The Bar Review

Journal of the Bar of Ireland • Volume 10 • Issue 5 • November 2005

- Can Ethics be Competitive
- Who'll be the Judges
- The Division of Marital Assets in Ample Resource Cases

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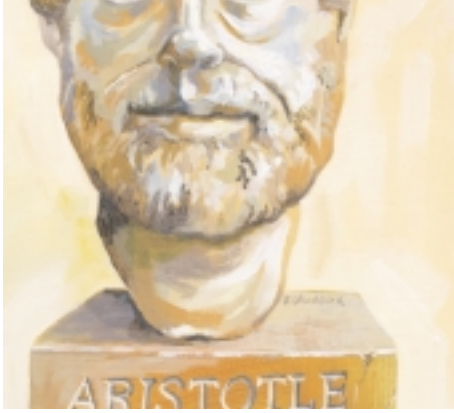
The Bar Review

Volume 10, Issue 5, November 2005, ISSN 1339 - 3426



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The Bar Review is published by Thomson Round Hall in association with The Bar Council of Ireland.

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Thomson Round Hall
43 Fitzwilliam Place, Dublin 2
Telephone: + 353 1 662 5301 Fax: + 353 1 662 5302
Email: info@roundhall.ie web: www.roundhall.ie

Subscriptions: January 2005 to December 2005 - 6 issues
Annual Subscription: €188.00
Annual Subscription + Bound Volume Service €288.00

For all advertising queries contact:
Directories Unit. Sweet & Maxwell
Telephone: + 44 20 7393 7000

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Changes to the Code of Conduct

Hugh Mohan SC

The Competition Authority and Bar Council both believe in an independent referral Bar. The report and the chairman of the Competition Authority endorse this and accept it is both necessary and good for a democratic society. Likewise, we agree that the Bar must be competitive and pro-consumer.

Some of the Competition Authority's proposals will facilitate competition and will not disadvantage the consumer. The Bar Council would like to implement those proposals. Other proposals would undermine the independence of the referral Bar to the detriment of the consumer. The Bar has carefully considered these proposals, and where appropriate, has suggested alternative and more proportionate means by which those objectives can be achieved. This document details those proposals.

The Bar's independence is important, as in a democracy, the law serves as a bulwark between the State and the citizen and protects the Constitution and peoples' rights. A person, anywhere in the land, can take on the might of the State or big business, on an equal footing. Exclusively commercial or competition standards cannot be applied to the administration of justice. These standards are ill equipped to reflect the value of equality of arms before the court and the need to protect those who cannot afford representation.

This is an on-going process of developing and modernising our rules and Code of Conduct for the benefit of barristers, consumers and businesses users and in the interests of increasing efficiency in the legal system. More detailed wording will be circulated to members in the forthcoming months. Below, please find an over view of the changes proposed and the effects these will have.

Regulation

It is felt that greater transparency and openness is needed in the complaints procedure to reassure clients that they are being treated fairly and equitably if they have a complaint. Complaints have always been very low against the profession which signals that clients are happy with the work of their barristers. These changes will improve the complaints procedure if a problem does arise, in the interests of both the barrister and their clients.

There will be more non-lawyers involved in the complaints process, with a majority on the Barristers Professional Conduct Tribunal and the Appeals Board of the Tribunal. An independent Ombudsman has been requested to oversee the complaints procedure. Any person who is dissatisfied with the decision of the Appeals Board will have an automatic right of referral of their complaint to an Ombudsman.

A simple form in plain English will be placed on the website or sent out to complainants. This will give clear instructions on how to make a complaint. The new procedures will be explained in a plain English leaflet and available on the website of the Law Library and the subject of an information campaign. The procedures and assistance available for complainants will be clearly explained

Legal fees and taxation of costs

The Bar Council wishes to encourage transparency and competition in respect of fees. It recommends all clients of the Bar to seek comparisons of fees for their legal work and recommends the issuing of fee estimates, where possible, prior to the commencement of work. The following reforms of the taxation of costs, which determines legal costs, are supported by the Bar Council, and would assist clients and reduce their costs:

(a) Fees should be set on the basis of the work undertaken by each of senior and junior counsel and the value of that work to the client.
(b) The Department of Justice, Equality and Law Reform should introduce legislation to permit persons other than solicitors be appointed to the position of Taxing Master.
(c) The Legal Costs Group established by the Minister for Justice, Equality and Law Reform should undertake a careful review the current system.
(d) Out-of-date provisions contained in Order 99 of the Rules of the Superior Courts should be revoked.
(e) The process of taxation should be reformed to eliminate unnecessary delays in delivering results.
(f) Additional Taxing Masters should be appointed to deal with the level of work and to allow proper assessments to be carried out in accordance with the requirements of section 27 of the 1995 Act.
(g) It is important that the taxation process should look at both the value or worth of the work done and the necessity to carry out that work. Unnecessary costs should not be for the account of the paying party.
(h) All taxations of costs should be centralised in one agency in the State, with provision to allow Taxing Officers to travel around the country to facilitate country practitioners.
(i) The objections process should be examined. Objections should be dealt with by a different Taxing Master to the Taxing Master who heard the original taxation.
(j) Appeals to the court should be dealt with by judges specifically assigned to reviews of taxation.
(l) A simple taxation process should be introduced to deal with cases where only a single item is in dispute or only a very small number of items are in dispute. A simple written process might well be appropriate in such cases.

Expansion of direct professional access.

It is proposed to extend the range of work available on a direct access basis as much as possible, while preserving the independent referral Bar. This includes increasing the number of organisations who have DPA, developing the Small Claims Arbitration Scheme and increasing the Voluntary Access Scheme, whereby barristers carry out opinion and litigation work for NGO's and charitable bodies on a free basis.

Advertising

Changes are proposed in relation to the way barristers advertise their services, their experience and expertise and the fees which they charge. A directory of barristers' services (sent to every solicitors' firm in the country) and corresponding website profile will be provided offering detailed information about each barrister. Increased advertising should

not encourage litigation or contain misleading information or diminish public confidence, but should enhance price transparency to the benefit of business and consumers.

Switching professions

There will be no rules restricting a solicitor from entering the barrister's profession, if they are qualified. This includes removing the rule which prevents a solicitor, who has switched profession, taking work from any solicitor's firm with which that solicitor was previously associated.

Assisting new barristers to get established

Changes should be made to make it easier for a barrister entering the profession to get established quickly. It is proposed that persons entering the profession will be free to take work from former employers immediately and that they will be able to participate in an expanded direct professional access scheme, as well as have significant freedom in advertising their fees, expertise and availability. It is proposed that they would be free to work in a greater variety of part-time jobs outside the profession to provide an income while getting started. The existing practice whereby barristers share expenses so as to achieve economies of scale will be formalised.

Entitlement of barristers to do work for other barristers

It is proposed that barristers will be allowed to engage other barristers on a paid basis, to do certain work for them. This amendment will assist new barristers in getting established and, in particular, help them to acquire experience and a reputation.

Sharing of facilities and expenses

The existing practice whereby barristers share office, secretarial, legal services and other facilities and expenses in relation to the operation of their profession will be formalised, thereby lowering costs. The Bar Council is continually expanding the services made available to barristers and using its purchasing power to achieve significant cost savings for barristers, to the overall benefit of business and consumers.

Part-time Occupations

The range of part-time occupations in which barristers may engage will be expanded.

Appointment of Senior Counsel

The Bar Council will support the establishment of clear and transparent criteria for the appointment of barristers, on merit, to the rank of Senior Counsel. There should be ongoing monitoring of quality and a procedure for withdrawing the mark in the event of a reduction in the level of quality.

These proposed changes would significantly improve many aspects of the profession, and are proposed for the benefit of business users and consumers. They offer modern regulation, increase information and price comparison and offer some stability for those entering the profession, which in turn offers more choice.

They are designed to meet the needs of users and will deliver significant efficiencies and services while maintaining professional standards and the integrity of the system of the administration of justice. It is believed that these proposals, when implemented, will meet any justifiable concerns expressed by the Competition Authority.

If any member has a query about any of these changes, please feel free to discuss them with myself or any member of the Bar Council. Further information will be circulated in the coming months and there will be many chances for dialogue on these changes, for the good of the profession and to improve our dealings with our clients. I hope that these amendments will be welcomed by members as part of an on-going process of modernising and improving the way in which the Irish Bar provides legal services to the community. ●

The Small Claims Arbitration Scheme

Jeanne McDonagh

Minister Micheál Martin officially launched the Bar Council's Small Claims Arbitration Scheme on Wednesday, 19th October in the Law Library Distillery Building. This is an innovation in small claims arbitration, for claims up to €7,500, which will reduce administration costs for all parties involved. The cost of the arbitrator is limited to €750. This scheme will allow businesses to claim small amounts, which are usually written off, as it is too costly and time consuming to go to court.

The arbitrator is available from a pool of barristers and agreed by both sides. The arbitrator's decision is binding. The scheme is explained in plain English in a pack laying out the rules and containing all the necessary documentation to pursue a claim and certified by NALA.

This is a trial scheme initially in order to see what systems work best and to train up arbitrators to ensure best practice and to eliminate any problems that might arise. The Bar Council welcomes the support of businesses and business organisations in developing it and has spoken to many organisations about how best to operate the scheme.

The aim of the scheme is to offer access to legal expertise at a low cost, with a short time limit and using plain English. Legal representation is not mandatory. The entire process will be case managed by Rose Fisher to ensure that a decision will be given in 28 days from the date of the hearing. It is an excellent opportunity for junior members to hone their skills in arbitration under supervision and should open up a new area of work for them.

As the trial scheme develops, a full panel of potential arbitrators will be put together. It is envisaged that the trial scheme will run for a period of six months, after which there will be an assessment of what improvements or changes need to be made.

In order to contact the administrator for further details, please ring Rose Fisher at Arbitration phoneline: 01 817 5072, fax number: 01 817 5018 or e-mail: arbitration@lawlibrary.ie ●

Can Ethics be Competitive?

Paul Gallagher SC*

Introduction

The aim of this paper is to address a question of fundamental importance for the Irish Bar, namely - the extent to which lawyers can embrace business methods and organisation while preserving the fundamental ethics of their profession. In this context, I focus on one section of the legal profession, namely barristers, and examine the implications of modern competition policy for the ethics of that profession. This paper focuses on the capacity of competition policy makers and, more particularly, competition law, to take account of ethical values and the sensitivities which such policy makers need to display in the context of the administration of justice.

What defines the Independent Referral Bar in Ireland?

There are a number of core rules which define the independent referral Bar which is comprised of practising barristers. These rules are enshrined in the Code of Conduct. Barristers are individually and personally responsible for their own conduct and for their professional work and must exercise their own personal judgement in all their professional activities. They must be absolutely independent and free from all other influences, specially such as arises from their personal interest or external pressure. A practising barrister has an overriding duty to the Court to act with independence and to ensure in the public interest that the proper and efficient administration of justice is achieved and that the court is not deceived or knowingly or recklessly misled. A barrister must conduct proceedings economically and bring all relevant authorities to the attention of the court, whether or not they assist the party for whom he/she appears. He or she must bring to the attention of the court any procedural irregularity which occurs during the course of the trial, ensure that the court is not invited to enforce an illegal transaction, and not make allegations of dishonesty without a proper basis to support them.

Subject only to his or her duty to the court, barristers must promote and protect fearlessly and by all proper and lawful means the best interests of their lay client and do it without regard to their own interest or to any consequence to themselves or to any other person. As between the lay client and any professional client or other intermediary, the barrister's primary duty is owed to the lay client. A barrister must not permit the intermediary to limit his discretion as to how the interests of the lay client can best be served. A barrister is bound to accept instructions in any case in the field of which he or she professes to practice at a proper professional fee unless justified by special circumstances in refusing to do so - this is colloquially known as the C*ab Rank Rule*. This applies irrespective of whether the client is paying privately or is publicly funded and irrespective of the party on whose behalf the barrister is instructed, the nature of the case and the brief or opinion which the barrister may have formed as to the character, reputation, cause, conduct, guilt or innocence of the person.

These are the fundamental principles by reference to which barristers operate. They are the ethics of the barristers' profession and are integral and fundamental to that profession. They define the very service offered by a barrister.

These are self-evidently rules which are not designed for the promotion of the financial self-interest of a barrister. Rather they impose very onerous obligations on a barrister in the practice of his/her profession. They are rules to which a barrister must conform irrespective of the personal or financial consequences. They are rules which impose on the barrister a duty additional to the normal duty owed by any professional person to their client. It is a duty not to a person but to a concept enshrined in the Constitution and embodied in the court system, namely the integrity of the justice system as administered by the courts pursuant to the Irish Constitution. The existence of these duties suggest that barristers do not operate like many other professionals and certainly like persons involved in business or trade. In business or trade so long as persons keep within the law, their exclusive duty is to themselves. They are entitled, and expected, to follow their own self-interest and financial well-being. While other professions may be subject to general obligations not to bring their profession into disrepute, they do not owe a duty to a third person, and are not under the intense scrutiny and supervision by the very body to which the duty is in practical terms owed, in the actual conduct of their practice. Other professions are free to select their clients and in representing those clients are not obliged to disclose to third parties matters which may be prejudicial to their client's interests.

These ethics in turn contribute to the public perception of barristers' independence. In the past, what was fundamental was independence from the patronage of government. In modern times, the emphasis has shifted more to independence from clients and other commercial considerations.

These ethics on their own distinguish the service offered by barristers from that offered by other service providers. These ethics reflect the crucial role played by barristers in the administration of justice. A failure by a barrister to adhere to these ethics has consequences not just for the barrister, but more fundamentally for the integrity of the system of administration of justice and all those exposed to that system. Adherence to these ethical principles therefore is something which must

*This paper was delivered at the Joint Conference of the Australian and Irish Bars in July 2005

be guaranteed, so far as possible. Effective compliance and confidence in the system requires the maintenance of structures and an environment conducive to the discharge by barristers of these ethical obligations. It requires something more than the mere existence of a code of conduct to which people are required to comply on risk of retrospective sanction for breach. The principles are so fundamental that it is necessary to ensure, so far as possible, that compliance is achieved, otherwise significant deficiencies arise in the administration of justice with consequent loss of public confidence and the threat of ex *post facto* sanction. Breaches of ethical obligations by their nature are difficult to detect, difficult to prove and consequently difficult to sanction. Compliance is not something which can be left to the market to enforce. Its enforcement requires the right structures and fear of professional rebuke or censure that is inherent in the operations of a profession, the members of which are engaged in daily interaction with one another and with the courts. Fear of loss of peer esteem, fear of loss of the court's confidence together with the habitual practice of these ethical values, required by daily or frequent exposure to the courts and judges, are essential safeguards in the maintenance of this delicate system. Barristers' independence and concentration on advocacy has the result that they do many cases before the Court on a frequent basis and constantly therefore apply these ethical principles. The function which professional peers and the courts play in maintaining not only ethics but also skill was neatly summarised by Donaldson MR in *Abse v. Smith* [1] where he said:

> "These high standards of skill and probity are not capable of being maintained without peer leadership and pressure and appropriate disciplinary systems and the difficulty of maintaining them increases with any increase in the size of the group who are permitted to practice advocacy before the courts. Furthermore, whilst the need for high standards of probity is universal, the occasions upon which problems of conflict of interest or duty will arise are more frequent in some courts or stages of proceedings than in others. Again the general standard of professional skill demanded is not the same in all courts and all stages of proceedings. In some courts it is higher than in others due to the complexity or specialised nature of the legal problems which may be expected to arise. Accordingly there is a public interest in ensuring that the size of the group of permitted advocates is not unduly large and, in the context of special skills, that the group is smaller in the case of some courts than of others. Against this must be set the public interest in ensuring the availability of qualified advocates in sufficient numbers and places and at a cost which will deny no one the services of such an advocate when the interests of justice so require."

The recognition of the vital role played by barristers in the administration of justice extends to other jurisdictions. US Federal Judge Posner, a noted specialist in economics and the law, said[2] in relation to the English system (a remark which applies even more to the Irish system).

> "Above all the barristers marshall the facts and the legal authorities for a decision, which is half the work of a Judge. The Judges can trust the barristers to play straight with them concerning the facts on the cases and the other materials for judgment. It is the general belief of students of the English legal system, and it is also what the Judges I spoke to in England told me and what my own observations of appellate argument in the Court of Appeal confirm. In drawing from the identical pool, moreover, judges and barristers can readily understand each other. They are on the same wavelength. As a result of these things, English judges are able to function without law clerks, who play an essential role in the American system with its effectively open bar dominated by lawyers whom the judges do not trust."

