The Bar Review

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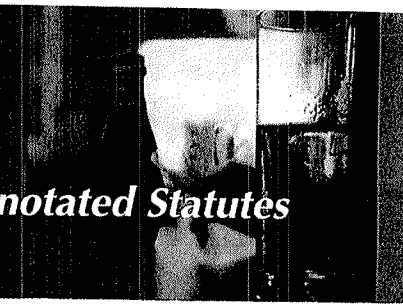
LIQUOR Licensing Law

part of the ***Butterworths Irish Annotated Statutes***



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PRIORITY ORDER FORM :

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NEWS
& King's Inns News

Speakers at the Bar Council Crime and Punishment Conference.

Brendan Howlin TD, Barry Scheck, Rory Brady SC, Michael Howard QC, MP, Ivana Bacik, Eamon Leahy SC.

New Judicial Appointment

Maureen Clark SC has been appointed an ad-litem judge of the International War Crimes Tribunal for the former Yugoslavia. She is the first ever Irish judge to be appointed to this Court, on the recommendation of the Government. It is the first world court established by the United Nations for the prosecution of war crimes.

CLASP

The Concerned Lawyers Association is holding a summer party in the Law Society Gardens, Blackhall Place, Dublin 7 on Friday 20th July 2001. Tickets are available from Dermot Manning, tel. (01) 817.3985 for £20 (£15 for devils and apprentices)

Irish Moot Court Competition

The final round of the Irish Moot Court Competition, which is sponsored by the Bar Council and Round Hall Press, took place in the Supreme Court on Friday 6th July 2001. Judges included Mr Justice Niall Fennelly (in the chair), John Cushnihan QC, Chairman of the Northern Ireland Bar Council, Rory Brady SC, Chairman of the Bar Council, Ms Justice Mary Laffoy and Mr Justice Brian MacMahon.

This was the seventh year of the competition and featured teams from The Honorable Society of King's Inns, The Solicitor's Apprentice's Debating Society of Ireland, University College Galway and the Institute of Professional Legal Studies, Belfast.

Annual General Meeting

The Law Library AGM is taking place on 23rd July in the main library. This is open to members only.

PILOT SCHEME TO REPORT ON FAMILY LAW CASES

The Court Services have established a pilot project to report on family law cases. The scheme will run in Dublin only, in the Circuit Court and the District Court. The purpose of the pilot project is to put in place a reporting system which will attempt to balance the right to privacy of the parties concerned with the right to a fair, transparent and accountable system of justice in the family law area. It is also an aim of the scheme to collect and collate statistics from the family law courts to guide future policy reform and provision of services in the family law area.

It is intended that the project will be of one year's duration, and it is hoped that it will be underway by July 2001. Based upon monitoring and evaluation during the pilot phase, consideration will be given to its more general expansion, or otherwise, prior to the expiration of the project in 12 months time. The Court Service has appointed Ms Siobhan Flockton BL as the Family Court Recorder for the twelve month pilot period.

The Recorder will only attend in Court with the consent of the individual trial judge and all of the parties to the litigation. Where a presiding trial judge has consented to the Recorder being present during the case, the judge concerned shall order that the "in camera" rule in regard to the case would be restricted in so far as it was necessary for the Recorder to be present in Court and to obtain and record information in relation to the case. It is intended that any trial judge may review his or her Order in relation to recording the case if it emerges during the course of the case that the case, because of its individual facts, should not be recorded at all, or that some specific aspect of the case should not be recorded at all.

In addition to the consent of the presiding trial judge, the consent of all the parties to the litigation would be required. In order to avoid unnecessary strain and tension to the parties, it is intended that they would be asked well in advance of the trial date to give their consent to allow the Recorder to be present in Court. For this purpose it is hoped, in so far as the Pilot Project relates to the Dublin Circuit Court, that a form would be sent out to litigants at the notice of trial stage of the proceedings. The form will explain the role of the Recorder as well as the type of facts that she may record in the course of the proceedings, and will request litigants to give their written consent in advance of the hearing to the Recorder being present. It is hoped to afford litigants in District Court proceedings advance notice to request to allow a Recorder to attend a particular hearing. This would have to be done bearing in mind the absence of pleadings, and the much shorter period prior to the trial of an issue, in the District Court.

The Recorder will not report details of the personal and intimate aspects of the lifestyle of the parties involved. Further, the following matters will not in any circumstances be published as part of the information about a case:

* The name, title or alias of either party.
* The address or location where the person resides or works.
* A physical description or style of dress of the person.
* The employment or any position held by the person.
* Any particulars that would be sufficient to identify that person.

