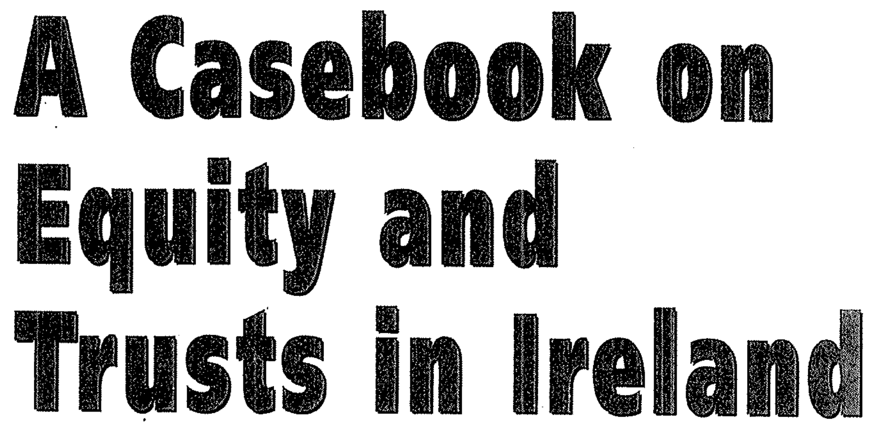
The Bar Review

Journal of the Bar of Ireland. Volume 3. Issue 8. June 1998



2nd Edition

Professor J.C.W. Wylie, LLM, LLD

The ONLY casebook to bring together all the leading cases on equity and trusts in the Irish Republic and Northern Ireland

Now expanded to include even more detailed introductory sections and including linking notes which set each case in its proper context, the new edition of **A Casebook on Equity and Trusts in Ireland** is essential reading for all practitioners and students.

This unique work features:

- Case judgments reproduced in full to ensure the reader loses nothing by over-zealous editing
- Statutory provisions to aid comprehension of the case law where relevant
- Full cross referencing to Wylie's *Irish Land Law* and *Irish Conveyancing Law*, and to other major works on equity and trusts.

Details are given of numerous new cases dealing with the fundamental principles relating to Equity and Trust law:

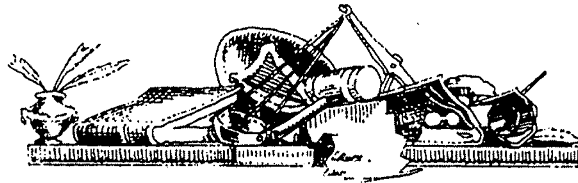
- Injunctions (including Mareva injunctions)
- Specific performance (and part performance)
- Rectification and aspects of the law of trusts
- Secret trusts
- Charitable and other purpose trusts
- Implied, resulting and constructive trusts
- The administration of trusts.

ISBN 1 85475 8802 Price £50.00 June 1998

To order your copy, or for further details, contact Butterworths at the address below.

Butterworths

26 Upper Ormond Quay, Dublin 7
Tel 01873 1555
Fax 01873 1876



The Bar Review

Volume 3, Issue 8. June 1998. ISSN 1339-3426

The Bar Review is a refereed journal. Contributions published in this journal are not intended to, and do not represent, legal advice on the subject matter contained herein. This publication should not be used as a substitute for legal advice.

Subscription (October 97 to July 98 9 issues) £76.23 inclusive of VAT and airmail post. Editorial and subscription correspondence to:

The Editor
The Bar Review, Bar Council Office, Law Library Building, Church Street, Dublin 7
Telephone + 01 804 5014 Fax+01 8045150
e-mail: edel@lawlibrary.ie

EDITOR: Jeanne McDonagh

CONSULTANT EDITORS
The Attorney General
Mr David Byrne, S.C.,
Dermot Gleeson, S.C.,
Patrick MacEntee, S.C.,
Frank Clarke, S.C.,
Thomas McCann, S.C.,
Mary Finlay, S.C.,
Eoghan Fitzsimons, S.C.,
Garrett Cooney, S.C.,
Donal O'Donnell, S.C.,
James O'Reilly, S.C.,
Fidelma Macken, S.C.,
Patrick Hanratty, S.C.,
Gerard Hogan S.C.,
Meliosa Dooge, B.L.,

EDITORIAL BOARD
John MacMenamin, S.C., Chairman, Bar Council
James Nugent, S.C., Vice-Chairman of the Editorial Board,
Rory Brady, S.C.,
Emily Egan, B.L.,
Mary Rose Gearty, B.L.,
Niamh Hyland, B.L.,
Nuala Jackson, B.L.,
Jerry Carroll,
Cian Ferriter,
Des Mulhere.

Staff Artist: Antonello Vagge.

369 OPINION

Confidentiality v. Public Interest

LEGAL ANALYSIS

370 Drugs: The Judicial Response
Peter Charleton, SC and Paul Anthony McDermott, Barrister

375 Revenue Penalties and the Criminal Law
Patrick Hunt, Barrister

378 The Organisation of Working Time Act, 1997
Julie Liston, Barrister

382 Advising Proofs in Respect of Pension Adjustment Orders
Marian McDonnell, Barrister

385 LEGAL UPDATE
A Guide to Legal Developments from 1st May 1998 to 5th June 1998

397 Some Cost Issues in International Arbitration in Ireland
James Gilhooly, Barrister

402 Shipowners' Limitation of Liability: a new Regime
Colm Ó hOisín, Barrister

406 EUROWATCH

Recent Judgments in the European Courts

408 ONLINE

The Regulation of the Internet
Denis Kelleher, Barrister

411 Section 10 of the Companies Act 1990 and the Investigation of Companies
Benedict O'Floinn, Barrister

414 BOOKS AND THE LAW
Powers of Attorney Act, 1996
annotated by Brian Gallagher

The Barristers Tea Room Restaurant

The Four Courts

We cater for your every need:
All Summer long
Parties
Weddings
Receptions
Finger Food
Book Launch
Family Occasions
Formal Gourmet Meal

We can Also Provide some of your Favourite Meals Professionally Packaged &Ready for the Freezer, Ready for Hassle Free, Re-heating – Helping to relieve some of the stress from your life.

For further information please contact:

Paul McGibney 086 563877

Just some of the improved services now available in our restaurant:

- Irish Breakfast from 8.00 am for only £2.50 (Healthy option also)
- Premium quality fresh brewed Arabica Coffee (Acid removed) for still only 65p (RRP £1.25)
- No Smoking Tables
- Newspapers, Flowers
- Hot Toasted Sandwiches
- Extensive range of Teas
- Gourmet Sandwiches
- 1st Year Devils Friday Discount (£1.00 off Main Course)
- Comment Cards available

Promoting Quality

Portugal '98 - The Sequel

It is, of course, well known that we beat the Portuguese (Oporto version) in Dublin last July. Although they had been overwhelmed by a superior tactical display, Portuguese pride was hurt. It came as no surprise, therefore, when it was insisted that we have a re-match in Portugal, this time in the cauldron that is Lisbon.

The Soccer club, as faithful readers will know, are now seasoned travellers. Past experience was put to good use and not only did all members come bearing passports but they were all valid as well. Another first for the club.

The tour is seen by some members as nothing more than a Whitsun sun holiday. This is a hurtful suggestion and resented by the squad of dedicated players and supporters. Naturally while there we might take some moments to soak up the sun. Unfortunately this year we had some rain which put a bit of a dampener on things. One wet day was used to visit Expo '98, a wash-out in more ways than one.

The team arrived at the selected pitch in good time. This allowed for an in-depth tactical discussion which stood us in good stead during the game. However the lengths to which the hosts were prepared to go to ensure victory soon became apparent. The only pitch in sight was a rugby pitch. We had to play into rugby goals, a ploy which did not faze seasoned net-minder Chris Meehan, who, as usual, turned in another fine display in managing to keep the score respectable. Yet again this year Conor Bowman was sensationally omitted from the starting eleven. However with the supporters spending the first half chanting his name he could not be ignored. His undoubted talents were brought into use in the second half.

At half-time there had been no score and the Irish support was delighted with the disciplined display of their team. There was some suggestion that the referee had allowed an illegal goal, the ball having gone wide, 'scored' by the Portuguese. Team captain Tom Rice clarified this with the referee and was assured that the goal had been disallowed. In deference to our hosts. and having regard to their injured pride. it was decided at half time to allow them three consolation goals. It was by these consolation goals that they won the match. This year no man-of-the-match was selected. Instead the pundits plumped for a team-of-the-match, and they didn't speak Portuguese. This was an entirely objective choice.

After the match, with the adrenaline levels still high, efforts were made to relax. The team was delighted that its pre-match curfew of 9.30pm had come to an end. The celebrations started with post-match dinner and got into full swing by the time that we reached Connolly's Bar, a little night spot near the hotel.

Preparations are already under way for Chicago '99.

Dara Hayes, Barrister

A great team, bar none

Confidentiality v. Public Interest

Recent events in Irish public life have rekindled the debate on the competing values of the right to confidentiality and the right of the public to be informed of matters in the public interest.

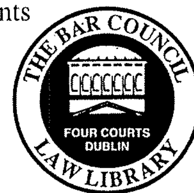
It is axiomatic that a free flow of information is necessary in a modern democracy to ensure that policy makers and citizens can make informed decisions on matters which legitimately concern the body politic. It is an equally cherished value that citizens should be free to organise their private affairs as they see fit without the unwarranted intrusion of agents of the state or of other citizens. Where the difficulties emerge is, to borrow a phrase, in drawing the lines in the sand between the waves of an information-hungry public and the privacy afforded to citizens, public representatives and commercial concerns taking refuge in the sand-dunes.

The acceptance that there is such a balance to be met is perhaps the most critical element of the debate. There is, properly, no absolute right to confidentiality, anymore than there is an absolute right of the State and the public to pry uncontrolled into the affairs of citizens. The key lies in focusing the debate on what constitutes matters of legitimate public interest and in what circumstances the right to confidentiality should yield to those legitimate public interests.

This is not a new debate. Our law has recognised that what might be said in the privacy of a confession box, or in confidence to a legal adviser, or in the secrecy of a national security briefing may be matters where the value of privacy will outweigh any competing claim of the public to be informed. Equally, our law has recognised that if the law is prima facie being broken, or if private acts are being committed which question the fides of the public acts of elected representatives, the public interest in pursuing those matters will outweigh any competing claim to the cloak of personal or corporate privacy. The recent Supreme Court decision in *National Irish Bank v. RTE* is welcomed as a mature assessment of these competing legal (and political) claims and as a positive restatement of the readiness of the Courts to promote the public interest where the facts of a case so demand.

It would be a disservice to narrow the debate to one of exclusively legal rights and obligations. In a healthy society, freedoms carry with them duties and responsibilities, which are acknowledged and acted upon without the need for recourse to legal actions. We have up to now had a media which has been careful in the conduct of its important role in disclosing information which is *in* the public interest and not merely of public interest; we have also entrusted to our politicians the role of determining the circumstances in which private interests would give way to their public responsibilities.

The spate of Tribunals, accompanying media revelations and alleged restraints on publishing relevant information make it clear that such vesting of trust has not always been reciprocated with the respect it deserved and that changes in the law are required accordingly. The Freedom of Information Act and the Ethics in Public Office Act may be a start to more open and responsible government, but further exploration of the issues and appropriate policies is required.



Drugs: The Judicial Response

(Continued from May Issue)

Peter Charleton, SC and Paul Anthony McDermott, Barrister

Sentencing

General

In Ireland the courts have consistently set their face against setting down sentencing tariffs. In *The People (DPP) -v- Gannon*[58], the Court of Criminal Appeal rejected the principle of the validity of sentencing guidelines:

> 'The courts here so far have rather set their faces against this idea of guidelines or tariffs for sentences. We put great store on the fact that each case must be considered in its individual frame, while being mindful that a sentence must be proportionate to the offence in question and to other sentences imposed in similar situations - though it needs to be emphasised, that very rarely will two cases be exactly alike.'[59]

What every court, however, is aiming for is not uniformity of sentence, which is an impossibility, but rather uniformity of approach.[60] The obvious legislative policy of increasing the maximum sentences for drug offences binds the courts to review their sentencing policy upwards. A complete absence of any mitigating factor in the behaviour of a defendant is clearly a central factor in a large sentence.

There must come a point where a person who is a commercial dealer in hard drugs, and therefore a menace to society, cannot escape the maximum sentence.[61] Life imprisonment is never to be imposed automatically for a drug offence. In this country such a sentence has never been imposed. In New Zealand, however, Cooke P. has warned that the activities of major drug traffickers should be equated with murder as they pose just as serious a threat to society.[62]

The dilemma faced by courts in sentencing persons who are addicted to narcotic substances has already been noted. This dilemma will continue, though the ability of courts to deal flexibly with addicts, ordering or encouraging treatment and holding out a carrot of a review followed by a suspended sentence to those who deal rigorously with their own habits at least leaves the possibility of reform open.

The commercial dealer, who may be a recreational user, is at the most serious end of the sentencing scale and the helpless addict is at the other. In between there are the semi-dependent, the opportunistic small time couriers and the addict-menace engaged in every form of criminality with a view to feeding his own habit. Unlike the simplistic legislative models that have been proposed in many countries, including our own, sentencing approaches to such defendants cannot be based merely on the quantity of drugs in their possession.

This is a factor of chance. A major dealer will make sure, under most circumstances, to have only a little, if any, of a drug in his possession. Exceptions can occur. Pathetic donkey figures can blindly close their eyes to what might be in a camper van which they are asked to drive from the continent to Ireland. They may later be found with huge quantities of drugs. It is too easy to overestimate the importance of the mere quantity of drugs involved when it comes to sentencing. McFarlen writes:

> 'The quantity of drugs is but one factor to be considered; care must be taken to ensure that an accused is not being sentenced on a "pound by pound" basis.'[63]

Sentences should reflect the quantity of drugs involved, but are not to be determined simply by multiplying the amount of the drug by some period of time.[64]

Even if legislation did not distinguish between different types of drugs the courts would still be under a duty to do so. The sentences imposed with regard to various dangerous drugs should bear a proper relationship to one another having regard to the relative seriousness of the drugs.[65] The social effects of such drugs are often led in evidence in prosecutions. The position with regard to ecstasy was considered by the Court of Criminal Appeal in *The People (DPP) -v- Purcell*.[66]

The investigating Detective Sergeant described for the trial court how the widespread use of ecstasy in Limerick City, particularly among the fifteen to twenty five age group had led to a big increase in hospital admissions from the suspected ill effects of the drug. Against this background a sentence of five and a half years for the possession of two thousand ecstasy tablets was upheld.

In England, a similar approach was taken in *Warren -v- Beeley*[67] where the Court of Appeal held that the tariff with regard to offences concerning ecstasy should be maintained at substantially the same levels as in relation to other Class A drugs.[68] Countries such as Canada, with experience of crack-cocaine, have warned of the severe and quasi-immediate dependency which it forms. The fact that it is a cheap drug in that country, within the finances of adolescents has led to exemplary sentences being imposed.[69]

Couriers

In order to excite the sympathy of a court, drug traffickers may deliberately recruit students or elderly persons. Courts have warned against encouraging this practice by providing misplaced sympathy.[70] The Alberta Court of Appeal warned that:

> 'Sympathetic though we are to the plight of many couriers, such concerns must give way to the need to protect society from the untold grief and misery occasioned by the illicit use of hard drugs.'[71]

The court held that first time couriers should receive three to five years for carrying up to 1 kilogram of cocaine, and six to eight years for amounts over 1 kilogram.[72] Couriers are often astonishingly poor, uneducated and vulnerable and so are easy targets to a trafficker who will view them as expendable. It may be, however, as one commentator has warned, that persons caught couriering drugs may belong to a class of persons whom customs officials are trained to look out for. Carrying drugs may well be spread around as diverse a group of people as possible in order to lessen the chances of detection.[73]

Students

Claims of leniency are made on behalf of students who are caught in possession of small amounts of drugs, particularly cannabis, for personal use. A discharge without conviction may be asked for on the basis, particularly in this country, that any drugs conviction can affect the potential for obtaining visas. The New Zealand Court of Appeal has held that each case must be examined on its own merits and that there would not be a proper exercise in judicial discretion if offences by students were to be treated as being in a special category.[74]

The fact that a conviction for a drugs offence could prove fatal to a professional qualification can be pleaded by way of mitigation. Again, the New Zealand Court of Appeal has refused to create a special category in respect of such cases, indicating that each case must depend on its own facts. Where, however, the direct and indirect consequences of a conviction are out of all proportion to the gravity of the offence, this should operate as an overriding consideration.

A lack of remorse by students who use soft drugs in order to relax, can prove a countervailing factor in the attempt to avoid a conviction. In this country the principle most likely to influence sentencing is that of equality of all citizens, be they students from well to do backgrounds, or the impoverished, in being dealt with by the law. Where drugs are trafficked to young people the courts should reflect this fact in their sentence.[75] An extreme example was *Condoleon* where a sentence of three years for supplying soft drugs to girls aged fifteen and seventeen was reduced because the prosecution had failed to contend that the girls were not previously interested in marijuana![76]

Social Supply

The possession of drugs for personal consumption is a mitigating factor; in the case of cannabis meriting only a fine under our legislation, until the third offence, and in the case of other drugs limiting the sentence to seven years for personal possession, as opposed to life imprisonment, in the case of possession for supply. The personal nature of the consumption has been held to be a mitigating factor, as can be the fact that drugs were to be supplied only within a small circle of friends.[77] The presence of a commercial motive will be seen as an aggravating factor, even if only friends are involved.[78]

Drugs for a Third Country

There is no mitigation in the claim that drugs were merely in transit to another country, or that they were not intended for distribution in the country in which the defendant is being tried. Because the drugs trade is an international business, countries owe to each other a duty to co-operate in the fight against trafficking.[79]

In *The People (DPP) -v- Loopmans and Van Onzen* the Court of Criminal Appeal rejected the notion that possession in Ireland for the purpose of supplying ultimately to the United States either destroyed an element of the offence, thus entitling the defendants to be acquitted, or was a mitigating factor. O'Flaherty J. warned that persons using Ireland as a staging post for the importation of drugs to other countries could expect only the severest treatment.[80] Neither is being a foreigner a mitigating factor.[81]

Assisting the Investigation

In sentencing two members of the Greenmount Gang who had promised co-operation to the authorities, including the giving of evidence against other gang members, Judge Cyril Kelly noted that the effect of their actions was to place their lives, and those of their families, in immediate danger.[82] The judge upheld the wide range of international authorities which supported this approach. The High Court of Australia has held:

> 'It would be to close one's eyes to reality to fail to recognise that in areas of organised crime in this country, particularly in relation to drug offences, the difficulties of obtaining admissible evidence are such that it is imperative, in the public interest, that there be a general perception that the courts will extend a degree of leniency, which would otherwise be quite unjustified, to those who assist in the exposure and prosecution of corrupt officials and hidden organisers and financiers by the provision of significant and reliable evidence.'[83]

In Ireland, giving evidence in open court that an offender has assisted can immediately put his life in danger. Our Constitution, however, requires that the courts operate in public unless a law, passed subsequent to 1937, allows for a private hearing. The unavailability of such private hearings means that a judge can be left in the dark where an offender has substantially assisted the police, but does not otherwise wish to endanger his life or enter onto a witness protection programme.

In general, a judge will have regard to whether the nature and effect of the information related to a trivial or a serious offence; whether the information brought persons to justice who would not otherwise have been brought to justice and whether the defendant was prepared to give evidence against other offenders in court.[84]

Role of the Defendant

How does one know, unless one admits evidence as to police suspicions, how serious has been the role of an offender on an individual charge? In *The People (DPP) -v- Purcell*[85] an objection was made in the Court of Criminal Appeal about remarks by the prosecuting Garda at the sentencing stage, to the effect that the defendant was known to the Drug Squad to be a very close associate of the principle dealer in drugs in North

Dublin, involving the supply of cannabis and ecstasy.

The objection was that this observation was unsupported by evidence and was prejudicial to the accused. The Court of Criminal Appeal accepted that a judge could not take into account an allegation unsupported by evidence, but it was prepared to assume that the trial judge, with vast experience in such cases, would not have taken account of any such allegations. If one is not to introduce Garda suspicions and if one is not to pursue a sentencing guideline based merely on amount, the answer would appear to be that the prosecution should call evidence of any factor which it regards as removing a potential mitigating factor to the accused.

So, while one cannot aggravate a sentence by reason of the fact that prior unprosecuted crimes have been committed, a judge will be aware that a failure to advance a 'once off enterprise' as a mitigating factor leaves the sentence towards its upper limit. Similarly, evidence of observed activities on prior occasions, when no detections were made, evidence of high living, evidence of frequent flying, evidence of the availability of vast amounts of money, all tend towards the kind of factors which judges have seen to be present in only the worst cases.

Dealing With Proceeds

Prior to 1996

Most European countries have had long standing offences of laundering money generated by crime.[86] Ireland introduced such a measure only in 1994 through section 31 of the Criminal Justice Act, 1994. This makes it an offence for a person who is engaged in drug trafficking or other criminal activity to conceal, disguise, convert or transfer any property which in whole or in part, directly or indirectly represents his proceeds from drug trafficking. The mental element involves a purpose of avoiding prosecution or a confiscation order. It is also an offence to assist such a person if the secondary party knows or believes the property represents, in whole or in part, directly or indirectly, the other person's proceeds of crime. Finally, it is an offence for a person who knows or believes that property is, in whole or in part, directly or indirectly, the proceeds of another person's crime, to handle that property.

Banks were, for the first time, made subject to stringent requirements designed to eliminate the possibility of a blind eye being turned in certain circumstances. The reverse is the case. An open eye must be turned to banking transactions with a view to uncovering any covert criminal purpose; Criminal Justice Act, 1994, section 32.

Most European States have confiscation provisions. As far as we can see they are all based upon the fact of a conviction and the possibility therefore of establishing profit by reason of criminal activity.[87] From these examples an ideal model of restraint pending the disposal of a charge, of confiscations of the proceeds of crime in certain cases with presumptions reversing the onus of proof onto a defendant was constructed. The result was implemented in the Criminal Justice Act, 1994. In essence, where proceedings have been instituted for an indictable offence or a drug trafficking offence, or are about to be instituted, and it is reasonable to think that a confiscation order may be made, or where one has been made, the High Court acting otherwise than in public on the application of the Director of Public Prosecutions, may restrain the person from dealing with all of his property, subject to discharge or variation.[88] A receiver may be appointed in aid of this process.

This function is by way of preservation only. A receiver appointed after a confiscation order may proceed to sale.[89] A confiscation order is made upon a sentence for drug trafficking[90] or other indictable offence.[91] The court may determine what benefit has accrued to a person by way of their criminal activity. A person may be required to give information as to his property and if he does not then the court may draw an inference from such failure.[92] In the case of drug trafficking, assumptions are made against an accused except where they are shown to be incorrect or give rise to a serious risk of injustice. The assumption is that moving back for a period of six years from the time when proceedings were instituted, all property received by him was taken free of encumbrance and was a payment or reward in connection with drug trafficking. Similarly, expenditure during that time is assumed to have been as a result of his carrying on that activity.

Since 1996

The departure from this model was introduced in the Proceeds of Crime Act, 1996. The Act came into force on the 4th of August, 1996. It is now the subject of a Constitutional challenge. Therefore the Act is simply described without comment on this issue. In essence it is much simpler than the 1994 Act. Any property obtained or received at any time in consequence of or in connection with the commission of an offence can be frozen by order of the High Court. The court must be satisfied that the property constitutes, directly or indirectly the proceeds of crime or was acquired, wholly or in part, with property that represents, directly or indirectly, the proceeds of crime.

An interim order, made otherwise than in public, restrains dealing in such property for twenty one days or, on an interlocutory application being brought, until the disposal of that application. An interlocutory order freezes the property for seven years. Then a final order is made transferring the property to the Minister for Justice.[93]

A civil standard of proof rests upon the applicant. Evidence is admissible from an officer of An Gárda Síochána that he or she believes that the property is the proceeds of crime.[94] Cases proceed in private until such time as a person against whom an order is made either discloses, or has had a reasonable opportunity to disclose the nature of whatever defence they wish to make: Section 8(4) of the Proceeds of Crime Act, 1996; *M -v- G*, Supreme Court, unreported, 10 May, 1997. A respondent may also be required to disclose the source of their property[95] and a receiver may be appointed at any time when an interim or interlocutory order is in force who, under the control of the court, may take possession of property and manage, dispose of it or otherwise deal with it.[96] None of these provisions are dependent upon the existence of a conviction or the institution of proceedings against any person. They were claimed, as a result, to be unconstitutional in terms of alleged procedural effects and an attack upon property rights. This argument was rejected in the High Court, but is now under appeal to the Supreme Court.[97] If the Act survives the challenge to its constitutionality[98] it may operate as a paradigm for comparative legislation. The purpose of the Act is the creation of a civil remedy whereby criminals and

their associates are deprived of profit from crime.[99]

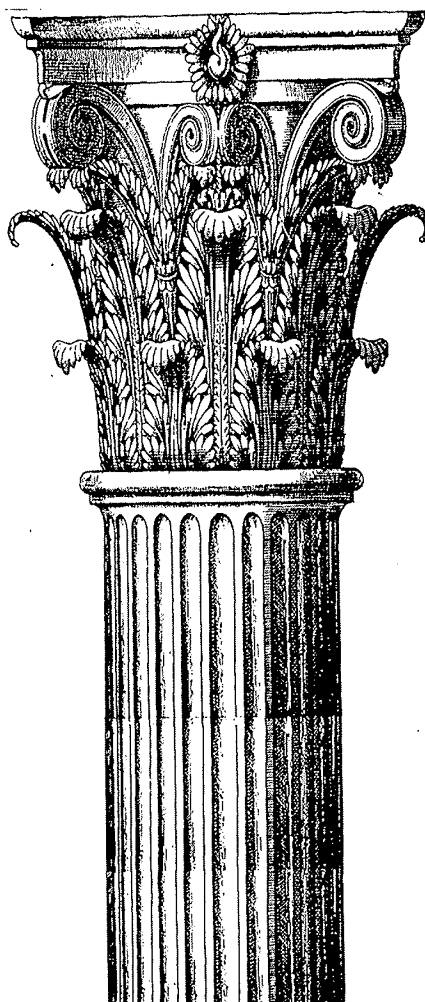
A defendant has ample opportunity to defend the application. The only power that can be exercised without the right to contest it is the initial freezing order which under ordinary circumstances will not last for longer than a month. An interlocutory application can be contested in the same way as any application for an injunction. In addition, where such an application is granted, whether contested or not, a defendant may bring an application[100] to overturn any freezing order made. This can be on the basis of a contest initiated after failing to contest an earlier application or it can be by reason of a desire to bring further evidence before the court after an earlier contest has been lost.[101] A final disposal order of whatever property is being frozen, or converted into cash in a bank by a receiver, is made only if a defendant has not shown that the property does not constitute, directly or indirectly, the proceeds of crime or is not acquired with or in connection with such property.