Barristers whose daily task it is to practice before the Courts in a wide range of cases acquire not only a greater expertise in advocacy but also help to create that atmosphere of judicial trust which is essential to the proper working of the system. Judges know that the individual barrister is aware that it is his/her reputation which is on the line and that it is he or she who must maintain the trust of the Court. The individual barrister bears the individual responsibility for the presentation of the case to the Court. It is that shouldering of the individual responsibility, that individual answerability which helps ensure the ethical duties to the Court are discharged. Further it is that individual responsibility and freedom that enables a barrister to fearlessly protect his or her lay clients' interest without having to have regard to what other partners may think or want. There is no pressure on the individual barrister to account to other partners for his or her time, or income generation, or for upsetting a particular client through ethical disclosure to the court.

The court system works well because it is served by a specialist independent Bar which traditionally has been prepared to champion the case of any deserving litigant; which is experienced not only in the complexities of the law but more particularly in the complexities and subtleties of litigation, and which provides all litigants with the possibility of being represented on reasonably equal terms, despite inequality of resources.

The independent Bar is perhaps the core principle because it greatly facilitates the operation of the *Cab Rank* rule. It reduces the external pressures which might otherwise make the discharging of the overriding duty to the court more difficult and it imposes the personal responsibility and the personal exposure to judges which is conducive to compliance with the ethical principles. The independent Bar is vital to the success of that system even if it is not the only vital component.

Because barristers are independent and do not concentrate in partnerships, particularly specialty partnerships, the choice of advocate open to litigants is significantly greater than it otherwise would be; their independence is more assured; their capacity to do *pro bono* work and no foal/no fee cases is greater because it is not dependent on anybody else's approval. Furthermore, Judges know that the extra independence from lay clients which barristers enjoy over solicitors, by virtue of working less closely with the client and being, in general terms, more independent of particular lay clients, justifies that confidence in those who appear before them and that in turn is essential to the smooth effective and justice running of the system.

If the importance of the existence of an independent referral Bar operating in accordance with these core principles is recognised, as it

1. [1986] 1 Q.B. 536 at 546
2. Law and Legal Theory in the UK and USA (Clarendon Law Lectures 1996)

must be, then the protection of the pillars which support that independent Bar becomes a fundamental consideration in any evaluation, by competition authorities, of the barristers' profession. Furthermore, competition policy and law must be able to accommodate these core ethical values if they are to survive and if the significant benefits that accrue to the public from the present system are to continue to be enjoyed.

I have concentrated above on the core ethical values. There are obviously many aspects of a barrister's profession/organisation that benefit greatly from the application of business principles of efficiency, economy and organisation. There is no potential conflict between competition policy and these aspects of a barrister's service. The potential for conflict only arises where competition policy does not fully take account of the relevance and importance of the fundamental ethical principles. I believe the real threat to the welfare of the users of a barrister's services comes from mechanistic attempts to apply competition law to the barrister's profession without properly distinguishing and appreciating the significant respect in which that profession contributes to consumer welfare in a manner which cannot be captured by existing economic models of pricing and efficiency. In the remainder of the paper I consider whether competition law as presently interpreted has the capacity to accommodate these core values. Any consideration of this issue involves, in the first instance, a consideration of the philosophy underlying competition law that applies in this jurisdiction and then an analysis of the relevant legal provisions.

Competition Law and its Rationale

Competition policy is concerned with consumer welfare. Theoretically consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Competition policy has a built-in preference for material prosperity but the concept of consumer welfare used in competition policy has no ethical component. The economic models that underpin competition theory have no co-efficient for ethical values. They do not measure the ethical externalities because they are not taken into account in the pricing mechanism. Provided competition authorities fully understand what is at stake and properly apply competition law, there is no inherent incompatibility between ethics and competition.

Mario Monti, the former EU Competition Commissioner, said:

> "The goal of competition policy in all its aspects is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer."[3]

In *Oscar Bronner GmbH -v- Media Print* [4] Advocate General Jacobs made the same point in different words:

> "It is important not to lose sight of the fact that the primary purpose of Article 8(2) is to prevent distortion of competition - and in particular to safeguard the interests of consumers - rather than protect the position of particular competitors."

The ideal of perfect competition on which competition policy is based is designed to deliver both productive and allocative efficiency. Productive efficiency occurs when a given set of products are being produced at the lowest possible cost (given current technology, input prices and so on). This occurs in industries characterised by perfect competition because any firm that does not produce at the lowest possible cost will lose money and exit the market.

Allocative efficiency relates to the difference between the cost of producing the marginal product and the valuation of that product by consumers. If the marginal cost of producing one more unit is different from the amount that consumers are willing to pay for that extra unit, then there is allocative inefficiency.

There are many aspects of the administration of justice, which are believed to contribute to consumer welfare but which of course would not meet the rigid requirements of productive/allocative efficiency and cannot be measured in terms of reduced prices or increased output. It is difficult to describe the constitutional right to natural justice in economic terms and indeed it is much harder to do so in terms of efficiency. A litigant is entitled to be heard. That entitlement does not rest on some prior evaluation of the prospects of success or the financial cost to the system in according that right. It is an inalienable right and a fundamental aspect of the administration of justice. The right of access to the court is not, save in exceptional cases, subject to prior scrutiny of the prospects of success or indeed the ability of the litigant to fund the costs of the proceedings.

Undoubtedly, the adversarial system adopted in this jurisdiction and a litigant's right, without leave of the court, to call relevant evidence and to argue any relevant point of law, involves cases taking considerably longer than might be the case were those rights to be restricted or if strict time limits were imposed by the court or if greater emphasis were to be placed on the written procedure or an inquisitorial role were accorded to the judiciary. In this jurisdiction, we have not adopted any of those options and we have accepted that the significant external cost of affording litigants access to the courts and an entitlement to conduct their cases in the manner described are ultimately costs which society should bear in the overall public interest so that justice can be administered in a manner which is thought to be consistent with the Constitution.

Barristers' services are an input into this system. Barristers undoubtedly render services to clients and like any other service providers, these services may vary in quality and price. Sometimes price will reflect the quality of the service provided. However, the product into which barristers' services are input is not an economic product. Justice is not traded. It cannot be expressed in terms of output or price. This suggests that orthodox economic analysis if mechanically applied in a competition context is likely to detract from, rather than augment, consumer welfare. This is the challenge therefore for competition policy makers and the obligation of barristers is to ensure that this challenge is properly understood and that the fundamentals are protected.

The task for the formulators of a competition policy has been neatly summarised by Judge Cooke in "*Competition in the Cab Rank and the Challenge to the Independent Bar*"[5] where he states:

3. Mario Monti Competition Commissioner - July 10th 2001
4. [1998] ECR I-7791.
5. [2003] 8 Bar Review 148 at 149. Judge Cooke is a Judge of the European Court of First Instance which hears a large number of competition cases.

"Clearly the formulation of competition policy for legal services involves the difficult task of balancing the public interest in procuring the cost effective availability of legal services for both the public and the State itself (the profession's biggest client), against the social interest of retaining public trust in the quality and integrity of such services by not allowing the administration of justice to be governed by predominantly commercial criteria."

The central issue is whether competition policy as expressed in the relevant legislative provisions is equipped to discharge this task. A policy which is premised on a very particular view of consumer welfare with no co-efficient for ethical values would, *prima facie*, appear poorly equipped for such a task. Whether it can discharge such a task ultimately depends on the manner in which the relevant provisions are interpreted by policy-makers and ultimately the courts.

In Ireland, the governing legal provision is to be found in Article 81 of the EC Treaty having regard to the inter-state trade element of the provision of barristers' services. Article 3 of Council Regulation 1/2003 (On The Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty) ("the Regulation") provides that where the Competition Authorities of the Member States or national courts apply national competition law to agreements, decisions or concerted practices (within the meaning of Article 81(1) of the Treaty) which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty. The application of national competition law may not lead to the prohibition of agreements, decisions and concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty. Ultimately therefore, where inter-state trade is actually or potentially affected the position is governed by the EC Treaty.

Article 81 of the EC Treaty provides:

"(1) The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by association of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investments;

(c) share market or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

(3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings
- any decision or category of decisions by an association of undertakings
- any concerted practice or category of concerted practices,

which contributes to improving the production of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

It will be seen that the wording of Article 81 is expressed very much in terms of pricing, production and efficiencies. Read literally, paragraph (1) prohibits and makes void any agreement which has the effect of preventing, restricting or distorting competition irrespective of any other attributes of such agreement. An agreement void for infringing paragraph (1) only escapes sanction if it meets the very strict and cumulative requirements of paragraph (3). Paragraph (3) is again expressed in terms of improvements in production and the promotion of technical or economic progress. There is no explicit mention of the protection of ethical values.

A narrow view of Article 81(3) suggests that it permits only improvements in economic efficiency to be taken into account because it speaks of improvements to production and distribution and to technical and economic progress. On that interpretation, Article 81(3) allows a balancing of the restrictive effects of an agreement under Article 81(1) against the enhancement of efficiency under Article 81(3). The Commission's White Paper on Modernisation[6] which began the process that culminated in the adoption of Regulation 1/2003 explained Article 81(1) and Article 81(3) in this way.

The question therefore arises as to how protection of the ethical values can be reconciled with the requirements of competition law or how do competition authorities, in Judge Cooke's words, "*balance the public interest*" in procuring the cost-effective availability of legal services on the one hand and the social interest of retaining public trust in the quality and integrity of such services on the other hand.

One possible avenue to achieving this goal might have been the adoption of some sort of rule of reason test as adopted in the United States. The US Supreme Court in *Continental TV Inc v. GTE Sylvania* [7] defined the rule of reason as calling for a case-by-case evaluation "*that is, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition*". This rule was a technique adopted in the United States to mitigate the absolute prohibition of "*every contract combination ..... or conspiracy and restraint of trade*" to be found in Section 1 of the Sherman Act 1890, which had no provision for exemption equivalent to Article 81(3) EC. The rule in essence requires that when determining whether an agreement

6. [2001] 5 CMLR 1148 White Paper on Modernisation
7. 433 US 36 at 49.

restrains trade in the sense of Section 1 of the Sherman Act 1890, the agreements pro and anti-competitive effects must be balanced and where the latter outweighs the former, the agreement will be unlawful. Such an approach has not been explicitly adopted in European law although some argue that the decision of the European Court of Justice ("ECJ") in *Wouters v. Algemene Raad Van De Nederlandescher Ord Van Advocaten*[8] represents a movement in that direction. However the Court of First Instance ("CFI") in *Metropole Television v. Commission* [9] expressly rejected the suggestion that a rule of reason existed under Article 81(1) and a similar approach was adopted by the CFI in *Van Den Berg Foods v. Commission* [10].

The apparent rejection of the rule of reason approach does not, however, mean that competition law is incapable of carrying out the necessary balancing act to take account of ethical considerations. In this regard, the approach of the ECJ in *Wouters* is of very considerable importance. In that case, Mr Wouters challenged a rule adopted by the Dutch Bar Council which prohibited lawyers in the Netherlands from entering into partnership with non-lawyers. He wished to practice as a lawyer in a firm of accountants. A number of questions were referred to the ECJ as to the compatibility of such a rule with ECJ competition law. It found that the prohibition of multi-disciplinary partnerships was "*liable to limit production and technical development within the meaning of Article 81(1)(b) of the Treaty*[11]". It also considered that the rule had an effect on trade between Member States. However at paragraph 97 of its judgment, the Court stated:

> "However, not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience ..... It is then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives."

What is important to note is that the ECJ recognised, in the context of Article 81(1) and not by reference to the exempting provisions of Article 81(3), the importance of ethical values and their role in any assessment of the competition issues arising in relation to the rules. The Court went on[12] to conclude that the prohibition could reasonably be regarded to be necessary in order to ensure the proper practice of the legal profession, as it was organised in the Member States concerned. The Court went on to say[13]:

> "Furthermore the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former state are incompatible with Community law. ..... Even if multi-disciplinary partnerships of lawyers and accountants are allowed in some Member States, the Bar of the Netherlands is entitled to consider the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal regimes by which the members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means .....
>
> In light of those considerations it does not appear that the effects restrictive of competition such as those resulting from members of the Bar practising in the Netherlands from a regulation such as the 1993 Regulations go beyond what is necessary in order to ensure the proper practice of the legal profession. ....."

Wouters is a very important case. Previous cases had accepted the idea of ancillary restrictions on conduct where they were ancillary to some other legitimate purpose. What was different in *Wouters*, however, is that the restriction was not necessary for the execution of a commercial transaction, or the achievement of a commercial outcome on the market. It was ancillary to a regulatory function to ensure that the ultimate consumer's legal services and the sound administration of justice were provided with the necessary guarantees in relation to integrity and experience. That appears to be a different application of the concept of ancilliarity from that in the earlier case law. The decision generated some controversy because the court decided the public interest issues in the context of Article 81(1). Some commentators believed that the public interest issues could only arise, in the context of Article 81(3), following a finding that there was an infringement of Article 81(1). However from May 1st, 2004, when Regulation 1/2003 came into force, the distinction between Article 81(1) and Article 81(3) is essentially of academic relevance. This is because, in practice, agreements etc which are justifiable in the public interest will be compatible with Article 81 EC by virtue of Article 81(3) EC exemption. That academic controversy therefore is a distraction and should not detract from the significant fact that the court, in assessing the validity of the agreement, took into account ethical values.

The ECJ, therefore, in *Wouters*, in determining that it is legitimate to take into account the need to pursue public interest objectives in deciding whether agreements infringe Article 81(1) EC, has explicitly acknowledged the significance of ethical values as defining the nature of legal services. In particular, the judgment recognises that while legal services are tradable and therefore subject to competition law, they are not directly comparable with services normally provided by undertakings operating in the market, which are usually defined solely in economic terms. The services provided by an accountant, an engineer, an architect, a stockbroker and service providers generally do not give rise to the same public interest issues analogous to those that arose in *Wouters*. The traditional analysis of competition law in terms of analysing whether an agreement is in breach of Article 81(1) and then testing the justification in terms of output and efficiency under Article 81(3) is more suited to an examination of the more orthodox competition issues which arise in relation to such services.

The *Wouters* case also emphasises another very important point which is sometimes overlooked. Legal services more than most, if not all, other economic services in modern Europe are fashioned by the significantly differing legal context in which they are provided. The closest analogy to the services (throughout the Member States) provided by Irish barristers is provided in the context of the English legal system. However, there are significant underlying differences between the

8. Case C-309/99 [2002] ECR I-1577
9. Case T-112/29 [2001] ECR II-2459
10. Case T-65/98
11. Paragraph 90
12. Paragraph 107
13. Paragraph 108

structures which exist in England and those which exist in Ireland, quite apart from the very substantial differences in the market context. The ECJ recognised these differences and in particular that different legal systems would have different requirements and give rise to different public interest considerations.

An issue which did not arise in *Wouters* but which does arise in other cases was the sufficiency of the methodology used in carrying out the economic analysis. Recently both the CFI and the ECJ in C*ommission v. Tetra Laval*[14] reversed a decision of the European Commission prohibiting a merger, largely on the grounds of the failure of the Commission to carry out the necessary rigorous coherent and data based economic analysis required before there should be a regulatory intervention in the market. In dealing with an area of the market which gives rise to such significant public interest issues, such an economic analysis is even more vital before recommending or attempting regulation or alteration of the existing structures. As Judge Cooke has said[15]:

> "Moreover, the structure and organisation of the legal system has important economic implications in a relatively small economy where outside the main cities, a very high proportion of practices are single practitioner firms .....
>
> In the circumstances therefore, one would expect the enquiring economist to ask himself first, whether or not this organisation of services represents, perhaps, evidence of an efficient allocation of resources before assuming that it must be the result of restrictive behaviour."

The necessity for such an approach is all the more apparent if, as this paper argues, the independent referral Bar, as it presently exists, plays a crucial role in the administration of justice and in particular, in providing the potential for litigants from all over the country, and in particular litigants of limited means, to achieve an equality of arms with litigants who have far greater resources. Again, as Judge Cooke pointed out[16]:

> "The market [for barristers' services] is only fragmented in that it is made up of 1,300 sole practitioners. But within that number there are just over 200 silks[17] and within the Bar as a whole, there are areas of important expertise (tax, local government, defamation, European Community law, company law and so forth) where the numbers of specialists may be less than a dozen. If even a handful of these specialists become employees or partners of solicitors or join multi-disciplinary practices, they are no longer potentially available as at present to the clients of any other firm."

In those circumstances (and in a context where 46% of solicitors practice in one person firms and the vast majority in firms of less than 3 persons), of course the loss should not be just measured as a reduction in the economic choices available to litigants but as a significant loss of the skill and experience which contributes to the integrity of the justice system. Those facts also suggest significant adverse effects from concentration of barristers' services in the legal profession.