It is intended that the Recorder will maintain a close liaison with the presiding judge as well as with the barristers, solicitors and litigants involved in each case recorded.

The role of the Recorder will be to record selected family law judgments containing sufficient details to enable the judgment to be understood and to be of use to legal practitioners and others. The Recorder will record in brief how and why a judge arrived at a particular decision. She will submit monthly statistical information on family law cases and report in greater detail on selected judgments to the Court Services Information Office, which will arrange in turn to have this information distributed to judges, legal practitioners and to the media/public, again on a monthly basis.

The Court Services have established a Monitoring/Review Committee. The Committee is chaired by his honour Judge Michael White and includes representatives from the judiciary, the Bar Council, the Law Society and the Court Services. The Monitoring and Review Committee has already met on a number of occasions prior to the commencement of the scheme, and it is intended it will meet on a monthly basis or such other intervals as the Committee shall decide. Its function will be to oversee the commencement, implementation and development of the Pilot Project and to evaluate the same on an ongoing basis. It will also deal with any issues or difficulties that may arise in the course of the project, and will make recommendations to the Court Services as to what changes, if any, ought to be introduced during the Project. The Pilot Project will be administered by the Director of Corporate Services, Mr Brendan Ryan BL.

This new scheme is very much to be welcomed. There has been much criticism in the past of the manner in which the "in camera rule" precludes information passing into the public arena in relation to family law matters. This scheme tries to strike a balance between the need of litigants for privacy, and the need of the public to know how family law is being administered in the Court system. In addition to providing much needed information on the nature and development of family law in Ireland, it is to be hoped that the Recorder's work will also contribute to greater transparency and consistency in the administration of justice in family law proceedings. ●

SECTION 218 OF THE COMPANIES ACTS 1963-99: RECOVERY OF POST-PETITION CHEQUE PAYMENTS

Micheál O'Connell BL considers the law relating to the honouring of company cheques subsequent to the presentation of a winding up Petition. He examines the implications for banks of the recent High Court decision in Re Industrial Services Company (Dublin) Limited (In Liquidation)[1] and questions whether the current approach meets the policy behind section 218 of the Companies Acts.

Background

Section 218 of the Companies Acts 1963-99 provides as follows:

> "In a winding up by the court, any disposition of the property of the company, including things in action, and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void."

A compulsory winding up of a company is deemed to commence on the date of presentation of the Petition to wind up.[2] Presentation of the Petition takes place when the papers are lodged in the Central Office.[3] Section 218 therefore renders void, unless validated retrospectively, any and every disposition of company property made after the filing of papers, including dispositions made before the company, its business associates or bankers have any knowledge of the fact of the Petition being presented.[4] Significantly, the Companies Acts do not provide for the consequences of a disposition being deemed void pursuant to section 218; no specific duties are laid down and no corresponding remedy is spelt out.

When a dispute arises, the Court must therefore deal with up to three questions: first, was there a disposition; secondly, if there was a disposition, to whom was it made and against whom does the remedy lie; thirdly, should the disposition be validated?

The policy behind section 218 was stated by Cairns LJ in *Re Wiltshire Iron Company*[5] as follows:

> "[The equivalent section] is a wholesome and necessary provision, to prevent, during the period which must elapse before a Petition can be heard, the improper alienation and dissipation of the property of a company in extremis."

It might fairly be added that the protection of the general body of creditors is at the heart of this policy, so that where dispositions are found to have been made they are appropriately recalled and redistributed *pari passu* among the unsecured creditors after priority claims are dealt with. According to Murphy J in *Re PMPA Coaches Ltd*:

> "[T]he debts and liabilities of a company in liquidation are ascertained as of the date of presentation of the petition and its assets as of that date are collected by the Official Liquidator and distributed *pari passu* amongst the creditors as of the operative date subject only to the particular preferences and priorities created in the legislation." [6]

The court's power to validate dispositions, whether retrospectively or prospectively, will depend on a number of factors, but the power is clearly designed to prevent the company's affairs being strangled to such an extent that it sustains loss or damage arising from the mere fact of the presentation of the Petition.

The practice of financial institutions upon receipt of notice of the presentation of a Petition[7] has been to 'freeze' the company's accounts pending further directions. Such directions from the court may allow for the making of specific dispositions on a prospective basis, and indeed if the Petition is refused the bank will be at liberty to reactivate the bank accounts. In the event that the Petition is granted, and an Order is made for the winding up of the Company, the provisions of Part VI of the Companies Acts 1963-99 will apply. The legal position in respect of this latter situation is beyond the scope of this paper. Similarly, it is proposed to deal solely with the concept of payments out, and not with lodgements in. [8]

Payments out on foot of cheques - the application in *Industrial Services*

How then does the section apply in the following circumstances: a Petition is presented, an Order for the winding up of the company is subsequently made, but through inadvertence or human error the company's bank does not see the advertisement until some time afterwards. The bank honours cheques made to creditors (a) in the period between presentation and advertisement, (b) in the period between advertisement and Order, and (c) after the Order is made until actual notification by the Official Liquidator? These were the circumstances faced by the High Court (Kearns J) in the *Industrial Services* case.