The court is, moreover, at liberty not to make a disposal order, notwithstanding the absence of such proof by the defendant 'if it is satisfied that there would be a serious risk of injustice'.[102] A huge discretion is therefore vested in the judiciary. One might tentatively suggest that the legislature does not want persons to be deprived of property who have, in good faith, and who have no knowledge of the true nature of the business conducted by the individuals with whom they are dealing, provided services or goods on a reasonable value basis to persons who turn out to be criminals or their associates. Evidence given in the constitutional challenge before McGuinness J. indicated that the Gardaí regarded as an essential component of the struggle against crime that profits should not be safe from seizure.

A conviction based model carries with it the necessity to obtain proof beyond reasonable doubt that a particular offence was committed. While this is constitutionally essential if injustice is to be avoided to persons accused of crime, the manner in which funds can be laundered and moved into the hands of associates indicates a caution against a conviction based model being ideal. Many people comment that Godfathers steer clear of actual execution, but reap the profits. They will commit any offence up to and including murder to ensure the secrecy of their operation.[103]

Courts in the United Kingdom seem to be in the forefront of granting orders which operate on a world-wide basis.[104] Such an order acts in personam only and freezes property by binding the defendant not to deal with it. Third parties without notice may require, depending upon the state of national legislation, formal enforcement proceedings within the courts of their own country. The courts may also, in aid of freezing orders, extend the duty to make an affidavit disclosing assets to foreign property.[105]

It is impossible for us to comment on the mutual enforceability of court orders which freeze, in aid of the confiscation of the proceeds of crime, assets in foreign jurisdictions. At least one such order has been made in Ireland. Obviously, on the Mareva model a number of world wide orders have been made in ordinary civil proceedings. It may be that judicial attitudes are so turned against profiting from the proceeds of crime that whatever discretion is left to them within the Member States of the European Union, will be used in aid of the orders of other Member States' courts freezing the proceeds of crime. It is clear that this will be not just a Europe-wide problem, but a global one.



As countries move, like Ireland, to freeze and confiscate the proceeds of crime the natural reaction of organised crime will be to move offshore. Mutual enforceability depends upon national laws. It would seem, however, that laws which are less stringent than those outlined above, both in relation to money laundering, non-conviction based freezing and confiscation and laws which place definite and distinct obligations on banks to turn an enquiring eye to new customers, facilitates an infusion of criminal funds. Strong reasons of policy indicate that such activities should not have a hiding place. Potentially serious problems arising from the presence of organised crime would surely follow in any country that is perceived to be a weak link in the determination to stop drug traffickers profiting from their activities.

Speculations

At present there are approximately four hundred addicts on the Eastern Health Board waiting list for treatment. Officials estimate that health boards needs to open about twenty five more treatment centres, in addition to the existing twenty eight, to cope with the current demand.[106] The *Garda Survey of Drug Addicts* shows that a substantial number of participants had not sought treatment of any kind. Reasons for not seeking treatment included: it is pointless (20%), it is too hard to get to a centre (11%), I do not need treatment (36%) and I would not be accepted for treatment (10%).[107]

Dublin seems to have led the way in developing a truly horrendous drug addiction problem. It would be nice to believe that we could begin to show the way out. In New Zealand, the Court of Appeal has twice taken time off from an appeal to consider the evidence of experts as to how the rapid growth of cocaine use, particularly its derivative crack-cocaine had occurred in the United States and the United Kingdom.[108]

In spite of the writers' lack of expertise in areas outside of law it has been necessary to dare to express

tentative views as to how problems have arisen and as to how they might be capable of solution.

Courts have traditionally had the task of having to grapple with extreme problems of expert testimony leading them into fields far outside their own areas of competence. When it comes to drug addiction we are dealing with criminogenic substances which relate to people's failings and weaknesses, the inter-relationship of groups within society and the horrible effects that it has on self-inflicted victims and those who, in turn, become the victims of those victims. If there is anything that has been learnt from a survey of this area it is that warehousing does not work. Simple determinate sentences, except for those deserving of the highest possible punishment which a court can impose, rarely work.

Forcing dependants into viewing themselves as having a problem, using alternatives to imprisonment, catching offenders early and diverting them into probation and treatment programmes, and offering the prospect of sentencing reviews or more lenient sentences with suspension on probation under strict conditions to those who look at their problem seriously seems to be the only response that offers any prospect of success. On the executive side resources must be made available on a phased basis to those programmes which are shown, after initial and intensive pilot studies, to work.[109] On the police side the continuing and urgent nature of their struggle calls for our admiration and support. ●

---

58. CCA Unreported, 15 December, 1997. Contrast to *R -v- Armah* 76 Cr App R 190 (1982) where the English Court of Criminal Appeal established a general range of sentence tariffs for drug offences.
59. It is to be noted that previously in *The People (DPP) -v- Preston*, CCA, Unreported, 15 October, 1984, the court adjourned its determination so that a list of previous relevant sentences could be prepared for its consideration. Tariffs have also been rejected in Scotland and in Canada; see *R -v- Lessard* 59 CCC (3d) 123 and Lord Fraser - *What Price Drug Abuse - The Prosecution of Offences of Drug Abuse/Distribution in Scotland*, 184 Scolag 8 (1992).
60. *Bibi* (1980) 2 Cr App R (S) 177 at 179.
61. See the remarks of McMahon J. in *The People (DPP) -v- Larry Dunne*, unreported, High Court, 23 May, 1985. In *The People (DPP) -v- Gannon,* op cit, the Court of Criminal Appeal held that, 'a supplier of a hard drug like heroin cannot expect any mercy from the court, he must expect to get an exemplary sentence'.
62. *R -v- Beri* [1987] 1 NZLR 46 at 49. See also *R -v- Curtis* [1980] 1 NZLR 406.
63. Drug Offences in Canada - 549.
64. *Allen*, Unreported, 27 April, 1995 (CA, WA).
65. See Rinaldi - Drug Offences in Australia, page 7.
66. CCA, Unreported, 14 July, 1997.
67. [1996] 1 Cr App R (S) 223.
68. See generally Bucknell - Misuse of Drugs (1996) para 9.001.
69. *R -v- Dorvilus*, 60 CCC (3d) 437.
70. *R -v- Hamouda* (1982) 4 Cr App R (S) 137. English cases on sentencing couriers include: *Ayoub* (1972) 56 Cr App R 581; *Mehagian & Fenwick* (1972) 57 Cr App R (S) 488; *R -v- Mbely* (1981) 3 Crim App R (S) 157.
71. *R -v- Cunningham*, 104 CCC (3d) 542 at 574. No mercy will be shown to a courier motivated by greed: *Farrugia*, Unreported, 31 March, 1979 (CCA, NSW).
72. See also *Choon Sien Tee* (1994) 71 A Crim R 181 at 183.
73. Shiels - *Sentencing the Drugs Courier* 35 JLS 228 (1990).
74. *Police -v- Roberts* [1991] 1 NZLR 205.
75. *R -v- McAuley*, 52 Cr App R 230.
76. 69 A Crim Rep 573 (1993).
77. *Bennett* (1981) 3 Cr App R (S) 68 and see Rinaldi at 243.
78. *Bowman Powell* (1985) 7 Cr App R (S) 85; *Leaver*, The Times, 14 March, 1989.
79. *R -v- Prickong* [1990] 1 NZLR 5 at 7; 'This country must co-operate with others and have regard to their interests in combating the international drugs scourge'.
80. Court of Criminal Appeal, Unreported June, 1996.
81. Rinaldi at page 35.
82. Circuit Court, Unreported, September and November, 1997.
83. *Malvaso -v- The Queen* [1989] 168 CLR 227.
84. *R -v- Sivan* (1988) 87 Cr App R 407. See also *Malvaso -v- The Queen* [1989] 168 CLR 227; *R -v- Delellis* [1990] 2 NZLR 147; *The People (DPP) -v- Maloney* 3 Frewen 267 at 269 where a failure to give evidence was held to be an improper factor in aggravating sentence; *Choon Sien Tee* 71 A Cim R 181; *Sehitoglu and Ozakan* [1998] 1 Cr App R (S) 89; *R -v- Tsolacos* 81 A Crim R 434.
85. Court of Criminal Appeal, Unreported, 14 July, 1997. See also *The People (DPP) -v- Walsh*, 3 Frewen 248 (1989) and *The People (DPP) -v- McEntee*, CCA, Unreported, 10 November, 1997.
86. Law Reform Commission Report - *The Confiscation of the Proceeds of Crime* (1991) 39.
87. Our only information in this regard is the Law Reform Commission Report, op cit, chapter 3. In addition this was confirmed by police officers from Finland, France, Belgium and the United Kingdom at a European Police drug conference which the first author attended in December, 1997.
88. Sections 23 and 24 of the Criminal Justice Act, 1994.
89. Section 19(5) of the Criminal Justice Act, 1994.
90. Section 4.
91. Section 9.
92. Criminal Justice Act, 1994, section 11.
93. Proceeds of Crime Act, 1996, section 3.
94. Section 8.
95. Proceeds of Crime Act, 1996, section 9.
96. Contrast the powers under the Criminal Justice Act, 1994, section 24(7) for interlocutory receivers and section 20(2) for final receivers after confiscation order which has the same words as in section 7 of the Proceeds of Crime Act, 1996.
97. See *Gilligan -v- The Criminal Assets Bureau, Ireland and the Attorney General*, McGuinness J. Unreported, 26 June, 1997.
98. As to a previous challenge to a similar kind of confiscating measure see *Clancy -v- Ireland* [1988] IR 326.
99. See remarks in relation to the corresponding British legislation of Leggatt L.J. in *Re: Thomas* [1992] 4 All ER 819.
100. Section 3(3) of the Proceeds of Crime Act, 1996.
101. In any event, the Act is not even limited by that fairly obvious restriction.
102. Section 4(8) of the Proceeds of Crime Act, 1996.
103. Per Carney J. in the Director of Public *Prosecutions -v- The Special Criminal Court*, High Court, Unreported, 14 March, 1998.
104. *Derby -v- Weldon and Others*, [1990] Ch 48; [1989] WLR 276.
105. *Deutsche Bank -v- Murtagh* [1995] 1 ILRM 381, citing *Derby -v- Weldon* (above).
106. *The Irish Times*, 9 March, 1998.
107. *Illicit Drug Use and Related Criminal Activity in the Dublin Metropolitan Areas*, 1997, page 24.
108. See *R -v- Latta* [1985] 2 NZLR 504; and *R -v- McFarlane* [1992] 3 NZLR 424.
109. We would like to thank Sharon Kearney LL.B for assisting in the final form of this paper and for offering many useful suggestions.

Revenue Penalties and the Criminal Law

PATRICK HUNT, Barrister

A Change of Climate

For the first time recently, tax and commercial lawyers have been consulted in situations where there is a real risk that the Revenue are seeking to assemble evidence for criminal prosecutions in relation to Revenue offences.

Voluntary disclosure, which formed a routine part of the accountancy profession's approach to routine compliance and the smooth functioning of Revenue audits, may in many cases have to be avoided and accountants will be seeking legal advice in this regard. The advantage of non-publication of the imposition of penalties conferred on parties making voluntary disclosure by s.1086 of the Taxes Consolidation Act 1997 (TCA 1997) will now be far outweighed by the possibility of self-incrimination, leading to convictions in criminal proceedings and large fines or prison sentences.

Penalties

The Taxes Consolidation Act 1997 now pulls together the relevant penalty provisions in Part 47, ss.1052-1086. Certain of the penalties have a 'civil' characteristic whereas others are purely criminal in nature.

The distinction is significant because when a particular section creates a penalty which is criminal in nature (constitutionally under Article 38.1), the taxpayer has a right to trial by jury unless the offence is a minor one. Furthermore, the Revenue themselves and not the DPP are entitled to maintain proceedings for 'civil' penalties.

In *McLoughlin v. Tuite* [1989] IR 83, the Supreme Court considered the effect of court proceedings for breach of s.500 of the Income Tax Act 1967 (s.1052 TCA 1997). The Supreme Court applied the test for discerning whether a particular offence was criminal in nature as laid down by Kingsmill Moore J. in *Melling v. O Mathghamhna* [1962] IR 1. A criminal offence had the following indicia:

1. It was an offence against the community at large rather than an individual.
2. The sanction was of a punitive nature.
3. There was a requirement of mens rea

Looking at the £750 penalty imposed by s.1052 of the Taxes Consolidation Act 1997 for failure to make a return, the Supreme Court was not satisfied that this default had all of the indicia of a criminal offence and therefore it could be pursued as a civil remedy. The taxpayer was therefore not entitled to fair procedures according to criminal law. Furthermore, the Prosecution of Offences Act 1974, which requires that all prosecutions are only at the instance of the Director of Public Prosecutions did not apply to it.

Penalty provisions which have such civil characteristics and can be recovered by the Revenue Commissioners on foot of Summary Summonses in the High Court or Civil Bills in the Circuit Court include those set out by ss.1052-1055, i.e., failing to make returns; fraudulently or negligently making incorrect returns; assisting in making incorrect returns - s.1057; obstructing officers - s.1058; failing to allow a deduction of income tax authorised by the Acts - s.305; making a false statement to obtain capital allowances - s.783; false statement in relation to pensions - s.789; failure to keep basic records and linking documents - s.886.

The remainder of the penalties provided for by Part 47 are criminal in nature. They are distinguishable from the civil type penalties in that they normally require an element of mens rea frequently connoted by the use of the phrase 'knowingly or wilfully' and have the possibility of the imposition of imprisonment as a penalty.

Application of Criminal Law to Taxation

The Director of Public Prosecutions is charged with pursuing criminal cases by the Prosecution of Offenders Act 1974. He will have the onus of establishing all of the essential components of the offence before a judge or jury may convict. On the other hand, the Revenue Commissioners or a designated Inspector may take proceedings in his (their) own name to recover civil type penalties.

Persons accused of Revenue offences, like any other accused persons, are entitled to the benefit of the rules of natural justice and in particular to be told clearly what charges are alleged against them and to have a proper opportunity to put forward a defence. In general they will have privilege against self-incrimination (subject to the possibility of civil penalties being imposed for breach of their obligations to give information, make returns, etc. imposed by ss.1052-1055 TCA 1997). Persons accused are entitled to the benefit of

legal representation, and the evidence used must be legally obtained or, if illegally obtained, there must be extraordinary justifying circumstances and no deliberate breach of the constitutional rights of the accused person.

The principal section under which criminal Revenue offences will be prosecuted is s.1078 of the TCA 1997 (previously s.94 of the Finance Act 1983). This section provides that a person is guilty of a Revenue offence if he knowingly or wilfully delivers incorrect returns; aids, abets or induces another person to deliver incorrect returns; fails to pay PAYE or VAT; or fails to keep books and records.

s.1056 of the TCA 1997 creates a criminal offence in relation to false statements made to obtain allowances.

Proofs Required

Section 951(10) of the TCA 1997 provides that a certificate signed by an Inspector which certifies that a person is a chargeable person and the return was not received before the filing date shall be evidence that no return was received. s.987 of the TCA 1997 provides for certificate evidence of failure to comply with PAYE regulations and failure to deduct PAYE. Section 1052(4) provides that certificate evidence may be tendered to show failure to make a return or failure to furnish particulars or deliver a stated account.

All of these provisions simplify procedures for enforcement of civil type penalties. However, s.1078, dealing with the criminal offence of knowingly or wilfully making one of the various defaults in delivering returns, paying over PAYE, etc., purports to apply these shorthand procedures to the criminal process.

In *Thomas O'Callaghan v. J.P. Clifford and Others* ITR IV 478, the Supreme Court seemed to query the appropriateness of such evidence to establish criminal culpability. As Mrs Justice Denham stated:

> "Where the State seeks to prosecute offences by way of a certificate which encompasses the entirety of the prosecution case of which a factor or factors (for example, the mode of service of the notice stated to have been served on the applicant herein) are not set out on the certificate, then the District Court has a special duty to ensure that due process of law is applied and that the appellant has an informed opportunity to raise any such matter at the hearing of a case."

Speaking specifically of s.1078 (i.e., s.94 of the Finance Act 1983), she stated:

> "A significant constituent of this criminal offence is that it must be committed knowingly or wilfully. Yet that mens rea was not apparent on the documents before the court as it is neither on the certificate nor the summons ... The burden of proof in criminal matters is higher than that in civil matters and thus whereas a particular certificate may be adequate in a civil matter, it may not be so in a criminal matter."

It seems therefore that the obvious difficulty for the Director of Public Prosecutions in prosecuting offences is to establish the knowing and wilful components.

Although in certain instances the DPP may be content to rely on the obvious inference that a person making incorrect returns must be presumed to be aware of the likely and probable consequences of completing them and intend them to be false having regard to his knowledge of his own affairs, with the hurdle of a burden of proof beyond reasonable doubt to surmount, frequently he may not be satisfied to rely on such an inference and it is in this context that the admissions of the taxpayer by way of voluntary disclosure come sharply into focus.

Voluntary Disclosure

Whether at his own instigation or in response to queries put to him by Revenue officials, an individual or his accountant makes voluntary disclosure, the voluntary disclosure will be treated in law as an admission which may be used in evidence against him provided it is voluntary and not obtained as a result of threats or inducements.

Furthermore, as a general principle, any confession or admission to be tendered in evidence must be obtained in accordance with the Judges' Rules.

Judges' Rules

These rules are in essence administrative decisions handed down by the English Courts originally in *R. v. Voisin* [1918] 1KB 531.

In Ireland, their status was clarified by Walsh J. in the Supreme Court in *People [AG] v. Cummins* [1972] 312. A trial judge is given the discretion to exclude statements obtained in breach of the Judges' Rules. The rules may be summarised insofar as they pertain to Revenue matters as follows:

1. In the course of an investigation. questions may be put to a person from whom useful information may be obtained, but
2. When the investigating officer has made up his mind to charge somebody with a crime, that person should be cautioned before further questioning, and
3. If a person wishes to volunteer a statement, the usual caution should be administered, and if a voluntary statement has been made, further questioning should only be as to the details of this statement.

The usual form of the caution is to the effect that the person is not obliged to say anything, but anything he does say will be taken down and may be used in evidence against him.

It seems to me that in Revenue prosecutions founded upon voluntary disclosure, the critical issue will be when the Revenue official formed the view that the taxpayer might be charged with a crime. At the outset, if he has not formed such a view and the taxpayer makes a full disclosure, the lack of a caution will not preclude the Revenue official from passing on the confession to the DPP for use in the course of a prosecution.

If, however, in the course of an audit. the Inspector has grave suspicions and still does not administer a caution but continues to question, it may be possible to successfully exclude information obtained after this time on the basis that it was obtained in contravention of the Judges' Rules. However, it must be emphasised that the failure to comply with the Judges' Rules is not a cause for mandatory exclusion of evidence but rather gives rise to a discretion on the part of the trial judge to decide whether or not to admit the prejudicial statements.

In relation to statements, confessions or disclosures generally, there is a further specific statutory exception given in relation to Revenue matters to the general rule as to admissibility. s.1067 of the TCA 1997 (formerly s.521 ITA 1967) provides that although a person may have been induced to produce documents to the Revenue on the basis that he may make a financial settlement instead of facing proceedings on the basis of full co-operation, these documents will nevertheless be admissible in proceedings. This section attempts to displace the normal rule of evidence that any form of inducement to make a disclosure will render that disclosure involuntary and thus inadmissible.

Sanctions

The criminal sanctions in general prescribed by s.1078 allow the District Court on summary conviction to impose a fine of £1,000 and/or imprisonment for twelve months. The Circuit Court on conviction may impose fines of £10,000 and/or imprisonment for up to five years.

Amnesty Provisions

It should also be noted that there are specific provisions which survive the Taxes Consolidation Act 1997 contained in s.9 of the Waiver of Certain Tax, Interest and Penalties Act 1993. The section applies to an individual who has availed of the amnesties under s.2 or s.3. It increases the penalties for knowingly or wilfully failing to comply with the provisions of the Acts regarding the furnishing of returns.

If an individual has availed of the amnesty, he is subject to the extra penalties prescribed by s.9 of that Act which allows, in the case of a specified difference in excess of £100,000, the imposition of a fine of twice that specified difference and a mandatory term of imprisonment of eight years.

The specified difference is the difference between the amount of tax payable by the individual for the relevant period and the amount which would have been payable if correct returns had been furnished.

Where a specified difference is less than £100,000, the amount of the fine varies from 25% of the specified difference for amounts less than £5,000 to the amount of the specified difference for specified differences between £10,000 and £25,000.

Conclusion

With the possibility of imprisonment and the imposition of large fines, the traditional approach of tax accountants and others of fully co-operating with the Revenue Commissioners is no longer appropriate where criminal prosecutions are possible. It is clear that from now on lawyers will have a significant involvement in those situations. ●

NEW TITLES

ADMINISTRATIVE LAW IN IRELAND Third Edition
by Gerard Hogan & David Gwynn Morgan — Paperback **£58.00** Hardback **£98.00**
This new edition has been significantly expanded, making it the definitive work on administrative law. It will undoubtedly prove an invaluable resource for all those who have to cope with the deluge of new legislation and case law.

POWERS OF ATTORNEY ACT 1996 by Brian Gallagher — Paperback **£17.00**
A practical explanation of the new law – in particular the provision for a new instrument called an enduring power – which clarifies both the substance and implications of the Act.. The annotation offers detailed comments on each section of the Act, as well as the Statutory Instruments, refers to relevant case law and reproduces the Practice Direction relating to the registration of an enduring power.

CONTEMPORARY ISSUES IN LAW AND POLITICS NO. 1
edited by Prof. Robert Clark and Dr. Joe McMahon — Paperback **£45.00**
This is the first attempt to integrate legal analysis with political developments. It includes both highly practical articles and excellent theoretical pieces. Anyone who wishes to keep abreast of developments in law and politics should read this.

DUBLIN UNIVERSITY LAW JOURNAL VOLUME 19, 1997
edited by Finbarr McAuley — Paperback **£42.00**

This is the only journal devoted exclusively to developments in contemporary Irish law. It covers a broad range of subjects and is informative reading for legal practitioners.

4 Upper Ormond Quay, Dublin 7, Ireland Tel. (01) 873 0101 Fax. (01) 872 0078 DX 1054 Four Courts

The Organisation of Working Time Act, 1997

JULIE LISTON, Barrister

Introduction

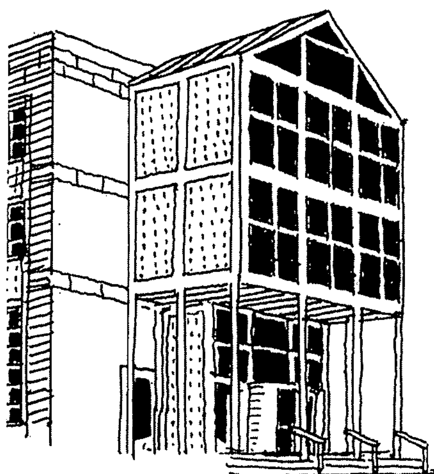
The Organisation of Working Time Act, 1997 ('the Act') sets out statutory rights for employees in respect of, inter alia, rest time, Sunday working, maximum working time, night work, zero hour contracts and holidays.[1] The Act is directly based upon the 1993 EC Working Time Directive[2] ('the EC Directive'), and is designed primarily to protect the health and safety of workers. Although the Act is clearly a step forward in the area of employment protection, its effect may be said to have been limited somewhat by the extent of exemptions and opt-out clauses which are provided for in the Act.

In this article I intend to look briefly at some of the main provisions of the Act, including provisions relating to rest time, Sunday working, maximum working time, night work, zero hour contracts and holidays.[3] However, before looking at these basic provisions it is important to set out the categories of persons who are not, in fact, covered by the Act at all. The Act does not apply at all to members of the Garda Siochana or to the Defence Forces.[4] The provisions relating to rest time, Sunday working, maximum working time, night working, provision of information and zero hour contracts (i.e. Part II of the Act) do not apply to persons who work at sea, junior hospital doctors, anyone who is employed by a relative and who is a member of that relative's household, and anyone whose place of employment is a private dwelling house or a farm in or on which he/she and the relative reside.[5] A further interesting exemption from the above mentioned provisions of the Act is any person who determines the duration of their own working time, save any minimum period of working time which is stipulated by the employer.[6] Clearly, this latter exemption is significant and will have the effect of excluding most executive/management type workers from these provisions of the Act. Such an exemption demonstrates what appears to be the intention behind the Act, i.e. to protect those workers who have little, if any, say over their working life.