These issues have a particular resonance in the Irish context at present because the Competition Authority has recently published a Preliminary Report on the legal professions. Many of the suggestions contained in the Preliminary Report have been welcomed by the Bar. Independently of the Competition Authority, the Bar has engaged in a process of amending its rules so as to improve the delivery of services to the consumer. A few of the changes suggested, however, do significantly threaten the continuation of the independent referral bar. It is apparent from a consideration of the Report that this threat has not been properly appreciated by the Competition Authority, much less properly analysed. The threat is serious notwithstanding that it is couched in terms of choice as opposed to any suggestion that the existing system of organisation / independence must change. The Competition Authority suggests that the structure of the profession can be determined exclusively by the market without of course attempting to measure in any way the potential consequences of such a change for the existence of the independent referral Bar. The Authority unrealistically believes that an effective independent Bar can co-exist with a system in which barristers would form partnerships, either amongst themselves or with others. They so conclude without making any attempt to measure the adverse consequences of such concentration or to take into account the inevitable consequence that the barristers who had not so organised themselves would be perceived by many persons as being of inferior ability and experience. That very likely consequence would effectively mean that barristers would be pressurised into forming firms, thereby seriously damaging if not destroying the existing system, where there is dynamic competition between barristers, and which has worked so well over the years. Additionally it would significantly reduce the consumer's choice.

It is not the purpose of this paper to carry out a detailed critique of the Authority's recommendations. Nevertheless I want to briefly discuss their conclusions because I believe they exemplify a deficient approach to the application of competition law, and one which has been rejected by the ECJ in both *Wouters* and *Tetra Laval*.

By way of example, the Authority asserts that the rule that barristers cannot form partnerships with other barristers prevents barristers

> "from organising supplies or services in the most efficient way possible. It prevents potential efficiencies being realised from being able to build shared reputation among professionals and from economies of scale, e.g. in advertising" [18].

The Authority has disclosed no data to support this assertion and it appears that none exists. As a matter of fact, the assertion ignores the very significant economies of scale which are presently achieved by barristers sharing a wide variety of services, e.g. office accommodation, library services, access to legal data bases and financial services. This concept of a shared reputation seems to suggest that consumer welfare is somehow improved by one barrister sharing a reputation achieved through his or her own ability with another barrister of presumably lesser ability. Such shared reputation is likely to confuse potential clients and lead to lack of transparency and greater difficulty in evaluating the services of a particular barrister and in deciding whether

14. Case C-12/03 European Court of Justice, 15 February 2005.
15. "*Competition in the Cab Rank and Challenge to the independent Bar*" (2003) 8 Bar Review 148 at 198
16. Op. cit. at 198.
17. As of July 2004 there were 1,468 barristers in practice of which 263 were Senior Counsel.
18. "*Study of Competition in Legal Services*", Preliminary Report, 24 February 2005, p.52

the fees charged by that barrister are commensurate with the skill and experience offered. It would also reduce personal responsibility.

The Authority asserted a second adverse effect, namely, that the present system may act as a barrier to sustainable entry. Again there is no data to support this assertion. Insofar as it is a concern, it is of course met by some of the Authority's other recommendations, which the Bar readily accept and in particular, the recommendation that young barristers should have the opportunity of working on a case-by-case basis for older barristers, so as to generate income and increase their exposure to potential clients. It also ignores the very significant subsidisation provided by the present system to young barristers and the provision to them at greatly reduced cost of significant shared resources, which enable them to practice on their own as barristers on entrance to the Law Library.

Having identified the alleged restrictive effects, the Authority does not, as the Court in *Wouters* did, analyse whether these consequential effects are inherent in the pursuant of the objectives of maintaining professional ethics, supervision and liability and the sound administration of justice. Instead they adopt an entirely different approach clearly at odds with *Wouters*. They recognise the objective of a barrister being free from undue influence as being valid; they acknowledge that it is in the interests of justice that a barrister operates in an independent manner[19]; but they assert (again with no supporting data or evidence) that the restriction requiring barristers to be sole practitioners is (a) disproportionate to the objective and (b) does not necessarily guarantee its achievement.

The issue of whether the restriction is disproportionate to the objective requires an analysis of the extent and effect of the restriction, which is wholly lacking. The measured effect must then be evaluated in the context of the importance of the protection of this independence. Again, this is not done. It cannot be doubted that independence is not only a valid consideration but is a vital consideration in the administration of justice and even the asserted restrictions on competition are, on any view, minor and could, to use the Authority's own analysis, be removed or reduced in a far less disproportionate way. There is not only a failure therefore to adopt the correct approach to an evaluation of the whole issue, but even within the Authority's own methodology, the disproportionality arises in the context of the Authority's suggested remedy and not in the context of the alleged restriction.

In addition to the contention of disproportionality, the Authority states that the independence of the Bar does not "necessarily guarantee" the achievement of the interests of justice. This of course is also to ignore the approach of the ECJ in Wouters. There, the ECJ asked whether the regulation could "*reasonably be considered to be necessary in order to ensure the proper practice of the legal profession*". It is not required to be established that the restriction necessarily guarantees the objective. Of course, on its own, the restriction does not. Much more is required to achieve such an objective. However, if the system of independent barristers does not necessarily guarantee the achievement of the objective, it follows that the change in structure proposed by the Authority will be significantly less effective. The lack of guarantee is not therefore a justification for change as asserted but rather is a powerful justification for not tinkering with the system in a manner likely to lead to adverse and immeasurable consequences.

Conclusion

In conclusion, therefore, there is no inevitable reason why there should be a conflict between competition and ethics provided the principles of competition law/policy are correctly applied to the evaluation of a service that has a significant public interest element and which cannot be evaluated in purely financial terms. The ECJ in *Wouters* adopted the correct approach and applied competition law as it ought to be applied in the evaluation of this particular *economic good*. A failure to apply the principles correctly can lead to unnecessary conflict and to unwanted and unforeseen changes in a structure that has contributed, and continues to contribute, significantly to the administration of justice and which provides benefits in terms of consumer welfare which cannot be evaluated purely on financial terms.

Competition policy must ensure that in its zeal to achieve efficiency, it does not undermine the very bedrock on which the system of administration of justice is built. An independent referral bar has served the administration of justice very well in this country. Significant efficiencies and improvements in the quality of barrister services can be achieved without ever seeking to impinge on any aspect of that independence. To allow competition policy dictate otherwise is to subscribe to a concept of consumer welfare that is inherently limited and ultimately likely to greatly detract from such welfare.

The Nobel Laureate and economist, Professor Amartya Sen, has frequently emphasised the limitations in existing economic theory and in particular the danger of evaluating utility and freedom in purely quantitative terms. He has pointed out[20] that Adam Smith, the father of modern economics, saw each human being as tirelessly promoting his own particular interest (and nothing else).

This assumption of rationality has the effect of simplifying the modelling of economic behaviour quite radically, since it disassociates individual behaviour from values and ethics (other than the value of self-interest). The individual may value anything, but in this view, he chooses entirely according to his reading of his own interest. Others can enter a person's calculation for rational choice only insofar as their actions and states affect his own well-being and advantage.

This theory of self-interest is fundamentally incompatible with the dictates of justice. A just legal system cannot be based solely on such values. It must embrace broader concepts of freedom and value. Competition policy is beneficial to society but it would do well to understand its own limitations. Otherwise that which is merely a tool for achieving consumer welfare becomes itself the end product which may be quantitatively pleasing but is qualitatively deficient. ●

19. Page 53.
20. Amartya Sen - "*Rationality and Freedom*"

Reflections on the Role of Law

Bishop Donal McKeown
Auxiliary Bishop in Down and Connor

The following is an extract from the homily delivered at a Mass at St Michans Church, Dublin 7 to mark the commencement of the Michaelmas legal term on October 3rd, 2005.

Like King Solomon, faced with the reality of having to make important decisions and judgments, we all pray for 'a heart to discern between good and evil'. (1 Kgs 3:9) Your judgments will affect the lives of individuals and sometimes, through precedents, the future direction of this society at this critical time in its development. That is an awesome responsibility.

There are - and have been - many ways of viewing law. It can be seen as an administrative tool to support the good management of a given society. Some assume it is there to vent the wrath of victims on offenders who have deserved punishment. It can be pilloried by others as merely a weapon to protect vested interests or as a self-serving closed shop. And like most Western societies, we remain ambivalent as to whether jail sentences are meant to reform, to punish or just to keep offenders off-side.

In the perspective of the Old Testament, a quite distinctive view of law appeared. Law was not just concerned with the smooth running of human affairs, nor with the punishment of offenders - but with the creation of a society where justice and right order flourished, in the interests of human dignity. Laws were not so much sent from on high to be obeyed with scrupulous care and fear. They were there that people might discover their dignity and their responsibilities. Law was a support in the creation of right relationships and thus a formative power on the human spirit. The psalmist suggests that "the law of the Lord is perfect, it revives the soul" (Ps 18). And in the New Testament, Jesus was clear that all law and laws were subordinate to the commandment of loving God, and our neighbour as ourselves.

Now that is easy to say - but not as easy to put into practice. Ireland is a changing society and I recognise that we live in a society where secularisation is quite rightly a vital force. We acknowledge the call to render unto Caesar the things that are Caesar's. Secularisation is not a bad thing. The secular world does have its rights and rules. The Second Vatican Council recognised clearly - and perhaps to the surprise of some - that "the temporal sphere is governed by its own principles, since it is properly concerned with the interests of this world" But secularisation needs to be distinguished from the secularism - as a dogma, a worldview - that is very strong in the Western world. That belief system flourishes in a post-modernist context where, it is insisted, there are no absolutes, no ultimate truth and no definitive statements about right and wrong. That is not a neutral belief but a clearly articulated belief system that is entitled to claim its place. But it has no more rights that any other belief system and cannot expect to have imperial rights over all citizens. Nowadays, few imagine that people of Christian faith are somehow entitled to expect a theocracy. A secularist hegemony is equally unhealthy. As believers in an incarnate God, we need clarity to see where imperatives of faith and the rights of the secular world can meet each other with respect.

The dominant modern context of moral uncertainty does create appreciable challenges for those who wish to be loyal servants of a pluralist state, and yet who come with their own profound convictions about moral and other values, based on the dignity of the individual. It can create real conflicts for those who believe that it is possible to seek the Truth, when acting as servants of a society that doubts whether truth exists. Inevitably, there are many pressures when we have to live in a world of what Professor Simon Lee helpfully called "uneasy ethics". And as we know from the mouth of Pontius Pilate, uncertainty as to the nature or possibility of Truth is not just a new post-modern concern.

This is not just a theological problem but a real one that you face each day as you seek justice in society. How do we build a society where there is little common vocabulary as regards the moral language of that society? How, in a pluralist state, do we allow public servants to have convictions without their being described as being dogmatic?

After all, while the bearer of the scales of justice may be blindfolded, law is always liable to be exploited for many purposes. The ability to sin is not restricted to church goers! You will be very aware of the background of so many who appear before the courts, the people that you daily prosecute, defend and judge. The social background of so many suggests that the guilty may also be in some ways victims themselves. I was startled by the figures published in the Department of Justice report which suggest that "disadvantaged petty repeat offenders, and not serious criminals, make up a significant portion of the prison population ..(and) the youth justice system is having virtually no impact on helping young people escape a life of crime" It must be worrying to you practitioners that half of the State's prisoners have a history of homelessness, and of these two thirds had spent time in a psychiatric hospital. You are people of great influence in this society. I know that you would want to pray for the wisdom and courage, not just to punish the wrongdoer, but to keep asking why it is that modern liberal societies seem to keep producing increasing levels of dysfunctionality. Emptying our psychiatric hospitals and filling our prisons does not really seem to be progress.

The late Pope John Paul II was clear about how there was an energizing interface between the rightful demands of the pluralist society and the contribution of believers to that society. People of conviction are not *a priori* enemies of social consensus and cohesion. The focus of any balanced community and the interest of believers are both directed towards the creation of a healthy society that respects the individual, builds solidarity and maximises the benefits of social capital.

There is thus no inherent conflict between serving the pluralist society and trying to be true to one's own deepest principles. We as a society, and primarily through your work, face the challenge of how to ensure that the use of law is a service of the common good. If it remains only a game, then we reflect King Lear's assertion that "we are the playthings of the God, they kill us for their sport". If law is only a milk cow to be exploited for self-centred purposes, then that will contribute little to the common good. If law ever becomes a tool of the strong to blame the weak for being victims, to help the strong take advantage of the weak, then it can reflect a Darwinian force, red in tooth and claw, raging against her brood. When, after a natural disaster, the primary assumption is that law firstly demands the defence of property rather than aid to the suffering, then we are moving in an unhealthy direction.

You have a huge responsibility and you bear that burden with dignity, compassion and wisdom. You have contributed - and will continue to contribute - much to the building of a society where all can live with dignity and security. As St Paul tells us, our society still groans in one great act of giving birth. This service of justice will always remain a work in progress. But as long as we see all of the parts of our society supporting the right of all citizens, not just to do what they want, but also to know love, hope, belonging and security, then the work of all of us will be seen as building the whole and not just defending sectional interests. ●

Continuing Professional Development.

Inga Ryan
CPD Manager

The Continuing Professional Development scheme came into operation in October. Our opening events in both the New Practitioners Programme and the Established Barristers Programme were very well received.

Our first activity for the new barristers was an update on Time Management at which Cathy Maguire BL shared her insights and a time management trainer warned of the downfalls of letting outside forces control you.

The first general event was presented by Nuala Butler SC and Mel Christle SC. They spoke on Immigration and Refugee Law, focusing on Judicial Review and the law of immigration in Ireland. They attracted a crowd of 150 people, not to mention those who were unable to attend because the seminar was booked out.

You are required to attain 10 CPD points throughout the year and Bar Council seminars are generally worth 1.5 points. You can claim up to 3 points for attending our half day conferences.

For details of CPD events planned for the Hilary term see the Professional Education page in the members section of the Bar Council website http://www.lawlibrary.ie/, or you can make enquiries by phone at tel. 01-8174614 or by email to iryan@lawlibrary.ie. Most seminars are free of charge, however, it is necessary to book in advance, as places are limited. To ensure you get CPD credit for attendance you must sign the register at the event (and ensure that your signature is legible).

If you have any ideas or suggestions for CPD activities I would love to hear from you. Feel free to contact me at the above co-ordinates.

St Audoen's Awards

At a recent presentation ceremony in St Audoen's School, Cook Street for Nastasie Leddy for her work on the children's plays were: Donal Monaghan, Principal, Nastasie Leddy and students from the school.

The Scheme recently awarded three scholarships worth EUR1,000 each to three students from three local schools. They were Leanne Mulvaney, Stanhope Street School, who is studying Accountancy and HR Management, Gresse Mulkundayi, O'Connell School, North Richmond Street, who is studying International Business and Languages and Ildiko Molnar, Mount Carmel Secondary School, who is studying Architecture. The presentation was made by the Chairman and the Treasurer of the Bar Council to the students in the presence of their parents and teachers.

FLAC Conference

Pictured at the FLAC conference on Public Interest law held recently in Dublin are Geoff Budlender, Advocate of the South African High Court, Peter Ward BL, FLAC Chairperson and Robert Garcia, Executive Director of Centre for Law in the Public Interest, Los Angeles, California.

You Be the Judge

A Study of the Backgrounds of Superior Court Judges in Ireland in 2004 Part I[1]

Jennifer Carroll

Introduction

The purpose of this study was to answer the question "Who is an Irish Judge in 2004?" In order to develop a typical profile of a judge in Ireland today, this study examined the socio-economic, education and political backgrounds of the High Court and Supreme Court Judges in Ireland in June 2004. It compared these background profiles of Irish Superior Court judges with a similar study conducted of the Irish judiciary in 1969. The 1969 analysis conducted by Professor Paul Charles Bartholomew, Professor of Government and International Studies at the University of Notre Dame, Indiana, United States forms the basis of the structure and content of this 2004 study. The variances between the two studies relate chiefly to gender, occupation before appointment, lawyers in the family background and political affiliation.

This article is the first of a two-part series from the author's M.A. thesis. The second of these articles in the December 2005 Bar Review will discuss the politics and procedures involved in the appointment of judges from the perspective of those who have gone through the process.

Bartholomew's 1969 study of the Irish Judiciary

Bartholomew describes his study as a "mildly behavioural investigation of the judges as persons" in an attempt to answer the question "What is an Irish Judge?[2]" In order to answer this question, Bartholomew sought such background information of the Irish judiciary in 1969 as birthplace, ethnic background, education, religious commitment, political party affiliation, occupation before appointment, lawyers in their family relationship, socio-economic status before appointment, paternal occupation, age at time of appointment and other factors that

> "might in some fashion be influential on the decisions handed down by a judge on the bench and that might indicate in general the type of person that a judge is - a composite picture of an Irish judge.[3]"

Bartholomew conducted personal interviews in 1969 with all of the sitting and retired judges of the Supreme Court, High Court and Circuit Court, with two exceptions. Of the thirty five judges of the District Court, seven judges were interviewed personally and ten returned a written questionnaire. In two instances, information was obtained by secondary sources.