In this case the Official Liquidator applied by way of Notice of Motion seeking, first, a declaration that all transfers of monies both into and out of the company's bank account were void and, second, an Order requiring the bank to account to the company for all such transfers. The parties limited the issue to the definition of the word 'disposition', the 'downstream consequential issues' being deferred to a later date. It is to be noted that no steps had been taken by the Official Liquidator to seek recompense from the ultimate recipients of monies paid out by way of cheques honoured.

The Bank, in its submissions, relied heavily on the judgment of the English Court of Appeal in *Hollicourt (Contracts) Limited v Bank of Ireland*,[9] the facts of which were materially

indistinguishable from those under scrutiny. In that case, it was held that the concept of disposition requires a 'disponor' and 'disponee' and that what was undoubtedly a disposition of company funds was a single disposition - to the payee of the cheque - and not a 'double disposition' i.e., first to the bank and then on to the payee. The Court found specifically that, in paying out on foot of cheques, the bank was an agent, interposing on behalf of the company. Mummery J, giving judgment for the Court, remarked that to hold the bank liable in circumstances where the transaction had not and could not have enriched the bank would be at variance with the restitutionary basis for relief under the equivalent English statutory provision.

In so finding, the Court of Appeal rejected a line of authority deriving from certain comments made by Buckley LJ in *Re Gray's Inn Construction*:

> "That all such payments out must be dispositions of the company's property is, I think, indisputable, but ... [t]he section must, in my judgment, invalidate every transaction to which it applies at the instant at which that transaction purports to have taken place. I cannot see any ground for saying that the invalidation can be negatived by any subsequent transaction." [10]

These comments gave rise to a particular line of authority,[11] put forward by Counsel for the Official Liquidator in *Hollicourt (Contracts)*, in support of the proposition that:

"(i) all post-presentation cheques drawn in favour of third parties on a company's bank account, whether that account is in credit or in debit, involve a disposition of the amount of the cheque in favour of the bank and are invalidated by the provisions, unless validated by the court;

(ii) in consequence of statutory avoidance of such dispositions, the bank may be liable in proceedings by the liquidator for the amounts of the dispositions of property, albeit only to the extent that the amounts prove to be irrecoverable from the creditors who were paid."

However, the Court of Appeal, reversing the decision of Blackburne J at first instance,[12] rejected both of these propositions as being unnecessary to the judgment in *Gray's Inn Construction*, and found that, given that the dictum cited had been made in the absence of full argument (certain arguably unwarranted concessions were made by the bank in that case), that dictum was, to the extent that it justified those propositions, wrong. *Gray's Inn Construction* was primarily concerned with payments into an overdrawn account, which constitutes a reduction of the company's liability to one of its creditors (the bank) and therefore amounted to a disposition properly invalidated. It did not merit the far-reaching conclusions put forward by the Official Liquidator in the *Hollicourt (Contracts)* case.

The Judgment in *Industrial Services*

Kearns J, giving judgment in *Re Industrial Services*, rejected the approach taken in *Hollicourt (Contracts)*, preferring that of the Official Liquidator. The following propositions emerge from the Official Liquidator's argument:

(i) The relationship between a bank and its customer was at all times one of borrower and lender, whose respective statuses could be exchanged depending on whether the relevant account was in credit or overdrawn.

(ii) Any change of the balance on a company's account at bank involves in each case a disposition as between the bank and the company, as the property in the money passes. In essence, every transaction constituted either a loan or the repayment of a loan.

(iii) Applying the argument to the case of a bank honouring cheques subsequent to the presentation of a Petition to wind up its company client, the bank as borrower (in the case of a credit account) reduces its indebtedness to the customer company, and thereby effects a disposition in its own favour.

In accepting this line of reasoning, the Court confirmed the double disposition theory disclaimed by the Court of Appeal and expressly preferred the decision of Blackburne J at first instance in *Hollicourts (Contracts)*, where he stated:

> "The action of the bank in debiting the company's account for the various payments had the effect of reducing the bank's liability to the company ... The consequences ... insofar as the bank is concerned, must therefore be that its liability to the company falls to be considered as if those payments out had not been made. In short, the bank's liability to the company must be what it was (i.e., the credit balance) as at the date of commencement of the winding up together with all sums credited to the account since the winding up began." [13]

The Concept of a Disposition - Payments out[14]

Several conceptual difficulties present themselves in light of the *Industrial Services/ Gray's Inn Construction* approach.