Rest Time

Under the Act an employee is entitled to a rest period of at least 11 consecutive hours in each period of 24 hours.[7] This is known as the 'daily rest period'. An employee is also entitled to a rest period of 15 minutes duration in each four and a half hour period worked; and to a rest period of 30 minutes in every six hour period worked.[8] A break allowed to an employee at the end of the day will not satisfy the requirements of the Act.[9]

Employees are also entitled to a rest period of at least 24 consecutive hours in each period of seven days.[10] This is known as the weekly rest period. This rest period is to commence immediately after the daily rest period. Therefore, an employee is entitled to a weekly rest period of 35 consecutive hours. If technical or other work related considerations prevent the weekly rest period from following on immediately after a daily rest period then this may be permitted, once such failure is based upon these considerations.[11] An employer who fails to grant the weekly rest period in a given seven day period may only do so if in the following seven day period two such weekly rest periods are granted.[12]



The Act provides for automatic exemption from the daily and weekly rest period requirements for shift workers and for persons employed in an activity which is spread out over various periods throughout the day.[13] However, in such circumstances an equivalent compensatory rest period must be granted to the employee within a reasonable time.[14]

The Act also provides that for certain activities which are set out in paragraph 2, point 2.1 of Article 17 of the EC Directive[15] the Minister for Enterprise and Employment ('the Minister') may make specific regulations exempting persons from complying with the statutory rest period provisions, including the provisions relating to night working.[16] Again, in such circumstances an equivalent compensatory rest period must be granted to the employee within a reasonable time.

Also any sector may enter into a collective agreement to provide that the statutory rest periods are not to apply.[17] Such an agreement must be approved by the Labour Court. Again, in such circumstances, an equivalent compensatory rest period must be given to the employee within a reasonable time.

An employer is also not obliged to grant the employee the statutory rest periods in situations of emergency or exceptional circumstances; or in other unusual or unforeseeable circumstances which are beyond the employer's control.[18] Once again, equivalent compensatory rest should be granted in this situation.

The use of equivalent compensatory

rest periods demonstrates how the Act recognises the practical logistics of working, and how it may be difficult at certain times to apply the specific statutory rest periods. Provision for equivalent compensatory rest periods enables employers, in certain specified circumstances, to implement the Act in a more flexible, and perhaps more realistic, fashion.

In circumstances where the statutory rest periods are not being applied due to the fact that the work is shift work or is spread out over the day; or due to the fact that there are exceptional or unforeseeable circumstances which prevent the granting of the rest periods, and it is simply not possible on objectively justifiable grounds to grant the employee a compensatory rest period, then the employer shall otherwise compensate the employer.[19] Such compensation should take the form of improving the employee's working conditions or improving the amenities or services available to the employee while he or she works. This section, albeit that it only applies to the specific stated areas, represents a significant exemption from the statutory requirements of rest periods.

Sunday Working

Although the EC Directive upon which the Act is based does not require that the weekly rest period shall include a Sunday, the Act does in fact contain such a requirement. As such, Ireland has gone beyond its European obligations in this area and has clearly demonstrated its own national attitude to Sundays. The Act provides that the weekly rest period shall be a Sunday, or if the weekly rest period is more than 24 hours, shall include a Sunday.[20] However, this requirement is one of principle only, and the Act provides that an employee may be required to work on a Sunday once he/she receives compensation for having to do this work. Such forms of compensation include:- (i) paid time off in lieu; (ii) payment of an allowance; (iii) an increased rate of pay; (iv) or a combination of any of these items.[21] The increased rate of pay for Sunday working which an employee is entitled to is the appropriate premium payable to a comparable employee under a collective agreement in force in a similar sector of employment. It should be noted that an employee is not entitled to compensation for Sunday working if the fact of having to work on a Sunday is already reflected in his/her standard pay.

Maximum Weekly Working Hours

It is this part of the Act which has attracted most attention and comment. The basic position in the Act is that the maximum hours that an employee may work in a week is 48 hours.[22] It is interesting to note that although the EC Directive provides the ability for same, there is no provision in the Act for an individual alone, having so agreed with his/her employer, to opt-out of the maximum weekly working requirements of the Act. This is significant and demonstrates how seriously it is considered necessary in this jurisdiction to compulsorily limit the amount of time that an employee works.

It is very important to note that the maximum working hours of 48 hours per week is the maximum amount of hours averaged over specific time periods. This ability to average the amount of hours worked over specific periods is to enable industries and workplaces in general to respond to rushes, demands and seasonal variations. As such, it is an important mechanism under the Act which reflects the realistic fact that at certain times there may be the need for increased working time. However, the position still remains that, over the specific averaging period that is provided for, it must be able to be shown that an employee did not work more than an average of 48 hours per week. The general averaging period for assessing the amount of hours worked in a week is a period of four months.[23] The Act also provides that for the activities referred to in paragraph 2, point 2.1 of Article 17 of the EC Directive[24] an averaging period of six months is to apply.[25] The Act further provides that the averaging period may be extended to 12 months for certain activities where this has been done by way of collective agreement between the employer and the employee, and the agreement has been approved by the Labour Court.[26] The Act provides for transitional phasing-in provisions of the maximum working week requirements.[27] These temporary arrangements may only be adopted once there has been a collective agreement between the employer and employee to this effect, and this agreement has been approved by the Labour Court.

Unlike the provisions relating to statutory rest periods and night work there are no exemptions provided for in the Act in relation to the maximum weekly working hours. The only scope for flexibility in this area is the averaging periods provided for, and the initial phasing-in provisions. This reflects how seriously the concept of maximum weekly working hours is taken under the Act. As a health and safety measure, the Act attempts to ensure that employees do not work excessively long hours, even if they should desire so to do.

Nightly Working Hours

The Act defines night time as the period between midnight and 7 a.m., and night work as any work carried out during that period.[28] For the purposes of the Act, a 'night worker' is an employee who normally works at least 3 hours of his/her daily working time during night time; and where the number of hours worked by that employee during the night time totals at least 50% of their annual working time. Under the Act an employer shall not permit a night worker, in each period of 24 hours, to work more than an average of 8 hours.[29] That period may be averaged over two months or over such greater length of time which has been agreed by way of collective agreement and approved by the Labour Court.[30]

The Minister may, by way of regulations exempt the activities provided for in paragraph 2, point 2.1 of Article 17 of the EC Directive from the requirements relating to night workers.[31] The Act also provides that in exceptional circumstances or in an emergency, which is beyond the employer's control, an employer will not have to comply with the provisions relating to night work.[32]

Zero Hour Contracts

The provisions relating to zero hour contracts under the Act will be of much significance to what may be called 'casual workers'. These provisions apply to employees whose contract of employment operates to require the employee to make himself/herself avail-

able to work for an employer either (a) a certain number of hours ('the contract hours'); or (b) as and when the employer requires him/her to do so; or (c) both.[33] In such circumstances, if an employer does not have an employee working for at least 25% of the contract hours; or for at least 25% of the hours for which the work, which the employer required the employee to keep himself/herself available was actually done, then the employee is entitled to a payment equivalent to the lesser of either 25% of the contract hours or 15 hours pay.[34] As such, if the employee works for the employer, but works less than 25% of the relevant time, he will still be entitled to 25% of the contract hours or 15 hours pay.

There are certain circumstances where the provisions relating to zero hour contracts shall not apply.[35] It should also be noted that if the employee is already being compensated for such zero hours work in his standard pay, then he/she will not need to be compensated in the manner described above.

Holidays

The previous legislation dealing with employee's holidays, namely the Holidays (Employees) Act, 1973, has been repealed in its entirety and has been replaced by the Act. Under the Act, all employees will have an entitlement to holidays irrespective of the number of hours worked. Under the Act holiday pay is simply earned as against time worked.

The Act increases the extent of holidays to be granted to an employee in any given work period. Under the Act employees are entitled to be paid annual leave under any of the following mechanisms:-

(a) four working weeks in a leave year in which he/she works at least 1,365 hours (i.e. 20 days in a year);
(b) one-third of a working week for each month in the leave year in which he/she works at least 117 hours; or
(c) eight percent of the hours worked in a year (but subject to a maximum of four working weeks).[36]

Apart from increasing the amount of annual leave to be given to employees, the Act also imposes other obligations on the employer in relation to holidays, such obligations reflecting the socially conscious and employee-friendly nature of the Act. For example, although it is ultimately up to the employer to determine when the employee can take his/her annual leave, the Act provides that in this regard the employer is to take into account the need for the employee to reconcile work and any family responsibilities, and the opportunities for rest and recreation which are available to the employee.[37] The Act also provides that where an employee's remuneration is partly composed of board and lodgings then that must be reflected in the employee's annual leave pay.[38]

In relation to public holidays[39] an employee is entitled to one of the following, namely:- (a) a paid day off on that day; (b) a paid day off within a month of that day; (c) an additional day of annual leave; or (d) an additional day's pay.[40] A part-time worker is only entitled to a public holiday, or to the benefit thereof, where he/she has worked for his/her employer for at least 40 hours during the period of five weeks ending on the day before that public holiday.[41]

Conclusion

The Act represents a major development in the area of protection for employees in the work place and in their working life.[42] Perhaps the most significant aspect of the Act is the statutory maximum hours imposed on the working week, recognising that in the interests of health and safety there should be a limit to the amount of time worked by any individual. Although the Act provides for certain averaging periods in assessing this maximum, once the Act applies to the worker in question (i.e. once he/she is not simply automatically exempted from the provisions of the Act), there are no other exemptions provided for in this area of the Act. By contrast to this, the provisions relating to statutory rest periods and to night working do provide for certain exemptions and opt-out clauses, thereby clearly reducing the effect of these provisions. However, it may be said that, on a practical level, such scope for exemptions and for equivalent compensatory rest periods is necessary in order to balance the needs between workers on the one hand, and the implementation of efficient work practices on the other. However, taking into account the overall provisions of the Act, including the provisions relating to Sunday working, zero hour contracts, and holidays, the Act can be said to represent a very significant and important development in the whole area of employment protection. ●

---

1 The Act was signed by the President in May 1997. Its various provisions came into operation at different times thereafter. For example, the holiday provisions came into operation in October 1997, and the rest time and maximum working time provisions recently came into operation in March 1998.

2 Directive 93/104/EC of 23 November 1993.

3 Due to constraints of space, I will not be examining the provisions relating to complaints procedures or to any of the offences created under the Act in this article. However, in relation to the latter, certain offences created under the Act should be noted in passing:- (a) the offence of failure by the employer to keep records, dating back at least three years, showing compliance with the Act (section 25); (b) the offence of employing a worker where the work done, when combined with work done for another employer, exceeds the period for which the worker could lawfully work for one employer under the provisions of the Act (section 33); and (c) the offence of obstructing an inspector appointed under the Act in his/her attempt to examine the premises, records etc. of the work place in order to determine whether there has been a breach of the Act (section 8). It should also be noted that where an offence is found to have been committed by a body corporate, section 34 provides that any director, manager, secretary or other officer may be found to be guilty of the offence, once the offence can be shown to have been committed with that person's consent, connivance or due to their neglect. Clearly, this is a significant extension of liability under the Act, and one that may have serious repercussions for many corporate employees.

4 Section 3(1) of the Act. It should also be noted that section 3(3) of the Act enables the Minister for Enterprise and Employment, who is the Minister responsible for the proper workings of the Act, to exempt by way of regulations persons working in transport or in the civil protection services from the provisions of the Act.

5 Section 3(2)(a) and (b) of the Act.

6 Section 3(c) of the Act.

7 Section 11 of the Act.

8 Section 12(1) and (2) of the Act.

9 Section 12(4) of the Act.

10 Section 13(2) of the Act.
11 Section 13(4) of the Act.
12 Section 13(3) of the Act.
13 Section 4(1) and (2) of the Act.
14 Section 6(2) of the Act.
15 These industries include, inter alia, security and surveillance activities; services in hospitals, residential institutions and prisons; dock or airport workers; press, television and telecommunications services; gas, water and electricity production; research and development; agriculture; tourism; and postal services. The sixth schedule of the Act contains the EC Directive therein and the reader is referred to this for greater detail here.
16 Section 4(3) of the Act.
17 Section 4(5) of the Act.
18 Section 5 of the Act.
19 Section 6(2)(b) of the Act.
20 Section 13(5) of the Act.
21 Section 14(1) of the Act.
22 Section 15 of the Act. This figure of 48 hours per week is the net figure of work carried out by the employee. As such, the computation of 48 hours does not include any breaks or rests taken by the employee. Therefore, an employee may in fact be on his/her employer's premises for several hours exceeding 48 hours every week and may still not exceed the maximum weekly working time of 48 hours.
23 Section 15(1)(a) of the Act.
24 See endnote 15 supra.
25 Section 15(1)(b) of the Act.
26 Section 15(5) of the Act.
27 Fifth Schedule of the Act. These transitional provisions will automatically cease to operate two years after the commencement of these provisions of the Act.
28 Section 16(1) of the Act.
29 Section 16(2) of the Act.
30 Section 16(2)(b) of the Act. It should be noted that the Act provides for more restrictive requirements for a 'special category night worker' as defined under the Act. Such a worker may not work for more than eight hours in any specific 24 hour period. As such, there are no averaging provisions provided for such workers.
31 Section 4(3) of the Act.
32 Section 5 of the Act.
33 Section 18(1) of the Act.
34 Section 18(2) of the Act.
35 See section 18(3) of the Act.
36 Section 19(1) of the Act. As with the maximum working time provisions, there are transitional provisions provided for under the Act which may be operated for two years after the coming into operation of these provisions of the Act, eventually leading up to the full holiday requirements as set out above. These transitional provisions are set out in the First Schedule to the Act.
37 Section 20(1)(a) of the Act.
38 Section 20(2)(c) of the Act.
39 The list of public holidays is set out in the Second Schedule to the Act.
40 Section 21(1) of the Act.
41 Section 21(4) of the Act.
42 The Act applies to all employees of any age. It should be noted that further protection for children and young persons in the area of employment also exists in the form of the Protection of Young Persons (Employment) Act, 1996.

— FORENSIC ACCOUNTING —

Forensic Accounting brings a structured approach to preparing and reviewing financial evidence. Applications include:

- Personal injury and loss of earnings
- Breach of contract and commercial disputes
- Insurance claims
- Matrimonial proceedings
- Negligence and professional malpractice
- Fraud and white collar crime

Our Directors have extensive experience in preparing reports and giving evidence in Court as Expert Witnesses.

James Hyland and Company
Forensic Accountants

26/28 South Terrace
Cork.
Tel: (021) 319 200
Fax: (021) 319 300

Carmichael House,
60, Lower Baggot Street,
Dublin 2.
Tel: (01) 475 4640
Fax: (01) 475 4643

E-mail:jhyland@indigo.ie

Advising proofs in respect of Pension Adjustment Orders

MARIAN MCDONNELL, Barrister

Notification of Trustees

Under Rule 8, of the Circuit Court Rules where an Order is sought pursuant to Section 12/13 of the Family Law Act, 1995 or Section 17 of the Family Law (Divorce) Act, 1996, the trustees of a Pension Scheme must be notified by registered post at their registered office or other appropriate address. An affidavit of service of the notification must be sworn and filed within 14 days of service of the Civil Bill. Under Rule 17 the trustees must file and serve an Affidavit of Representation within 28 days of service of the notice upon them.

In reality it is unlikely that the Applicant will be in a position to know whether or not such relief will actually be pursued at the hearing. In order to avoid possible costs the trustees should be advised to take no steps which may incur costs pending further notification and further advised that, in the event of the reliefs being proceeded with, there will be consent to late filing of the Affidavit of Representation.

If a decision is made to pursue the reliefs, the trustees should be notified and issued with consent to late filing of their affidavit.

The trustees should be advised of the date and place of the court hearing and should be asked to indicate their attitude to the application.

Obtaining Information on Members Entitlements

N.B. Always obtain a copy of the Rules of the Pension Scheme.

If the Member Spouse is an employee and the name of the Employer is known, the names of the Trustees can be obtained from the Pensions Board who maintain a record of all Occupational Pension Schemes. If the Spouse is self-employed, the names of the trustees and details of the Scheme should be sought from the Member spouse and/or their solicitor.

Section 54 of the Pension Act, 1990 obliges trustees of Pension Schemes to provide certain information to spouses of members. It does not oblige trustees to provide specific details regarding a Member as are needed for the purposes of a Pension Adjustment Order.

If the information is not forthcoming an Order should be sought under Section 28(7) of the 1995 Act or Section 38(6) of the 1996 Act directing the Member Spouse to provide the names of the trustees and under Section 12(25) of the 1995 Act or Section 17(25) of the 1996 Act directing the Trustees to provide the requisite information.

Defined Benefit Schemes

The information provided by the trustees is usually in a similar format to Schedule "A".

It contains the following information:

1. Date of entry to Scheme.
2. Normal Pension age.
3. Pensionable Service.
4. Annual Salary.
5. Final Pensionable Salary (usually an average of the last three years salary prior to retirement/calculation).
6. Contribution for previous year.
7. Cumulative Contributions to date of Notice.
8. Personal Benefits i.e. the Members prospective entitlements based on the information at 1-7 and without regard to any possible future salary increases:-
   (a) Pension from Normal Pension Date.
   (b) Spouses's Pension on Death in Retirement.
   (c) Lump Sum payable on Death in Service.
   (d) Spouse's Pension on Death in Service.
   (e) Pension on incapacity after 26 weeks continuous absence.
9. The formula used in calculating entitlements. Usually 1/60th X Final Pensionable Salary X Pensionable Service.
10. Method of payment - usually monthly in advance for a minimum of 5 years and for life thereafter. There is usually a built in percentage increase each year.
11. Usually states whether exclusive of State Benefits if payable - currently £3,900 p.a. to a single person.

A Table should be prepared, using the above information, as described at Schedule "B" and Table "B". It is not necessary to engage the services of an Accountant if the Scheme is a Defined Benefit Scheme. The calculations are simply multiplication and division.

Defined Contribution Schemes

The services of a Pension Advisor/ Forensic Accountant must be obtained.

The Advisor should be asked to produce a Report containing the following information:-

1. Information upon which the assessment is based.
2. Nature of the Benefits.
3. Valuation of Retirement Benefits.
4. Valuation of Death in Service Benefits.
5. Valuation of Death in Retirement Benefits.
6. Table as Described at Schedule "B" and Table "B"

Effect of Orders

As the judges hearing the Family Law lists appear in general to be operating on a 50/50 basis when making Pension Adjustment Orders the effect of the Orders should be before the Court.

In the example at "A" if an Order is made giving the applicant spouse 50% of the Accrued entitlements the results are, all things being equal,* as follows:

On Retirement:
Member receives Pension of £11,332.08
Spouse receives £7,554.72

On death of Member in Service
Spouse receives £53,406.00
Leaving £53,406.00 to other beneficiaries.

In this case therefore Wife No. 1 receives the same amount after a 25 year marriage as Wife No. 2 after a marriage of 8 years Maximum.

On Death of Member in Service or after Retirement:

Spouse receives Widow's pension of £3,777.36p.a. (In addition to own Pension pursuant to the Pension Adjustment Order).

In this case Wife No. 2 receives Widow's Pension at £5,666.40 after a marriage of 8 years maximum. If the Member had not re-married this portion of the Pension may be lost. It is important that such results are brought to the attention of the Court.

*This assumes two parties of the same sex and same age. As the wife is usually younger than the husband and women live longer than men, the wife's pension will in fact be smaller than the husbands as it is likely to be payable over a longer period.

Pension Splitting

Splitting of the Pension ensures an independent benefit which is not dependent on the survival of the member spouse. Under Section 12(5) of the 1995 Act and Section 17(5) of the 1996 Act a Pension split must take place before the Pension becomes payable. On the grant of a Pension Adjustment Order in relation to a Defined Contribution Scheme the trustees have a discretion to split the pension and transfer the relevant amount into another pension fund. On the grant of a Pension Adjustment Order the Client should be advised that a split must be sought prior to retirement of the Member Spouse. Client should engage a Pension Advisor to ensure maximum benefit from the Order.

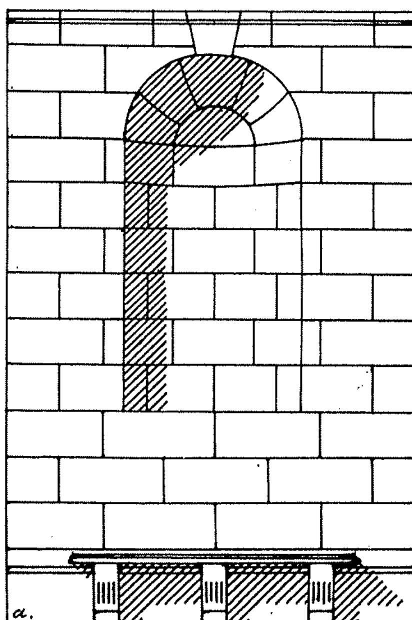
Preservation of Pension Entitlements after a Decree of Judicial Separation -

Section 13 of the 1995 Act.

It is not necessary to issue proceedings under the Acts to obtain a Court Order for this relief. Section 43 of the 1995 Act confers jurisdiction on a Court, on an application for a Separation Agreement to be made a rule of Court, to make an Order preserving Pension Entitlements as in Section 13 of the 1995 Act. The trustees must be on notice of the application.

It should not be assumed that such an Order confers any rights. Such an Order only directs the trustees not to regard the decree of Judicial Separation as a ground for disqualifying a spouse from receiving a benefit a condition for the receipt of which is that the spouses be residing together at the time the benefit becomes payable.

The Rules of the Pension Scheme must be obtained to ascertain exactly what benefits such an Order will confer. Most Pension Schemes provide that death in Service benefit is paid at the discretion of the trustees or is paid to the personal representatives of the deceased Member. Therefore a spouse is not entitled to any benefit.



The Order

The Order must specify;

a. The names of the trustees.
b. The Scheme to which the Order relates,
c. The Benefits to which the Order relates,
   i.e. Retirement Pension, contingent death in service benefit, Contingent Spouses Pension.
d. Name of the Member,
e. Name and address of the person in whose favour the Order is made.
f. The relevant period to be taken into account,
g. The percentage applicable.

Example

An Order pursuant to Section 12(2) of the Family Law Act, 1995 directing Messrs. Smiths Trustees Ltd. To pay to Mrs. Mary Jones of 1 Church St. Dublin a designated benefit being 62.5% for a membership period of 32 years of the Retirement Pension payable to Scheme Member Mr. John Jones.

OR

Messrs. Smith Trustees Ltd. are directed by this Honourable Court pursuant to Section 12(2) of the Family Law Act, 1995 to pay the part of the accrued Retirement Benefit, as determined below, to Mrs. Mary Jones of 1 Church St. Dublin in accordance with the Rules in Force of the Scheme on the date that this Order is made. The relevant period over which the designated benefit is deemed to have accrued commenced on the 1st day of May 1965 and ended on the 30th day of April 1997 and the relevant percentage of the designated benefit is 62.5%.

The Order must be served on the trustees.

The Beneficiary must notify the trustees of any change of address.

Costs

The charge by the trustees in the case illustrated for the provision of Schedule "A" was £650.00

SCHEDULE "A"

THE LOSER'S CLUB OF IRELAND CONTRIBUTORY PENSION AND DEATH BENEFITS PLAN FOR CLERICAL EMPLOYEES AND OFFICIALS

NEW SCHEME MEMBER

MESSRS. SMITH LTD.
Trustees

Personal Information

Name:	Mr. Jones J.
Marital Status:	Married 1972
Date of Birth:	29.08.1939
Normal Pension Date:	29.08.2004
Date of Entry to Service:	01.01.1960
Date of Entry to Fund:	01.05.65
Pensionable Service:	40,000 Years
Annual Salary:	IR£35,604.00
Final Pensionable Salary:	IR£28,330.20
Member's Contributions for 01.05.97 to 30.04.98	IR£2,136.24
Cumulative Contributions to 30.04.97	IR£19,0036.64

Personal Benefits

Based on the above information as at 1st May 1997 and without regard to any possible future salary increases, your prospective entitlements under the Scheme are as follows:

Personal Pension from Normal Pension Date:	IR£18,886.80 pa
Spouses Pension on Death in Retirement:	IR£9,443.40 pa
Lump Sum Benefit payable on Death in Service;	IR£106,812.00
Spouse's Pension on Death in Service:	IR£9,443.40 pa
On incapacity the following may be paid after 26 weeks continuous absence:	IR£18,886.80pa

The following should be noted:

1. Your prospective Personal Pension is calculated using the formula:-
   1/60th X Final Pensionable Salary X Pensionable Service
   Final Pensionable Salary is your pensionable Salary in your last full year of Plan membership, Pensionable Salary is the average of your Salaries in the last three complete scheme years prior to retirement less 1.5 X Single Person's State Pension.
2. Your Personal Pension is payable monthly in advance for a minimum of five years and for the balance of your lifetime thereafter. Both your pension and that of your spouse will increase at 2.5% per annum compound during the course of payment.
3. Your disability benefit will increase at a rate of 3% per annum compound.
4. All benefits illustrated excluded any State Benefits payable. The current State Pension payable to a single person is IR£3,900.00 per annum.
5. This Certificate does not confer any contractual rights. Your benefits are payable in accordance with the Rules and the policies of the Scheme, which govern your rights and entitlements.
6. Any queries concerned your benefits can be referred to the Trustees

SCHEDULE "B"

A Table should be prepared for the following scenarios:-

a. Years of Pensionable Service and length of marriage - the entire period is available not just the period accrued during the marriage. If you are acting for the member spouse you will obviously be seeking to have any Order confined to benefits accrued during the years of the marriage particularly if it was a short marriage and there is a lengthy period of membership of the Scheme.

b. Amount of Member's full Retirement Pension, amount of Member's Retirement Pension accrued during the term of the marriage and the amount of Member's Pension accrued to date.

c. Amount of Spouse's full Pension - usually the same whether death occurs prior to or post retirement - amount of Spouse's Pension accrued during the term of the marriage and the amount of Spouses' Pension accrued to date.

d. Amount of lump sum payable on Death in Service and, in some schemes it is possible to calculate, the amount accrued during the term of the marriage.

e. Spouses' pension payable on Death in Service of the Member - if different from c.

f. The designated benefit that is required to give the spouses equal purchasing power at full retirement age.
If the Member Spouse should retire prior to the normal retirement age an application to vary can be made in order to avoid injustice.

TABLE "B"

In the Example at Schedule A this Table would read:-

a. 32 years membership 25 year marriage.