> "The study covered nine Supreme Court judges, eight High Court judges, ten Circuit Court judges, and seventeen of thirty-five sitting District Court judges. Thus forty-four judges comprise the group used to develop this profile of an Irish judge.[4]"

It is important to note that Bartholomew's study was original in the Irish context.

> "This is strictly a pioneer study. Nothing of the sort has been done before in Ireland. Its purpose is to determine something not before known with any degree of accuracy - the characteristics of Irish judges, their social and political backgrounds, and something of how they came to be appointed.[5]"

Byrne and McCutcheon[6] state that no study of this form has been done in published form since The Irish Judiciary, although studies of this kind are common in other jurisdictions[7].

Bartholomew's 1969 Superior Court Findings

There is one important caveat in comparing the studies conducted in 1969 and 2004. Where Bartholomew has studied the backgrounds of judges from the four courts in Ireland in 1969, this 2004 study includes judges of the High Court and Supreme Court only. There has been substantial growth in the numbers of judges in Ireland since Bartholomew's study - in 1969 there were 57 sitting judges of all the Courts in Ireland while in June 2004 there were 121 members of the Irish judiciary.

The reason for confining the 2004 study to the judges of the superior courts is purely resource based - the confines of time and resources within a one-year academic programme lent themselves to conducting a study of the superior court judges only. The completion of the study

1. The author is deeply appreciative to all those that participated in and made contributions to this study. In particular the study could not have been completed without the support of The Honourable Mr. Justice Ronan Keane, Chief Justice and The Honourable Mr. Justice Joseph Finnegan, President of the High Court. The author is also grateful for the contributions made by Professor Tom Garvin, Head of Department of Politics, UCD; Dr. Garret Fitzgerald, Chancellor of National University of Ireland; Dr. Gerard Hogan FTCD Senior Counsel; Dr. Jacqueline Hayden, Department of Political Science, Trinity College Dublin; Mr. Brendan Ryan, Director, Courts Service; Professor Kevin McGuire, Fulbright Scholar, University of North Carolina. She would especially like to thank all of the Judges of the High and Supreme Courts in Ireland in 2004 for their time and interest in participating in the study, their helpful comments and suggestions on which it based, and their extraordinary generosity, kindness and welcome for a novice researcher with her myriad of errors!

2. Bartholomew, *The Irish Judiciary* (1971), pp. 31 - Full results and analysis of Bartholomew's 1969 study are contained in Chapter Two *The Irish Judiciary* (1971).
3. Bartholomew (1971), pp.31
4. Ibid, pp. 31
5. Ibid, pp. 32
6. Byrne and McCutcheon (1996) pp. 121
7. Summaries from similar studies in the US and UK include "A 50-55 year old male; white; generally Protestant; of Anglo-Saxon stock; upper-middle to high social status; reared in a non-rural but not necessarily urban environment; member of an economically comfortable, civic-minded, politically active family; with B.A. and LLB. or J.D. degrees (one-third of these from "Ivy League" institutions); experienced in some public or civic office." Abraham (1996); "80% of the senior judiciary are products of public schools and of Oxford or Cambridge, with an average age of about sixty; 5.1% are women; 100% are white." J.A.G. Griffith (1997)

to include the entire Irish judiciary would be a logical extension of the research to date.

Notwithstanding the differences in the quality of the population group, the two studies are broadly similar in numerical terms - where Bartholomew's study included forty-four judges, this study has a population of thirty-eight judges. Nevertheless, in order to attempt a comparative analysis between the survey data compiled in 1969 and 2004, it is necessary to extract from Bartholomew's data the information relating exclusively to the Supreme and High Court judges at that time. A comparative analysis of the judges of the four courts and the judges of only the two superior courts would be fundamentally skewed.

The table below summarises the variations between the responses of all the judges in Bartholomew's study and those of the superior courts. It must be noted that these results include both sitting and retired judges, however this is not a qualitative factor that would affect the characteristics of their backgrounds prior to appointment.

Variations between 1969 Superior Court Judges and 1969 Total Judiciary:

	All Judges 1969	Superior Court Judges 1969
Born in an urban area	47%	58%
Lived in Dublin at the time of their appointment	68%	94%
Self-characterised as being upper-middle class	59%	71%
Had judicial experience prior to current appointment	14%	35%
Supporters of Fine Gael political party at appointment	9%	18%
First self-supporting occupation was as a barrister	36%	53%
Active supporter of political party prior to appointment	77%	65%

Irish Judiciary Study 2004

The total population of the 2004 study is thirty-seven available judges of the Supreme and High Courts in May 2004. Twenty-nine judges participated in the study, the results therefore were chiefly obtained by primary sources. For the remaining judges, the author used secondary sources to gather biographic information on the remaining judges of the High and Supreme Courts. It was not possible to gather answers by secondary sources for all of the questions, as some questions required the personal input of the judge.

Therefore, the topics examined have different response populations. The findings for each topic have been expressed as a percentage of the population for that topic. As much as possible, the findings have been classified in the same terms as Bartholomew's 1969 results, to facilitate comparison between the two studies. An explanation is provided for the results for each topic considered.

Results of 2004 Study

The person who is most likely to be a judge of the Superior Courts in Ireland in 2004 is male, was born in Dublin and grew up in an urban setting. He lived in Dublin and was a practising Senior Counsel at the time of his appointment. He did not necessarily come from a legal family background. He attended a private secondary school and studied at University College Dublin and obtained a Bachelor of Arts degree. His first self-supporting job was as a barrister and he has never worked in any other capacity. He was first appointed to the Court between 1995 and 1999 and had no judicial experience prior to his current appointment. He was appointed after he was forty-five, but most likely after he was fifty. He describes himself as middle class but believes that it is very difficult to define or apply a social class structure to the Irish context. His family was not involved in politics but he himself was involved in a political party at some point in his career, either as a student or local supporter. He was never a member of a political party. He had no political party affiliation at the time of his appointment and has no political party sympathy now. He is a Roman Catholic and of pure Irish ethnicity. He views himself as a liberal but does not believe there is any room for ideology in the Courts. He believes he was appointed to the judiciary because of his professional status, but thinks that his particular legal speciality and political connection may have been important contributing factors.

Analysis of 2004 Results and Comparison with Bartholomew's 1969 Study

The principal differences between the results of the 1969 and 2004 Irish Judiciary studies may be summarised as follows.

Variances between the 1969 and 2004 Irish Judiciary study results

Gender	13.5% female Superior Court judges in 2004, as compared to 0% in 1969
Occupation before judicial appointment	36% decrease in judges appointed from Attorney General position since 1969 study; 2.7% of Superior Court judges appointed from practice as a Solicitor in 2004 study as compared to 0% in 1969
Lawyers in Family	Declined from 70.5% in 1969 to 40% in 2004
First Self-Supporting Job	72% in 2004 as against 53% in 1969
Religious Commitment	Decrease in number asserting Roman Catholic faith from 82% in 1969 to 67% in 2004
Political Affiliation	62% of the respondents in 2004 had no political affiliation at the time of their appointment as against 12% in 1969.

Gender

This category was not included in Bartholomew's study. In 1969, there was only one female member of the judiciary, representing 2.3% of its membership. However, there were no females as judges of the High or Supreme Court in 1969. In 2004, there were two female Judges of the Supreme Court and three female Judges of the High Court - totalling 13.5% of the population of the 2004 study.

Birthplace

Results have been divided into the same categories as used by Bartholomew. "Other Urban" includes other cities such as Belfast, Cork and Limerick. Over 83% of Judges surveyed were born in an urban setting.

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Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 10, Issue 5, November 2005

A directory of legislation, articles and acquisitions received in the Law Library from the 15th July 2005 up to 7th October 2005.

Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

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COMPANY LAW

Directors

Disqualification - Grounds - Persistent default in complying with filing obligations - Fitness to manage company - Whether directors persistently in default - Whether directors fit to manage company - Whether directors displayed lack of commercial probity - Whether remedy of default subsequent to issue of disqualification proceedings sufficient - Costs - Refusal of disqualification - Whether court had discretion to award costs against directors against whom no disqualification order was made - Restriction - Restriction as alternative to disqualification - Grounds for restriction - Whether directors should be restricted where company solvent and trading as going concern with outstanding tax liabilities - Companies Act 1990 (No 33), ss 150, 159, 160(2)(d) and (f), 160(9A) and 160(9B) - Application refused - (2003/570COS - Laffoy J - 24/2/2005) [2005] IEHC 41
Director of Corporate Enforcement v McGowan

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Personal rights

Family - Definition of term 'family'- Whether family rights under article 8 of European Convention of Human Rights similar to balancing exercise required where family rights guaranteed by Article 41 of Constitution are invoked - Whether length of time husband and wife reside together since their marriage legitimate factor to be taken into account by respondent - Whether husband should be allowed return to Ireland pending substantive hearing - *R (Mahmood) v Home Secretary* [2001] 1 WLR 840; A.O. and D.L. v Minister for Justice [2003] 1 I.R. 1 considered - European Convention on Human Rights Act 2003 (No 20) - Leave granted (2004/336JR - Clarke J - 3/12/2004) [2004] IEHC 394
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Frank Towey Ltd. v South Dublin County Council

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Bail
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Road traffic offences
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People (DPP) v Laide and Ryan

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Disciplinary procedures

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Extradition
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European Communities (Ivory Coast) (financial sanctions) regulations, 2005
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SI 359/2005

European Communities (marketing of fruit plant propagating material and fruit plants intended for fruit production) (amendment) (no. 2) regulations 2005
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European Communities (two and three wheel motor vehicle entry into service) regulations 2005
DIR 2002/24, DIR 2003/77
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2/2005	Criminal Justice (Terrorist Offences) Act 2005 Signed 08/03/2005
3/2005	Health (Amendment) Act 2005 Signed 11/03/2005
4/2005	Social Welfare and Pensions Act 2005 Signed 14/03/2005 S.I. 187/2005 commencement s's 38 & 39 S.I. 230/2005 commencement s7(1)
5/2005	Finance Act 2005 S.I. 225/2005 commencement s's 100& 104(1)(b)
6/2005	British-Irish Agreement (Amendment) Act 2005 Signed 06/05/2005
7/2005	Landlord and Tenant (Ground Rents) Act 2005 Signed 19/05/2005
8/2005	Dormant Accounts (Amendment) Act 2005 Signed 25/05/2005
9/2005	Sea pollution (Hazardous Substances) (Compensation) Act 2005 Signed 30/05/2005
10/2005	Safety, Health and Welfare at Work Act 2005 Signed 22/06/200
11/2005	Maritime Safety Act 2005 Signed 29/06/2005
12/2005	Investment Funds, Companies and Miscellaneous Provisions Act 2005 Signed 29/06/2005
13/2005	Air Navigation and Transport (Indemnities) Act 2005 Signed 04/07/2005
14/2005	Disability Act 2005 Signed 08/07/2005 S.I. 474/2005 commenced in part.

15/2005 International Interests in Mobile Equipment (Cape Town Convention) Act 2005
Signed 09/07/2005

16/2005 Electoral (Amendment) Act 2005
Signed 09/07/2005

17/2005 Commission to Inquire into Child Abuse (Amendment) Act 2005
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18/2005 Civil Service Regulation (Amendment) Act 2005
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19/2005 Civil Registration (Amendment) Act 2005
Signed 09/07/2005

20/2005 Garda Siochana Act 2005
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Broadcasting (amendment) bill 2003
1st stage -Dail

Child trafficking and pornography (amendment) (no.2) bill 2004
2nd stage- Dail [pmb]

Civil partnership bill 2004
2nd stage- Seanad

Comhairle (amendment) bill 2004
2nd stage - Dail

Consumer rights enforcer bill 2004
1st stage -Dail

Criminal Justice bill 2004
2nd stage-Dail

Criminal law (insanity) bill 2002
Report - Seanad

Defence (amendment) bill 2005
1st stage - Dail [p.m.b]

Diplomatic relations and immunities (amendment) bill 2005
Committee - Dail

Driver testing and standards authority bill 2004
Committee- Dail

Electricity regulation (amendment) bill 2003
2nd stage - Seanad

Employees (provision of information and consultation) bill 2005
Committee stage - Seanad

Employment permits bill 2005
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Enforcement of court orders bill 2004
2nd stage- Dail

Enforcement of court orders (no.2) bill 2004
1st stage- Seanad

Finance bill 2005
1st stage-Dail

Fines bill 2004
2nd stage- Dail [p.m.b]

Fluoride (repeal of enactments) bill 2005
2nd stage - Dail [p.m.b]

Freedom of information (amendment) (no.2) bill 2003
1st stage - Seanad

Freedom of information (amendment) (no.3) bill 2003
2nd stage - Dail

Fur farming (prohibition) bill 2004
1st stage- Dail

Good Samaritan bill 2005
1st stage - Dail [p.m.b]

Health (amendment) (no.2) bill 2004
1st stage- Dail

Health and social care professionals bill 2004
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Housing (state payments) bill 2004
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Irish medicines board (miscellaneous provisions) bill 2005
1st stage - Seanad

Irish nationality and citizenship and ministers and secretaries (amendment) bill 2003
Report - Seanad

Land bill 2004
2nd stage - Seanad

Law of the sea (repression of piracy) bill 2001
2nd stage - Dail (Initiated in Seanad)

Local elections bill 2003
2nd stage -Dail [p.m.b]

Money advice and budgeting service bill 2002
1st stage - Dail (order for second stage)

National economic and social development office bill 2002
2nd stage - Dail (order for second stage)

National transport authority bill 2003
1st stage - Dail

Offences against the state acts (1939 to 1998) repeal bill 2004
1st stage-Dail

Official languages (amendment) bill 2005
2nd stage -Seanad

Parental leave (amendment) bill 2004
2nd stage - Dail (Initiated in Seanad)

Patents (amendment) bill 1999
Committee - Dail

Planning and development (acquisition of development land) (assessment of compensation) bill 2003
1st stage - Dail

Planning and development (amendment) bill 2003
1st stage - Dail

Planning and development (amendment) bill 2004
1st stage - Dail

Planning and development (amendment) bill 2005
Committee - Dail

Planning and development (amendment) (no.2) bill 2004
1st stage -Dail

Planning and development (amendment) (no.3) bill 2004
2nd stage- Dail [p.m.b]

Postal (miscellaneous provisions) bill 2001
1st stage -Dail (order for second stage)

Prisons bill 2005
1st stage - Seanad

Proceeds of crime (amendment) bill 2003
1st stage - Dail

Prohibition of ticket touts bill 2005
2nd stage - Dail [p.m.b]

Public service management (recruitment and appointments) bill 2003
1st stage - Dail

Railway safety bill 2001
Committee - Dail

Registration of deeds and title bill 2004
2nd stage - Seanad

Registration of wills bill 2005
1st stage - Seanad

Registration of lobbyists bill 2003
2nd stage- Dail [p.m.b]

Residential tenancies bill 2003
2nd stage - Dail

Sea-fisheries and maritime jurisdiction bill 2005
1st stage - Dail

Sea pollution (miscellaneous provisions) bill 2003
Committee - Seanad

Social welfare consolidation bill 2005
1st stage - Dail

Statute law revision (pre-1922) bill 2004
1st stage - Seanad

Sustainable communities bill 2004
1st stage - Dail

The Royal College of Surgeons in Ireland (Charter Amendment) bill 2002
2nd stage - Seanad [p.m.b.]

Totalisator (amendment) bill 2005
1st stage - Seanad

Transfer of execution of sentences bill 2003
Committee - Seanad

Twenty-fourth amendment of the Constitution bill 2002
1st stage- Dail

Twenty-seventh amendment of the constitution bill 2003
2nd stage - Dail

Twenty-seventh amendment of the constitution (No.2) bill 2003
1st stage - Dail

Twenty-eighth amendment of the constitution bill 2005
1st stage- Dail

Waste management (amendment) bill 2002
2nd stage- Dail

Waste management (amendment) bill 2003
2nd stage - Dail [p.m.b]

Water services bill 2003
Committee - Seanad

Whistleblowers protection bill 1999
Committee - Dail

Abbreviations
BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Society of Ireland
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = Irish Tax Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland

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

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Urban/Rural

Over 83% of Judges surveyed grew up in an urban environment. This category was included to recognise the possibility of being born in an urban setting but growing up in a rural area. This has proved to be the case with two judges.

Residence at Time of Appointment

There is a higher population for this response than the interview population as it was possible to reasonably deduce from secondary sources the address of an individual immediately prior to their appointment. The category "Other Leinster" has been used to protect the anonymity of participants. It can be stated that all of the Supreme and High Court judges had an address either in Dublin or the counties immediately adjacent to Dublin at the time of their appointment to the judiciary.

Occupation Prior to First Judicial Appointment

The most common occupation for a Judge immediately prior to their appointment is that of a Senior Counsel (94.6%). Only one Judge (3%) was an Attorney General immediately prior to his appointment to the judiciary. This represents a substantial decrease on the figures reported by Bartholomew of 36%. This change between the two studies raises an issue for future consideration - what employment trends exist for Attorney Generals following their period in office?