First, it is certainly the case that the bank and its customer can be classed as lender and corresponding borrower at all times. However it does not follow from this that they must be treated as such in respect of every transaction and, specifically, that they must be so treated in the context of honouring cheques made payable to a creditor. The clearing of cheques on a credit account can be described as a payment by the bank of monies from the customer's account to the customer's order, and no bargain is made in relation thereto. Describing this process as a loan as between bank and customer *simpliciter* pays little regard to several conspicuous hallmarks of the principal/agent relationship.[15]

Second, it would appear that the line of reasoning in *Gray's Inn Construction* and *Industrial Services* equates the meaning of the word 'disposition' with that of 'transaction', and thereby wears the cloth of a literal or technical interpretation of the section. However, it is equally logical to argue that in fact a disposition can consist of more than one transaction,[16] and that in the circumstances of a bank honouring the cheques of its customer there is no more than one alienation of property. Neither of the two transactions would occur without the other. One might contend that pushing a man off a tall building does not kill him, rather the impact with the ground does; but nevertheless it is undoubtedly the case that the events are indistinguishable in their effect on the dead party and in an apportionment of fault - to differentiate the two is a largely worthless academic exercise.

Third, if the action of debiting the customer's account constitutes an alienation of company property, and thereby a disposition, then it must follow that payment out to a third party on foot of an honoured cheque is not a disposition of company property but rather one of bank property. In its terms, therefore, section 218 would prescribe no remedy for the company or the bank against the enriched third party. But this conclusion fails on a descriptive level, given that the courts have habitually imposed remedies against third parties in reliance upon their jurisdiction under section 218.[17] Indeed, Kearns J noted,[18] in reference to the court's power of validation, that:

> "It does not necessarily follow from the conclusions I have reached that there is any justification for arguing that a Liquidator can set his sights against the bank only, ignoring the ultimate recipients of payments made."

With respect, it would seem that the theoretical basis for the double disposition concept does not necessarily support this finding.[19]

Consultation of the Oxford English Dictionary reveals that in fact the use of the word 'disposition' may well have been an unfortunate choice by the parliamentary draftsmen, both in this jurisdiction and in England. In particular, it appears that the term 'disposition' correctly refers to a static arrangement of things (or faculties) and does not derive from the verb 'to dispose'. It would seem that the term 'disposal' would therefore have been the more accurate term to use. However, it is acknowledged that in ordinary usage the words can have an identical meaning, and indeed the two words share a common alternative meaning, described in the OED as "the action of disposing of, putting away, getting rid of, settling or definitely dealing with." The literal meaning of the word therefore connotes a positive act on the part of the 'disponer' or 'disposer', and not a unilateral act of the recipient. In the delivery, presentation and honouring of a company cheque, we do see one positive act on behalf of a company, being the delivery of the cheque. The third party then presents the cheque and the bank pays out and also debits the company's account.

At the same time, it is accepted that no 'disposition' occurs before presentation and payment.[20] So on a literal interpretation of the word 'disposition' (quite independent of - albeit consistent with - the approach taken in *Hollicourt (Contracts)* as to the requirement of a disponor and disponee), one can only conclude that a disposition takes place as a result of the bank's acts, but that those acts are performed by the bank as agent acting on behalf of the company.

Abiding by the logic of the double disposition approach, one might take the example of the office clerk who carries the company's cash to the company's bank to lodge it into the company's account.[21] Unless he lodges it into the account, he is liable to the company for the return of the cash. If he lodges it, he reduces his liability to the company to the extent of the amount of that sum lodged. Now, if this train of events were to occur subsequent to the commencement of winding up, then on the double disposition reasoning it would amount to a disposition in favour of the office clerk, who would be liable to the company for the amount lodged, since the property would have passed with the money.

The conduct of the office clerk in this example is perfunctory, and it would seem that to view such action as the effecting of a disposition of the company's property is to introduce a legal fiction that is unnecessary to secure the policy of section 218.

One might argue that the bank/company relationship is distinguishable from that of the employee/company, and that the latter is nothing but an agency. However, if one commits to the technical view of what constitutes a disposition, then is such a distinction justified? Take another example: the office clerk presents a cheque made payable to 'cash' and thereby obtains monies from the company's account at bank. This sum is deposited in the office safe for petty cash purposes. Although the company itself is the recipient of the monies, *prima facie* it is entitled to avoid the transaction and to seek recompense from the bank, because it is clear that in fact the bank's liability to the company has been reduced.