	Full payment	accrued during marriage	accrued to date
b.	£18,886.60	£11,804.16	£15,109.44

i.e. full amount divided by full term x years of marriage/years to date
£18,886.60 div by 40 multiplied by 25 - multiplied by 32.

c.	£9,443.40	£5,902.08	£7,554.72

i.e. full amount divided by full term x years of marriage/years to date.

d. £106,812.00

e.	£9,443.40	£5,902.08	£7,554.72

i.e. same as c.

f. 32 years and 62.5%
100% of what is in the pot = £15,109
? % = £9,442 (1/2 of full retirement pension)

Legal Update

The Bar Review
Volume 3, Issue 8. June 1998. ISSN 1339-3426

**A directory of legislation, articles and written judgments received from 1st May 1998 to 5th June 1998.
Judgment information compiled by the researchers in the Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts, Dublin 7.**

Administrative

Statutory Instruments
Houses of the Oireachtas (Members) Pensions Scheme
(Additional Allowances)(Deduction of Contributions) Regulations, 1998
SI 97/1998

Oireachtas (Allowances to Members) (Travelling Facilities and Overnight Allowance) Regulations, 1998
SI 101/1998

Oireachtas (Allowances to Members) (Telephone and Postal Facilities) Regulations, 1998
SI 99/1998

Oireachtas (Termination Allowance) (Amendment) Regulations, 1998
SI 98/1998

Oireachtas (Allowances to Members) and Ministerial, Parliamentary, Judicial and Court Offices (Amendment) Act, 1998 (Allowances and Allocations) Order, 1998
SI 25/1998

Oireachtas (Allowances to Members) and Ministerial and Parliamentary Offices (Amendment) Act, 1992 (Allowances)
(Amendment) Regulations, 1998
SI 100/1998

Referendum (Ballot Paper) Order, 1998
SI 103/1998

Referendum (Special Difficulty) Order, 1998
SI 122/1998

Referendum Commission
(Establishment) (No.2) Order, 1998
SI 113/1998

Agriculture

Statutory Instruments
European Communities (Processing of Mammalian Animal Waste) Regulations, 1998
SI 62/1998

European Communities (Introduction of Organisms Harmful to Plants or Plant Products) (Prohibition)(Amendment) Regulations, 1998
SI 78/1998
(DIR 97/3)

European Communities (Export and Import of Certain Dangerous Chemicals)(Pesticides) (Enforcement) (Amendment) Regulations, 1998
SI 88/1998
(REG 2455/92)

Aliens

Lomidze v. Minister for Justice
High Court: **Geoghegan J.**
05/05/1998

Judicial review; asylum application; safe third country; application for refugee status refused; whether application should have been considered in accordance with the principles in the Von Arnim letter; UN Convention on the Status of Refugees and Stateless Persons 1951
Held: Applicants entitled to judicial review; breaches of principles found

Van Thuan v. Minister for Justice
High Court: **Geoghegan J.**
05/05/1998

Judicial review; asylum application; safe third country; application for refugee status refused; whether application must be considered in circumstances where refugee status refused by safe third country; applicants turned down opportunity to have a preliminary meeting concerning their application; whether in such circumstances the principles in the Von Arnim letter apply; UN Convention on the Status of Refugees and Stateless Persons 1951
Held: Judicial review refused

Arbitration

Tobin & Twomey Services Ltd v. Kerry Foods Ltd.
High Court: **Laffoy J.**
22/04/1998

Contract; electrical works; additional works carried out by the plaintiff at the request of the defendant; dispute as to amount owed to the plaintiff; appointment of an Arbitrator; error on the face of the Interim Award; matter remitted to Arbitrator; plaintiff seeking removal of the Arbitrator and an order that the arbitration agreement shall cease to have effect; alleged misconduct of Arbitrator; sealed offer; amount of the sealed offer disclosed to Arbitrator; whether Arbitrator failed to give effect to the Supreme Court judgment; whether Arbitrator guilty of misconduct in that his request for payment of fees was made at an inappropriate time in the proceedings; whether Arbitrator guilty of misconduct in that he failed to disclose previous dealings with associated companies of one of the parties to the arbitration; whether disclosure of amount of sealed offer attributable to any misconduct of the Arbitrator
Held: No misconduct found; arbitration to proceed; no delay

Children

Articles
Juvenile Justice and the Regulation of the Poor 'Restored to Virtue, to Society and to God'
O'Sullivan, Eoin
1997 ICLJ 171

Rights of the natural father
Keville, Cathrina
1997 FLJ 29

Commercial

Wise Finance Company Ltd. v. Hughes
High Court: **Laffoy J.**
27/04/1998

Land; possession; land subject of a charge; plaintiff registered owner of the charge; error in the charge; loan not repaid; whether the plaintiff was a 'moneylender' within the meaning of the Moneylenders Acts 1933 and 1990; whether plaintiff entitled to operate as an unlicensed moneylender
Held: Application refused; plaintiff carrying on business of moneylender without a licence; advance irrecoverable; security unenforceable

Article
Playing the Stock Market
Bowes, Neil
1998(May) GILSI 33

Library Acquisition
Commercial Agreements and Competition Law P & P in the UK and EC
Green, Nicholas
2nd ed
London Kluwer 1997
N266

Statutory Instrument
Proposed Merger or Takeover Prohibition Order, 1998
SI 102/1998

Company

Edenfell Holdings Ltd., In re
Supreme Court: **O'Flaherty J., Keane J., Barron J.**
23/04/1998

Receiver; duty of care; sale of encumbered company property; duty to get best price for sale of property; whether higher offer should have been accepted, though conditional on encumbrance; whether receiver exercised all reasonable care in accepting offer in question; whether undue delay in notifying other interested parties of offer; s.316A Companies Act, 1963
Held: Appeal allowed; receiver without the benefit of hindsight, was entitled to accept only unconditional offer

Cavan Crystal Glass Ltd, In re
Supreme Court: **O' Flaherty J., Barrington J., Lynch J.,** (ex tempore)
02/04/1998

Appointment of Examiner; company under the protection of the court; whether petition invalidly presented; whether the company is capable of surviving as an ongoing concern; s.10 Companies Act, 1990
Held: Examiner appointed

New Ad Advertising Ltd, In re
Supreme Court: **O'Flaherty J., Keane J., Lynch J.,** (ex tempore)
26/03/1998

Petition; alleged oppression; director in the company not joined as a notice party; director required to pay sum in respect of plaintiff's holding in the company; whether director entitled to be party to the proceedings; whether the principle of audi alteram partem should be applied; s. 205 Companies Act, 1963
Held: Appellant to be made a notice party to the proceedings

La Moselle Clothing Ltd. v. Soualhi
High Court: **Shanley J.**
11/05/1998

Disqualification of directors; voluntary liquidation; declaration sought to have respondent restricted from acting as a director of any company for five years; whether such restriction applicable to a voluntary winding up; whether director acted honestly and responsibly with regard to the affairs of the company; whether it is just and equitable in all the circumstances to restrict the director; interpretation of "responsibility" of a director; s.150 Companies Act, 1990
Held: Declaration granted restricting director

Southern Mineral Oil Ltd. v. Cooney
High Court: **Shanley J.**
11/05/1998

Fraudulent trading; liability of directors; conduct of directors; limitation period; whether respondents should be personally liable for the debts of the company; whether action to recover sums due statute barred; whether liquidator can be substituted as applicant; ss.297 & 298 Companies Act, 1963
Held: Reliefs refused; claim statute barred

Articles
The Hampel Committee Report on Corporate Governance and the New "Super Code"
Clarke, Blanaid
1998 CLP 93

The Role of the Irish Lawyer in U.S. Offerings by Irish Companies
Conlon, Julian
1998 CLP 87

Library Acquisition
Loose on Liquidators; the Role of a Liquidator in a Winding-Up
Loose, Peter
4th ed
Bristol Jordon & Sons Ltd 1997
N262.5

Statutory Instrument
Comptroller and Auditor General (Amendment) Act, 1993, Order, 1998
SI 121/1998

Competition

Article
Prey of the Protected Competition Actions against Undertakings within the Remit of Article 90
O'Raw, Eunice
1998 CLP 96

Library Acquisition
Commercial Agreements and Competition Law
P & P in the UK and EC
Green, Nicholas
2nd ed
London Kluwer 1997
N266

Constitutional

I O'T v. B
Supreme Court: **Hamilton C.J., Denham J., Barrington J., Keane J.*, Barron J.**
(*dissenting)
03/04/1998

Unenumerated personal rights; conflicting rights; claim by informal adoptees to discover identity of natural parents; declaration of parentage under s.35, Status of Children Act, 1987 applied to applicants but only regarding named parents; whether Circuit Court had jurisdiction in this case; whether succession rights relevant; whether right exists to know identity of natural parents; whether this is a legal right implicit in s.35 or otherwise; whether it is an unenumerated right guaranteed by the Constitution; whether such right outweighed by parents' right to privacy; whether criteria exist for reconciling these rights
Held: Constitutional right to know identity of parents exists, but is not absolute; neither is parents' right to privacy; for resolution parents may be heard with their identity protected

Irish Times Ltd. v. Murphy
Supreme Court: **Hamilton C.J., O'Flaherty J., Denham J., Barrington J., Keane J.**
02/04/1998

Fair procedures; administration of justice in public; freedom of the press; foreign nationals detained pending trial; mis-reporting during trial; contemporaneous reporting banned for risk of further detention if jury discharged; whether ban meant trial not in public; whether ban warranted by due process; ban only justified where otherwise real risk of unfair trial, unavoidable through appropriate directions to jury; whether trial judge correctly applied test; whether in the circumstances ban constitutional
Held: Contemporaneous reporting nowadays vital for public administration of justice; in the circumstances ban unjustified

Articles
Irish Participation in European Integration the Casual Abandonment of Sovereignty
Murphy, Finbarr
XXXI(1996) IJ 22

Interpretation of Constitutional Guarantees an Antipodean History lesson
Casey, James P
XXXI(1996) IJ 102

Towards Greater Governmental Transparency: the Freedom of Information Act 1997
Michel, Niall
1997 2(1) IIPR 17

Statutory Instruments
Freedom of Information, 1997 - Delegation Under Section 4
SI 116/1998

Referendum (Ballot Paper) Order, 1998
SI 103/1998

Contract

O'Donnell & Company Ltd. v. Truck & Machinery Sales Ltd.
Supreme Court: **O'Flaherty J., Lynch J., Barron J.**
01/04/1998

Contract; sale of goods; misrepresentation; contractual interest; representation as to quality of goods; whether representation constituted negligent or statutory misrepresentation; whether silence could constitute misrepresentation; whether concurrent remedies available in contract and tort; whether clause providing for interest on overdue payments an unenforceable penalty clause; whether interest rate in excess of subsisting commercial rate; s. 14 Sale of Goods Act, 1893; s. 45 Sale of Goods and Supply of Services Act, 1980
Held: Representation as to quality of goods did not constitute negligent or statutory misrepresentation; interest rate in excess of subsisting commercial rate; matter remitted to High Court to assess commercial rate subsisting at time of breach

Article
Terms of Engagement
Twomey, Adrian F
1998(May) GILSI 30

Copyright, Designs & Patents

Articles
Performers and Copyright - Where is the Equity?
Sheehy, Helen
1998 2(1) IIPR 30

Irish Copyright Law Reform - the Copyright (Amendment) Bill, 1998, and Beyond
Rutledge, John
1998 2(1) IIPR 2

More European Union Harmonisation Measures in Copyright Law New Rights Explained
Clark, Robert W
1998 2(1) IIPR 12

Copyright Law: Perspectives from a Neighbouring Island
L Maddier Justice, Hugh
1998 2(1) IIPR 5

Digital Works and Irish Copyright Law
Lynch, Kevin G
1998 2(1) IIPR 20

Criminal

Meagher v. O'Leary
Supreme Court: **Hamilton C.J., O'Flaherty J., Barrington J., Lynch J., Barron J.**
08/05/1998

Sentencing; multiple charges; offences in question arose from same transaction; whether consequently Circuit Court judge not entitled to impose consecutive sentences; whether judge exceeded jurisdiction in imposing consecutive rather than concurrent sentences; whether in view of gravity of offences and absence of explanation by accused judge entitled to so impose
Held: Appeal dismissed; offences separate

Geoghegan v. Hussey
Supreme Court: **O'Flaherty J., Barrington J., Keane J.** (ex tempore)
05/05/1998

Sentencing; offences committed whilst on bail; consecutive sentences imposed under s.11, Criminal Justice Act, 1984;

whether order not reciting jurisdiction to so sentence valid; whether individual having dishonoured bond is still on bail or unlawfully at large; whether such individual can come within s.11
Held: Consecutive sentences mandatory under s.11; order valid; bailee having dishonoured bond is still on bail; s.11 applies

Herron v. Judge Haughton
High Court: **O'Higgins J.**
12/05/1998

Judicial review; certiorari; natural justice; applicant convicted of minor traffic offences; certiorari sought of conviction orders; whether applicant prejudiced because full list of previous convictions not put in evidence by prosecution; whether applicant prejudiced by being refused permission to call prosecutor as witness
Held: Judicial review refused

Madigan v. Judge Devally
High Court: **Kinlen J.**
02/04/1998

Arrest; unlawful; certiorari sought; offence contrary to s. 49(2) Road Traffic Act, 1994; whether s. 49(6) Road Traffic Act, 1994 conferred powers of arrest on the arresting Garda; whether sample of applicants blood taken unlawfully; whether applicant granted permission for the blood sample to be taken; whether Applicant had knowledge of reasons for his arrest; s. 13 Road Traffic Act, 1994
Held: Certiorari granted

Articles
Crime and Poverty in Dublin - an Analysis of the Association between Community Deprivation, District Court Appearance and Sentence Severity
by Ivana Bacik [et al.]
1997 ICLJ 104

Crime, Punishment and Poverty
O'Donnell, Ian
1997 ICLJ 134

Juvenile Justice and the Regulation of the Poor "Restored to Virtue, to Society and to God"
O'Sullivan, Eoin
1997 ICLJ 171

Punishing Poverty and Personal Adversity
O'Mahony, Paul
1997 ICLJ 152

The Grammar of Mistake in Criminal Law
McAuley, Finbarr
XXXI(1996) IJ 56

Library Acquisition
Archbold Criminal Pleading, Evidence and Practice 1998
1998 ed / by P.J. Richardson
Archbold, John Frederick
London Sweet & Maxwell 1998
M500

Statutory Instrument
Bail Act, 1997 (Section 10)(Commencement) Order, 1998
SI 140/1998

District Court (Extradition) Rules, 1998
SI 89/1998

Damages

Articles
Always on My Mind Post-Traumatic Stress Disorder
Walshe, David O'Callaghan, Eadbhard
1998(May) GILSI 14

State Liability to Individuals in Damages an Emerging Doctrine of EU Law
Brown, L Neville
XXXI(1996) IJ 7

Library Acquisition
Essential Quantum Cases
Holding, Frederick J, Sampson, Melissa L
London Butterworths 1997
N37.1

Education

Statutory Instruments
Social Welfare (Consolidated Payments Provisions) (Amendment) (Educational Opportunities) Regulations, 1998
SI 54/1998

Employment

Articles
'Spent Convictions' the Statutory Lie
Dillon, Edmond J
Shannon, Geoffrey
2(1998) IILR 7

Mental and Emotional Stress in the Workplace - the Impact in Ireland of Walker v Northumberland County Council
MacNamee, Michael
2 (1998) IILR 4

Terms of Engagement
Twomey, Adrian F
1998(May) GILSI 30

Statutory Instrument
Industrial Training Levy (Chemical and Allied Products Industry, 1998 Scheme) Order, 1998
SI 127/1998

Environmental Law

Statutory Instruments
Air Pollution Act, 1987 (Marketing, Sale and Distribution of Fuels) Regulations, 1998
SI 118/1998

European Communities Act, 1972 (Access to Information on the Environment) Regulations, 1998
SI 125/1998

Equity & Trusts

Article
Aspiring Students, Retiring Professors and the Doctrine of Legitimate Expectation
Brady, James C
XXXI(1996) IJ 133

European Union

Articles
The Principle of Proportionality in Community Law from the Rule of Law to Market Integration
Tridimas, Takis
XXXI(1996) IJ83

Road Traffic Insurance Irish and EU Perspectives
Pierse, Robert
2(1998) IILR 18

European Citizenship and the Free Movement of Persons
O'Keeffe, David, Horspool, Margot
XXXI(1996) IJ 145

Irish Participation in European Integration the Casual Abandonment of Sovereignty
Murphy, Finbarr
XXXI(1996) IJ 22

The Status of European Community Law in the United Kingdom
Ellis, Evelyn
XXXI(1996) IJ 35

Taking Remedies Too Seriously? National Procedural Autonomy in the European Court of Justice
Flynn, Leo
XXXI(1996) IJ 110

State Liability to Individuals in Damages an Emerging Doctrine of EU Law
Brown, L Neville
XXXI(1996) IJ 7

More European Union Harmonisation Measures in Copyright Law New Rights Explained
Clark, Robert W
1998 2(1) IIPR 12

Challenging E.C. Legislation - an Uphill Struggle Part 11
Conlan Smyth, David
1998 (2) P & P 4

Library Acquisition
The Brussels Jurisdiction and Enforcement Convention an EC Court Casebook
Bogdan, Michael
The Hague Kluwer Law 1996
W73

Family

D v. D
High Court: **Smith J.**
03/04/1998

Marriage; duress; claim for annulment; applicant forced to marry; parental pressure; respondent married under duress; annulment applied for and granted by the Catholic Church; whether each party freely consented to marry each other; whether there was full and free consent on behalf of both parties to the marriage
Held: Annulment granted

Article
Rights of the Natural Father
Keville, Cathrina
1997 FLJ 29

Fisheries

Statutory Instrument
Common Sole (Restriction on Fishing in the Irish Sea) Order, 1998
SI 117/1998

Garda Síochana

Lohan v. Garda Commissioner
High Court: **McCracken J.**
13/05/1998

Judicial review; Board of Inquiry; disciplinary proceedings; natural justice; disciplinary proceedings against Garda; failure of Garda to appear before Board of Inquiry; proceedings adjourned from time to time; decision by Board of Inquiry to proceed in absence of Garda; whether Board of Inquiry acted in breach of natural justice; Regulation 34 Garda Síochana (Discipline) Regulations, 1989
Held: Judicial review refused

Information Technology

Article
OK, Computer?
Rothery, Grainne
1998(May) GILSI 24

Library Acquisition
Researching the Legal Web a Guide to Legal Resources on the Internet
Venables, Delia
Holmes, Nick
London Butterworths 1997
L157

Insurance

Articles
Road Traffic Insurance Irish and EU Perspectives
Pierse, Robert
2(1998) IILR 18

Should Pay Won't Pay?
McMahon, Bryan M E
1998(May) GILSI 22

International

Articles
The Incorporation of Customary International Law into Irish Law Recent Developments and Suggestions
Symmons, Clive R
XXXI(1996) IJ 165

The Role of the Irish Lawyer in U.S. Offerings by Irish Companies
Conlon, Julian
1998 CLP 87

Landlord and Tenant

McDonagh v. South Dublin County Council
Supreme Court: **O' Flaherty J., Murphy J., Lynch J.,** (ex tempore)
09/04/1998

Judicial review application; notice to quit; interim injunction; site property of defendants; whether Notice complied with the requirements of s. 10 Housing (Miscellaneous Provisions) Act, 1992; whether it is possible for the applicants to comply with the notice
Held: Interim injunction granted; leave to apply for judicial review granted

Legal Profession

Articles
The Irish Legal System
O'Higgins The Hon Mr Justice, Thomas F
XXXI(1996) IJ 1

Ambulatorius in the Roman Legal Sources
ANKUM, Hans
XXXI(1996) IJ 190

An Irishman in Westminster Hall William Skrene of Dundalk (c.1358-c.1420)
Brand, Paul
XXXI(1996) IJ 255

The Preparation of the Solicitors' Acts 1954 and 1960
Hogan, Daire
XXXI(1996) IJ 266

The Voice of the Gael Chief Justice Kennedy and the Emergence of the New Irish Court System 1921-1936

Keane The Hon Mr Justice, Ronan
XXXI(1996) IJ 205

Letters to Ireland - Professional Enlightenment from the English Bench
Osborough, W N
XXXI(1996) IJ 226

The Role of the Irish Lawyer in U.S. Offerings by Irish Companies
Conlon, Julian
1998 CLP 87

Solicitors and the Euro
MacDomhnaill, Cillian
1998(May) GILSI 27

Licensing

Cobh Fishermen's Association Ltd. v. Minister for the Marine
Supreme Court: **O'Flaherty J., Keane J., Lynch J.,** (ex tempore)
01/04/1998

License; expired; appellant seeking to quash the licence; whether an expired licence can be quashed
Held: Appeal dismissed

Medical

Statutory Instrument
Infectious Diseases (Maintenance Allowances) Regulations, 1998
SI 115/1998

Negligence

Gillick v. Rotunda Hospital
Supreme Court: **O'Flaherty J., Barrington J., Lynch J.** (ex tempore)
15/05/1998

Damages; personal injuries; hysterectomy performed without patient's consent; whether damages awarded adequate; whether trial judge sufficiently considered physical trauma
Held: Higher award substituted

Duffy v. Rooney
Supreme Court: **Hamilton C.J., Keane J., Barron J.**
23/04/1998

Causation; personal injury; child injured when clothing caught fire; manufacturer breached duty by not providing warning label on flammable clothing; whether injury caused by absence of warning label; whether defendant negligent in failing to supervise child; whether trial judge correct in attributing fault to defendant and not retailer
Held: Appeal dismissed; causal link between injury and lack of warning not made out by plaintiff

McGee v. JWT Ltd
High Court: **O'Sullivan J.**
27/03/1998

Personal injury; hotel accident; plaintiff fell on slippy bathroom floor; second defendant seeking order setting aside service of the notice of summons of this action; holiday booked with first defendant; hotel owned by second defendant; whether contract between the plaintiff and first defendant was made outside the jurisdiction of the court; whether there are plausible grounds to allege a breach in the duty of care owed by the first defendant; Article 18, Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; s. 3 Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988
Held: Application refused

Hearne v. Marathon Petroleum (Ireland) Ltd.
High Court: **Morris P.**
27/02/1998

Personal injury; accident on oil rig; inspection of oil rig to be carried out by an engineer; defendants will not allow inspection unless engineer provides them with an indemnity in respect of any loss or damage or personal injuries he may suffer while inspecting the oil rig; whether defendants reasonable in seeking full indemnity; Occupiers Liability Act, 1995; O. 50, r. 4 of the Rules of the Superior Courts
Held: Appeal allowed; defendants request unreasonable

Articles
'Spent Convictions' the Statutory Lie
Dillon, Edmond J
Shannon, Geoffrey
2(1998) IILR 7

First Report of the Special Working Group on Personal Injuries Tribunal
O'Regan Cazabon, Attracta
1(1997) IILR 19 (Part 1)
2(1998) IILR 22 (Part 2)

The New Rules on Disclosure in Personal Injuries Cases Putting the Cart Before the Horse
O'Connor, Martine
2(1998) IILR 13

Mental and Emotional Stress in the Workplace - the Impact in Ireland of Walker v Northumberland County Council
MacNamee, Michael
2 (1998) IILR 4

Little House of Horrors
Hall, Eamonn G
1998(May) GILSI 18

Always on My Mind - Post-Traumatic Stress Disorder
Walshe, David
O'Callaghan, Eadbhard
1998(May) GILSI 14

Library Acquisition
Jackson and Powell on Professional Negligence
Jackson, Rupert M, Powell, John L, 4th ed
London Sweet and Maxwell 1997
N33.7

Planning

Keane v. An Bord Pleanala
Supreme Court: **Hamilton C.J., Barrington, J., Keane J.**
22/04/1998

Planning permission; criteria; radio mast planned for international marine navigation; permission granted by respondent; whether permission could be granted to body unable to carry out plan; whether respondent exceeded jurisdiction in taking various issues into account; whether effects outside local authority area relevant; whether only relevant if deleterious; whether respondent entitled to consider national policy or the common good
Held: Respondent entitled and obliged to take such factors into account

Statutory Instruments
Local Government (Planning and Development) (Fees) (Amendment) Regulations, 1998
SI 119/1998

Local Government (Planning and Development) Regulations, 1998
SI 124/1998

Local Government (Planning and Development) (Fees) (Amendment) (No.2) Regulations, 1998
SI 128/1998

Practice & Procedure

Roche v. Clayton
Supreme Court: **O'Flaherty J. ,Keane J., Lynch J.,** (ex tempore)
08/05/1998

Summons; renewal; plenary summons issued but not served within twelve months; whether reasonable efforts made at service; whether any other grounds for renewal
Held: Statute of Limitations not sufficient ground for renewal

Dubcap Ltd. v. Microcrop Ltd.
Supreme Court: **Keane J., Lynch J., Barron J.** (ex tempore),
09/12/1997

Costs; interlocutory injunction; application to make defendant comply with licence; matter settled at time of hearing; whether costs of proceedings to date including interlocutory application correctly awarded to plaintiff at hearing; whether award avoided unnecessary hearing solely to determine costs; whether application necessary solely to effect settlement
Held: Plenary hearing unnecessary; award correct

Fagan v. McQuaid
High Court: **O'Higgins J.**
12/05/1998

Application to set aside judgment; stay; strike out; jurisdiction of court; whether plaintiff's claim should be struck out as being an abuse of process; whether judgment should be set aside on grounds of fraud; whether fraud has to be the fraud of the successful party to litigation; whether application must be considered on "new evidence" since the judgment; O.19 r.28 Rules of the Superior Courts
Held: Stay granted

McEniry v. Flynn
High Court: **McCracken J.**
06/05/1998

Taxation of costs; Taxing Master; judicial review; standing; duty to give reasons; application for judicial review of certificate of taxation; applicant not a party to taxation proceedings; whether applicant had standing to seek judicial review; whether Taxing Master should have given reasons for decision when requested to do so; O.125 & O. 99 r. 38 Rules of the Superior Courts
Held: Applicant did not have standing; Taxing Master not obliged to give reasons for decision