A further difference between the 1969 and 2004 studies is that one judge in the 2004 study was a practising solicitor immediately prior to his appointment to the Court. This is a consequence of the Court and Court Officers Act 2002 which created the entitlement of solicitors to be appointed to the Superior Courts directly from practice.

Occupation Prior to Current Appointment

This category was included as an addition to Bartholomew's 1969 study in order to assess the career trends of judges once appointed.

The first issue highlighted is the general trend in favour of gaining judicial experience before joining the Supreme Court. Save in two instances, all of the Supreme Court Judges had experience as a judge in a court of absolute jurisdiction experience, either the High Court or the European Court of Justice. Of the two exceptions, one was appointed directly from practice at the Bar. The other was an Advocate General in the European Court of Justice. This is deemed to constitute practice at the Bar for the purposes of appointment[8].

The second issue raised in the course of this study was the promotion of judges from the Circuit Court to the High Court. A Circuit Court judge of four years standing can be appointed to the High or Supreme Court[9]. Of the thirty-seven judges in this study, five had been judges of the Circuit Court prior to their appointment to the High Court.

Bartholomew states that although promotion between the Irish judiciary is theoretically possible, it has real difficulties in practice. He notes that at the time of the study in 1969, no individual had ever been promoted from the District Court to the Circuit Court. Similarly rare were promotions of judges from the Circuit Court to High Court. Bartholomew states that there was only one such case and that it was improbable that it would be repeated:

> "Considering the rather remarkable prestige of Judge Davitt, based in large measure on his part in the establishment of the Republic, this sort of thing is unlikely to happen again.[10]"

Bartholomew cites two reasons for the failure to promote District and Circuit Court judges to the superior courts.

> "First, the judges of the lower courts generally are considered not to be of the high quality desired for appointees to the upper courts. Second, it is feared that a policy of promoting lower court judges would encourage them to make decisions, in both civil and criminal cases in which the government is a party, favouring the government so as to enhance their chances of promotion.[11]"

The issue of promotions between the courts was raised to the author by some of the contributors as being an important development for the judiciary in recent years. It was put to the author that the tradition against promotion between the courts (other than from the High Court to the Supreme Court) is changing.

> "*The promotion of (a Judge) from the Circuit to the High Court in 1995 was the first such promotion since that of Judge D'Arcy in 1977, nearly 20 years, with a number of other promotions since then.*[12]"

There were mixed views among the contributors as to the long-term value of this perceived development. Some contributors were of the view that the tradition is not changing and that there is still no natural process of moving up through the courts in Ireland. They believed that there was, and still is, an expectation that a judge would stay on the court to which they were appointed. It was commented that promotions between the Circuit Court and the High Court used to be very unusual, and still is unusual - albeit slightly less so.

> *"A few appointments of an exceptional nature is not necessarily "changing" a tradition.*"

A further view was that there has been a substantial change in the tradition. One view offered was that the there could be a lot of "*canvassing*" for promotion, especially as promotions between the Courts are not within the remit of the Judicial Appointments Advisory Board but within the gift of the government. It was commented that this development is regretful because of its potential to politicise the judiciary and dilute judicial independence. Another comment was made to the effect that the changing tradition was most undesirable as it created canvassing and lobbying for promotion, which could be corrupting and humiliating for the judiciary.

8. Court and Courts Officers Act 1995, s.28
9. Courts and Court Officers Act 1995, s. 28
10. Bartholomew (1971) pp. 38
11. Ibid, pp. 38
12. Quotes made in the course of the 2004 study have been italicised to clearly distinguish them from literary quotes.

One contributor offered the view that the appointment of a judge was a largely unknown entity in that a person's performance at the Bar did not necessarily indicate how they might perform on the bench. As such, promotions between the courts could be a useful way of vetting judges before their appointment to a superior court. This is also the view of Lord Mackay, a former British Lord Chancellor:

> "I personally believe that this (the promotions system) is no better way of judging a person's qualification for a job than seeing how he or she performs in it.[13]"

This view was rejected by a number of contributors to the study who opined that they would not be enthused by the "seen them in action" argument. It was commented that there have been people appointed from practice that have turned out to be disappointing as judges and some that have turned out much better than conventional wisdom might have thought they would. In any case, the work of a High Court judge is very different to that of a Circuit Court judge, so one does not necessarily get a feel for how they might perform.

Lawyers in Family

The evidence from the study shows that the percentage of judges of the Superior Courts that had members of their family in the legal profession has declined from 70.5% in 1969 to only 40% in 2004.

Any advantages to be garnered by having a family member in the legal profession (such as client referrals etc.) are likely to be of most relevance when the individual is beginning their career. Bacik et al report the strong view in their focus groups that there is a general perception that law is "a hard profession to get into without family (connections)[14]". One contributor noted that what is critical is whether the individual had any family active in the legal profession at the time that he was called to the Bar. Otherwise, their inclusion in the statistics could be misleading in terms of the assistance that family connections at the Bar would have been in establishing a career. Two of the eleven judges in the study who stated they had family connections did not have these connections at the time they were called to the Bar.

One contributor stated that the Bar was never exclusive in the sense that people tend to think it was a combination of second or third generation professional families. Although that might account for about 50%, the other 50% was always open to everyone and there were no barriers to success. The perception would have been that it was an almost hereditary occupation but it never was. It was also commented that historically the Law Library has always been an independent society and that once qualified, connections were not important for admission.

> *"They (connections) might have been important for survival* at *certain times, but not now. I think a lot of people in the Library would have no connection with the law. A lot of people come in from other backgrounds and they survive. And very often, they do very well.*"

The 30% decrease in the proportion of Superior Court judges surveyed that had family connections in law provides evidence that success in the legal profession is not restricted to individuals with family connections in law.

Date of First Appointment to the Courts

Over 35% of the thirty-seven judges in the study were appointed between 2000 and 2004. The date included was the date of the first effective[15] judicial appointment.

University of Primary Degree

The population for this question is thirty-five to take account of the two judges who attended lectures in UCD, but did not actually receive a degree from the University. At that time, it was not necessary to have a law degree in order to qualify as a barrister. Two individuals completed their professional training in the King's Inn while working in the civil service.

The proportion of Superior Court judges that attended University College Dublin has increased since 1969. Over 79% of judges in the 2004 study (compared with 76% in 1969) attended University College Dublin. This figure may in fact be higher, as two of the two judges classified as having qualified from the National University of Ireland may have attended University College Dublin, which is within that university institution.

There is a decline in the number of judges who attended Trinity College Dublin from 23% in 1969 to 15% in 2004. As in the 1969 study, the figures correlate broadly with the proportion of individuals who come from non-Catholic backgrounds, a consideration which would have been relevant at the time that this generation of judges would have entered university.

Primary Degree

There is a reasonably even divide between the proportion of judges with a law degree (40%) and an arts degree (45%). It should be noted that the most common response of the judges was that they obtained a BCL in University College Dublin. However, statistically 5% more judges overall obtained a B.A. degree than a BCL.

Eleven judges in the 2004 study obtained some post-graduate university qualification including LLB., LLM. and Ph.D.

13. Mackay (1994) pp. 4
14. Bacik et al. (2003) pp. 189
15. One individual was appointed to the High Court for a very short period to be informed that in fact, a there had not been a vacancy. The mistake was administrative in nature and the individual was subsequently "re-appointed" some years later. The later date has been included in this question.

The vast majority of judges of the superior courts in 2004 (92%) obtained their professional qualification at the King's Inns. Bartholomew highlights the importance of the King's Inns in developing personal contact and loyalties.

> "The amount of sponsorship for judicial office that results can only be conjectured.[16]"

Socio-Economic Class Prior to Appointment

The judges in this study were asked "Would you say that prior to your appointment you belonged to the upper class, the middle class or the lower class?" This question was written based on the terms used in Bartholomew's study, so as to facilitate comparison between the two sets of results. This question raised difficulties in each of the twenty-eight personal interviews conducted as part of this thesis.

The principal difficulties with this question related to the definitions of the terms used and their relevance in the Irish context. 17% of judges interviewed stated that they could not define themselves in terms of upper, middle or lower class. One contributor commented that they believed there exists a separate class entity than the terms used. The professional class may not necessarily be linked to economics, but you have

> "*...the huge advantage of a very educated background and people that were interested in education.*"

7% of judges interviewed chose to define themselves as belonging to a professional class in preference to the terms in the question.

Another contributor commented that irrespective of the difficulties in defining class structures in Ireland, Senior Counsels definitely belonged to the upper class.

> *"I can't think of how much upper you could go beyond being a Senior Counsel, it's as simple as that.*"

One contributor made the point that one way of defining class structures might be to use generations of university education as a guide to background and class. One respondent remarked that:

> "*Everybody (in Ireland) is middle class now. Perhaps in the 1940's and 1950's it would have been possible to discern an upper class in Ireland, but who would that be today? The academics? The nouveau riche?"*

Two contributors commented on the fluidity of whatever class structures existed in Ireland, saying that immediately prior to appointment, they would have belonged to the middle class "*or whatever barristers are*" but "*my background was most definitely lower-middle class*". While 52% of judges stated that they believed *they would belong to the "middle class"* prior to their appointment, no judge opined that they were of the lower middle class.

Bartholomew found that 71% of Superior Court judges in 1969 defined themselves as upper-middle class and 24% defined themselves as being middle class prior to their appointment. The corresponding figures for the 2004 study are 21% and 52% respectively.

The definition of social classes in Ireland is a complex economic and sociological question. Coakley and Gallagher[17] comment that Ireland has always been characterised as being without social bases. It is not purported to analyse class structures at this point, as it is outside of the remit of this study. Nevertheless, as a contribution to that debate, what was interesting in this study was the level of difficulty and uncertainty created by the question as to the definitions of the terms and how, if at all, they might apply to Irish society.

Previous Judicial Experience

The majority of judges of the Superior Courts (54%) had no judicial experience prior to their appointment. This is a decrease on the 65% of judges of the Superior Courts in 1969 who professed to have some form of judicial experience. The 1969 study includes quasi-judicial bodies. The question as to whether these bodies were necessarily judicial in nature was a point of some discussion throughout the study. The question of whether a power is judicial in nature depends on a determination as to whether or not the exercise of the power amounts to an administration of justice[18]. Generally the view was that arbitration was not a judicial function, but merely part of the role of a practising barrister. However, one judge gained judicial experience prior to their appointment to the Irish judiciary on the International Court of Arbitration. Other judges had experience on Appeals Boards and Inquiries set up under legislation and these have been included in the results. Two judges expressed the view that it was not possible to have judicial experience, other than that of the District, Circuit or High Court.

Paternal Occupation

Despite the fact that 40% of those surveyed in the 2004 study had a member of their family in the legal profession, the most common paternal occupation identified in the study was law. 27% of the responses of the Superior Court judges had a father in the legal profession, which is a slight decrease from 29% in the 1969 study. A number of judges had fathers who had been either a Superior Court judge themselves, Chief State Solicitor, Attorney General, President of the High Court or Chief Justice.

16. Bartholomew (1971) pp. 41
17. Coakley and Gallagher (1996) pp. 102
18. Casey (2000)

Maternal Occupation

This topic was not included in Bartholomew's findings. It has been included in this study in recognition of the increased female participation in the labour force over the past thirty-five years. Over 58% of the responses for this topic included a maternal occupation outside the home. Three of the Superior Court judge's mothers had legal qualification, although only one practised law. Other occupations outside the home included Nurse (16%), Teacher (6.5%) and Business (6.5%).

Religious Commitment

67% of judges classify themselves as being of the Roman Catholic religion. This is a decrease from over 82% of the judges of the Superior Court in 1969. A number of judges made the point that they used to be of the Roman Catholic faith but now they do not have a commitment to any faith.

Ten percent of the judges of the Superior Courts belong to the Church of Ireland. This is broadly similar to Bartholomew's result of 12%. There is one Methodist and one judge who classifies himself as simply Christian. It is interesting that in contrast to Bartholomew's study, there are no members of the Jewish faith as Superior Court judges in Ireland today.

Ethnic Background

Over 93% of the judges surveyed were of pure Irish ethnicity.

Party Affiliation at Time of Appointment

The majority of judges (62%) of the Superior Courts interviewed in this study stated that at the time of the appointment to judicial office, they had no affiliations with a political party. This is a considerable increase from the 12% of Superior Court judges in 1969 who stated that they had no political affiliation at the time of their appointment.

Of those judges surveyed in 2004 that did have an affiliation with a political party, 17% supported Fianna Fáil, 7% supported Fine Gael and 7% supported the Progressive Democrats, a political party formed since Bartholomew's study in 1969. However, these figures show that there have been other substantial changes on the results of the 1969 study. In 1969, 65% of Superior Court judges supported Fianna Fáil at the time of their appointment and 18% supported Fine Gael. It is a remarkable decrease in support for both parties, particularly Fianna Fáil. The high proportion of support of judges for this party at the time of their appointment may partly reflect the long period of power held by Fianna Fáil prior to Bartholomew's 1969 study[19].

Of the Superior Court judges in the 2004 study that did not profess their support for a political party prior to their appointment, some state that they had been involved as a student or while at the Bar. However, at the precise time of their appointment they were no longer affiliated actively or socially with the political party. Other judges expressed that view that although they were not affiliated with a political party at the time of their appointment, they might still be regarded by their colleagues or the media as a "Fianna Fáil" or "Fine Gael" appointment.

Party Sympathy Now

The dominant response to this question was "*None*" and in many cases "*None because I'm a judge*". It was commented that judges are not supposed to have political persuasions. 35% of judges stated that they had no political sympathies.

A second point of interest is the relatively high proportion of judges (14%) that commented that their political sympathies were issue or candidate dependent and that they viewed themselves as a floating voter. A further 7% of judges commented that they had no fixed political sympathy but that they would generally vote left of centre.

The proportion of Superior Court judges in 2004 that support the Fianna Fáil political party has dropped to 14% from 47% in 1969. Similarly support for Fine Gael on the bench has dropped from 12% in 1969 to 10% in 2004. Both figures represent a drop in support for the political party once appointed to the judiciary. This is consistent with Bartholomew's comment that judges tend to have less enthusiastic support for political parties after they were appointed than before[20].

Age when First Appointed to the Judiciary

Forty two percent of the Superior Court judges surveyed in 2004 were between the age of forty-five and forty nine at the time of their appointment. Fifty five percent of the judges were over the age of fifty at the time of their appointment. The average age at appointment was 52. The typical age at which a judge is appointed has increased since the study in 1969 where Bartholomew found that 41% of judges were appointed to the Superior Courts between the age of forty and forty-four.

First Self-Supporting Job

The vast majority of judges of the Superior Courts in 2004 were first employed as barristers (72% in 2004 as opposed to 53% in 1969). This represents an increase of nearly 20%.
There was a drop in the proportion of Judges that had joined the Solicitors profession as their first self-supporting role - from 12% in 1969 to 8% in 2004.

The proportion of judges first employed in the civil service has risen from 6% in 1969 to 14% in 2004

Political Activity Prior to Appointment

There is a relatively even split between the judges that characterised themselves as having no involvement in politics whatsoever prior to their appointment and those that participated in party politics, even in a very limited way. Forty eight percent of judges of the Superior Courts stated that they had been involved in a political party either as a student, involvement with a political party at local level, acting as an advisor to a party or making donations.

Some judges stated how they may have been known as a supporter of a political party in the Law Library and may have canvassed at elections,

19. Bartholomew (1971) commented (pp.35) that the Fianna Fáil party had been in power for all but five of the thirty-eight years prior to his study in 1969.

20 Bartholomew (1971) pp. 42

but that their involvement did not extend beyond that. Such responses were counted as not having been involved in party politics.

Family politically active

Sixty nine percent of judges of the Superior Court stated that their family had not been involved in politics. This figure is similar to Bartholomew's corresponding figure of 71%. The results expressed include relations of the immediate family, grandparents and cousins.

Ideology

In this study the judges were asked "How would you describe your ideological viewpoint - liberal, centre or right of centre?" This question was taken from the terms used by Bartholomew in his 1969 study and included so that comparison could be made between the two studies. However, this question raised two critical difficulties.

The first difficulty was one of definition. 17% of judges felt unable answer this question on the basis that the terms used were incapable of clear definition. One judge commented that the terms used could be as misleading as they were helpful.

> "What is conservative? It could be someone that conserves human rights above all - the common understanding of liberal!"

One judge was of the view that the terms were "very ill-defined - it depends on the issue". Fourteen percent of judges commented that were fairly fluid in their views and that it depends entirely on the context, whether you are talking about economic or social issues.

> "*You cannot say someone is liberal, you must define the context.*"

The second difficulty with the terms in the question was the view of their inapplicability to the Irish context. Many of the judges in the 17% who felt unable to answer the question made the comment that politically, socially and historically, Ireland does not have clear ideological lines, even if the terms could be defined.