Moreover, as discussed above, it is difficult to see how section 218 can provide a remedy as against a third party recipient since the monies paid out on foot of the cheque were the proceeds of the second disposition, i.e., of the bank's property. Under the logic of the double disposition theory, therefore, the bank in effect insures the company against the risk of the office clerk absconding with the cash.

The Validation Procedure

One might argue in the alternative that the harshness of the two examples taken above is capable of moderation by the validation procedure. Indeed, Kearns J noted[22] that "the Court retains the important power of validation. This gives the Court a wide discretion to ameliorate and mitigate the rigours of Section 218." However, as was stated by Murphy J in *Re PMPA Coaches Limited*:

> "The hardship which flows from this express statutory provision could not be of itself a ground for validating a payment. Such a principle would constitute an effective repeal of the statutory provision." [23]

Two insurmountable difficulties therefore prevent the validation procedure from repairing the harshness of the double disposition theory: first, where hardship flows from the invalidation, i.e., where the intermediary who is not enriched is faced with a duty to repay, that factor cannot *per se* ground validation by the court; and secondly, as discussed above, the invalidating provision prescribes no remedy for the company or the intermediary as against the enriched party - at best, they might have some form of restitutionary remedy extraneous to the provisions of the Companies Acts.

The operation of the validation procedure is outside the scope of this paper.[24] However, it would seem that it provides a doubtful rationale for retaining the legal fiction of the double disposition.

Fault and Enrichment

Kearns J was alive to the 'commercial reality' argument put forward on behalf of the bank,[25] and made the Court's view clear:

> "In one sense [the banks] act as agents, but, given that property in money passes to them, the true relationship is that

of borrower and lender. Thus the bank can be both agent, creditor and lender. They thus have a very special role of responsibility in winding up situations. Not the least part of that role is one of vigilance in respect of their client customers which, because of their assets and expertise, they are well placed to perform...

The Oireachtas by providing for the advertisement of a petition must be seen, it seems to me, as wishing to impose an obligation on institutional creditors in particular, not only to have regard to such advertisements, but to control the operation of company accounts in a particular way after it becomes clear that the company is in financial difficulty.

This may appear harsh insofar as the bank is concerned. However, that cannot be a valid reason for construing the section in a way which banks might regard as more satisfactory from their own commercial point of view." [26]

With respect, while it is proper that there must be some sanction against a bank which continues to jeopardise the funds available to a company in liquidation, the above reasoning is incomplete since it cannot accommodate the case where a bank honours its client company's cheques in the period *after* presentation but *before* advertisement of a Petition. In this circumstance, the bank has no notice, actual or constructive, of the invalidating event, and the vigilance demanded by the court would be ineffective to diminish its exposure under section 218.

It is respectfully submitted that unjust enrichment and a duty of care, rather than the double disposition concept, are the most appropriate touchstones for the analysis. From such a perspective, were a bank negligently to honour cheques presented after advertisement, its liability could properly and plausibly be imposed by reference to a duty of care, which arose upon receipt of constructive notice, and a breach of that duty might ground liability, but only where relief against the ultimate beneficiary of the transactions is impossible. This would be a contractual or common law duty of care, and would properly arise independently, albeit against the background, of section 218.[27]

However, the approach taken in *Industrial Services*, relying on the concept of a double disposition, precludes such a course, and leaves financial institutions (and indeed office clerks) in an invidious position as regards their corporate clients. Vigilance is paramount, but not even immediate action upon receipt of notice of the existence of a Petition will assist the bank in the first finding i.e., that of invalidity. The paying bank must rely on the court's discretion and, while it may be that experience will see a standardised exercise of that discretion in favour of (i) the bank paying out pre-advertisement, and (ii) the bank paying out a sum recoverable from the third party in question, it remains apparent that the double disposition rationale would, in the second case, create a conceptual hurdle for recovery against the third party. In the first case, it would require the bank to make application to court in order to justify the simple honouring of its mandate. Such an application would need to be grounded on more than mere evidence of harshness.[28] ●