Lawless v. Dublin Port and Docks Board
High Court: **Barr J.**
27/02/1998

Maritime; personal injury; applicable limitation period; extension of limitation period; constitutionality of limitation period; plaintiff injured on board tug; whether two year limitation period in s. 46(2) Civil Liability Act, 1961 applicable; whether s. 46(2) limited to actions in rem; whether appropriate to extend limitation period pursuant to s. 46(3); whether s. 46(3) unconstitutional as imposing different limitation periods based on location of accident giving rise to cause of action
Held: Two year limitation period in s. 46(2) applicable; limitation period extended pursuant to s. 46(3)

Articles
The New Rules on Disclosure in Personal Injuries Cases Putting the Cart Before the Horse
O'Connor, Martine
2(1998) IILR 13

Rules of the Superior Courts Order 11 - Service Outside the Jurisdiction Part 1
Daly, Emile
1998 (2) P & P 2

Library Acquisition
The Annual Practice 1998
London Sweet & Maxwell 1998
Text taken from 'The Supreme Court practice 1997'
N361

Statutory Instrument
Courts (Supplemental Provisions) Act, 1961 (Section 46) Order, 1998
SI 73/1998

District Court (Extradition) Rules, 1998
SI 89/1998

District Court (Licensing) Rules, 1998
SI 123/1998

Property

Articles
Property and Honour-Price in the Brehon Law Glosses and Commentaries
McLeod, Neil
XXXI(1996) IJ 280

Little House of Horrors
Hall, Eamonn G
1998(May) GILSI 18

Records & Statistics

Statutory Instrument
Registration of Births and Deaths (Ireland) Act, 1863 (Section 17 and Section 18) (North Eastern) Order, 1998
SI 114/1998

Road Traffic

Articles
Road Traffic Insurance Irish and EU Perspectives
Pierse, Robert
2(1998) IILR 18

Should Pay Won't Pay?
McMahon, Bryan M E
1998(May) GILSI 22

Statutory Instrument
Mechanically Propelled Vehicles (International Circulation) (Amendment) Order, 1998
SI 111/1998

Shipping

Agra Trading Ltd v. MV 'Blue Ice'
Supreme Court: **O'Flaherty J., Lynch J., Barron J.,** (ex tempore)
18/02/1998

Motor-vessel; transportation of frozen produce; contract; vessel in unseaworthy condition; motor-vessel uncertified, un-

insured and condemned by the Department of the Marine; arrest of the vessel; plaintiff obliged to charter alternative vessel; whether entitled to the release of the vessel; whether there was a contract for chartering the ship; whether the plaintiff had established a fair and stateable case; whether defendant can recover charges for a wrongful arrest; whether s. 47 Court of Admiralty (Ireland) Act, 1867 has any application
Held: Appeal allowed

Social Welfare

Statutory Instruments
Social Welfare (Consolidated Payments Provisions) (Amendment) (Educational Opportunities) Regulations, 1998
SI 54/1998

Social Welfare (Consolidated Payments Provisions) (Amendment)(no 2) (Late Claims) Regulations, 1998
SI 55/1998

Social Welfare (Appeals) Regulations, 1998
SI 108/1998

Social Welfare (Consolidated Contributions and Insurability) (Amendment)(Defence Forces) Regulations, 1998
SI 104/1998

Social Welfare (Consolidated Supplementary Welfare Allowance) (Amendment)(Determinations and Appeals) Regulations, 1998
SI 107/1998

Social Welfare Act, 1996 (Section 30) (Commencement) Order, 1997
SI 106/1998

Social Welfare Act, 1997 (Section 26(1) (a)) (Commencement) Order, 1998
SI 92/1998

Solicitors

Kennedy v. Law Society of Ireland
Supreme Court: **Hamilton C.J., Keane J., Barron J.**
29/04/1998

Professional rules; application for practising certificate; judgment against applicant outstanding; certificate refused despite indemnity in applicant's favour; whether grounds for refusal existed under s.49(1)(g) Solicitors Act, 1954; whether decision to refuse properly taken
Held: S.49(1)(g) inapplicable; refusal must be for protection of public or profession, not for disciplinary purposes

Successsion

Blackall v. Blackall
Supreme Court: **O'Flaherty J., Lynch J., Barron J.***
(*dissenting)
01/04/1998

Will; validity; whether testatrix of sound mind, memory and understanding; whether testatrix knew and approved of contents of will; whether presumption of testamentary capacity applicable; whether presumption of knowledge and approval of contents of will applicable; whether burden of proof of sound disposing mind on party seeking to prove will; s. 77(1) Succession Act, 1965
Held: Will valid

Taxation

Saatchi and Saatchi Advertising Ltd. v. McGarry
Supreme Court: **Barrington J., Keane J., Lynch J.**
28/04/1998

Manufacturing tax relief; interpretation of statute; whether advertising qualified for such relief; s.41(1)(b) Finance Act, 1990 meant advertising qualified for manufacturing relief under s.39 Finance Act, 1980; whether plaintiff's claim barred under s.41(8) 1980 Act; whether such a procedural provision could defeat the purpose of the 1990 Act
Held: Tax legislation must be read literally; claim dismissed

Article
Last Resort for Investors?
O'Halloran, Barry
1998(May) GILSI 28

Library Acquisitions
Brennan and Howley Tax Acts Commentary Consolidation 1997
Brennan, Frank
Dublin Butterworth Ireland 1998
M337.C5.Z14

Corporation Tax
Feeney, Michael
Dublin Butterworth Ireland 1997
M337.2.C5

Tolley's Value Added Tax 1997 - 1998
Wareham, Robert
Dolton, Alan
Croydon Tolley 1997
M337.45

Statutory Instrument
Capital Gains Tax (Multipliers) (1998-9) Regulations, 1998
SI 110/1998

Telecommunications

Statutory Instrument
Wireless Telegraphy Act, 1926 (Section 3) (Exemption of Short Range Business Radios) Order, 1998
SI 93/1998

Transport

Statutory Instrument
Coras Iompar Eireann (Additional Functions) Order, 1998
SI 76/1998

At a Glance

European provisions implemented into Irish Law up to 05/06/98

Information compiled by Ciaran McEvoy, Law Library, Four Courts, Dublin 7.

European Communities (Introduction of Organisms Harmful to Plants or Plant Products) (Prohibition)(Amendment) Regulations, 1998
SI 78/1998
(DIR 97/3)

European Communities (Export and Import of Certain Dangerous Chemicals)(Pesticides) (Enforcement) (Amendment) Regulations, 1998
SI 88/1998
(REG 2455/92

European Communities (Hygiene of Foodstuffs) Regulations
SI 86/1998
(DIR 93/43, 96/3)

European Communities (Official Control of Foodstuffs) (Approved Laboratories) Order, 1998
SI 95/1998
(DIR 89/397, 93/99)

European Communities (Hydrocarbons) (Prospection, Exploration and Production) Regulations, 1998
SI 77/1998
(DIR 94/22)

European Communities (Leased Lines) Regulations, 1998
SI 109/1998
(DIR 92/44, 97/51)
(DEC 94/439)

European Communities (Telecommunications Licences) Regulations,1998
SI 96 /1998
(DIR 90/388, 96/2, 96/19, 97/13)

European Communities (Introduction of Organisms Harmful to Plants or Plant Products) (Prohibition) (Amendment) (No.2) Regulations, 1998
SI 120/1998
(DIR 98/1, 98/2, 98/17)

Rules of Court

District Court (Extradition) Rules, 1998
SI 89/1998

District Court (Licensing) Rules, 1998
SI 123/1998

Library Acquisitions

Information compiled by Joan McGreevy, Law Library, Four Courts, Dublin 7.

The Annual Practice 1998
London Sweet & Maxwell 1998
Text taken from 'The Supreme Court practice 1997'
N361

Archbold Criminal Pleading, Evidence and Practice 1998
1998 ed / by P.J. Richardson
Archbold, John Frederick
London Sweet & Maxwell 1998
M500

Brennan and Howley Tax Acts Commentary Consolidation 1997
Brennan, Frank
Dublin Butterworth Ireland 1998
M337.C5.Z14

The Brussels Jurisdiction and Enforcement Convention an EC Court Casebook
Bogdan, Michael
The Hague Kluwer Law 1996
W73

Commercial Agreements and Competition law P & P in the UK and EC
Green, Nicholas
2nd ed
London Kluwer 1997
N266

Corporation Tax
Feeney, Michael
Dublin Butterworth Ireland 1997
M337.2.C5

Essential Quantum Cases
Holding, Frederick J, Sampson, Melissa L
London Butterworths 1997
N37.1

Jackson and Powell on Professional Negligence
Jackson, Rupert M
Powell, John L
4th ed
London Sweet and Maxwell 1997
N33.7

Loose on Liquidators the Role of a Liquidator in a Winding-Up
Loose, Peter
4th ed
Bristol Jordon & Sons Ltd 1997
N262.5

Modern Dictionary for the Legal Profession
Beyer, Gerry W
2nd ed
New York William S. Hein 1996
L40

Researching the Legal Web a Guide to Legal Resources on the Internet
Venables, Delia
Holmes, Nick
London Butterworths 1997
L157

Thoms Dublin and County Street Directory 1998
REF

Tolley's Value Added Tax 1997 - 1998
Wareham, Robert
Dolton, Alan
Croydon Tolley 1997
M337.45

Government Bills in Progress

Information compiled by Sharon Byrne, Law Library, Four Courts, Dublin 7

Air Navigation and Transport (Amendment) Bill, 1997
Report - Dail

Child Trafficking & Pornography Bill, 1997
Committee - Dail

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

Copyright (Amendment) Bill, 1998
1st stage - Dail

Court Offices (Amendment) Bill, 1998
1st stage - Dail

Court Services (No.2) Bill, 1997
Report - Seanad.

Criminal Justice (No.2) Bill, 1997
Report - Seanad

Economic and Monetary Union Bill, 1998
1st stage - Dail

Education (No.2) Bill, 1997
Committee - Dail

Employment Equality Bill, 1997
Report - Seanad

Employment Rights Protection Bill, 1997
2nd stage - Seanad [PMB]

Energy Conservation Bill, 1998
2nd stage - Dail

Enforcement of Court Orders Bill, 1998
1st stage - Dail [PMB]

European Communities (Amendment) Bill, 1998
1st stage - Seanad

Family Law Bill, 1998
2nd Stage - Seanad

Food Safety Authority of Ireland Bill, 1998
1st stage - Dail

Geneva Conventions (Amendment) Bill, 1997
Committee - Dail

Housing (Traveller Accomodation) Bill, 1998
Passed in Seanad

International War Crimes Tribunals Bills, 1997
1st stage - Dail

Investor Compensation Bill, 1998
1st stage - Seanad

Jurisdiction of Courts and Enforcement of Judgments Bill, 1998
Passed in Seanad

Merchant Shipping (Miscellaneous Provisions) Bill, 1997
Report - Dail

National Sports Council of Ireland Bill, 1998
2nd stage - Dail [PMB]

Plant Varieties (Proprietary Rights)(Amendment) Bill, 1997
Committee - Dail

Prohibition of Ticket Touts Bill, 1998
1st stage - Dail [PMB]

Protections for Persons Reporting Child Abuse Bill, 1998
[changed from - Children (Reporting of Alleged Abuse) Bill, 1998]
Committee - Dail [PMB]

Protection of Workers (Shops)(No.2) Bill, 1997
2nd stage - Seanad

Roads (Amendment) Bill, 1997
Report - Dail

Road Traffic Reduction Bill, 1998
2nd Stage - Dail [PMB]

Seanad Electoral (Higher Education) Bill, 1997
1st Stage - Dail

Sexual Offenders Registration Bill, 1998
2nd Stage - Dail

Shannon River Council Bill, 1998
2nd stage - Seanad

Solicitors (Amendment) Bill, 1998
1st stage - Seanad [PMB]

Tribunals of Inquiry (Evidence)(Amendment) (No.2) Bill, 1998
1st stage - Dail

Turf Development Bill, 1997
Committee - Dail

Urban Renewal Bill, 1998
1st stage - Dail

ACTS OF THE OIREACHTAS, 1998

1/1998 - Referendum Act, 1998
26/02/1998

2/1998 - Central Bank Act, 1998
signed 18/03/1998
To be commenced by S.I.

3/1998 - Finance Act, 1998

4/1998- Electoral (Amendment) Act, 1998
signed 31/03/1998
commenced on signing

5/1998 - Oireachtas (Allowances to Members) and Ministerial, Parliamentary, Judicial and Court Offices (Amendment) Act, 1998
signed 01/04/98
s 24-28 commenced 19/06/1996
rest commenced on signing

6/1998 - Social Welfare Act, 1998
signed 01/04/1998
ss 4 &5 to be commenced by S.I.
rest commenced on signing

7/1998 - Minister for Arts, Heritage, Gaeltacht and the Islands (Powers and Functions) Act, 1997

8/1998 - Court Services (No.2) Act, 1998

9/1998 - Local Government (Planning & Development) Act, 1998

10/1998 - Adoption (No.2) Act, 1998

11/1998 - Tribunals of Inquiry (Evidence)(Amendment) Act, 1998

12/1998 - Civil Liability (Assessment of Hearing Injury) Act, 1998

13/1998 - Oil Pollution of the Sea (Civil Liability & Compensation) (Amendment) Act, 1998

14/1998 - Arbitration (International Commercial) Act, 1998

15/1998 - Finance (No.2) Act, 1998

16/1998 - Local Government Act, 1998

17/1998 - Gas (Amendment) Act, 1998

18th Amendment of the Constitution Act, 1998
19th Amendment of the Constitution Act, 1998

Abbreviations

BR	=	**Bar Review**
CLP	=	**Commercial Law Practitioner**
DULJ	=	**Dublin University Law Journal**
GILSI	=	**Gazette Incorporated Law Society of Ireland**
ICLJ	=	**Irish Criminal Law Journal**
ICLR	=	**Irish Competition Law Reports**
ICPLJ	=	**Irish Conveyancing & Property Law Journal**
IFLR	=	**Irish Family Law Reports**
IIPR	=	**Irish Intellectual Property Review**
ILTR	=	**Irish Law Times Reports**
IPELJ	=	**Irish Planning & Environmental Law Journal**
ITR	=	**Irish Tax Review**
JISLL	=	**Journal Irish Society Labour Law**
MLJI	=	**Medico Legal Journal of Ireland**
P & P	=	**Practice & Procedure**

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

CCBE Plenary Sessions, Brussels

HAROLD A. WHELEHAN S.C.
BAR COUNCIL REPRESENTATIVE TO THE CCBE

I attended the plenary session of the CCBE (the Council of the Bars & Law Societies of the E.C.) in Brussels on the 24th and 25th April, 1998. Below is a very brief summary of what was discussed and decided. I have arranged for various documents mentioned in the text* to be available in a special CCBE folder at the issue desk in the Law Library so that my colleagues who might wish to refer to them specifically, will have access. For those who might wish to get a fuller sense of the scope of the activities of the CCBE, I recommend that they consult the folder and read the newsletter of the CCBE which I think will be found to be both readable and informative.

The main items discussed at the plenary session were the following:-

1. Multi-Disciplinary Practices

Some time ago an Ad Hoc Committee was set up to reassess the CCBE's view on MDPs. A draft position paper was circulated and discussed. The view of the Committee is summarised in paragraph 1.1 in the following terms;

> 'Lawyers should not be permitted to engage in forms of co-operation which give to persons not having the position of Lawyer, and themselves subject to duties, regulatory principles or interests relevantly different from those applicable to Lawyers, a substantial influence over the Lawyers practice or over any form of organisation upon which the Lawyers practice depends to an appreciable degree.'

This draft will be considered for approval at the plenary session in Lyon in November next. The National Councils of Bars of France have taken a very strict line against MDPs and for information purposes a copy of their decision of the 14th March was circulated.*

2. Draft Model Rules for Procedure of European Court of Human Rights

CCBE has been asked to make comments on the draft Model Rules before the Court and a copy of the observations made by the CCBE were circulated.* A report from the Permanent delegation to the Court was discussed.* CCBE were advised that the Judges of the Court will comprise of;

a) Judges of the existing Court
b) Some Judges of the Commission
c) New Judges appointed to take up office at the end of the year

The official languages of the Court will be English and French. However, submissions may be made in the national language of the Applicant and will then be translated into English and French by the Court.

The recommendation of CCBE is that the Council of Europe should request the member states to include the preliminary proceedings before the Court expressly in their domestic legal aid scheme.

3. The Establishment Directive

The Directive is dated 14th March 1998 and therefore the implementation date will be the 14th March, 2000. The final draft of the guidelines on the implementation prepared by the Ad Hoc Committee were circulated for discussion.* There was extensive discussion as to whether periods of legal practice under Article 3 (as defined in Article 10) before the coming into force of the Directive should be taken into account for the purpose of obtaining the advantages that Article 10 of the Directive confers. The majority of delegations felt that such periods should be taken into account.

A number of delegations also raised the query as to whether 'guidelines' should be published at all, since some delegations felt that to do so involved the CCBE in the interpretation of the Directive and that in issuing guidelines, the CCBE might be seen to pre-empt the decisions of the legislators and the courts in the different jurisdictions. This was a minority view, as the majority of delegations (led by our delegation) felt that the CCBE was acting on behalf of all lawyers in the EU and since it had a large input into the drafting of the Directive, it was not only right and proper but it was also incumbent on the CCBE to be to the forefront in issuing guidelines 'which could be used by members in dealing with bodies in their respective countries which will be drafting the legislation and will be negotiating with their national Bar Associations and Law Societies.'

Following a note, the guidelines were approved by all delegations except the United Kingdom delegation which abstained (though they strongly indicated that they would adhere to the guidelines and follow them) while Luxembourg and Liechtenstein voted against.

The guidelines will be sent out to each delegation accompanied by a letter stressing that they are guidelines only and are not compulsory. I will arrange to place the guidelines in the CCBE folder when they come to hand.

It is strongly hoped that the guidelines will be used by members as a basis for negotiating with their legislators and the objective of adhering to the guidelines should result in a relatively uniform application of the terms of the Directive.

4. Forum on Transnational Practice for the Legal Profession

The date of this forum has been fixed for the 9th and 10th of November next, in Paris. A letter of invitation and press release is been circulated to all heads of Bar Associations and Law Societies. The purpose of the forum is to discuss the problems which may arise on liberalisation of the professional legal services with a view to obtaining consensus which would serve as a guide in making

a presentation to the WTO working party on Professional Services. Both Geraldine Clarke (who is the Law Society delegate to the CCBE and head of the Irish delegation) and I hope that the Chairman of the Bar Council and the President of the Law Society will attend the forum with at least one delegate from each body having regard to the particular importance of this forum and the issues arising in this sphere.

5. Reduced VAT Rate on Legal Services

A copy of a submission paper prepared by Moret Ernst & Young at the request of the Dutch Bar was circulated.* Its recommendation is to advocate a reduced VAT rate applicable to services rendered by lawyers in areas in which they are exclusively competent to provide these services. Delegates were asked to lobby at national level to give the services of lawyers listed in Annex H to the Sixth VAT Directive. In order to achieve a change at Union level, broad support is required from Ministers for Finance and the European Parliament.

6. Commission's Green Paper on Commercial Communications

A summary of the thinking in the field of commercial communications and an assessment of its impact on the legal profession prepared by Patrick Oliver, a member of the Ad Hoc Committee on advertising, and was circulated and discussed.* Although the legal profession is not the main target of the Green paper, it states that 'as part of its overall strategy, the Commission intends to review the advertising and publicity rules which affect the professions.'

The Commission is currently undertaking a comparative study of the legal profession's Rules of Professional Conduct in the fifteen member states and how they affect publicity and advertising by lawyers. The Commission believes that the legal profession should itself seek to work out a set of EU wide rules concerning commercial communications and remove some of the unacceptable bands and restrictions. Otherwise there is a chance that the Commission will take the initiative itself and impose an agreement on the professions.

It was suggested and accepted that CCBE's Publicity Committee should review the national Rules of Professional Conduct and make suggestions for removing any unnecessary restrictions and that the CCBE would work closely with the Commission.*

7. Secure E-mail

A very interesting presentation was made by a member of the Belgian Bar on secure e-mail for lawyers, encryption, identification (digital signatures) and ways in which CCBE might be involved. UINL has already developed a sophisticated system of digital signatures.

If such a system were to be developed for lawyers, every practising lawyer would require to be registered and obtain a certificate from a Certification Authority. It was suggested that CCBE could act as a Certification Authority.

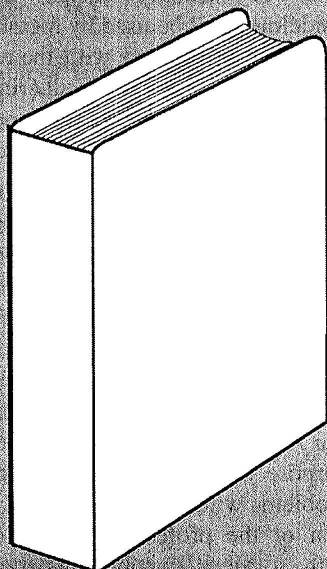
Further work is being done in this area by the Technology Committee and each delegation has received extensive questionnaires seeking details of their technology system. We have returned the necessary data to meet the requirements of the questionnaire.

8. Miscellaneous

The meeting was addressed by Jeff Hoon MP, Parliamentary Secretary of the Law Chancellor's Department on the necessity of training lawyers in member states and educating them in Community Law.

The meeting was also addressed by Ann Marie Rouchard of Limognes University, a member of the EU Commission Task Force on increasing efficiency in the execution of Court Judgments within the EU.

As I said at the outset, the foregoing is a 'thumbnail' sketch of the proceedings at the plenary session and I would be very happy to assist any member of the profession with any queries they may have arising out of the above or the operation of the CCBE either in general or in particular spheres. ●



The Bar Review

Volume I & II 1995/96 and 1996/97 and Volume III 1997/98

Attention Subscribers!

Attractive, durable, easy to use, binder for back issues of **the Bar Review** now available.

Price: £9.07 (includes 21% VAT)

Please make cheque payable to: Law Library Services Ltd. and forward to:

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

Shipowners' Limitation of Liability: A new Regime

COLM Ó hOISÍN, Barrister

History

For centuries in the maritime world shipowners have been entitled to limit their liability in certain circumstances. The ancient rationale for this was that in order to encourage shipping and trading it was necessary to allow the shipowner to limit the risks associated with his commercial venture at sea. The first piece of English legislation on the subject of limitation of liability was the Responsibility of Shipowners Act of 1733.

That Act limited shipowners' liability for loss of cargo, by theft of master or crew, to the value of the ship and freight. This was followed by further legislation extending the relief afforded to shipowners; to cases of theft by persons other than the crew and to cases of loss by fire (1786) and to limitation of liability in case of collision (1813). The Merchant Shipping Act of 1854 went further still and allowed a shipowner to limit his liability for claims for loss of life for personal injury to a sum of £15 per tonne.

Up until 1862 the limits of liability for claims, other than those for loss of life or personal injury, were based on a limit of the value of the ship and its freight. In each particular case the value of the ship and its freight, at or immediately before the incident which had caused the proceedings, had to be ascertained. Needless to say this caused a considerable amount of litigation and expense.

Furthermore, it also favoured bad and inferior ships over good and valuable ships. Accordingly, the Merchant Shipping (Amendment) Act of 1862 fixed the limit of £8 per tonne for all claims other than those for loss of life or personal injury where the limit remained at £15 per tonne. The Act of 1862 was, in substance, re-enacted in Section 503 of the Merchant Shipping Act 1894 which remained on the Statute books in this country until its repeal by the Merchant Shipping (Liability of Shipowners and Others) Act 1996[1].

The principle of limited liability was clearly based on consideration of policy rather than justice. According to Dr. Lushington in the *Amelia* (1863) 1 Moo. P.C. (N.S.) 471, 473:-

> "The principle of limited liability is that full indemnity, the natural right of justice, shall be abridged for political reasons"

The preamble to the 1813 Responsibility of Shipowners Act expresse the rationale for the rule as follows:

> 'it is of the utmost consequence and importance to promote the increase of the number of Ships and Vessels belonging to the United Kingdom registered according to law and to prevent any discouragement to Merchants and others from being interested therein.'

The principle enshrined in the legislation referred to above was not without its critics. Brett, J.J. in *The Ettrick* (1881) 6 P.D. 127, 136, described one particular limitation act as 'tyrannical'. More recently, Lord Denning in the case of *Alexandra Towing Company v. Millet* (*the Bramley Moore*) [1964] P. 200 stated at page 220:-

> "I agree that there is not much room for justice in this rule: but limitation of liability is not a matter of justice. It is a rule of public policy which has its origins in history and its justification in convenience."

Section 503

Section 503 of the Merchant Shipping Act 1894 provided, inter alia:-

> 'The owners of a ship, British or foreign, shall not ...without their actual fault or privity ...be liable for damages beyond the following amounts; (that is to say)
>
> (i) in respect of loss of life or personal injury, either alone or together, with loss of or damage to vessels, goods, merchandise or other things, an aggregate amount not exceeding £15.00 for each tonne of the ship's tonnage; and
>
> (ii) in respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount, not exceeding £8.00 for each tonne of their ship's tonnage.'

Although in 1894 these may well have been reasonable limits they remained unaltered in Irish law until the repeal of the Section in 1997. By this time they had become ridiculously low. However, the effects of this were lessened considerably by the widespread suspicion that Section 503 was unconstitutional. I do not intend to go into the reasons for this view in any detail. They are set out in a paper given by the present Attorney General in a paper he gave to the Irish Maritime Law Association in October 1983 (which is available in the Law Library). In summary, however, the Section applied to 'British or foreign' ships. The word 'British' was never adapted to mean 'Irish' in any enactment. Furthermore, Part I of the 1894 Act which defined 'British ship' was repealed by the

Mercantile Marine Act of 1955 without changing the provisions in the 1894 Act as regards limitation of liability. A strong case could be made following the 1955 Act that although British and foreign ships were entitled to limit their liability under Section 503, Irish ships were not. This state of affairs, it was argued, might well have amounted to an invidious discrimination against Irish citizens rendering the Section repugnant to Article 40.1 of the Constitution. If it did not amount to an invidious discrimination, it was argued that it amounted to an interference with the right to litigate, i.e. one of the personal rights mentioned in Article 40.3. Furthermore, even if the Section could be interpreted as applying to all ships, Irish, British or foreign it was argued that the constitutionality of the Section had been eroded because of the absence of any power to review the limits and the fact that the limits had remained unaltered for 100 years. It was also significant that as a pre-1922 provision Section 503 did not enjoy a presumption of constitutionality.