On explanation for this may be that in many countries in eighteenth-century Europe, the aristocracy played an independent role in politics. As a consequence the middle-class had to develop a high degree of political consciousness in its struggle to establish its position with respect to the aristocracy[21]. In the course of this struggle, the two sides articulated their distinctive ideologies of conservatism and liberalism, and the working-class subsequently developed equally systematic socialist ideologies. In the absence of an aristocracy, it could be argued that Ireland effectively missed its historical window to develop distinct ideologies based essentially on economics rather than national self-determination.

Notwithstanding that, it should be noted that some contributors to the study remarked that if there was not a clear Liberal/Conservative ideological divide in Ireland, there may have been other ideological forces at work in the past, though they may not have been consciously expressed. In the 1970's and 1980's, the potential for conflict between members of the judiciary existed along a Traditionalist/Modernist divide. The "Traditionalists" were more religious, more wedded to the common law, more modest with respect to judicial power and were less inclined to use the constitution. The "Modernisers" were more forward thinking, they used the constitution at every opportunity, were more anxious to break free from English case law and precedent and more willing and eager to establish a body of Irish case law.

One contributor commented that there still is a divide to some extent but much less so. The "Modernisers" won out in the end as evidenced by the volume of essentially Irish case law developed over that time on a range of issues. One reason offered for the level of intervention in public policy was that the Oireachtas had been unresponsive to the pace and form of social change.

One judge commented in the course of the study that:

> *"If you could identify an ideological group on the bench it would be the Catholic/Nationalist ideology as opposed to either liberal or conservative. However, this is much less so today because the Catholic/Nationalist view doesn't hold much appeal for too many of my generation.*"

Of those judges that did classify themselves as having an ideological outlook, most did so reluctantly and with reservations as to how the terms were understood and applied. 31% of judges classified themselves as liberal and 24% as centrist. Several judges commented that irrespective of the difficulties of defining the terms liberal and conservative, ideology of itself had no place in the judiciary. One contributor commented that his private dispositions are not what decide a case, therefore religious and political motivations are not material.

Factors Influencing Appointment

It should be noted that this is a subjective assessment by the judges themselves of the basis on which they were appointed. In many cases more than one factor was given as having influenced their appointment. In total, there were fifty responses given to this question, as distinct from the number of respondents which was twenty-eight. All of the factors mentioned by the respondents have been included to give a better picture as to the contemporaneous factors that influence judicial appointments. The responses are considered as the proportion of judges that commented affirmatively to the different factors that may have influenced their appointment to the judiciary.

Sixty percent of the Superior Court judges interviewed in this study believed that the principal reason for their appointment was their professional status. This corresponds with Bartholomew's 1969 finding that 41% of Superior Court judges believed they had been appointed on the basis of their professional standing.

Thirty six percent of Superior Court judges interviewed in 2004 commented that the believed their particular legal speciality in practice

21 Huntington (1981) pp. 28

had influenced their appointment to the judiciary. Many made the comment that "t*hey try to keep a breadth of expertise on the bench*" and that they believed their area of practise had helped their appointment prospects. Others commented that on the High Court you have to sit on every type of case and so it is best to have a general practice. It should be noted that the new Commercial Court will be chaired by two High Court judges who would have been regarded as having expertise in the area of commercial law in their legal practice prior to their appointment.

Eighteen percent of the Superior Court judges interviewed in 2004 were of the view that their political connections had an influence on their appointment to the judiciary. One contributor commented that their political connections "certainly didn't hinder their appointment". One judge commented that although political influence still counts in judicial appointments, they believed their apolitical stance positively influenced their appointment at a time when the government sought to minimise the perception of political influence on judicial appointments. This point is also made by Bartholomew when he comments that apolitical or opposition party appointments are political, because they are supposed to serve as concrete evidence of the "non-partisan character of judicial appointments[22]".

Other factors believed to have influenced appointment included reward for service to the state or political party, knowing influential persons and having European Court experience.

A fundamental development between the two studies is the proportion of Superior Court judges that believed their gender had been a factor in their appointment. Fourteen percent of the Superior Court judges interviewed in this study stated that they had been appointed

> "*...because I was a woman. Absolutely no doubt about it.*"

There are two principal reasons for the obvious under-representation of women in the Superior Courts: the small proportion of women entering law at university thirty years ago and the negative effect of maternity leave on practice at the Bar.

Bacik et al comment that the number of women enrolling in university law schools equalled the number of men in the mid-1980's. On average, women now constitute 66% of enrolments in law across all the universities in Ireland[23]. It was commented in the course of this study that:

> "Since 1985, the majority of law students entering Trinity as freshmen have been female to the point whereby there are classes that are almost exclusively female. In recent years, there have been 75% women freshmen in law courses.[24]"

It was commented by one participant in the study that:

> *"In practice one is appointed to the High Court in your late 40's, and only when you have a very large practice. However, the number of women who had reached that position was very small. Take a typical appointment of someone aged fifty years. They probably went into college thirty-two years ago at age eighteen. That would be 1972 when women in law courses at university were very much the minority, almost an exotic minority. Couple that with the effect of sustained maternity leave and how could there be as many women as judges today?*"

Bacik et al comment that even though women were in a minority in undergraduate law courses, they would have been expected to progress more swiftly through the profession than they did. It is possible this might be attributed, at least in part, to the traditional difficulty experienced by women in the legal profession with respect to the effect of sustained maternity leave on a legal practice. One contributor made the comment that[25]:

> "The Bar is one of the professions where, irrespective of gender, you can't just drop out for a period of time, because how do you get back in again? If you drop out, you should stay out because other people will take your speciality - it is a very competitive system and people will fill in your place as soon as you go. There is a similar problem with women in medicine as consultants but even that is not as bad because they are employed by the state, not self-employed as at the Bar."

One contributor to the study commented that:

> "Women really suffer a distinct disadvantage with respect to maternity, it is very difficult to take time out of a legal practice, especially at the bar. However, if you are a female Senior Counsel with a very good practice, you have a distinct advantage over your male counterpart because all other things being equal, the female will get the job."

It was commented in the course of this study that the appropriate age and intensity of practice for Circuit Court appointments is lower than the High Court and that there are more women being appointed to the Circuit Court[26]. These tend to be younger women who have carried their career through the years so that shortly there will be more women who would be appropriate to appoint to the High Court, in terms of their experience at the Bar, having adopted a different career path than their predecessors. It was commented that women at the Bar today tend to work through having children and take substantially less time off to ensure their continued practice. The historical sociological trend of sustained maternity leave for a period of months or years meant that even the women law graduates (of which there were fewer) may not have been of appropriate experience for senior judicial appointments. Naturally the author looks forward with glee to the ladies of the Bar substantially redressing this imbalance in time for any future studies of the backgrounds of Irish judges. ●

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22 Bartholomew (1971) pp. 35
23 Bacik et al (2003) pp. 89
24 As with all potentially attributable quotes, the author has sought and obtained permission of the contributor.
25 As with all potentially attributable quotes, the author has sought and obtained permission of the contributor.
26 29% of Circuit Court judges are women - Bacik et al (2003) pp. 63

The Division of Marital Assets in "Ample Resource" Cases

Inge Clissmann SC and Paul Hutchinson BL[1]

Introduction

Former Miss Hungary, and classic Hollywood movie star Zsa Zsa Gabor was no stranger to matrimonial law, being married a total of nine times. The experience left Gabor with a somewhat jaded view of marriage and divorce and, with her talent for the pithy sound-bite, she once famously remarked[2]:

> "I am a marvellous housekeeper. Every time I leave a man I keep his house."

This is hardly the mindset that any ethical family law practitioner would wish to instil in a client, but it nevertheless serves as a gentle reminder that, for good or ill, a large proportion of matrimonial litigation concerns the division of marital assets and the making of financial provision.

Compared to other common law jurisdictions, the availability of judicial separation and divorce in Ireland is in its relative infancy. This is clearly due to the constitutional history of divorce here[3]. However, figures from the Central Statistics Office[4] show that there were 3,347 decrees of divorce granted last year and 1,258 decrees of judicial separation. This amounts to a respective trebling of divorce rates since 1997 and a doubling of judicial separations since 1991[5], and gives weight to the view that matrimonial law is still an emerging and evolving area.

One might very well ask why the so-called "ample resource" cases (as defined below) are deserving of special mention. The answer to this is two-fold. Firstly, as with many other areas of law, those cases with the most dramatic facts tend to provide the best illustrative examples of principle in action. Secondly, the economies of scale involved demand consideration of the availability or otherwise of a "clean break" in circumstances where it simply would not in a comparative, lower resource case. As such, certain considerations unique to "ample resource" cases have slowly emerged, and it is now possible, to some degree, to chart judicial trends in this regard. As with much family law, the pronouncement of absolute principles comes with the important caveat that the unpredictability of human relationships, their subtleties and differences, make cases highly distinguishable from one and other. As Thorpe LJ alluded to in the decision of *Cowan v. Cowan*[6]:

> "...even within the relatively narrow sphere of the big money case the infinite variety of facts and circumstances thrown up in individual cases makes it dangerous to generalise or to attempt to distil principles."

Whilst paying due regard to this danger, it would also be foolhardy of the practitioner to ignore important precedents, and it is with this balance in mind that the following observations are made:

What Constitutes an "ample resource" case?

It is not easy to proffer a comprehensive definition of what constitutes an "ample resource" case. The tendency is for practitioners to adopt the attitude of Stewart J. in the famous United States Supreme Court case of *Jacobellis v. Ohio*[7] where the learned judge refused to define obscenity, noting instead that "I know it when I see it"[8].

However given that, to a greater or lesser degree, some divergence in principle has arisen between the treatment of "ample resource" cases and other matrimonial cases, there is a corresponding need to categorise cases according to the resources available. There is a natural reluctance amongst the judiciary to draw lines in the sand regarding financial resources for sound policy reasons (which also reflects the cautious, informal way in which "ample resources" cases have been separated). Notwithstanding this, certain tentative dicta have emerged. In the decision of the Supreme Court in *C.F. v. J.D.F.*[9], McGuinness J. made the following remarks regarding the choice of forum for seeking a judicial separation or divorce[10]:

> "The Oireachtas, in framing our family law statutes, has given a wide ranging and virtually unlimited jurisdiction to the Circuit Court. No doubt this was done to enable litigants to avoid the very high costs that are inevitable in a prolonged High Court action. Where the parties in family law proceedings are, to use the current phrase, of 'high net worth', and many millions of euros are

1. This article was originally delivered as a speech to the Family Law Conference, School of Law, Trinity College, Dublin (8th October 2005). Thanks are due to Prof. William Binchy, Regius Professor of Laws, Trinity College, Dublin, however, all errors remain the responsibility of the authors alone.
2. See http://en.wikipedia.org/wiki/Zsa_Zsa_Gabor (viewed on the 20th September 2005).
3. See Hogan & White, J.M. Kelly: *The Irish Constitution*, (4th Ed., Butterworths-LexisNexis, 2003) at 1871-1888.
4. Statistical Yearbook 2004, available to download from www.cso.ie (viewed the 19th September 2005).
5. O'Brien, "Marital breakdown figures the 'tip of the iceberg'", The Irish Times, 15th July 2005.
6. [2001] 2 FLR 192 at 213.
7. 378 US 184 (1964), United States Supreme Court.
8. *Ibid.*, at 197.
9. Unreported, Supreme Court, 12th July 2005.
10. *Ibid.*, at page 28 of the unreported judgment.

> at stake, it may be necessary to invoke the jurisdiction of the High Court. This is not such a situation."

Implicit in this is the view that "many millions of euros" are required before case is of "high net worth". In a similar vein, McKechnie J. made the following obiter comment in the decision *B.D. v. J.D.*[11]:

> "It might be somewhat surprising to realise that the specialist practitioners in the field of family law are virtually unanimous in their view that a case with an asset base of €5 million or under does not qualify as a 'big money case'. In addition and perhaps equally surprising is the fact that in about 90% of cases that come before this Court, the monetary threshold which applies to a case in the Commercial List would be most easily satisfied."

Whilst both comments undoubtedly reflect truisms, it is respectfully submitted that they do not approach the subject with a sufficient degree of subtlety. Just as what constitutes "proper provision" in a given matrimonial case varies according to the particular needs and circumstances of the individuals concerned, an element of fluidity regarding the point at which resources become "ample" should also be adopted. "Ample", after all, is simply a synonym for "sufficient". To illustrate, consider a young, childless, professional couple with net assets of €600,000 seeking a divorce. Compare this scenario to a middle-aged couple with six infant children, whose primary asset is an income-producing farm of €2.5 million, also seeking a divorce. Ostensibly, €2.5 million in net assets appears far closer to "ample" than €600,000, but the obvious reality is that the former couple probably possess more subjectively "ample" resources to make immediate "proper provision" for the parties. Need and resources to meet that need are subjective reflections of one and other.

As such, it is respectfully submitted that a more flexible and reliable "rule of thumb" when considering whether a given matrimonial case amounts to an "ample resources" case is to be found in the decision of Lord Nicholas of Birkenhead in the House of Lords case of *White v. White*[12] where he prefaces his judgment with the following remark[13]:

"This appeal raises questions about how the courts should exercise these powers in so-called 'big money' cases, where the assets available exceed the parties' financial needs for housing and income."

Though it may be trite to state it in these terms, it is respectfully submitted that where parties' resources exceed their accommodation and financial needs, those resources can properly be described as "ample" (notwithstanding people's tendency to exploit their incomes to the full).

Consent orders, separation agreements and a policy of "clean break".

The oft-stated policy of Irish matrimonial legislation, and by extension its interpretation and application by the Irish judiciary, is that an absolute "clean break" between the parties is not properly available. The precise parameters of this are the subject of much debate[14], and are of obvious interest to practitioners. This was discussed at some length by the Supreme Court in the seminal case of *D.T. v. C.T.*[15] whereupon a jurisprudential shift in favour of finality where the circumstances of the case permit was advocated. Tellingly, Keane C.J. stated[16]:

> "... It is not correct to say that the legislation goes so far as virtually to prevent financial finality. On no view could such an outcome be regarded as desirable and I am satisfied that it is most emphatically not mandated by the legislation under consideration."

Hence, the decision in *D.T. v. C.T.* leaves us with the tantalising proposition that a situation resembling a "clean break" situation may properly be available under the right conditions, but with little guidance as to what might comprise those conditions, beyond the availability of ample resources to affect such a break. With this in mind, the decision of Hardiman J. in the High Court decision[17] of *W.A. v. M.A.*[18] is interesting.

The facts of the case are relevant. The parties to the divorce proceedings respectively came from comfortable, agricultural backgrounds in Cork. They married in 1978 and ultimately separated in 1988. During the currency of the marriage, they acquired and cultivated significant farmlands in the Cork area. To regularise the dissolution of their relationship, they entered into a separation agreement in 1993. The agreement was held by Hardiman J. to "undoubtedly"[19] represent proper provision for both parties, with the aggregate of their farm holdings split approximately evenly[20], and with each party having relative expertise in farming matters. Furthermore, the agreement provided for a "full and final settlement"[21] between the parties, for the settlement of all outstanding proprietary claims, for a covenant that all future properties would be solely owned, and for a covenant that neither party would obstruct the other in seeking a divorce a *vinculo*. The High Court concluded that[22]:

> "The agreement fairly envisaged that each party would live a personally and economically independent and self-sufficient life with no further claims on each other."

Since the separation, the fortunes of the parties diverged radically. The respondent husband employed his equity to commence property speculating in the Cork area (remarkably assisted by his mother, a woman in her mid-eighties and described by Hardiman J. as "a shrewd and formidable business woman"[23]). At the time of the case, the husband's estimated worth amounted to some €7 million.

By contrast, the applicant wife farmed the land "in the most inefficient and expensive manner possible"[24]. She sold off certain parcels of her holdings and built a lavish home, and provided "very truculent"[25] evidence about some of the proceeds of sale. The High Court estimated her net worth as being in the region of €1.25 million. The High Court found that this divergence of fortune was not founded in any physical inability of the applicant to run the farming enterprise she received under the settlement agreement, and further rejected her contention that she suffered from an emotional inhibition in this regard.