1 High Court (Kearns J), unreported, 23 March 2001
2 Companies Acts 1963-99, section 220(2)
3 Rules of the Superior Courts, Order 74 rule 8
4 In practice it is often the case that a letter of demand pursuant to section 214 has been served, so the company would have warning at least. However, non-service of this letter is not of itself a bar to presentation of the Petition.
5 (1868) LR 3 Ch App 443, at 446
6 Unreported, High Court (Murphy J), 16 June 1993, at p. 6. See further *Re J Leslie Engineers Company Limited* [1976] 2 All ER 85
7 This usually occurs upon sight of the statutory advertisement in Iris Oifigiúil or one of the two newspapers carrying the same advertisement: see Rules of the Superior Courts, Order 74 rule 10
8 Payments into a company's bank account, whether it is in credit or overdrawn, is amply discussed in Re Barn Crown Limited [1994] 4 All ER 42. See also Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, London, 1997) pp. 423-435; *Re Gray's Inn Construction Limited* [1980] 1 All ER 814; *Re Pat Ruth Limited* [1981] ILRM 51; *Re Industrial Services (Company (Dublin) Limited (In Liquidation)*; High Court (Kearns J), unreported 23 March 2001.
9 [2001] 1 All ER 289. See Goddard, The Company Lawyer Vol 22 p. 115; Moore [2001] CLP 10
10 [1980] 1 All ER 814, at 818
11 This can be seen from the comments of Harman J in *Re McGuinness Bros (UK) Limited* (1987) 3 BCC 571, at 574 :
"However, the matter stands that in law all the dispositions of the company's property after the winding up are void. It is clear that payments out of or into the bank account are dispositions of property. That follows from *Gray's Inn Construction* and was indeed well-known long before that case was decided."
This case was not considered in *Hollicourt (Contracts)*. In *Re Pat Ruth Limited* [1981] ILRM 51, the Court held that payments out on foot of cheques were dispositions, and while it did not expressly state that such dispositions occurred in favour of the bank, it would appear to have been on the bank's application that the cheque payments in that case were validated. Accordingly, and since reference was made to *Gray's Inn Construction*, it would seem that *Re Pat Ruth Limited* lends support to the line of authority, a point noted by Kearns J in *Re Industrial Services* at pp. 3/4 and 15.
12 [2000] 2 All ER 45
13 *Ibid.*, at 53
14 See further Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, London, 1997) pp. 423-435; Breslin, *Banking law in the Republic of Ireland* (Round Hall Sweet & Maxwell, Dublin, 1998) p. 386; *Mersey Steel and Iron Co v Naylor Benzon & Co* (1884) 9 AC 434; *Re Mal Bower's Macquarie Electrical Centre Pty Ltd* [1974] 1 NSWLR 254; *Re Gray's Inn Construction Limited* [1980] 1 All ER 814; *Bank of East Asia Limited v Rogerio Sou Fung Lam* [1988] 1 HKLR 181; *Re Loteka Pty Limited* (1989) 7 ACLC 998; *Ashmark Limited v Allied Irish Banks plc* [1994] 3 IR 461; *Coutts & Company v Stock* [2000] All ER 2 All ER 56; *Re Hollicourt (Contracts) Limited* [2000] 2 All ER 45, [2001] 1 All ER 289 (CA).
15 Breslin, in *Banking law in the Republic of Ireland* at p. 128/9, states that:
"A mandate is a specific or general authority by one person (the principal) to another (the agent), to carry out certain acts on behalf of the principal. A mandate therefore implies an agency relationship. The customer's mandate to his bank is a necessary feature of the bank-customer contract because it governs the mechanics of the bank as agent, making and receiving payments on behalf of the customer."
16 See for example the dictum of O'Connor J in the Australian case of *Re B J and T A Bassola, Official Trustee in Bankruptcy (Intervener)* (1985) 10 Fam LR 413:
"Before considering the authorities on the meaning of the words "dispose of" and "disposition" I want to make some comment on the interaction of the two phrases. As I understand the words the act of disposing of property results in a disposition of it. Further the disposal may take place in a variety of different ways. *It may take place by a single act or by a series of different acts. The result is the same - there has been a disposition of property.*"
Emphasis added
17 See for example *Re Ashmark Limited* [1990] ILRM 330; *Re Ashmark Limited* (No. 2) [1990] ILRM 455
18 At page 17 of the transcript.
19 See the judgment of Lardner J in *Ashmark Limited v Allied Irish Banks plc* [1994] 3 IR 461, which discusses one specific result of the finding that moneys in the company's account at bank are the property of the bank: the deduction from the company's account, in favour of the bank, of sums representing interest due to the bank was held not to be a disposition.
20 See for example Blayney J in *Re Ashmark Limited* (No. 2) [1990] ILRM 455
21 See a similar example used in *Re Mal Bower's Macquarie Electrical Centre Pty Ltd* [1974] 1 NSWLR 254 at 257-258.
22 At page 18 of the transcript
23 *Supra* n. 7, repeated at p. 16 of the decision in *Industrial Services*
24 See further *Re Ashmark Limited* [1990] ILRM 330; *Re Ashmark Limited* (No. 2) [1990] ILRM 455.
25 This view is also presented in Breslin, *Banking Law in the Republic of Ireland* (1998) at p. 386.
26 At pages 15/16 of the transcript
27 Compare the comments of Mummery J *(obiter)* in the *Hollicourts (Contracts)* case at p. 298.
28 See n. 23