The constitutionality of Section 503 was never tested before the Irish Courts. In practice, although it was frequently pleaded by defendants, no case arose where a defendant was prepared to test its constitutionality. On the other hand, a plaintiff could not ignore the existence of the Section and, consequently, the normal result was a compromise between the parties at a figure which was somewhere between the limit under Section 503 and the full value of the claim, although generally closer to the latter than to the former.

Introduction of Modern & Effective Limitation

Because of the unsatisfactory situation relating to Section 503 there were many calls for the Legislature to replace it with a more modern and effective limitation.[2] Those calls were finally heeded with the enactment of the Merchant Shipping (Liability of Shipowners and Others) Act 1996 which implemented the 1976 London Convention on Limitation of Liability for Maritime Claims.[3] The adoption of the 1976 Convention into Irish law will clearly have a significant impact in maritime claims in Ireland. There is now in force a credible regime of limitation of liability. The limits in force are significant and can only be broken in very extreme cases.

Who is Entitled to Limit Liability?

Both shipowners and salvors are entitled to limit their liability under the Convention. 'Shipowner' is given a relatively broad definition. It includes owners, charterers, managers and operators of a seagoing vessel. Any person for whom the shipowner or salvor is vicariously liable is also entitled to avail themselves of the limits of liability as is the insurer of liability for any claims subject to limitation.

What Claims are subject to Limitation?

Article 2(1) (a)-(f) sets out a very wide list of maritime claims for which liability may be limited. Most importantly it includes claims for death or personal injury, or for loss or damage to property occurring on board or in connection with the operation of a ship or with salvage operations. It also includes claims for delay, and claims for infringement of non-contractual rights.

However although Article 2 covers claims in respect of the raising, removal, destruction or rendering harmless a ship which is sunk, wrecked, stranded or abandoned, together with its cargo, or anything which has been on board the ship, these types of claims are specifically excluded by Section 11 of the 1996 Act from the limitation regime.[4]

Article 3 of the Convention excludes a number of other claims from limitation under the Convention, including those for salvage, for oil pollution damage[5], claims subject to any international convention, or national legislation, governing or prohibiting limitation of liability for nuclear damage, claims against the owner of a nuclear ship for nuclear damage, and claims by employees of the shipowner or salvor if the domestic legislation contains a higher limit or does not permit limitation of such claims.

The Limits of Liability6

The limits of liability under the 1976 Convention are far more in tune with modern values than those provided in Section 503 of the Merchant Shipping Act. The limits are effectively set out in Special Drawing Rights (SDR's). This is a unit defined by the International Monetary Fund which fluctuates on a daily basis. Under Section 13 of the 1996 Act a certificate from the Central Bank as to the specified value of the SDR on a particular day is admissible as evidence. On the 4th June, 1998 the rate was as follows: 1.06281 SDR = IR£1.

Special limits of liability are provided in Article 6(1)(a) for claims in respect of death or personal injury. All ships, no matter what size, have a basic liability of 333,000 SDRs. Vessels in excess of 500 tonnes have an additional liability which operates as follows:-

1. For each tonne from 501 to 3,000 tonnes an additional 500 SDRs;
2. For each tonne from 3,001 to 30,000 tonnes an additional 333 SDRs ;
3. For each tonne from 30,001 to 70,000 tonnes, an additional 250 SDRs;
4. For each tonne in excess of 70,000 tonnes, and additional 167 SDRs.

It can be seen from this that a little bit of arithmetic is necessary in order to ascertain the limit in any particular case. By way of example, a vessel which had a gross tonnage of 10,000 tonnes would have a limit under Article 6(1)(a) in regard to claims for death or personal injury of 333,000 SDRs + 1,250,000 SDR's (i.e. 2,500 x 500 SDR's) + 2,330,667 SDRs (i.e. 6,999 tonnes x 333 SDRs) = 3,913,600 SDRs (or IR£3,682,300 at the rate on 4th June 1998).7

Article 6(1)(b) provides a limit in respect of any other claims of 167,000 SDRs. This is increased as follows: -

1. For each tonne from 501 to 30,000 tonnes by 167 SDR's;
2. For each tonne from 30,001 to 70,000 tonnes by125 SDR's;
3. For each tonne in excess of 70,000 tonnes by 83 SDR's.

It is important to note that these limits apply to liability arising out of 'any distinct occasion'. If a vessel sunk, then all claims arising out of the sinking of that vessel, whether they be claims for death or personal injury or claims in respect of the loss of property or damage to the property, would be subject to the

above limits. Significantly, if the limit for death or personal injury is not sufficient to meet all the claims, then those claims can be met out of the limit in respect of other claims where they rank rateably with such other claims.

There is a special limit provided for passenger claims. This limit is calculated by multiplying the amount of 46,666 SDR's by the number of passengers which the ship is authorised to carry with a maximum limit of 25m. SDR's.[8]

Do the Limits Include Costs and/or Interest?

Although there is no specific mention of costs in the Convention it appears clear that costs are an additional item over and above any limitation amount. A claim for costs is not mentioned in Article 2 of the Convention as one of the claims in which limitation can be invoked. It is separate to the claim in respect of which the costs are incurred. This had been the accepted position in England in relation to the old Limitation Acts.[9]

On the other hand, there is English authority that interest on sums due is included in the damages for the purposes of limitation, although it may be possible to recover interest after the date of judgment over and above the limitation amount.[10]

Breaking the Limit

The limits under Section 503 of the 1894 Act did not apply where a claimant could show 'actual fault or privity' of the owners of the ship. In the case of *Lennard's Carrying Company Limited v. Asiatic Petroleum Company Limited* [1914] 1 KB 419; [1915] AC 705, Buckley, L.J. in the Court of Appeal stated:-

> "The words 'actual fault or privity' in my judgment infers something personal to the owner, something blameworthy in him as distinguished from constructive fault or privity such as the fault or privity of his servants or agents;"

Experience, however, demonstrated that there were a multitude of situations where it could be shown that the accident had been contributed to by the 'fault or privity' of the owners. For instance, through the appointment of an incompetent master[11]; or through the appointment of an uncertificated officer[12]; or the failure to impress on the masters of their ships the importance of complying with the regulations for preventing collisions at sea.[13]

The 1996 Convention set out to make it far more difficult to break the limits of liability. In order for a person to lose the entitlement to limit his liability it must be proved that:-

> 'The loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.'

This wording is similar to that in a number of other Conventions.[14] In order to bring a case within this criteria it must firstly be shown that there was a personal act or omission. It is not sufficient that it was an act or omission of the servant or agent of the shipowner or salvor. Special consideration obviously has to be given to cases where the shipowner or salvor is a company. According to Lord Reid in *Tesco Supermarkets v. Nattrass* [1972] A.C. 153 : -

> "[a corporation] must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company within his appropriate sphere, and his mind is the mind of the company."

Secondly, one must demonstrate that there was either an intention to cause the loss which occurred or that the shipowner or salvor had acted 'recklessly and with the knowledge that such loss would probably result'. In the case of *Goldman v. Thai Airways International Limited* [1983] 1 W.L.R. 1186 the Court of Appeal considered the meaning of the words in the Warsaw Convention (as amended by the Hague Protocol) 'recklessly and with knowledge that damage would probably result'. It held that the word 'recklessly' was not to be construed in isolation but in its context and with the qualification that the act or omission had to be done both 'recklessly' and 'with knowledge that damage would probably result'. The wording in the Limitation Convention is even more exacting. It requires that the knowledge which accompanies the 'recklessness' is that damage of the kind suffered will probably result. For these reasons it should be very difficult to break the limits of liability under the 1976 Convention. Indeed this was clearly the intention of the drafters of the Convention in moving from the old regime of 'actual fault or privity' which had operated under the 1957 Convention.

Procedure to rely on Limitation

The party wishing to seek to limit its liability may do so either by pleading limitation in its Defence or by bringing a limitation action seeking a limitation decree which is valid against all claims. In Ireland the former option is usually taken. A Defendant adopting this course of action may also counterclaim for a declaration that he is entitled to limit his liability. Limitation actions are rare in Ireland. They are more obviously suited to circumstances where there is a possibility of a number of claims arising out of the one distinct occasion.

A limitation action is commenced by the shipowner or the salvor against those claimants of which the shipowner has knowledge. Further defendants may be added at a later stage. Interestingly, there is no provision in the Rules of the Superior Courts for such an action although there is an oblique reference to it in Form No. 2 of Appendix J. By contrast, the Rules of the Supreme Court of England make specific reference to the limitation action and contain a number of rules which deal solely with such actions.

Section 504 of the Merchant Shipping Act 1894 made provision for the limitation action. It stated as follows:-

> "Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of

loss of life, personal injury or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then the owner may apply in England and Ireland to the High Court ....and that Court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the court thinks just."

However the Section was repealed by the 1996 Act and nothing was inserted in its place. It would be desirable that the present vacuum be filled. Certainly it would be helpful if Order 64 of Rules of the Superior Courts could be amended to make provision for the limitation action.

Limitation Fund

Article 11 of the Convention provides that a party may constitute a limitation fund in respect of claims subject to limitation. The fund is made up of the amounts set out in Articles 6 and 7 as are applicable to claims for which persons constituting the fund may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund.

There are several advantages to constituting a limitation fund from the point of view of the defendant. Firstly, and most importantly, under Article[13] once a limitation fund has been constituted, any person having a claim against the fund is barred from exercising any rights in respect of such claim against any other assets of the person who has constituted the fund. Once a limitation fund has been constituted, therefore, it is not possible for a claimant to arrest a ship owned by that person in another Contracting State to the Convention, in respect of a claim covered by the limitation fund. Furthermore, any ships or other property which has already been arrested or attached must be released once the fund has been constituted. Secondly, because the limitation amounts are denominated in SDR's which fluctuate from day to day a shipowner will not know the precise amount in his own currency of his liability until judgment. However, by constituting a limitation fund the shipowner fixes his liability to the value of the SDR on that day.

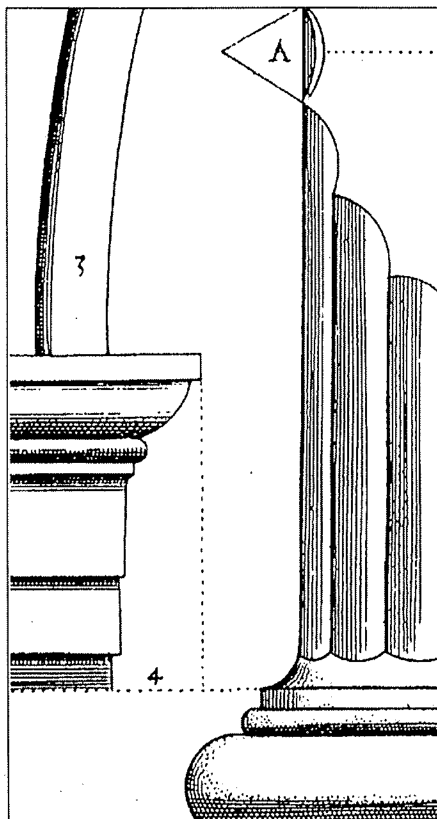
One possible disadvantage of constituting a limitation fund is the requirement to include in the fund a sum for interest on the limits from the date of the occurrence giving rise to the liability to the date of the constitution of the fund.

The Rules of the Superior Courts do not make any provision for the constitution of a limitation fund.[15] Clearly such rules are required. As with the Limitation Action amendments to the Rules are needed.

Constitutionality Questions

Are the new limitation provisions as constitutionally suspect as their predecessor in Section 503? Does the fact that the new regime of limitation emanated from an international convention change matters?

An international convention can have no effect in Irish domestic law unless it has been given the force of law by the Oireachtas. As part of Irish domestic law, it has no immunity from constitutional scrutiny. The Irish Courts have in the past reviewed the constitutionality of an international agreement (*see McGimpsey v. Ireland* [1988] I.R. 567 (High); [1990] 1 I.R. 110 (Supreme) where the High and Supreme Courts reviewed the constitutionality of the Irish Anglo Irish Agreement.) In giving the force of law to an international agreement, the Oireachtas is exercising the exclusive legislative power which it has under Article 15.2 of the Constitution. Clearly, as domestic legislation, it enjoys the presumption of constitutionality. It might well be argued, however, that an international agreement given the force of law enjoys an especially strong presumption of constitutionality. In the case of *McGimpsey v. Ireland*, Barrington, J. in the High Court was considering whether the Anglo-Irish Agreement was contrary to the provisions of the Constitution. He stated as follows:-



> "It appears to me that there should be a similar presumption that a government did not violate the Constitution in entering into a particular treaty and that unless the treaty expressly contradicts some provision of the Constitution the onus is on the Plaintiff clearly to establish that the government has violated the Constitution in entering into the treaty. This onus must necessarily be a heavy one. The conduct of the foreign policy of the State is not a matter which easily lends itself to judicial review and if there is any area in which judicial restraint is appropriate, that is it."

Clearly, the Anglo Irish Agreement is a very different type of agreement to the 1976 Limitation Convention. It is a bilateral treaty between two sovereign states. The other is a convention, open for signature by states, which attempts to harmonise the laws of the Contracting States. Nonetheless it is an international agreement and one to which the Government has subscribed and to which the Oireachtas has given the force of law in Irish domestic law. Article 29.3 provides that :-

"Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states."

In the case of *Wadda v. Ireland* [1994] 1 ILRM 126 at page 135, Mr. Justice Keane stated that the giving effect in legislation to the provisions of conventions which eliminated injustices and inconveniences stemming from differences between the rules of private international law in different states was in accordance with Ireland's acceptance of the generally recognised principles of international law in Article 29.3. and was 'in harmony with one of the aims of the Constitution, as stated in the Preamble, to establish concord with other nations.'

For the reasons expressed above, it is submitted that there would be a considerable reluctance on the part of the Irish Courts to declare any provision of a convention which had been implemented into Irish law as unconstitutional.

The right to litigate or the right to have access to the Courts is one of the personal rights of a citizen guaranteed by Article 40.3 of the Constitution. There is some controversy as to whether it may also be a form of property right pursuant to Article 43, although this appears to be largely an academic point and of little practical importance.[16] The right to be compensated in respect of damage clearly flows from the right to litigate or to have access to the Courts. Clearly a provision which allows a defendant to limit its liability is an interference with such right. None of the personal rights as expressed in Article 40.3 are, however, absolute.

In other areas the Oireachtas has clearly restricted the 'right to litigate'. In the case of *Tuohy v. Courtney* [1994] 3 I.R. 1 the Supreme Court considered the constitutionality of Section 11 of the Statute of Limitations Act 1957. Chief Justice Finlay stated as follows at page 47:-

> "It has been agreed by counsel, and in the opinion of the court quite correctly agreed, that the Oireachtas in legislating for time limits on the bringing of actions is essentially engaged in a balancing of constitutional rights and duties. What has to be balanced is the constitutional right of the plaintiff to litigate against two other contesting rights or duties, firstly, the constitutional right of the defendant in the property to be protected against unjust or burdensome claims and secondly, the interest of the public constituting an interest or requirement of the common good which is involved in the avoidance of stale or delayed claims.

> "The court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the Legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individuals' constitutional rights."

It would appear that in enacting legislation allowing shipowners to limit their liability the Oireachtas is engaging in a balancing of the rights of shipowners with those of the litigant. The Court, on the authority of *Tuohy v. Courtney*, would be reluctant to interfere unless it could be shown that the balance was 'contrary to reason and fairness'. It seems unlikely that a court would come to such a conclusion having regard to the origins of this legislation in an international agreement.

Conclusion

The implementation of the 1976 London Convention on Limitation of Liability for Maritime Claims is a welcome development in Irish law. It introduces a credible regime of limitation with realistic limits. It puts Ireland in line with the law in this area in most of its neighbouring countries. It has also removed the very unsatisfactory situation which had prevailed for too long while Section 503 of the Merchant Shipping Act 1894 remained on the Statute books. ●

---

1 The 1996 Act was commenced in full with effect from the 6th February 1997 by 1997 by Statutory Instrument No. 215 of 1997.

2 See, for instance, papers given by the present Attorney General and by Niall McGovern to the Irish Maritime Law Association Seminar, October 1983.

3 The first International Convention on the limitation of shipowners' liability was agreed in 1924. This was later supplanted by a 1957 Convention which in turn was overtaken by the 1976 London Convention on Limitation of Liability for Maritime Claims 1976.

4 Interestingly section 11 does not mention removal, destruction, or rendering harmless of the cargo of the ship (Art 2(e)) but it might well be argued that this is covered by the phrase 'anything that is or has been on board such a ship'.

5 The Oil Pollution of the Sea (Civil Liability and Compensation) Act, 1988 governs limitation of liability of a shipowner for oil pollution damage.

6 In 1996 a Protocol to the 1976 Convention was introduced. This Protocol increases the limits under the Convention and introduces a streamlined procedure by which the limits can be further increased in the future. The 1996 Protocol has not been implemented into Irish law. It is not yet entered into force internationally as it has not been ratified by a sufficient number of countries.

7 A ship's tonnage is effectively its gross tonnage which is calculated by reference to tonnage measurement rules contained in an international convention on the subject.

8 Individual passenger claims are, of course, subject to a different limit under the Athens Convention 1974. Under that Convention, which is also implemented into law by the 1996 Act, any claim for death or personal injury is limited to a sum of 46,666 SDR's.

9 According to McGuffie, Fugeman and Gray, *British Shipping Laws*, Vol. 1, Admiralty Practice, para. 1224 on page 535: 'Costs are outside the limitation figures and are an additional liability'.

10 the *Joannis Vatis* (No. 2) [1922] P. 213.

11 the *Fanny* (1912) 28 T.L.

12 the *Empire Jamaica* [1957] A.C. 386

13 the *Lady Gwendolyn* [1965] 1 Ll. L.Rep. page 335.

14 See Article IV 5(c) of the Hague-Visby Rules and Article 13.1 of the Athens Convention on the Carriage of Passengers and their Luggage by Sea, 1974 and Article 25 of the Warsaw Convention on International Carriage by Air (as amended by the Hague Protocol).

15 This is in contrast to the Rules of the Superior Courts in England

16 See Judgment of Finlay, C.J. in *Tuohy v. Courtney* [1994] 3 I.R. 1 at 47.

Some Cost Issues in International Arbitration in Ireland

JAMES GILHOOLY, Barrister

The Arbitration (International Commercial) Act, 1998[1] has now come into operation, bringing into effect in the State the UNCITRAL Model Law on International Commercial Arbitration. In consequence, some sharp distinctions will emerge between domestic and international commercial arbitrations, not least in relation to costs.

Before going on to consider some costs aspects of international arbitrations, we should establish what an international commercial arbitration is. The Model Law is set out in the Schedule to the 1998 Act. Article 1 provides that the law is to apply to 'international commercial arbitration'.[2] A note indicates that the term 'commercial' is to be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not, and goes on to give a wide, but not exhaustive, range of examples. It is clear that any transaction which involves commerce in the very widest sense is covered. An arbitration is 'international' if the parties, when they enter into the arbitration agreement, have their places of business in different states; or the place of arbitration or the place of performance, or the place with which the subject matter is most closely connected is in a different state to the parties' place of business; or, finally, if the parties agree that the subject matter of the agreement relates to more than one country.[3]

As a general rule, the emphasis in arbitration is always on party autonomy and the parties to an arbitration agreement are free to make such agreement regarding the costs of the arbitration as they think fit.[4] However, an important limitation was placed on this freedom by statute, which rendered void any agreement to the effect that a party in any event pay his own costs of the reference or award.[5] This applied to all arbitrations governed by Irish law irrespective of the nature of the issues or the parties. This policy of the law is readily understandable where submission to arbitration may be forced on a party, perhaps a consumer, who is not on a position of equal bargaining power. Now, however, in international commercial arbitration, the parties will be completely free to reach such agreement as they wish.[6] The Arbitration Acts, 1954 and 1960 no longer apply to the procedural aspects of international commercial arbitration.[7]

In an arbitration, costs fall under two headings. The costs of the award and the costs of the reference, the latter being roughly equivalent to the party costs in litigation. The costs of the award are the costs of the arbitral tribunal itself and include such items as fees payable and travelling and other expenses reimbursable to the members of the tribunal, together with related expenses such as the fees of any administering institution, shorthand writers, translators, physical facilities such as hearing rooms and other incidental expenses. The costs of the reference will include the familiar items in a party and party bill, such as the fees of solicitors, counsel and experts, witness expenses, travelling expenses and so on.

Because of the confidentiality of the arbitral process, relatively few awards are published, so it is not possible to identify with confidence any general practice as to the treatment of costs in international commercial arbitration. Clearly, the costs of the award will have to be paid by the parties or one of them in any event. In arbitrations between states, the general practice appears to be that each party agrees to share the costs of the arbitral tribunal and bears its own party costs. This practice is often followed in large ad hoc arbitrations where the costs may be of relatively little significance having regard to the amounts or issues involved.[8] It appears also to be common in disputes submitted to the International Centre for the Settlement of Investment Disputes (ICSID). In the absence of agreement between the parties, ICSID has discretion regarding the award of costs[9] but seems to lean towards an even division[10] or the award of the costs of the arbitral tribunal to the successful party with each party bearing its own costs of the reference.[11] The latter is also a position commonly adopted in large ad hoc arbitrations, as the costs of the arbitral tribunal are relatively easy to ascertain while the costs of the parties may be relatively difficult to ascertain in the absence of some mechanism for taxation, other than by the tribunal itself. An example of this problem may be found in the arbitration rules of the International Chamber of Commerce (ICC) which handles the largest number of international commercial arbitrations. The rules provide that the 'reasonable legal and other costs incurred by the parties for the arbitration' are to form part of the costs of the arbitration and are to be the subject of an award.[12] If the tribunals are to tax and ascertain the party costs and there is no agreement between the parties, the process could easily be so time-consuming, and

therefore costly, that it would be more efficient to decide that each party should bear its own costs of the reference.

The issues just discussed have been addressed by the 1998 Act in a way that will assist those involved both in arbitrations which are subject to institutional rules and those of a more ad hoc nature. An agreement to arbitrate subject to the rules of an arbitral institution is deemed to be an agreement to abide by the rules of that institution as to how costs are to be allocated and as to the costs that are recoverable.[13] 'Arbitral institution' is not defined in the Act. Most countries have some kind of arbitral institution with rules, frequently framed by the local chamber of commerce, so the scope for adoption of rules is quite wide. It may be argued that in the hands of competent arbitrators, almost any set of rules will give reasonable results because they will be applied reasonably. Nevertheless, the rules of arbitral institutions differ quite considerably in the detail of costs matters, so careful consideration should be given to the choice of rules, whether at the stage of drafting a contract containing a submission to arbitration or a submission after a dispute has arisen.

In the case of the ICC, the costs of the award are calculated by reference to a scale contained in the institutional rules and on which administration fees and arbitrators fees are a percentage of the amount in dispute.[14] As noted above, however, it is left to the tribunal to ascertain the reasonable legal and other costs of the parties and make an award in respect of these. The London Court of International Arbitration (LCIA) which also handles a substantial number of international commercial arbitrations, takes a somewhat different approach. It sets out a schedule of fees and costs based for the most part on hourly rates. Tribunal members, for example, may command £800-£2,000 per day, and exceptionally more, depending on the LCIA Court's assessment of the general weight and complexity of the matter.[15] Unless the parties have agreed otherwise, the tribunal has power to award the costs of the reference but again, like the ICC, it is for the tribunal to ascertain and determine the costs 'on such reasonable basis as it thinks fit.'[16] The International Arbitration Rules of the American Arbitration Association (AAA), an institution handling a substantial number of US domestic as well as international arbitrations, provide for the fixing of costs of the award by the arbitral tribunal. The tribunal also has discretion to award 'the reasonable costs for legal representation of a successful party'.[17] There is no fixed rate for members of the tribunal; it is to be determined by agreement, or in default by the AAA-appointed administrator. As in the previous cases, it is for the tribunal to ascertain and determine the party costs. The UNCITRAL arbitration rules again permit the tribunal to fix the costs of the award and the costs of the parties, including in this case witness expenses and reasonable legal representation costs claimed in the arbitration.[18] Unless there is a schedule of fees published by the appointing authority, arbitrators fix their own remuneration 'of reasonable amount', taking into account the amount in dispute, complexity of the case, time spent and any other relevant considerations.[19] Unlike the institutional rules, the UNCITRAL Rules explicitly declare the principle that costs should follow the event.[20]

In exercising their discretion as to the award of costs, arbitral tribunals are bound to act judicially. They must apply the same principles when deciding upon the award of costs as are applied by the courts. The tribunal must confine its attention strictly to relevant facts and not depart from the rule that costs should follow the event without special reason, such as the extent to which a party has succeeded, gross exaggeration of the claim or deliberate protraction of the proceedings by obstructive conduct.[21] As the award of costs is essentially a procedural matter, the exercise of the discretion regarding the award of costs will be governed by any relevant mandatory provisions of the lex arbitri, as well as the agreement of the parties. Thus, in the case of an arbitration held in Ireland, the tribunal has to apply any mandatory provisions of Irish law which may be relevant. If the tribunal is to act judicially, it must surely take into account the same considerations regarding the award of costs as a court. It would seem, therefore, that in exercising a discretion on costs, the tribunal would have to have regard to the considerations described above and also such matters as a sealed offer or Calderbank letter. It has been suggested that the discretion of an international arbitral tribunal is wider than that of a court.[22] However, it is submitted that from the viewpoint of enforceability of the award, the better view is that the discretion should be exercised in the same manner as it would be by the national court of the place of arbitration.