In the absence of any domestic authority on reviewing a *prima facie* fair settlement agreement where the fortunes of the parties diverge

11 Unreported, High Court (McKechnie J.), 4th May 2005; [2005] IEHC 154, at paragraph 20.
12. [2000] 2 FLR 981.
13. Ibid., at 984.
14. Cretney, Masson, & Bailey-Harris, *Principles of Family Law*, (17th Ed., Thomson Sweet & Maxwell, 2002), Chapter 14, at 380-386; Herring (Ed.), *Family Law: Issues, Debates, Policy,* (Willan Publishing, 2002) at 64-66; Walls & Bergin, *The Law of Divorce in Ireland*, (Jordans, 1997) at 34-36; Power, "Maintenance: No Clean Break with the Past" [1998] 1 IJFL 15; and Shannon, "What price a "clean break" divorce now?" (2002) 96 (10) Law Society Gazette 20.
15. [2002] 3 IR 334.
16. *Ibid.*, at 365.
17. Hardiman J. sitting on the High Court on circuit in Cork.
18. [2005] 1 ILRM 517.
19. *Ibid.*, at 526.
20. Under the settlement agreement of 1993, the Applicant wife received 178 acres along with a milk quota, farm equipment, farm buildings, a residence and a fully working farm while the Respondent husband received 174 acres without buildings or equipment.
21. [2005] 1 ILRM 517 at 520.
22. *Ibid.*, at 530.
23. *Ibid.*, at 522.
24. *Ibid.*, at 523.
25. *Ibid.*, at 525.

dramatically, Hardiman J. considered relevant English authorities[26] which indicated that an agreement not to seek further provision was not binding on a court, but was a factor to which great weight should be attached if entered into in a considered matter and with advice. However, Hardiman J. refused to consider the persuasive authorities to be determinative regarding the issue before the court. Notwithstanding this reluctance to accept the English authorities wholesale, Hardiman J. appeared to follow the rationale therein, and in so doing held as follows[27]:

> "I must in justice record my view that any difficulties which the wife now experiences are wholly of her own making and that the husband has contributed to them in no way whatever. Equally, the wife contributed to the husband's present state of prosperity in no way whatever...In all the circumstances, I do not consider it proper, that is "fit, apt or suitable", much less "correct or in conformity with rule", to make any ancillary order against the husband in the circumstances of this case. Still more fundamentally, I do not consider it just to do so and therefore I am precluded from doing so by the terms of Section 20(5). I will accordingly grant a decree of divorce and make no further or ancillary order..."

Hence, it appears from this decision that where "proper provision" is made for respective parties to matrimonial proceedings at the time of a settlement agreement, the mere fact that their fortunes subsequently diverge for independent reasons will not, of itself, provide the basis for the separation agreement to be re-opened.

However, hot on the heels of the decision of Hardiman J. in *W.A. v. M.A.*, the decision of Finlay-Geoghegan J. in the case of *R.G. v. C.G.*[28] was delivered, adding another layer of subtlety to the issue of finality in matrimonial proceedings. This case concerned the weight to be attached to a consent order in earlier judicial separation proceedings between the parties when the applicant husband initiated divorce proceedings some five years later. The Circuit Court granted a decree of divorce but elected to make certain ancillary orders in favour of the respondent notwithstanding the terms of the prior consent, and both parties appealed. In the High Court, it was accepted that the availability of ancillary relief was the sole controversial issue as between the parties. Finlay-Geoghegan J. rejected outright the contention that no regard should be had to the consent, and similarly rejected the contention that Section 20(3) of the Family Law Act, 1996[29] should be construed as imposing a negative prohibition on the consideration of such a consent (by merely referring to "a separation agreement still in force"). On the contrary, it was held that[30]:

> "The principles of certainty and finality of litigation contended for and the principles as explained and applied by Munby J. in *X. v. X.* [2002] 1 F.L.R. 508 in relation to the upholding of agreements made between parties and properly and fairly arrived at with competent legal advice are such that I am satisfied that this Court should have regard to the Consent Order and Consent as a full and final settlement (subject to any applications for variations permitted) of the then extant judicial separation proceedings under the Acts of 1989 and 1995."

Thereafter, the High Court also determined that the provision of the consent which purported to usurp the jurisdiction of the courts by contracting out the entitlement to seek maintenance payments was unenforceable and should accordingly be ignored. However, Finlay-Geoghegan J. also held that the acknowledgment within the consent that "proper provision" within the meaning of the Family Law (Divorce) Act, 1996 had been made should also be ignored. The Court reasoned that "proper provision" must exist at the date of the hearing of the application for a decree of divorce and distinguished a situation where agreement was reached during or proximate to divorce proceedings, from an agreement reached long ago. Also of relevance to Finlay-Geoghegan J. was the fact that the consent was entered into by the parties on an assessment of their assets at the time of the separation, as opposed to their assets at the time of the divorce proceedings.

It is difficult to reconcile this approach with that of Hardiman J in *W.A. v. M.A.* insofar as the relevant change in income of husband and wife between the separation agreement and the date of the divorce was expressly irrelevant, once proper provision had been made at the time of the separation. Furthermore, it appears that the consideration to be given to a consent order, properly and fairly arrived at, with competent legal advice, is reduced virtually to nothing if it is always to be superseded by an analysis of the parties respective financial situations at the date of divorce proceedings. It appears that on this basis, "proper provision" can never be acknowledged at a point prior to a divorce.

The resolution between the two decisions may lie in the character of the respective separation agreement and consent. The potential for distinguishing one decision from the other may lie in the objectively differing intentions of the respective parties before entering the consent/separation agreement. Hardiman J found in *W.A. v. M.A.*, that the intention of the parties on entering the agreement was to live "personally and economically independent and self-sufficient"[31] lives. By contrast, Finlay-Geoghegan J. noted that the different intention of the parties in *R.G. v. C.G.* as follows[32]:

> "Finally, it is also important to note that the Consent Order does not reflect an intention by the parties in 2000 to achieve a "clean break" financially even in so far as permitted under Irish law. On the contrary, it indicates an intention that the husband should continue indefinitely to support the wife with periodical payments for her benefit and separate payments in respect of the dependent children. In addition, the house in which the wife was to live was to be purchased in the name of the husband and held in trust for the wife with other consequential provisions."

So it appears that a *post-facto* analysis of the intention of the parties on entering a consent or a separation agreement carries considerably more weight then acknowledgments to the effect that "proper provision" has been made. While this gives the practitioner a helpful indicator on the finality of such a measure, it reaffirms the underlying principle that no matrimonial settlement in this jurisdiction can comfortably be considered absolutely final at the time it is entered into.

26. *Wright v. Wright* [1970] 1 WLR 1219; *Edgar v. Edgar* [1981] 2 FLR 19; *Hyman v. Hyman* [1929] AC 601; and *Beech v. Beech* [1995] 2 FLR 160.
27. [2005] 1 ILRM 517 at 535.
28. Unreported, High Court (Finlay-Geoghegan J.), 8th February 2005; [2005] IEHC 202.
29. Section 20(3) of the Family Law (Divorce) Act, 1996 reads as follows: "In deciding whether to make an order under a provision referred to in sub-section (1) and in determining the provisions of such an order, the court shall have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force."
30. Unreported, High Court (Finlay-Geoghegan J.), 8th February 2005 at page 11 of the unreported judgment.
31. [2005] 1 ILRM 517 at 530.
32. Unreported, High Court (Finlay-Geoghegan J.), 8th February 2005 at page 14 of the unreported judgment.

Consideration of tax implications

Often, the only realistic means of achieving a clean break in "ample resource" cases is by way of a "lump sum order". As many practitioners will know, these orders are provided for under the Section 8(1)(c)(i) of the Family Law Act, 1995[33] and Section 13(1)(c)(i) of the Family Law (Divorce) Act, 1996 and are available as ancillary relief to a decree of judicial separation or divorce[34]. However, an important factor for consideration whenever such an order is sought or obtained is the tax implications for the debtor attendant to obeying the order.

In the Supreme Court case of *B.D. v. J.D.*[35], the appellant-respondent husband based his appeal precisely on this point - that insufficient findings were made by the High Court regarding the tax implications of complying with the lump sum order obtained by his wife.

In the High Court, McKechnie J. heard a "considerable volume of evidence"[36] as to the value of a group of companies owned and controlled by the husband, and held that they were worth in the region of €10 million, clearly rendering this an "ample resources" case. The High Court rejected the claim by the wife that she was entitled to a 50% equity in these companies, and ordered instead that the husband pay a lump sum of €4 million between 2004 and 2006. McKechnie J. stated that[37]:

> "...it would not be correct or appropriate for this Court to stand in the shoes of a taxation advisor to the respondent in the post litigation situation. It becomes entirely a matter for him as to how he discharges these financial obligations..."

The appellant-respondent argued before the Supreme Court that McKechnie J. erred in not making any findings as to the financial implications of extracting sufficient monies from the companies to discharge the lump sum order. To this end, it was submitted that the concept of "proper provision" under Section 16 of the Family Law (Divorce) Act, 1996 properly means "proper provision" for *both* spouses, and this could not properly or justly be obtained without certain findings as to tax liability[38]. In opposition to this, counsel for the wife argued that to impose an obligation to form a view of tax liability was to ask too much of a trial judge.

Hardiman J. delivered the unanimous decision of the Supreme Court[39]. He held that the High Court was correct to avoid stepping into the shoes of a taxation advisor, but further noted that the potential tax liability arising from compliance with the lump sum order could range from approximately €800,000 to €1.68 million[40]. Accordingly, he held that[41]:

> "In my view, these sums are simply too significant to be dealt with simply by according the husband total flexibility in raising them. This indeed, might be more aptly described as simply imposing no additional constraint on him in doing so.
>
> If one envisages that, instead of a possible tax liability of up to €1,680,000 there were some other liability in that maximum amount, it would plainly be unjust for the Court not to take it into account."

This decision was based on the terms of Section 16(1)(a) and (b) of the 1995 Act which require a court, in deciding whether or not to grant ancillary relief under that Act, to consider:

> "a) the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future,
>
> b) the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise)..."

The court held that this construction of the 1995 Act was supported by the judgment of Fennelly J. in the Supreme Court decision of *D.T. v. C.T.*[42] where he stated that[43]:

> "...in order to make provision in the form of a lump sum for the wife in accordance with the law, assets will have to be realised. This, in turn, necessarily entails the incurring of realisation costs and expenses in the form of legal and other professional expenses and tax liability, in particular capital taxes."

As such, Hardiman J. concluded that an analysis of the tax implications of compliance with a lump sum order was positively required by both statute and case law. The matter was remitted back to the High Court accordingly, and, it appears, the precedent set for future cases.

High value trust funds and property adjustment orders

An interesting and potentially far-reaching decision regarding the scope to which ancillary relief under the Family Law Act, 1995 and, by extension, the Family Law (Divorce) Act, 1996, can attach to property held on trust was reached by McKechnie J. in the High Court case of *F.J.W.T.-M. v. C.N.R.T.-M.*[44] (hereinafter "*T.-M. v. T.-M.*"). Pursuant to judicial separation proceedings, the applicant here sought and obtained an order under Section 40 of the Family Law Act, 1995[45] requiring that the trustees of properties known as the "Repus Trust" be joined as notice parties. In granting the order, Abbott J. directed that the trustees be joined pending the determination of a preliminary issue of whether the trust property could be included within the provisions of Section 9(1)(c) of the Family Law Act, 1995, which states that a property adjustment order under the 1995 Act may provide for:

> "...the variation for the benefit of either of the spouses and of any dependent member of the family or of any or all of those persons of any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the spouses..."

The preliminary issue duly arose for determination by McKechnie J. in the High Court. The trust was comprised of considerable assets, including a large period house which served as the parties' family home, and some 750 acres of agricultural lands which could be traced through the respondent's family for 350 years. The property was the subject of a

33. As amended by Section 52(a) of the Family Law (Divorce) Act, 1996.
34. Section 8(1) of the Family Law Act, 1995 and Section 13(1) of the Family Law (Divorce) Act, 1996.
35. Unreported, Supreme Court, 8th December 2004; [2004] IESC 101.
36. *Ibid.*, at 6.
37. Referred to at page 3 of the judgment of the Supreme Court.
38. Especially in circumstances where both parties agreed that the husband was to continue to run the businesses.
39. Denham and Kearns JJ. concurring.
40. Depending on a tax accruing at a rate between 20% and 42%.
41. Unreported, Supreme Court, 8th December 2004; [2004] IESC 101 at pages 5-6 of the unreported judgment.
42. [2002] 3 IR 334.
43. *Ibid.*, at 415.
44. Unreported, High Court (McKechnie J.), 22nd June 2004
45. Section 40 of the Family Law Act, 1995 reads: "Notice of any proceedings under this Act shall be given by the person bringing the proceedings to (a) the other spouse concerned or, as the case may be, the spouses concerned, and (b) any other person specified by the court."

complex series of transactions designed "to achieve the most tax efficient manner" for the respondent to succeed to the estate. Ultimately, the trust property was represented by a majority shareholding in a company incorporated in Jersey. The settlor of the trust was the respondent himself, while the beneficiaries were the respective daughter and son of the parties, their spouses, their issue and the spouses of such issue. Additionally, "the widow" of the respondent was a stated beneficiary.

The High Court was satisfied that the series of transaction were bona fide and legitimately entered into, and not for the purposes of diminishing the family assets to the detriment of the applicant or the marital children but that also[46]:

> "...it was never the intention of the parties, that as a consequence of these arrangements the major asset of either the applicant or the respondent or in part both of them, would be excluded from consideration in the event of their marriage not ultimately succeeding."

McKechnie J. in the High Court was mindful of the statutory considerations under Section 16 of the 1995 Act which set out the criteria for any order under Section 9, in that "proper provision" for each spouse and dependent family member must be made[47], it must be "in the interests of justice" to make the order[48], and that, amongst other things, regard must be had to the current and potential "income, earning capacity, property and other financial resources" of the respective parties[49]. Furthermore, the judgment makes important reference to the multitude of contextual interpretations of the term "settlement"[50]:

> "To a trust lawyer a "settlement" has a narrow meaning referring to conveyance of real or personal property to trustees to hold subject to either general or express limitation. To the tax lawyer it may go wider, and may include "any disposition, trust, covenant, agreement, arrangement or transfer of assets" providing there is some element of bounty... To a family lawyer, however, the word, in the context of an anti-nuptial or post-nuptial instrument, has an entirely different meaning, a meaning derived from a broad and purposeful approach, rather than one which is exclusively obtained from a literal interpretation. This is founded at least partly upon the aims and objectives of, and the social purpose which underlies the category of family legislation where, in this context, the relevant phrase is used. This method of construction has, almost without exception, for several years been the guiding force by which the courts have interpreted this phrase in family law legislation."

Thereafter, the issue of whether an order could be made in circumstances where the applicant wife was only a potential beneficiary to the trust arose for consideration. Interestingly, McKechnie J. chose not to follow the earlier decision of McGuinness J. in the High Court case of *J.D. v. D.D.*[51] where property adjustment relief ancillary to a decree of judicial separation was held only to attach to that property to which the beneficiary was entitled in possession or in reversion, and not to other trust property[52]. McKechnie J. noted that the High Court in *J.D. v. D.D.* relied on the English authority of *Howard v. Howard*[53], and that the stronger, contrary line of reasoning represented by the authorities of *Bosworthick v. Bosworthick*[54], *Prinsep v. Prinsep*[55], and *Young v. Young*[56] was not opened to McGuinness J. Accordingly, McKechnie J. held that[57]:

> "...I have some doubt that her [McGuinness J.'s] end conclusion in *J.D. v. D.D.* would have been the same if the relevant authorities had been open to her. In such circumstances, I believe that I can still uphold the deference which the learned judge commands, even by coming to a conclusion different from that arrived at by her in *J.D. v. D.D.*
>
> In my view, therefore, this instrument of trust is a "settlement" within s. 9(1)(c) of the 1995 Act. In my opinion, it was entered into after contracting, but during the currency of, a valid marriage between the applicant and the respondent and the fact that the wife is not named or so referred to, but instead can only possibly have a contingent interest within the enlarged class of beneficiaries, does not interfere with this conclusion."

It is respectfully submitted that this approach to Section 40 amounts to a welcome "teleological" or "purposive" interpretation which "faithfully reflect[s] the true legislative intention gathered from the Act as a whole"[58].

Relief orders after a divorce or separation outside the state

Part III of the Family Law Act, 1995 allows an Irish court to make a "relief order" in circumstances where the applicant has obtained a decree of divorce or separation outside of the jurisdiction[59]. There are certain strict jurisdictional matters that must be satisfied before an applicant will be entitled to pursue such and application[60]. Additionally, Section 23(3) of the 1995 Act[61] requires the applicant to satisfy the court, via an ex parte preliminary application, that they have "a substantial ground" for making the application.

The decision of Quirke J in the High Court case of *M.R. v. P.R.*[62] represents the first major decision within this jurisdiction demanding consideration of Section 23 of the 1995 Act. As a result, the learned trial judge placed a good deal of reliance upon the persuasive precedents relating to the equivalent English statute[63].