ESTOPPEL AND THE RIGHT TO PLEAD A DEFENCE UNDER THE STATUTE OF LIMITATIONS

Anthony Barr BL considers the principles governing the question of when a defendant will be prevented, on the grounds of estoppel arising from the conduct of settlement negotiations, to rely on a defence that the claim is statute barred.

Introduction

This article examines the law in relation to the circumstances in which a defendant will be held to be estopped from relying on a defence which would otherwise be open to him under the Statute of Limitations, in particular in light of the recent Supreme Court decision in *Ryan -v- Connolly.*[1]

Cases have arisen where, following an accident involving personal injuries, correspondence has commenced between the proposed plaintiff's solicitor and the insurance company representing the proposed defendant. For one reason or another, a writ has not issued within the relevant limitation period. When the defendant raises the defence that the plaintiff's action against him is statute barred, the plaintiff, or more particularly his solicitor, will sometimes argue that due to some representation or conduct on the part of the defendant's insurers or his legal representatives, they are estopped from relying on this defence under the Statute of Limitations. While each case will turn on its own facts, it is possible to discern a number of governing principles, as first established by the Supreme Court in the case of *Doran -v- Thompson*[2] and as applied in a number of subsequent cases leading to the recent unanimous decision of the Supreme Court in *Ryan -v- Connolly*, which was delivered on 31 January 2001.

Doran v Thompson

In looking at the circumstances in which a defendant will be held to be estopped from relying on a plea that the plaintiff's claim against him is barred pursuant to the provisions of the Statutes of Limitations, one must begin by looking at the decision of the Supreme Court in *Doran -v- Thompson*. On 20 July 1972 the plaintiff was injured while working for the defendant. In October 1973, solicitors representing the plaintiff wrote to the defendant in the usual terms, alleging that the accident was due to their negligence and requesting an admission of liability and a proposal for payment of compensation to the plaintiff. On 18 December 1973, a reply was received to this letter from the insurers representing the defendant. They stated that the circumstances of the accident were being investigated. There was some subsequent correspondence in relation to a medical examination, and a medical examination of the plaintiff was duly carried out by a doctor on behalf of the defendant on 29 July 1975, just after the action had become statute barred on 20 July 1975. The Plenary Summons was not issued until 18 February 1976. During all this time, the defendant's insurers had not discussed liability or damages with the plaintiff or his solicitors.

When the defendant pleaded that the plaintiff's claim was statute barred, the plaintiff alleged that the defendant was estopped from raising this point against him. Following a trial of the matter by way of preliminary issue, the point was appealed to the Supreme Court, where Henchy J. set out the following statement of principle:-

> "Where in a claim for damages such as this a defendant has engaged in words or conduct from which it was reasonable to infer, and from which it was in fact inferred, that liability would be admitted, and on foot of that representation the plaintiff has refrained from instituting proceedings within the period prescribed by the Statute, the defendant will be held estopped from escaping liability by pleading the Statute. The reason is that it would be dishonest or unconscionable for the defendant, having misled the plaintiff into a feeling of security on the issue of liability and, thereby, into a justifiable belief that the Statute would not be used to defeat his claim, to escape liability by pleading the Statute. The representation necessary to support this kind of estoppel need not be clear and unambiguous in the sense of being susceptible of only one interpretation. It is sufficient if, despite possible ambiguity or lack of certainty, on its true construction it bears the meaning that was drawn from it. Nor is it necessary to give evidence of an express intention to deceive the plaintiff.

"It is not necessary that the representation by the insurers should be one "positively incapable of more than one possible interpretation." However, a party must show that it was reasonable in the circumstances for him to construe the words used by the other party in a sense which would render it inequitable for that party to rely on the defence under the Statute of Limitations."

An intention to that effect will be read into the representation if the defendant has so conducted himself that, in the opinion of the Court, he ought not to be heard to say that an admission of liability was not intended." [3]

In looking at the circumstances of the case, Henchy J held that there had been no representation at all by the defendant or his insurers in relation to the issue of liability. Therefore any misapprehension that there was in the mind of the plaintiff or his solicitors was not shown to have been induced by any representation made by the defendant or his insurers. Accordingly they were not estopped from raising the plea under the Statute of Limitations 1957.

