Second Schedule; Military Service Pensions Act 1934, section 5(8); Cork Tramways (Employees Compensation) Act 1933, section 7(2); Merchandise Marks Act 1931, Section 4(2; and Civil Service (Transferred Officers) Compensation Act 1929, section 8(6).
6. Section 107(2) and Section 109(3) of the Defence Forces (Temporary Provisions) Act 1923, which were repealed by the Defence Act 1954; Section 5(2) of the Tariff Commission Act 1926, which was repealed by the Tariff Commission Repeal Act 1939; Section 101(6) of the Local Government (Dublin) Act 1930, which was repealed by the Local Government (Dublin) (Amendment) Act 1940; Section 8(2) of the Mines and Minerals Act 1931, which was repealed by the Minerals Development Act 1940; Section 18(2) of the Control of Prices Act 1932, which was repealed by the Control of Prices Act 1937; Section 8(D) of the Harbours (Regulation of Rates) Act 1934, which was repealed by the Harbours Act 1996; Section 17(2) of the Control of Prices Act 1937, which was repealed by the Prices Act 1958; Section 43(2) of the Shops (Conditions of Employment) Act 1938, which was repealed by the Organisation of Working Time Act 1997; Section 35(2) of the Minerals Development Act 1940, which was repealed by Section 11 of the Minerals Development Act 1979; Section 10(5) of the Electricity Supply Board (Superannuation) Act 1942, which was repealed by the Industrial Relations Act 1969; Section 4(5) of the Electricity Supply (Amendment) Act 1949, which was repealed by the Industrial Relations Act 1969; Paragraph 6(4) of the Restrictive Trade Practices Act 1953, First Schedule, which was repealed by the Restrictive Practices Act 1972; Section 19(2) of the Solicitors Act 1954, which was repealed by the Solicitors (Amendment) Act 1960; Section 15(2) of the Solicitors (Amendment) Act 1960, which was repealed by the Solicitors Act 1994; Section 168(3) of the Companies Act 1963, which was repealed by the Companies Act 1990; Section 60(6) of the Trademarks Act 1963, which was repealed by the Trademarks Act 1996; Section 73(6) of the Patents Act 1964, which was repealed by the Patents Act 1992; Section 17(2) of the Criminal Procedure Act 1967, which was repealed by the Criminal Justice Act 1999; and Section 30(2) of the Building Societies Act 1976, whichwas repealed by the Building Societies Act 1989.
7. Section 208(1) of the Defence Act 1954, as amended by Section 12 of the Defence Act 1987; and Section 15(2) of the Solicitors (Amendment) Act 1960, as amended by Section 25 of the Solicitors Act 1994.
8. Section 13(5) S.I. 265/1965; Section 13(4) S.I. 226/1965; Form 140, Appendix to S.I. 147/1965; Section 12(5)S.I. 232/1966; Section 13(5) S.I. 224/1966, and Section 13(5) S.I. 49/1971.
9. See report of the decision of Kelly J. in *Attorney General v. Linda Lee* in The Irish Times, 15th February 2000.

BOOK REVIEW

Revenue Law

By Kieran Corrigan (Vols. I & II)

(Round Hall Press, November 2000)

reviewed by Brian Kennedy B.L.

When it comes to publications, tax is better served than most other areas of Irish law. In addition to legislation updates, both Butterworths and the Institute of Taxation produce a number of annual volumes, focused squarely at practitioners. However, Kieran Corrigan's long-awaited work, aimed at both practitioners and students, breaks new ground in taxation publishing in this jurisdiction.

The book is in two volumes and runs to almost 2,200 pages. It covers the range of income tax and general taxation matters. In addition to a detailed consideration of the basic principles and various schedules, specific chapters consider topics such as the Constitution and the European Community, Tax Avoidance, Double Taxation and Taxation and Damages Awards. Two hundred pages are devoted to the administration of the tax system. Helpful appendices list Revenue publications and Double Taxation Treaties in force and give details of relevant rates and allowances. A third volume, dealing with the other taxes, is to follow.

A number of features differentiate this book from other tax works. In the first place, it is a very analytical work. Relevant legislative provisions and judicial dicta are scrutinised in detail in order to evaluate their meaning. The author also places the tax system in context - he sets out the policies behind the main provisions and, in particular, considers the impact of the Constitution on various provisions.

For example, the author considers that there are many provisions within the tax code which treat families less favourably than groups of unconnected individuals, arguably infringing Article 41 of the Constitution. He also makes a number of interesting arguments based on Article 15.5, which prohibits certain types of retrospective legislation. In this respect, he argues convincingly that the current practice of announcing legislative amendments which take effect from Budget Day, although the legislation itself is not enacted until the following Finance Act, is of dubious constitutional validity.

Of particular interest are the chapters dealing with anti-avoidance. The treatment of section 811 of the Taxes Consolidation Act 1997, the general anti-avoidance provision, would greatly assist any practitioner considering the topic. After a historical introduction which places the enactment of section 811 in context, the author critically considers the section line by line and then comprehensively analyses the arguments in favour and against its constitutionality. Here again, he notes the impact of Article 15.5, which he considers to provide the most powerful constitutional argument against the validity of section 811. He asserts that to permit the Revenue to "withdraw" or "deny" reliefs that had been validly claimed at the time when the transaction giving rise to the reliefs had been entered into is, in effect, to allow retrospective legislation. He concludes, however, that while the legislation is not unassailable, a constitutional challenge may well be a real uphill battle.

Corrigan also considers the broader impact on society of our taxation system, providing a comprehensive overview and referring on a number of occasions to the long-shelved reports of the Commission on Taxation. He makes the point that arguably no other area of law has such a direct and important effect on the financial situation of both individuals and corporations or, indeed, on the economy of the country as does tax law.

The author makes a number of suggestions for reform of the system. For example, he argues that the *Gourley* principle, whereby awards of damages which are non-taxable upon receipt are reduced to take account of this fact, gives an unfair advantage to defendants. He canvasses a number of alternatives, considering Irish and English authorities and, in particular, the decision of the Canadian Supreme Court in *R. v. Jennings*.

A minor criticism which could be made about this work relates to its hardback format. With annual Finance Acts, the tax field is a rapidly evolving one. As the author himself points out in his preface, writing a book about tax law is like trying to paint a moving train. If the book had been published in loose leaf format, it would have been possible to update it regularly by way of supplements. Unfortunately, the hardback format means that some matters may soon become outdated.

Kieran Corrigan has combined his experience as a practitioner and academic to produce a book of extraordinary depth and breadth. Considering its technical subject matter, it is also extremely accessible. It will no doubt become the primary port of call for practitioners requiring assistance on complex aspects of tax law.●

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