The costs of the award are straightforward enough, especially in an institutionally administered arbitration. However, an arbitral tribunal, even one composed wholly or mainly of lawyers, may lack the expertise to fix the costs of legal representation. The 1998 Act, as noted above, gives the force of law to the institutional rules adopted. However, it will be clear that these rules for the most part leave it to the tribunal members to determine the costs, including those which they may have no expertise in fixing. The Act gives an opportunity to the parties to apply to the High Court for the determination of the recoverable costs of the reference as between the parties where there is no prior agreement and the parties do not consent to have them determined by the tribunal.[23] It also gives the opportunity to the parties to move the Court to review the costs of an award determined by the tribunal where there has been no prior agreement as to the amount or basis of ascertainment of these costs.[24] In such cases, the Court will presumably refer the determination of the amount of the costs to a taxing master. In drafting the Act, presumably these provisions were framed with regard to the need to respect party autonomy and the modern trend towards 'delocalisation' of international commercial arbitrations. One cannot help feeling, however, that a successful party who has made no prior agreement as to the amount or basis of ascertainment of costs or has successfully excluded the applicable provisions of any relevant rules is likely to get a better deal than one who has bound himself fully to any of the sets of rules referred to above.

The notion of reluctant parties to an international commercial arbitration and the recovery of costs leads us to a consideration of the question of deposits against costs. As noted by Professor Emmanuel Gaillard, national laws have very little to say on the question of deposits against costs, legislators undoubtedly believing that such matters will be settled by any arbitral institution concerned or by the parties and arbitrators themselves in ad hoc arbitrations.[25] Where an arbitral institution is involved in the process, although rules vary, for example as to the sum payable, the mode of computation and the effect of non-

payment, the general rule is that both parties are required to fund the reference from the beginning, depositing equal amounts by way of security for the institution's administration fees, the fees of the arbitrators and necessary outlay on the conduct of the proceedings. Clearly, arbitral institutions could not operate effectively nor would arbitrators accept nomination were there not some effective procedure in place to compensate them for their work. As discussed above, these advances may be on costs computed by reference to the value of the amount in dispute,[26] a combination of fixed fee and agreed or institutionally determined daily or hourly rates[27] or by reference to a published schedule.[28]

Where no arbitral institution is concerned, it is for the parties to negotiate with the tribunal in advance of appointment, what advances will be required and what will be the consequences of any failure to make them. Whilst the tribunal has some degree of security in the possibility of exercising a lien over its award, this is no security against the possibility that the proceedings will settle early.

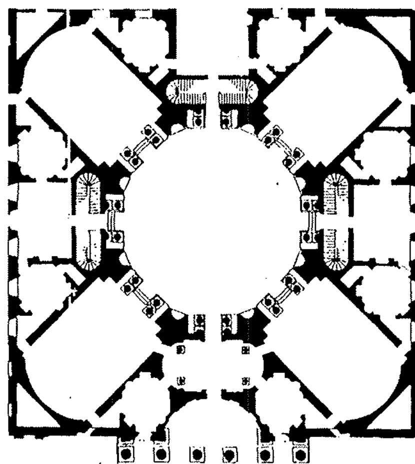
The tribunal, therefore, will generally require a deposit against costs of the award, to be placed in a separate bank account under the control of the tribunal. Unless the matter has been dealt with in some detail in the arbitration agreement, the ad hoc situation offers a reluctant participant considerable scope for the creation of difficulties.

Where a party fails to meet his obligations regarding deposits on costs, the favoured solution of the arbitral institutions mentioned herein, although it differs in points of detail, is in general to allow the party who wishes the reference to proceed to pay the full amount of the advance. This, of course, renders the process much more costly for the party having to foot the initial bill, usually the claimant. He has, however, generally no option but to pay the share of the recalcitrant party if he wishes the arbitration to proceed, as the result of failing so to do would usually be the suspension or termination of the arbitration with the loss of any non-refundable payments already made.[29] Similar provisions exist in the UNCITRAL rules.[30] The institution which appears by its rules best to favour the compliant party is the LCIA, which provides that the party paying the substitute payment is to be entitled to recover the sum paid immediately as a debt from the defaulting party;[31] and further provides that failure by a claimant or counter-claimant to pay the required deposit may be treated as a withdrawal of the claim or counter-claim as the case may be.[32]

Given that a recalcitrant claimant may thereby be deprived of his right of action, the question occurs, if a defendant fails to pay his share of the deposit should he not forfeit his right to proceed with his defence? The answer, it is submitted, is that the institutional rules quoted, in the event of default in payment, treat a claim or counter-claim as withdrawn (i.e. without prejudice to the right to raise it again) rather than irrevocably waived whereas a defendant denied the right to defend would be deprived of procedural due process when the justice of the case could be met by an appropriate award or apportionment of costs at the end of the proceedings.

Were the various rules to adopt the more draconian approach, it must be doubted whether an award made in such circumstances would be enforceable under the New York Convention on the enforcement of arbitral awards. As one of the great benefits of arbitration, as distinct from litigation, is the possibility of virtually worldwide enforcement, rules must always err, if at all, on the side of enforceability.

An interesting point arises concerning the interpretation of Section 11(2) of the 1998 Act, the provision which deems the agreement to arbitrate under institutional rules to be an agreement 'to abide by the rules of that institution as to how costs are to be allocated'. Depending on the precise wording of the rules concerned, it could well be open to a party who has had to pay the deposit for both sides to bring an action in the Irish courts (as the courts of the place in which the obligation characteristic of the arbitration agreement was to be performed) to recover the sum so paid in advance of an award in the arbitration and to enforce that judgment in other Brussels Convention states.



The other side of the deposit against costs coin is perhaps the issue of security for costs. Section 7(1) of the 1998 Act provides for the High Court to make a number of orders in relation to international commercial arbitrations. The effect is to treat an international commercial arbitration in Ireland for the purpose of a variety of interim and interlocutory orders pari passu with actions or other matters before the High Court. The orders referred to include an order for security for costs. A party is not to be ordered to provide security for costs solely on the ground of ordinary residence or domicile outside the State.[33]

The relevant Rules of the Superior Courts,[34] although they refer to the furnishing of security for costs by 'a party' do not in reality envisage such an order against a defendant.[35] Even a counter-claiming defendant will not be required to give security for the costs of a counterclaim which arises out of the same transaction, the reasoning being that such a counterclaim is in substance a defence.[36] In a more recent case in England, it was held that a counter-claiming defendant in a maritime arbitration should be required to give security for costs even though its counterclaim was in substance a defence.[37] The Court of Appeal accepted that the general rule was that if the counterclaim is 'a defence and nothing more than normally the discretion should not be exercised in favour of ordering security'.[38]

The court, however, then went on to hold that as it was 'mere chance' that one party had started the arbitration rather than the other, then if one got an order for security for costs, the other should too. It seems clear, however, that the court in effect was ordering a deposit against costs by both parties rather than a true order for security.[39]

It seems clear that the jurisdiction to order security for costs in international commercial arbitrations will be exercised sparingly. In a recent English case. the House of Lords analysed the principles applicable to the granting of security for costs in international

arbitration.[40] As Lord Mustill put it in the leading judgment in the case;

> "there is emerging a general measure of agreement about the spirit in which a local court should approach a problem such as the present: that it should aim to be at the same time supportive but sparing in the use of its powers."

He took the view that in approaching such a case, it was important to take account of the principle of party autonomy, so as to make the consensus of the parties in submitting their dispute to arbitration effective and also to have regard to the type of arbitration chosen. Applying these principles, from which the other members of the court did not demur, Mustill nevertheless found himself in a minority in holding that security should be refused. However, the majority decision (while understandable from a consideration of the justice of the situation) has been criticised[41] and it is respectfully submitted that the principles applicable are correctly stated in the judgment of Lord Mustill.

A final point worth considering in the context of costs issues in ICA is the question of VAT on arbitrators' fees. As a general rule, VAT is chargeable on the services of arbitrators. One would have thought, however, that the question of the place of supply of the services of arbitrators would be determined analogously with that of lawyers in accordance with the third indent of Article 9(2)(e) of the Sixth VAT Directive. That is to say, they would not be subject to Irish VAT if the parties paying the fees were not Irish-resident. The services would be subject to VAT in the state of establishment of the party concerned and it would be he who would be liable for VAT.

However, in a recent decision of the European Court of Justice, it was held that a lawyer arbitrator will, irrespective of the nationality or residence of the parties to the arbitration, be regarded as supplying his services in the place where he has his principal business establishment.[42] In doing so, indeed, the Court did not follow a very cogently reasoned opinion as to the correct interpretation of the directive by Advocate General Fennelly, reasoning that the correct interpretation of the Directive was what one would have thought was the obvious one, i.e. that the provision of his services as an arbitrator was merely part of his professional practice as a lawyer. However, now that the decision has been made, it has the implication for Irish lawyers acting as arbitrators that they must now charge VAT at the Irish rate, regardless of where the parties are domiciled or resident or where the arbitration is held.

This has obvious adverse implications for the choice of Ireland or indeed any other EU country as a venue for international arbitration and indeed for the choice of EU lawyers and other professionals as arbitrators.

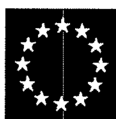
It has been suggested[43] that it would be open to Ireland (and the UK) to apply for a derogation under the provisions of Article 27(1) of the Sixth Directive (as a tax simplification measure) that lawyers (and indeed accountants, engineers, architects and other professionals likely to be appointed as arbitrators) should be subject to the same VAT place-of-supply rule on their activities as arbitrators as on their other professional activities. This is surely logical and if the authorities here are serious about promoting Ireland as a venue for international arbitration, it is to be hoped that they will take this suggestion on board with great alacrity. ●

---

1. No. 14 of 1998 ("the 1998 Act). Signed by the President on 20th May, 1998.
2. 1998 Act, Schedule, Article 1(1).
3. 1998 Act, Schedule, Article 1(3).
4. *Mansfield v. Robinson* [1928] 2 KB 353 at 359; *Prince v. Haworth* [1905] 2 KB 768 at 770;
5. Arbitration Act, 1954, Section 30(1)
6. 1998 Act, Section 11(1).
7. 1998 Act, Section 16.
8. See e.g., *Kuwait v. Aminoil* [1988] *Lloyd's Arbitration Rep.* 143
9. Washington Convention, Article 61(2).
10. E.g. *Amco Asia Corpn v. Indonesia* [1988] *Lloyd's Arbitration Rep.* 1 at 49.
11. E.g. *AGIP v. Popular Republic of the Congo* [1988] *Lloyd's Arbitration Rep.* 87 at 108.
12. ICC Rules (1998 Edition), Article 31(1) and 31(3).
13. Section 11(2).
14. See ICC Rules (1998 Edition), Appendix III.
15. LCIA Rules (1998 Edition), Schedule of Fees and Costs.
16. LCIA Rules (1998 Edition), Article 28.3.
17. AAA Rules (1997 Edition), Article 31.
18. UNCITRAL Arbitration Rules (1991 Edition), Article 38.
19. UNCITRAL Arbitration Rules (1991 Edition), Article 39.
20. UNCITRAL Arbitration Rules (1991 Edition), Article 40.
21. See Mustill and Boyd, *Commercial Arbitration* [2nd Edition], 395 sqq and *Metro-Cammell Hong Kong Limited v. FKI Engineering plc* [1997] *The Arbitration and Dispute Resolution Law Journal* 134.
22. See Redfern & Hunter, *International Commercial Arbitration* [2nd Edition] 411-412.
23. 1998 Act, Section 11(4) and 11(7).
24. 1998 Act, Section 11(5) and 11(9).
25. See *Preventing delay and disruption of arbitration,* ICCA Congress Series No. 5, Van den Berg Ed., Kluwer 1991, at p. 104.
26. E.g., as in the case of the ICC (see ICC Rules, Article 30 and Appendix III, Article 4).
27. E.g. AAA Rules, Articles 32 and 33.
28. LCIA Rules, Articles 24 and 28 and Schedule of Fees and Costs.
29. See ICC Rules, Article 30; AAA Rules, Article 33; LCIA Rules, Article 24.
30. See UNCITRAL Rules, Article 41.
31. LCIA Rules, Article 24.3. Whether this provision would invariably be enforceable must be open to question.
32. Ibid., Article 24.4; and see also ICC Rules, Article 30(4).
33. Section 7(3).
34. RSC, O.29.
35. *Leonard v. Scofield* [1936] IR 715. At p. 718, Johnston, J. described this as "a universal rule" and said that it would be "almost a mockery of justice" to require a defendant to give security for costs.
36. *Compania Naviera Vascongada v. Hall Limited* 40 ILTR 114.
37. *Samuel J Cohl Co. v. Eastern Mediterranean Maritime Limited (The "Silver Fir")* [1980] 1 Lloyd's Rep. 371.
38. Per Lawton, L.J. at p. 374
39. See the remarks of Lawton, L.J. about deposits against costs in Continental European arbitrations at p. 374.
40. *Coppée-Lavalin S.A./N.V. v. Ken-Ren Chemicals and Fertilizers Limited; Voest Alpine AG v. Ken-Ren Chemicals and Fertilizers Limited* [1994] 2 Lloyd's Rep. 109
41. See Beechey, *International Arbitration and the award of security for costs in England* [1994] *The Arbitration and Dispute Resolution Law Journal* 242 and Hill, *Security for costs in ICC Arbitration* [1995] *Lloyd's Maritime and Commercial Law Quarterly* 19.
42. Case C-145/96 Bernd von Hoffmanv. Finanzamt Trier [1997] E.C.R. I-4857 and see Travers, *The Value Added Taxation of Arbitrators' Services, Commercial Law Practitioner,* March 1998, 1.
43. Travers, op. cit., p.4

Recent judgments in the European Courts

Court Rules on Package Holiday Directives



Verin Für Konsumenteninformation v. Österreichische Kreditsversicherungs AG

Mr and Mrs Hofbauer booked a holiday in Crete with an Austrian travel agency. They had paid the full cost of the package including the air tickets and their half-board accommodation before departure.

At the end of their holiday, the owner of the hotel demanded payment in full for their accommodation and even prevented them from leaving the premises until they paid. The travel agency was insolvent and was no longer able to pay the hotelier.

Mr and Mrs Hofbauer were thus forced to pay for their accommodation a second time. When they returned and the travel agency's insurers refused to reimburse the money they had paid to the hotel, the consumer association brought an action on their behalf before the competent national court (the Bezirksgericht für Handelssachen Wien).

The association argued that Mr and Mrs Hofbauer were entitled to cover for 'the refund of money paid over' or for the expenditure necessary for the 'repatriation of the consumer' within the meaning of the Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours and that the insurers were therefore liable to refund those sums of money if the travel organiser became insolvent.

The national court therefore requested the Court of Justice to rule on the question whether the Directive could be interpreted in that way.

The Court observed that the purpose of the Directive was to protect consumers against the risks stemming from the payment in advance of the price of a package holiday and from the spread of liability between the travel organiser and the various providers of the services which in combination make up the package.

Accordingly, it considered that the Directive was intended to cover the situation in which a hotelier forces a holidaymaker to pay for the accommodation provided, claiming that he will not be paid that sum by the insolvent travel organiser. The risk involved for the consumer who has purchased the package holiday derives from the travel organiser's insolvency.

The Court concluded that, since the consumer had actually paid the cost of the accommodation twice over, first to the travel organiser and then again to the hotelier, the insurer's obligation was to refund the money paid over. The holidaymaker having been accommodated at his own expense, the sums he paid to the travel organiser would have to be refunded to him since, following the organiser's insolvency, the services agreed upon were not supplied to him by the organiser.

Court reduces fines in 'Cartonboard' cartel cases

Judgments of the Court of First Instance of 14th May 1998 in Case T-295/94 and others ('Cartonboard')

On 13 July 1994 the Commission adopted Decision 94/601/EC in which it found that 19 producers supplying cartonboard in the European Community had infringed article 85(1) of the EC Treaty and imposed fines on them on that basis. The total fines amounted to ECU 131,750,000 of which ECU 22,750,000 was imposed on the Swedish Company Mo Och Domsjö AB. These were the largest fines ever imposed in a competition case.

According to Article 1 of the Decision, 19 undertakings were held to have infringed Article 85(1) of the EC Treaty by participating, during a period which varied depending on the undertaking concerned but which ended no later than April 1991, in an agreement and concerted practice originating in mid-1986 whereby the suppliers of cartonboard in the European Community, inter alia, planned and implemented simultaneous and uniform price increases throughout the Community, reached an understanding on maintaining the market shares of the major producers at constant levels, subject to modification from time to time and increasingly from early 1990, took concerted measures to control the supply of the product in the Community in order to ensure the implementation of those concerted price rises.

According to the Decision, the infringement took place within a body know as the 'Product Group Paperboard' which comprised several groups or committees including the 'Presidents Working Group' (PWG), which brought together senior representatives of the main suppliers of cartonboard in the Community and the 'Joint Marketing Committee' which was set up at the end of 1987.

Procedure before the Court of First Instance

All the companies to which the Decision was addressed, except for Papeteries de Lancey and Rena, brought actions to annul the Decision. Laakmann Karton GmbH withdrew its action (Case T-301/94). Four Finnish undertakings, members of the trade association of Finnboard, and as such held jointly and severally liable for payment of the fine imposed on Finnboard, also brought actions against the Decision.

The Court has handed down individual judgments in respect of each undertaking. Of the courts findings, the following in particular are worthy of note.

Proof of the Undertakings Anti-Competitive Actions

In only one case (Enso-Gutzeit v. Commission) did the Court find that there was no proof of the undertaking's participation in the cartel. The Decision was therefore wholly annulled as regards that undertaking.

In cases involving applicants which had taken part in meetings of the PWG (Cascades, Finnboard, KNP, Mayr-Melnhof, MoDo, Sarrió, Stora and Weig), the Court found that the Commission proved that they participated in the constituent elements of the infringement, namely collusion on pricing, downtime and market shares.

In other cases, where the applicants submitted a plea to that effect, the Court held that the Commission did not adequately prove that they took part in the collusion on market shares. It therefore annulled Article 1 of the Decision to the extent that those applicants were held liable for participating in that aspect of the collusion. The Court stated that 'in order to be entitled to hold each addressee of a Decision, such as the present decision, responsible for an overall cartel during a given period, the Commission must demonstrate that each undertaking concerned either consented to the adoption of an overall plan comprising the constituent elements of the cartel or that it participated directly in all those elements during that period. An undertaking may also be held responsible for an overall cartel, even though it has shown that it knew or must have known that the collusion in which it participated was part of an overall plan and that this overall plan included all the constituent elements of the cartel.'

The Fines

In its judgments the Court of First Instance held, inter alia, that the general level of the fines adopted by the Commission was justified. The fines were imposed on the cartel ringleaders and its ordinary members at rates of 9 and 7.5% of their turnover on the Community cartonboard market in 1990 respectively.

The Court explained the requirements regarding the information which the Commission must set out in its decisions when it systematically uses particular criteria in order to calculate the amount of fines.

It should be noted that the 'Cartonboard' decision was the first decision in which the Commission reduced the fines imposed on undertakings where they had co-operated with it. Depending on the degree of co-operation displayed by an undertaking, the Commission reduced its fine by one-third or two-thirds.

The Court of First Instance considers that the reductions granted by the Commission for co-operation afforded to it during the administrative procedure, are justified only if the co-operation in question enabled the Commission to find an infringement more easily and to bring it to an end. Thus, an undertaking which expressly states that it is not contesting the factual allegations on which the Commission bases its objections may be regarded as having facilitated the Commission's task of finding and bringing to an end infringements of the Community competition rules.

Lastly, the fact that the Court found that undertakings which did not participate in meetings of the PWG, could not be held responsible for collusion on market shares has not led to a reduction in the fines imposed on those undertakings.

These cases involve the largest number of applicants and the highest total amount of fines since the Court of First Instance was created. In the exercise of its unlimited jurisdiction in regard to fines, the Court reduced the fines by a total of ECU 11,420,000 (which includes that of ECU 3,250,000 imposed on Enso-Gutzeit, the Decision having been wholly annulled as regards that undertaking). ●

DIRECT LINK SECURITY SERVICES

DIRECT LINK SECURITY SERVICES

Telephone: (01) 820 9334

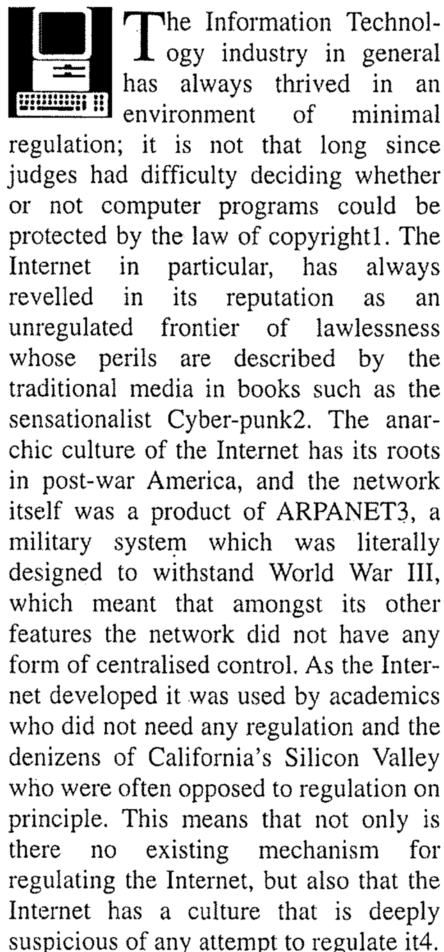
Mobiles: 087-645 855
087-230 1248

Prop: John Caffrey

• Retail/Static Guards •
• 24 Hour Mobile Patrol •
• Guard Dogs •
• Key Holdings •

The Regulation of the Internet

DENIS KELLEHER, Barrister



The Information Technology industry in general has always thrived in an environment of minimal regulation; it is not that long since judges had difficulty deciding whether or not computer programs could be protected by the law of copyright[1]. The Internet in particular, has always revelled in its reputation as an unregulated frontier of lawlessness whose perils are described by the traditional media in books such as the sensationalist Cyber-punk[2]. The anarchic culture of the Internet has its roots in post-war America, and the network itself was a product of ARPANET[3], a military system which was literally designed to withstand World War III, which meant that amongst its other features the network did not have any form of centralised control. As the Internet developed it was used by academics who did not need any regulation and the denizens of California's Silicon Valley who were often opposed to regulation on principle. This means that not only is there no existing mechanism for regulating the Internet, but also that the Internet has a culture that is deeply suspicious of any attempt to regulate it[4].

In the last few years the Internet has changed dramatically. Cheaper telecommunications (at least outside Ireland) have allowed huge numbers of people to connect to the Internet, and the advent of the World Wide Web and browser systems such as Netscape Navigator have allowed them to access Internet content with ease. The fact that millions of people are accessing the Internet would make governments interested in regulating the Internet, however the main motivation for the recent interest in regulation is the anticipation that considerable sums of money are to be made from electronic commerce. Electronic commerce is the term given to the sale of goods and services over the Internet[5] and it is expected that it will be a major global market place in the next few years. The European Commission has suggested that 'electronic commerce revenues on the Internet may increase to 200 billion ECU world wide by the year 2000.'[6] It notes that the US already boasts more than 250,000 'cyber-companies' using the Internet and that travel services and flower distribution services are a major success[7]. The manager of Microsoft's Interactive-Services division, has suggested that in 30 years time, 30% of all consumer sales will be on the Internet[8] and Bill Clinton, President of the USA, thinks that 'commerce on the Internet will total tens of billions of dollars by the turn of the century and could expand rapidly after that'[9].

Programmers, researchers and entrepreneurs are hard at work around the globe building the technology which will ensure that this bonanza can occur, but electronic commerce will never develop unless appropriate legal and regulatory safeguards are put in place to ensure that electronic commerce is as safe and predictable as shopping in a conventional supermarket. This process may be compared to the European Union initiatives to ensure that all consumers in Europe have the same rights and which gave rise to the Liability for Defective Products Act[10] and the Unfair Terms in Consumer Contracts Regulations[11]. However co-ordinating legislation over the 15 countries of the European Union is comparatively straightforward when compared with the problems likely to be encountered when trying to regulate Electronic commerce.

As the Internet is a global network ultimately any system of regulation will have to literally be acceptable to every country in the world. This illustrates the fact that Europe cannot regulate electronic commerce unilaterally, as the Commission itself acknowledges: 'new national legislation in diverse areas (for example encryption, digital signatures, data protection and privacy, contract law, new electronic means of payments) can create trade barriers which will hamper the development of electronic commerce at a global level.'

The Commission suggests that 'the community should further work through appropriate international forums and bilaterally with its major trading partners to establish a coherent global regulatory framework.'[12] It has also suggested the adoption of an international charter for electronic commerce which would be a multi-lateral understanding on a method of co-ordination to remove obstacles for the global electronic marketplace; be legally non-binding; recognise the work of existing international organisations; promote the participation of private sector and relevant social groups; and contribute to more regulatory transparency[13].

At the same time the Internet is dominated by the USA, a large proportion of the content on the Internet is based in the USA[14] and most if not all of the technology used on the Internet emanates from the USA. This has effectively given the USA the right to veto any proposals for the Internet

which they feel threaten their position and the Americans have made it clear that they will wield this veto. At the present time the European Commission has produced two major initiatives which relate to electronic commerce and the regulation of the Internet.

The European Initiative in Electronic Commerce[15]

This was published in April of 1997 the Commission suggests that 'the pace and the extent to which Europe will benefit from electronic commerce greatly depends on having up-to-date legislation that fully meets the needs of business and consumers'. The Commission suggests that the many potential electronic consumers are concerned about 'the identity and solvency of suppliers, their actual physical location, the integrity of information, the protection of privacy and personal data, the enforcement of contracts at a distance, the reliability of payments, the recourse for errors or fraud, the possible abuses of dominant position'. The Commission also suggests that these considerations will be heightened in cross-border trading. Many of these concerns will have to be dealt with by technical means, such as the provision of encryption systems but the Commission also intends to implement an 'appropriate regulatory framework by the year 2000' with the objectives of building trust and confidence and of ensuring full access to the single market. The creation of a single market is of course a primary aim of the European Union[16] and a series of Directives have already been adopted which can be applied to the Internet and electronic commerce. The Commission suggests that these include inter alia the Directives on:- Data Protection[17]; the Legal Protection of Databases[18]; and Contracts Negotiated at a Distance[19]. The recent Draft Directive on the harmonisation of certain aspects of copyright and related rights in the information society[20] must also be added to this list. To ensure that the European Union is provided with an 'adaptable and appropriate framework of legislation[21]' the Commission has proposed four principles to underpin future legislation.