The facts of the case are as follows. The applicant wife was a dual Irish-French citizen and the respondent was an Irish man. The parties were

46. Unreported, High Court (McKechnie J.), 22nd June 2004 at paragraph 7.
47. Section 16(1) of the Family Law Act, 1995.
48. Section 16(5) of the Family Law Act, 1995.
49. Section 16(2)(a) of the Family Law Act, 1995.
50. Unreported, High Court (McKechnie J.), 22nd June 2004 at paragraph 13. In coming to this conclusion, McKechnie J. analysed the relevant English authorities on the point, and also certain academic treatises: Bromley's Family Law (9th Ed.), (Butterworths, 1998) at 798-799; *Jackson's Matrimonial Finance and Taxation* (5th Ed.), (Butterworths, 1992) at 258-259; Duncan and Scully, *Marriage Breakdown in Ireland*, (Butterworths, 1990) at 335; and *Shatter's Family Law* (4th Ed.), (Butterworth's, 1997) at 899-900.
51. [1997] 3 IR 64.
52. *Ibid.* at 83-87.
53. [1945] 1 All ER 91.
54. [1926] All ER 198.
55. [1927] P. 225.
56. [1962] 3 All ER 695.
57. Unreported, High Court (McKechnie J.), 22nd June 2004 at paragraph 24.
58. Per Keane J. in *Mulcahy v. Minister for the Marine*, Unreported, High Court (Keane J.) 4th November 1994.
59. See Shatter, *op. cit.* at Chapter 17.
60. Shatter, *op. cit.* at 967-970.
61. Section 23(3)(a) of the Family Law Act, 1995 reads: "An application shall not be made to the court by a person for a relief order unless, prior to the application, the court, on application to it *ex parte* in that behalf by that person, has by order granted leave for the making of the first-mentioned application and the court shall not grant such leave unless it considers that there is a substantial ground for so doing and a requirement specified in section 27 is satisfied."
62. Unreported, High Court (Quirke J), 5th July 2005; [2005] IEHC 228.
63. The Matrimonial and Family Proceeding Act 1984. Quirke J. describes the English provisions as "similar but not identical" to the Irish counterparts.

married in a Registry Office in Cork in 1976. In the twenty year currency of their marriage, the court found their lifestyle to be "unstable and characterised by drug abuse"[64] and the parties "drifted from location to location with no obvious source of income and no fixed abode"[65]. There was evidence to the effect that the parties cohabited for a total of 8 years. The parties obtained a decree of divorce pursuant to Spanish law on the 14th October 1996[66] whereupon the Applicant accepted a sum of IR£50,000 as a full and final settlement and she agreed not to contest the proceedings any further. It was accepted by the High Court that the applicant acquiesced to this on the basis that she believed the respondent to only have months left to live (he was H.I.V. positive) and she wished to assist him in legitimising his two other children under Spanish law. Both parties were aware that the respondent was, at the time of the divorce, the principal beneficiary of a trust fund. However, neither party at the time appreciated the full value of the trust which, as of January 2001, was worth €2,900,000[67].

The respondent husband survived, and his wife sought and obtained leave pursuant to Section 23(3)(a) of the 1995 Act to seek a Financial Relief Order in December 2003. At the substantive hearing in the High Court, Quirke J accepted that he had jurisdiction to hear the application on the basis of the applicant's ordinary residence in Ireland for a period in excess of one year prior to seeking leave[68].

The respondent argued that leave to bring the application should never have been granted and should be set aside on the basis that there was no bona fide ground for the grant of same which could be identified as a "substantial ground"[69], and that the application further should be dismissed as it disclosed no reasonable cause of action[70] and was an abuse of process. On the substantive issue, the respondent argued that the application did not come within the scope of Section 26, that a broadly similar form of relief was available in Spain and the applicant was merely "forum shopping"[71], and that the 7 year delay was without justifiable explanation.

The High Court found as a matter of fact that: both parties knew of the trust fund, but neither appreciated the full value; that by accepting the sum of IR£50,000 the applicant had permanently extinguished her interest in the trust fund; that the applicant's stated reason for not contesting the Spanish divorce was that she thought the respondent was about to die; the applicant was professionally represented at the Spanish proceedings; the presiding magistrate at the Spanish proceedings did not acquaint himself with the financial situation of the parties; no application for maintenance was made by the applicant wife at the time of the Spanish proceedings; and no relief was currently available to the applicant under Spanish law.

Quirke J accepted the principles set out by Purchas LJ in the English Court of Appeal decision of *Holmes v. Holmes*[72], namely that the leave stage constitutes a "first hurdle" for the filtration of applications without substantial grounds, and that the purpose of the legislation is to remedy hardship visited as a result of the absence of appropriate financial relief accompanying foreign proceedings, and not simply to vest in the domestic court the power to review or correct the decisions of foreign tribunals in matrimonial matters. This interpretation, it is respectfully submitted, is in general accordance with the principle of comity[73]. In the present case, Quirke J held that there were "exceptional circumstances"[74] which *prima facie* justified supplementation of the decision of the Spanish court on the basis that no request was made for that court to consider the applicant's upkeep and maintenance in circumstances where the respondent's means and resources were not disclosed to the court, or to the applicant, or her advisors.

On the substantive issue of relief, Quirke J held that any order made in the High Court would be enforceable on foot of undertakings by the respondent's solicitor (and trustee of the fund at issue) to comply with same, and hence the trust fund comprised property accessible from the State. Furthermore, the apparent delay between the date of the divorce and the date of the proceedings at issue was not, in fact, attributable to any fault on the part of the applicant and, following the Court of Appeal decision in *Lamagni v. Lamagni*[75], delay was a proper consideration for the substantive application (as opposed to the leave stage of such an application). Quirke J declined to consider what would have constituted "proper provision" under the Family Law (Divorce) Act, 1996, but elected instead to grant relief "to address the apparent injustice which has resulted from the failure on the part of the respondent to disclose the full extent of his means and financial resources in 1996". In so doing, Quirke J made the following statement of principle[76]:

> "The court is required to take into account all of the circumstances of the case (including the statutory factors identified in sections 16 and 26 of the Act of 1995). It should do so as they exist and can be considered at the date of the grant of relief and not at the date of divorce.
>
> The statutory relief granted is not intended to compensate the applicant for past financial or other hardship or inequity. It is intended to alleviate present inequitable financial or other hardship or reduced circumstances caused by a seemingly unjust outcome resulting from divorce proceedings in another jurisdiction where no comparable remedy is now available to the applicant. It is intended to do so in a just and equitable fashion."

The decision of Quirke J. provides a useful example of the potential of Part III of the Family Law Act, 1995 and its practical application.

Nullity of marriage in "ample resources" context

It is tempting to assume that the cleanest way to affect a clean break in an "ample resources" case is via a declaration of nullity[77]. Naturally, if two

64. Unreported, High Court (Quirke J), 5th July 2005; [2005] IEHC 228 at page 25 of the unreported judgment.
65. *Ibid.*, at 26.
66. The Spanish divorce was declared to be entitled to be recognised within this jurisdiction by the High Court on the 8th August 2003 (pursuant to the Domicile and Recognition of Foreign Divorces Act, 1986).
67. Additionally, the Applicant inherited a sum of €120,000 and the Respondent inherited approximately €381,000 in the interim period between the conclusion of the Spanish proceedings and the grant of leave to bring the Irish proceedings at issue.
68. Section 27(1)(b) of the Family Law Act, 1995.
69. Pursuant to Section 23(3)(a) of the Family Law Act, 1995.
70. Order 19; rule 28 of the Rules of the Superior Courts, 1986.
71. Unreported, High Court (Quirke J), 5th July 2005; [2005] IEHC 228 at page 9 of the unreported judgment.
72. [1989] Fam. 47.
73. See Binchy, *Irish Conflicts of Laws*, (Butterworths (Ireland) Ltd, 1988) at 13-14.
74. Unreported, High Court (Quirke J), 5th July 2005; [2005] IEHC 228 at page 18 of the unreported judgment.
75. [1995] 2 FLR 452.
76. Unreported, High Court (Quirke J), 5th July 2005; [2005] IEHC 228 at pages 29-30 of the unreported judgment.
77. See the Matrimonial Causes and Marriage Law Act, 1870 and the decision of the Supreme Court in *S. v. S.* [1976] ILRM 156.

individuals are never validly married, there can be no question of ongoing financial obligations between the two[78]. However, the indications are that a period of liberal application of the law of nullity has ended with the arrival of judicial separation and divorce in this jurisdiction[79].

The effect of this shift towards a more conservative attitude to nullity has been somewhat unpredictable, as can be seen by contrasting two recent, and on the face of it quite similar, cases in the High Court.

In the case of *P.McG. v. A.F.*[80], the petitioner sought a declaration that his marriage to the respondent was null and void on the basis that the respective parties lacked the capacity to enter into and sustain a normal lifelong marital relationship as a result of their respective states of mind, mental conditions and emotional and psychological development at the date of the purported marriage. The petitioner was a very successful property developer, and the respondent a secretary some 9 years his junior. From the parties' engagement onwards, their relationship was characterised by stress, tension, rows and disharmony. Matters reached a stage whereby the day before the wedding in September 1993, the petitioner believed the respondent no longer wished to proceed. As it transpired, the High Court found that[81]:

> "[t]he respondent was very late arriving at the church and was visibly intoxicated, having consumed a substantial amount of alcohol while preparing for the wedding and during a visit to a licensed premises on her way to the church."

This "extraordinary and embarrassing behaviour"[82] marked the beginning of a particularly unhappy union, with ongoing tensions between the respective families, and a pre-occupation on the part of the petitioner with business matters.

The petitioner issued proceedings in January 1997, and the Master of the High Court ordered a medical inspector to carry out a psychiatric examination of the petitioner and respondent. The medical inspector[83]:

> "...took the view that neither the petitioner nor the respondent showed any evidence of psychiatric illness or personality disorder. He believed that the actual circumstances of the wedding, together with the rows which preceded it, caused the petitioner to lose commitment to the marriage and to repudiate it almost immediately after the ceremony as a result of sexual and other difficulties which made him unable to sustain the relationship."

However, he also concluded that the petitioner suffered from an un-named condition, precipitated by the above disharmony, which was superimposed on his state of mind, and reduced his capacity to enter into and to sustain a relationship with the respondent (whose state of mind was "inconclusive").

Quirke J. in the High Court accepted that the decision of *U.F. (orse. U.C.) v. J.C.*[84] was authority for the proposition that where a person at the date of marriage lacks the capacity to enter into and sustain a proper or normal marital relationship this constitutes a valid ground for nullity. He further accepted, following the judgment of Barrington J. in the case of *B.D. v. M.C. (orse. M.D.)*[85], that both illnesses and "disorders" could be equally incapacitating in terms of forming a relationship. It was held accordingly that[86]:

> "...on the evidence that, as in *P. C. v. V.C.* (supra), both parties in this case entered into the marriage contract innocently, in the sense that, by reason of factors connected with the personality and psychology of each partner, it was impossible for them to sustain a normal marriage relationship for any length of time. I have already indicated I am satisfied that there has been no collusion between the parties."

This decision ought to be contrasted with the more recent case of *L.B. v. T.MacC.*[87]. Whilst all of the previous cases concern various sums of money which, depending on context, can be rightly described as "ample", the case of *L.B. v. T.MacC.* concerns the diametric opposite - the illusion of ample resources. The petitioner here was a successful, professional woman who met and married the respondent, a Scottish man, in 1993. The High Court accepted evidence that the petitioner had a "very difficult marriage"[88] during which the time the respondent's representations that he was a successful quantity surveyor and a man of considerable substance and wealth transpired to be wholly fabricated. The court found that the respondent "was not truthful with her [the petitioner] concerning his financial situation and his difficulties at work"[89] and that "during the course of the impugned marriage, the respondent was almost entirely financially dependent on the petitioner"[90]. Furthermore, the High Court heard expert opinion evidence that the respondent suffered from a narcissistic personality disorder characterised by self-importance, grandiosity, the need for admiration, the inability to empathise with others, very strong negative reactions to criticism, manipulative behaviour, an exaggerated sense of achievement, and a strong sense of entitlement. Hence, the petitioner sought a decree of nullity on the basis that:

> i) The respondent lacked capacity to proffer a valid consent to the marriage on foot of his psychological immaturity and under-development of character, and
>
> ii) The petitioner's consent to the marriage was not fully informed, and had been obtained by misrepresentation of fundamental facts and fraud on the part of the respondent.

O'Higgins J. in the High Court held that the respondent's personality was not such as to disable him from proffering a valid consent to marry and in so doing stated [91]:

> "I am not satisfied, however, that the totality of the evidence discloses that the personality traits of the respondent were so outside the norm as to constitute a personality disorder such as would preclude him from contracting to a valid marriage. Nor am I convinced that his personality was such as to preclude him from sustaining a relationship with the petitioner. Furthermore, it has

78. Wood, "Nullity and Divorce - The New Alternatives?" [1999] 2 IJFL 12.
79. Ryan, "Family Law-Reversal of Fortune-Nullity Law in the Age of Divorce" (2000) 22 DULJ 224.
80. Unreported, High Court (Quirke J.), 7th May 2003; [2003] IEHC 19.
81. *Ibid.*, at 3.
82. *Ibid.*
83. *Ibid.*, at 4.
84. [1991] 2 IR 330.
85. Unreported, High Court (Barrington J.), 27th March 1987.
86. Unreported, High Court (Quirke J.), 7th May 2003; [2003] IEHC 19 at page 8 of the unreported judgment.
87. Unreported, High Court (O'Higgins J.), 20th December 2004; [2004] IEHC 409.
88. *Ibid.*, at 7.
89. *Ibid.*
90. *Ibid.*, at 7-8.
91. *Ibid.*, at 7 (Emphasis added by author).

> not been shown to the satisfaction of the court that the respondent *constructed a persona entirely at variance with reality*."

Similarly, O'Higgins J. was unimpressed by the petitioner's argument on the basis of informed consent. In the Supreme Court decision of *M.O'M (orse. O'C.) v. B.O'C.*[92], Blayney J. set out the test for "fully informed consent" in nullity cases[93] as follows[94]:

> "What has to be determined, accordingly, is whether the consent of the wife was an informed consent, a consent based upon adequate knowledge, and the test is a subjective one, that is to say, the test is whether this spouse, marrying this particular man, could be said to have had adequate knowledge of every circumstance relevant to the decision she was making, so that her consent could truly be said to be an informed one."

However, doubt was cast on correctness of this approach by McGuinness J. delivering the unanimous judgment of the Supreme Court in the case of *P.F. v. G.O'M.*[95] whereby the prior judgment of that court was distinguished and, following the decision of Jeune P. in *Moss v. Moss (orse. Archer)*[96], the doubt and confusion attendant to a subjective test of informed consent was identified as a mischief to be avoided[97]. Thus, the decision of Blayney J. was distinguished insofar as it pertained to considerations of inherent disposition and mental stability, while *P.F. v. G.O'M.* is authority for the proposition that lack of informed consent cannot be extended to cover concealed misconduct and other forms of misrepresentation[98]. With this in mind, O'Higgins J. rejected the Petitioner's argument in *L.B. v. T.MacC.* as follows[99]:

> "The lack of full disclosure about his financial affairs, family and social circumstances are not in my view grounds on which one can base a claim for nullity. Neither the failure of the respondent to be the breadwinner for the family nor the failure of his business endeavours constitutes grounds on which to grant a declaration of nullity."

However, there is an argument that O'Higgins J. could have adopted an alternative approach to examining each of the petitioner's claims separately. Viewed in isolation, the respondent's condition may not have rendered him incapable of valid consent, and, in similar isolation, the respondent's misrepresentation may not have retrospectively invalidated the petitioner's consent, but surely this is to ignore the causal link between both features of the relationship - that the respondent's narcissistic personality disorder amounted to an inherent disposition which manifested itself by way of the serial misrepresentation. This would appear to remove the case at hand from the ambit of *P.F. v. G.O'M.* and render it more properly comparable to the decision in *M.O'M (orse O'C.) v. B.O'C.*

At the time of writing, the High Court decision in *L.B. v. T.MacC.* is under appeal.

Conclusion

It is difficult to draw conclusions regarding the recent cases in this area in the traditional sense. They deal with different, practical aspects of the Family Law Acts and are grouped together on the basis on a certain "common denominator" of subject matter. However, it is respectfully submitted that the decisions of *W.A. v. M.A.* and *R.G. v. C.G.* require judicial analysis to clarify their mutual effect. The issue of finality in Irish matrimonial law looks set to remain an open question, for the moment at least.

It seems apt, therefore, to conclude on a philosophical note, quoting the words of Lord Nicholas of Birkenhead in the House of Lords decision of *White v. White*[100] where he stated[101]:

> "My Lords, divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided and whether one of them should continue to support the other. Stated in the most general terms, the answer is obvious. Everyone would accept that the outcome on these matters, whether by agreement or court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder." ●

92. [1996] 1 IR 208.
93. See Shatter, *op. cit.* at 186-188.
94. [1996] 1 IR 208 at 217.
95. [2001] 3 IR 1.
96. [1897] P. 263.
97. [2001] 3 IR 1 at 23.
98. *Ibid.*
99. Unreported, High Court (O'Higgins J.), 20th December 2004; [2004] IEHC 409 at page 8 of the unreported judgment.
100. [2000] 2 FLR 981.
101. *Ibid.*, at 983-984.