- No regulation for regulation's sake
- Any regulation must be based on all Single Market freedoms
- Any regulation must take account of business realities
- Any regulation must meet general interest objectives effectively and efficiently

The Commission anticipates that this regulatory response will have to deal with different legal issues at each step of business activity so that electronic commerce can flow freely across national frontiers. So regulation will apply 'from the establishment of the business, to the promotion and provision of electronic commerce activities through negotiation and conclusion of contracts to the making and receipt of electronic payments'[22]. At the same time this regulatory approach will have to develop appropriate 'horizontal' policies on issues such as data security and

protection, appropriate protection for intellectual property rights and conditional access services and ensuring a clear and neutral tax environment. The Commission's Communication on *The Need for Strengthened International Co-ordination*[23] suggests that reform may be necessary in the following areas: VAT; jurisdiction; labour law; copyright; data protection; trade marks; authentication; consumer protection; terms and conditions of contract; and harmful and illegal content.

The Green Paper on Regulation[24]

In a Green paper published at the start of December 1997, the European Commission sets out how it thinks the regulation of the 'information society' will develop[25]. The Commission anticipates that sectors such as the Internet, cable and satellite television and telecommunications will converge to form one new sector and also anticipates that devices such as telephones, computers and televisions will start to adopt one anothers characteristics. It is mindful of the fact that there are 650 webcast radio stations and 270 'Real-Video' enabled sites on the Internet offering video material of current European and US broadcasters[26]. The Commission has suggested the following principles for future regulatory policy in such converged sectors:

- Regulation should be limited to what is strictly necessary to achieve clearly identified objectives
- Future regulatory approaches should respond to the needs of users
- Regulatory decisions should be guided by a need for a clear and predictable framework
- Ensuring full participation in a converged environment
- Independent and effective regulators will be central to a converging environment

The most interesting proposals in the Green Paper are the options suggested by the Commission for Regulatory Structures for the Internet and other 'converged' sectors. The first option is to build on current structures, regulators such as those for television or telecommunications would be left in place, but it would be extended on an ad hoc basis principally at national level. The commission suggests that this approach would minimise the need for change in the near future and could be effective in providing a predictable regulatory framework for investment. However it might leave certain anomalies in place which could deter investment. If Ireland's telecommunications regulator would also become the regulator of the Internet, this approach would involve minimal legislative change but it is hard to believe that it would be a long term solution.

The second option is to develop a separate regulatory model for new activities, which would coexist with telecommunications and broadcasting regulation. New services and activities such as the World Wide Web would be 'carved out' and placed under a distinct set of rules. The result of this would be to move away from technology-based or platform-based market boundaries for a wide range of services, whilst allowing the framework for traditional core

telecommunications and broadcasting activities to be adapted more gradually. The Commission suggests that the principle difficulty with such an approach is determining the boundaries of what is part of the lightly regulated new service world and what remains subject to traditional regulation, which could give rise to litigation. The Commission suggests that this approach may prove to be impractical.

Finally the Commission suggests that a new regulatory model could be progressively introduced to cover the whole range of existing and new services. This far-reaching option would require a fundamental reassessment and reform of today's regulatory environment. The Commission suggests that this option would require a broader definition of communication services to supersede those of telecommunications and audio-visual services within Community legislation. What the Commission refers to as 'proportionality' would be a necessary feature of the new environment given that within such a broad definition, the level of regulation would have to be matched to the nature of the service and the intensity of competition. The Commission acknowledges that such an option might be considered to be too ambitious but it suggests that it would not necessarily lead to sudden disruptive change. The approach could be gradual, focusing initially on priority areas which require a consistent regulatory approach (such as network operation or issues relating to access). There would also have to be sufficient time for a change-over from the old to the new regime[27].

Some may be tempted to query the motives of the Commission in advocating a central regulatory body, if such a body were to be created the Commission would probably run it whether directly or indirectly. Although the Commission's proposals are ambitious and might even be successful, Europe cannot regulate the Internet unilaterally. It is hard to believe that the Commission could simply create such a regulatory body without at least consulting with the USA, to say nothing of the rest of the world.

Conclusion

The main criticism of the Commission's proposals is that Europe does not need new regulatory structures for the Internet, but rather companies producing software, content and technology for that market and capable of competing with the USA while doing so. The danger is that European Regulation may stifle the emergence of such an industry, and to be fair, these dangers are acknowledged by the Commission:

"If Europe can embrace these changes by creating an environment which supports rather than holds back the process of change we will have a powerful motor for job creation and growth, increasing consumer choice and promoting cultural diversity. If Europe fails to do so, or fails to do so rapidly enough, there are real risks that our businesses and citizens will be left to travel in the slow lane of an information revolution which is being embraced by businesses, users and by Governments around the world"[28]. ●

1 Computer *Edge -v- Apple Computer* 1986 FSR 537
2 Hofner & Markoff, *Fourth Estate*, 1991.
3 See the Judgment of the US Supreme Court in *ACLU -v- Reno*. (check website www.law.cornell.edu)
4 See generally, Kelleher & Murray, *Information Technology Law in Ireland*, Butterworths (Dublin) 1997.
5 For example books can be ordered over the Internet, the prime example being Amazon.com.
6 Communication from the Commission, *A European Initiative in Electronic Commerce*, Brussels 16.04.1997, Com (97) 157 final, p4, citing Activmedia, Romtec, in European Information Technology Observatory 97.

7 ibid p5.
8 Quoted in the *Economist, Electronic Commerce Survey*, p25, May 10th 1997
9 Memorandum of Bill Clinton, President of the USA on Electronic Commerce addressed to Heads of Executive Departments and Agencies, 1 July 1997. See http://www.whitehouse.gov.
10 OJ L 210 7/8/85, p29.
11 SI 27/1995.
12 ibid p20.
13 Communication from the Commission on the need for strengthened international co-ordination, COM (98) 50, p11-12.
14 Some 60% of the total content of the Internet was American at the time of the judgment of the US Federal District Court in *ACLU -v- Reno*.
15 A Communication from the European Commission, Brussels, 16.04.97, Com (97) 157 final.
16 Treaty of Rome.
17 Directive 95/46/EC, OJ L 281 23.11.95, p31
18 Directive 96/9/EC, OJ L 77,27.03.96, p20
19 Directive 97/7/EC
20 Brussels, 10th December 1997.
21 ibid p14.
22 ibid p15-17.
23 European Commission, DG XIII, Com (98) 50.
24 European Commission, Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for regulation towards an information society approach., Brussels, 3 December 1997, COM (97) 623, p2. The Commission liked this section so much they repeat it on p48.
25 The Green Paper is available at http://www.ispo.cec.be/convergencegp/97623.htm. Submissions on the Green Paper may be sent to the Commission until April 1998, a report will then be completed on these submissions by June 1998, the Council and the European Parliament are expected to adopt any resolutions on this matter in the second quarter of 1998 and in response the Commission could prepare a convergence action plan by the end of 1998.
26 ibid p12-13
27 ibid p47
28 European Commission, Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for regulation towards an information society approach., Brussels, 3 December 1997, COM (97) 623, p2. The Commission liked this section so much they repeat it on p48.

Section 10 of the Companies Act 1990 and the Investigation of Companies

BENEDICT O'FLOINN, Barrister

With the current level of unprecedented expansion in private business, one can expect ever-increasing use to be made of the power of the Court (and, under the Companies Act 1990, the Minister) to appoint inspectors to scrutinise the operation and ownership of the corporate sector.

The precise scope of any such inquiry will, in large part, depend upon the factual backdrop to the appointment and whether it is made by the Court or the Minister. Similarly, wider consideration of natural and constitutional justice may arise - an adequate analysis of which would require substantially more space than a single article allows.

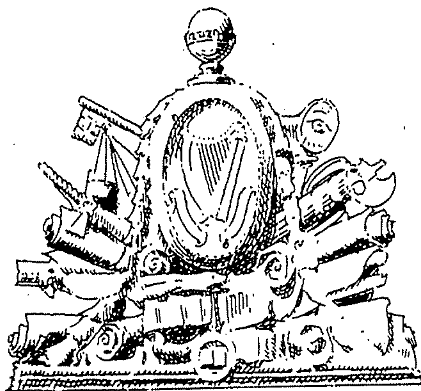
However, the principal statutory provisions governing the conduct of an investigation are set out in section 10 of the Act and it is with that specific provision, therefore, that this article is concerned.

Section 10 (1) of the Companies Act, 1990 states;

> 'it shall be the duty of all officers and agents of the company and of all officers and agents of any other body corporate whose affairs are investigated by virtue of section 9 to produce to the inspectors all books and documents of or relating to the company or, as the case may be, the other body corporate which are in their custody or power, to attend before the inspectors when required to do so and otherwise to give to the inspectors all assistance in connection with the investigation which they are reasonably able to give.'

The Production of Books, Documents and Information relating to the Company

Sub-section (1) imposes two obligations. The first is to produce all books and documents. While the books of the company might be fairly be said to consist of no more than those accounts, returns and other records which the company is obliged to maintain in accordance with the Acts, the inclusion of the word 'documents' confirms that a much wider field of inquiry is contemplated. Indeed, in *Chestvale Properties Ltd. and Hoddle Investments Ltd. -v- Glackin* [1993] 3 IR 35, the Court confirmed that an inspector was entitled to demand documents, the ownership of which was vested in other companies. On the facts of that case, Murphy J (at p54) rejected the contention that, where the class of documents requested was expressed in broad and general terms, it constituted an abuse of the inspector's statutory powers, although he implicitly recognised that, in other circumstances, it might;



> 'Whatever argument might be constructed on the basis of any such analysis, the reality is that both the bankers and the solicitors were able to comply with the demand and within the time limits prescribed by the inspector. Neither the bankers nor the solicitors raised any objection based upon administrative difficulties. Their only concern was to ensure that, in performing the obligations which appeared to them to have been imposed by statute, that they did not neglect the duty which they had to their clients or former clients as the case may be.'

Where the inspector has been appointed by the Court, accounts held by directors may also be scrutinised (sub-section 3). The wide meaning given to 'accounts' in that sub-section might arguably imply a more confined meaning for 'books and documents' earlier in the section, although one would be reluctant to predict that a court would uphold such reasoning.

Sub-section (1) itself is restricted to the books and documents 'of, or relating to the company' that is, the company under investigation or another company under investigation by virtue of section 9. The latter section confirms that the Court may approve an investigation into the affairs of related companies, which term connotes a holding company or a subsidiary (although for a precise definition of the term, the reader is referred to section 140(5) of the Act). Notwithstanding the fact that section 9 provides for a prior application to court in circumstances where an inspector thinks it necessary for the purposes of his investigation, such an application may not be necessary where the investigation is known by the inspector to be the logical consequence of his

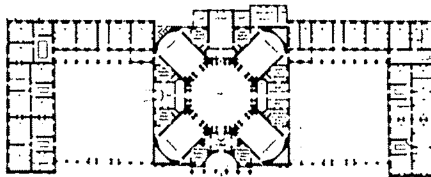
terms of inquiry (*Lyons -v- Curran* [1993] ILRM 375) a distinction which, while it does not do violence to the meaning of the section, betrays the indulgence with which the inspector's actions may be viewed by the Court. Indeed, the manner in which the Court may vindicate inquiries which are much more wide-ranging than originally warranted is amply demonstrated in both *Desmond & Dedeir -v- Glackin (No. 2).* [1993]3IR 67 and *Probets & Freezone Investments Ltd. -v- Glackin,* [1993] 3 IR 134 where, in the context of an inspector appointed under section 14, inquiries were made into both personal records and what appeared, at first blush, to be unrelated companies (in the sense meant by section 9) - although under the express provisions of section 17, the effect of section 10 is to be applied to bodies which, although incorporated outside the State, are or have carried on business therein.

Section 23 of the Act confirms that nothing in section 10 or the other section contained in Part II of the Act compels the disclosure by any person of any information of which he would, in the opinion of the Court, be entitled to refuse production on grounds of legal profession privilege[1]. Nevertheless, the duty to co-operate with the inspector clearly overrides the duty of confidentiality which a banker owes to his client, *Glackin -v- Trustee Savings Bank,*[1993] 3 IR 55. As it was put by Costello J (at p62-3);

> 'The Oireachtas has made perfectly clear, to my mind, what people... are required to do. They are required to assist the inspector... They are not entitled to ask their customer whether or not the customer objects.'

This unequivocal statement may require modest reassessment in the light of the recent decision of the Court in *Haughey -v- Moriarty & Ors,* High Court, 28th April 1998. Although the case was concerned with the powers of a tribunal of inquiry established under the Tribunal of Inquiry (Evidence) Acts 1921 - 1997, it is noteworthy that the Court held it to have been inappropriate for the tribunal in question to compel banking institutions to produce accounts held by individuals named in its terms of reference without first allowing the account holders an opportunity of challenging the orders by virtue of which discovery was to be made. The Court expressly refrained from determining whether the right to confidentiality was an unenumerated right protected by An Bunreacht as well as a contractual obligation owed by the bank to its customers - although this distinction may merely serve to place a greater onus on the party asserting a public interest in disclosure rather then prevent disclosure altogether.

The requirement to produce is confined to books and records in the 'custody or power' of the officer or agent. The first of these terms presents little difficulty. As to the latter, in accordance with the principles enunciated in *Bula -v- Tara Mines,* [1994] 1 ILRM 111 (at p113) a document is within the power of a party if he has an enforceable legal right to obtain sight of it from the person who actually holds it without obtaining the consent of any other person. Thus a nominal ledger, prepared by an accountant while in the employment of a party required to discover all relevant documents to the Revenue Commissioners, was held to be within his 'power'; *Quigley -v- Burke,* Supreme Court, 7th November 1995.



The Requirement to Attend before the Inspector

The second obligation imposed by subsection (1) requires all officers and agents to attend before the inspector when required to do so and otherwise to give all assistance which they are reasonably able to give. Sub-section (4) permits the administration of an oath to such persons by the examiner. On the authority of *Re Readbreat Preserving Company (Ireland) Ltd.,* 91 ILTR 12, such an investigation may take place in private.

Murphy J adverted to a practice that has subsequently become common to the conduct of tribunals of inquiry - namely that of dividing inquiries into a 'closed' investigative phase followed, if deemed necessary by a public hearing (in Chestvale -v- Glackin cit. sup. (at p51)). However, following the decision in In re Countyglen plc [1995] 1 IILRM 213, the question appears to have been resolved in favour of investigations proceeding in private.

R -v- Harris [1970] 2 All ER 746 and other English authorities suggest that a person thus examined may not be relieved of the obligation to answer a question put to him simply by reason of the fact that the answer might incriminate him - a proposition which must now be considered in the light of the case of *Saunders -v- The United Kingdom* (43/1994/490/572) heard by the European Court of Human Rights. This is an important consideration. Section 18 states that an answer given by a person to a question put to him in exercise of powers conferred by section 10 may be used in evidence against him - a point which is emphasised in the context of an inspector's report itself, which pursuant to section 22 is said to be admissible in any civil proceedings as evidence (a) of the facts set out therein without further proof unless the contrary is shown, and (b) of the opinion of the inspector in relation to any matter contained in the report.

Furthermore, the swearing of an affidavit or filing of a statement cannot prevent the inspector from undertaking further examination nor even place an onus on him to show a prima facie case as to why the deponent should be disbelieved; *Probets* cit. sup.

In this jurisdiction, the Supreme Court have considered what is popularly described as 'the right to silence' and have found it to be the corollary of the freedom of expression protected by Article 40 of An Bunreacht: *Heaney -v- Ireland* [1996] 1IR 580. Although section 10 was cited in *Heaney* as an example of legislative intrusion upon this right, there was no detailed consideration of the provision or its interface with any constitutional right to silence. Indeed, even in the wider sphere, it is difficult to predict the effect of this re-characterision of what has hitherto been described simply as a privilege against self-incrimination - although, in applying *Heaney,* McGuinness J. in *Gilligan -v- Criminal Assets Bureau,* High Court, 26th June 1997 re-emphasised (at 59 et seq.) the Supreme Court's finding that the right is no more absolute that the privilege before it and will, in appropriate cirmumstances, be set aside in favour of the achievement of wider policy objectives.

Where the inspector and the officer

ıd/or agent differ as to what informa- ɔn may be 'of assistance in connection ith the investigation' it is the honest ɔinion of the officer or agent which is ıe determing factor. However, the ɜgree to which an opinion is honestly ɜld will clearly relate to the level of ɜtail contained in the inspector's ɜquest; *Probets -v- Glackin* cit. sup. In ther words, the scope for the inspector nd the officer or agent to differ as to the ıformation to be furnished will be onsiderably narrowed if the request for ıformation and /or questioning is learly defined and specific rather than eneral and wide-ranging.

Jpon Whom does the Obligation rest?

Pursuant to sub-section (7) the words 'officers and agents' include past, as vell as present, officers and agents. The ubsection goes on to state that 'agents' nclude the company's bankers, solicitors and persons employed as auditors, vhether they are officers of the company or not. Meanwhile, section 2 of the Companies Act, 1963 states that the vord 'officers' embraces both directors ınd secretary within its ambits.

The class of person who may be required to comply with section 10(1), already wide, is broadened considerably by sub-section (2). This provides that a person other than an officer or agent of the company or other body corporate who is or may be in possession of any information concerning its affairs may be required to comply with the obligation to furnish books and records and generally assist the investigation.

Having regard to the latitude permitted in some of the cases cited above, there must be a very real concern that inspectors may embark upon costly and open-ended scrutiny of individual employees and advisors. On the basis of *Quigley -v- Burke*, cit. sup., it seems clear that the documents prepared by an employee during the course of his employment are within the 'power' of his employer for the purposes of discovery to the inspector. In order to prevent an inspector inquiring into the affairs and records of individual employees therefore, two hurdles must be surmounted. Firstly, that the employee does not constitute an officer or agent for the purposes of the Act and does not fall within the ambit of sub-section (2) and secondly, that such documents as may exist, were prepared or relate to affairs outside the scope of his employment.

As in all investigations the rules of natural and constitutional justice form a bulwark against patently excessive or unwarranted investigation or crudely managed procedures which fail to afford the officer or agent an opportunity to contest any allegation that may be made. However, the onus which an aggrieved party must discharge if he is to establish that the inspector has acted unreasonably is a heavy one; *O'Keefe -v- An Bord Pleanála* [1993] 1 IR 39. In England and Wales, the equivalent statutory provision has been construed in such a fashion as to allow the investigation of a journalist; *Re an inquiry under the Company Securities (Insider Dealing) Act, 1985* [1988] AC 660. On that basis there seems little hope that a court may be persuaded that the breadth of inquiry per se is unreasonable and ought to be curtailed. However, in the context of tribunals of inquiry into the affairs of Charles Haughey, Mr Justice Geohegan appears to have recognised the potential harm which unfettered inquiry may cause. ●

1 This section also makes important provision for the protection of banking records in the context of an investigation by an officer duly authorised by the Minister.

Computer Training for the Law Library

The Bar Council has arranged for Computer Training courses to be run in the Distillery Legal Research Centre.

Courses are being run in Microsoft Word for Windows 95 (Word Processing) at both Elementary and Intermediate levels. The Elementary course includes a basic introduction to computers.

Other courses available will include Excel (Spreadsheet) and Internet/Mail. The courses will commence on 1st September 1998.

As places are limited you are advised to book early. A basic 10 hours course run over 4 days costs £130. Courses are kept small to ensure maximum individual attention.

For further details contact Eileen or Aisling at:

Ashfield Computer Training

Tel: 492 6708 or 490 0866 Fax: 490 0871

POWERS OF ATTORNEY ACT, 1996, *Annotated by Brian Gallagher*, Round Hall, Sweet & Maxwell, p/b £17.00.

Mr. Gallagher's book is an annotated version of the Powers of Attorney Act, 1996 (hereafter 'the Act'), and includes Appendices which contain Regulations made pursuant to the Act and a Practice Direction on enduring powers of attorney (hereafter 'EPAs').

The EPA is an innovation of the Act which is, in part, loosely modelled on the UK Enduring Powers of Attorney Act, 1985. It is a form of power of attorney which subsists notwithstanding the subsequent mental incapacity of its donor. An EPA allows the donor to empower his attorney to do such things as he (the donor) can lawfully do by attorney, and in the event of the donor's mental incapacity, to make certain personal care decisions relating to him. Prior to the Act, powers of attorney automatically determined, inter alia, upon the donor's mental incapacity. The Law Reform Commission had recommended the introduction of the EPA in this jurisdiction as far back as 1989 (LRC31 - 1989).

As practitioners will be aware, the Act and its Regulations contain very detailed provisions relating to EPAs. The Act also contains, at Part III, provisions dealing with powers of attorney generally, in consequence of which it goes on to repeal, at Part IV (at Section 25 (as amended)) those provisions of the Conveyancing Acts, 1881 and 1882 which heretofore applied to powers of attorney.

Being an 'annotated statute', the main body of Mr. Gallagher's book, unsurprisingly, follows the layout of the Act. He provides an 'Introduction and General Note' towards the beginning of the Act, and further annotations ('General Notes') appear at the start of each Part (except Part II) and at the end of each section within the Act. These annotations are, in general, very useful, and the author not infrequently cross-references other pertinent sections of the Act and the Regulations. Mr Gallagher's involvement in the Conveyancing Committees of the Law Society and the Dublin Solicitor's Bar Association , both of which bodies made representations in respect of the draft Bill, is evident from a number of annotations.

The author draws upon extracts from Dail Debates as a means of clarifying the meaning of, or intention behind, certain less than clear statutory provisions. He compares the final version of several statutory provisions with provisions in the draft Bill (where different) and explains the background and reasoning behind some of those amendments, again by reference to relevant Dail Debates.

The author usefully highlights certain anomalies in the Act, flagging provisions which may give rise to uncertainty in the future. Where possible, he makes helpful comments and practical suggestions in respect of such matters. For example, he notes that there is some uncertainty as to whether applications for registration of EPAs should be made in the first instance to a Judge of the High Court or to the Registrar of Wards of Court. He goes on to say that while the Practice Direction on EPAs indicates that such applications should be made to a Judge of the High Court, the 'generally accepted viewpoint' is that they should be made to the Registrar of Wards of Court, and an amendment to the Rules of the Superior Courts to that effect is anticipated.

Mr. Gallagher points out that the definition in the Act of 'personal care decision' (a decision in respect of certain specified aspects of a donor's personal welfare which may be included in an EPA) does not include decisions regarding medical treatment. Thus an attorney cannot be empowered to make a decision to terminate medical intervention upon the person of the donor.

The author further highlights a potential shortcoming in the definition of 'mental incapacity' in the Act. It appears that there is an emerging practical problem in this regard, namely the position of stroke victims - persons who may be very seriously physically incapacitated but often without any mental incapacity. Clearly there may be practical difficulties in obtaining instructions from such persons and perhaps indeed there is a case for extending the procedure for EPAs to such cases.

The Appendices to the book comprise, as briefly mentioned earlier, Regulations and a Practice Direction from the President of the High Court (undated) relating to applications under the Act and the Regulations. These Regulations set out prescribed forms for EPAs (general) and EPAs (personal care decisions only) and forms of Notice of Execution of EPA and Notice of Intention to Apply for Registration of EPA.

The absence of a table of cases and of copious case references within the book (just 11 cases are cited) is not due to any lack of diligence on the part of the author. Rather it is at least partly a function of the relative youth of the Act and, of course, the novelty of the EPA in this jurisdiction. Indeed, despite the implementation of similar provisions relating to EPAs in England and Wales some 11 years earlier, I am aware of little more than half a dozen relevant reported decisions in that jurisdiction since 1985.

To the back of the book is a short, but nonetheless helpful, index of topics covered in the Act. I have to confess, however, that I tested the index by searching for only one item - 'disclaimer of an enduring power' - but found to my disappointment that I was directed only to section 5(10) of the Act, but not to section 11(1)(b) which also deals with the topic. Practitioners will also note a typographical error in the author's 'Introduction and General Note' where the Enduring Powers of Attorney Act in the U.K. is twice referred to as being a 1995 rather than a 1985 statute. Finally, confusion will be avoided if, in section 13(2)(b) in the book, the word 'recreated' is corrected to read 'created' (a typographical error which also appears in the Irish Current Law Statutes Annotated).

The above are, however, relatively minor defects. Even without the author's useful annotations, this book would be an invaluable asset bringing together as it does the Act, the Statutory Instruments made pursuant to it and the Practice Direction on EPAs. It also incorporates subsequent amendments to the Act contained in the Family Law (Miscellaneous Provisions) Act, 1997 and the Family Law (Divorce) Act, 1996.

This book will prove a very useful addition to the library of every practitioner who has occasion to advise on or draft powers of attorney, including EPAs.

—Gregory Bracken, Barrister

SUBSCRIBERS

Subscriptions are now due for the next volume of the Bar Review (October 98 to July 99), £76.23 inclusive of VAT ,and airmail postage. Please make all cheques payable to Law Library Services Ltd. Address: The Bar Review 158/9 Church Street, Dublin 7.

FINIS

Long Life 2000

Agent For

"THE COMPANY OF THE FUTURE"

Unit 6
Palmerstown Business Park
Dublin 20

Telephone: 623 7323 Fax: 623 7324
VAT No. 82656491

For further information contact: Eric Lawlor

Suppliers of Superior Quality Products and Services to:

The Bar Council
Law Library Building
Church Street, Dublin 7. Ireland

ALBRIGHT

ELECTRICAL CONTRACTORS

Unit 6
Palmerstown Business Park
Dublin 20

Telephone: 623 7325 Fax: 623 7324
VAT No. 82656491

For further information contact: Richard Shortall

To all members of the legal profession

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

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

WE OFFER

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

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

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

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

PADRAIC HANNON
MANAGER

EBS
BUILDING SOCIETY