Griffin J reached the same conclusion and stated that if the defendant's insurers had made a clear and unambiguous representation that liability was not to be an issue, and if the plaintiff's solicitor had withheld the issue of proceedings as a result, he would have held that the defendants were estopped from pleading the Statute of Limitations. However, on the facts which had been agreed between the parties, he found that there was no promise, assurance or representation made by the insurers to the plaintiff's solicitor. Nor could any such representation be inferred from the correspondence or any telephone conversations between the parties, or from the conduct of the insurers. Apart from stating in the first letter that they were investigating the circumstances of the accident, the insurers had made no reference, express or implied, to the circumstances of the accident or to the question of liability. He held that the fact that the insurers had failed to deny the statement in the plaintiff's first letter to the effect that the accident had been caused by the negligence of the defendant, did not amount to a representation that the insurers were not contesting liability. He held that in the absence of any duty to speak out, mere silence or inaction was not such conduct as would amount to a representation. Accordingly, Griffin J agreed that the defendant was not estopped from raising the defence under the Statute of Limitations.

Kenny J, while reaching the same conclusions on the facts, did not appear to go as far as his brethren in relation to the facts which would be sufficient to establish an estoppel. In particular, he expressly reserved the question as to whether a mere admission of liability on its own would suffice to prevent the defendant subsequently relying on a defence under the Statute of Limitations. He stated that he found it difficult to reconcile the remarks of the former Chief Justice in the case of *O'Reilly -v- Granville*[4] with the reasoning of the Court of Appeal in England in *The Sauria*[5] on this point, and he reserved the question for future consideration. It should be noted that this aspect appears to have been now decided by the present Supreme Court in the case of *Ryan -v- Connolly*, which is dealt with below.

Subsequent Cases

The decision in *Doran -v- Thompson* has been followed in a number of High Court and Supreme Court decisions. In *Traynor -v- Fegan*[6] the defendant was resident outside the jurisdiction. The accident occurred on 25 October 1977. By letter dated 27 March 1979, the defendant's insurers wrote to the effect that they had nominated a firm of solicitors in Dublin to accept service of the proceedings. However, they requested that talks should take place. Such talks never took place. The plaintiff's solicitor became aware that the defendant driver had died in a subsequent road traffic accident in January 1980. No grant had been extracted to his estate. The insurance company agreed that the deceased defendant could be named as the defendant in the proceedings. In September 1980, the plaintiff's solicitor sent draft proceedings to his town agent for issuing out of the Central Office. He was told by the Central Office that he could not issue these proceedings, as the defendant was resident out of the jurisdiction, unless he had an Order of the Court or a letter from a solicitor within the jurisdiction undertaking to accept service. On 8 October 1980 the plaintiff's solicitor sent a Plenary Summons back to his town agent with a copy of the letter which had been issued by the defendant's insurers indicating that they had nominated a particular firm of solicitors in Dublin to accept service of the proceedings. The plaintiff's solicitor pointed out to his town agent the urgency of the matter having regard to the Statute of Limitations. On 10 October 1980 the town agent visited the solicitor who had been nominated by the defendant's insurers, who then stated that he would take instructions and revert to the town agent in due course. On 24 October 1980, time expired for instituting the proceedings. On 4 December 1980 the solicitors in Dublin wrote confirming that they had authority to accept service of the proceedings. The proceedings were duly issued on 17 December 1980.

In the High Court, Barrington J held that the plaintiff's solicitor knew that he should issue the proceedings within the limitation period and did in fact attempt to issue the proceedings in time. However, the plaintiff's solicitor relied on the representation in the letter of March 1979 to the effect that a particular firm of solicitors in Dublin had been nominated to accept service of the proceedings. Barrington J held that although this letter was written without any ulterior motive, the statement in this letter was not true at the time that it was written because, in fact, no such solicitor had received authority to accept the proceedings on behalf of the defendant. He further held that the insurance company took an inordinate amount of time to authorise the solicitor in Dublin to accept service on behalf of the defendant. In such circumstances it would be unconscionable for the insurance company to plead the Statute of Limitations, and therefore the defendant was estopped from pleading this defence. The trial judge also criticised the practice which was then current in the Central Office - this practice has now changed, in that a writ may now issue out of the Central Office but be marked "not for service outside the State."

In *Boyce -v- McBride*[7] the defendant had died as a result of a road traffic accident which occurred in July 1979. The plaintiff's solicitor issued a Plenary Summons on 19 October 1981 against the defendant despite having received letters from

the defendant's insurers which had been headed "Peter McBride (Deceased)" and despite having received further correspondence intimating that the defendant was deceased. In January 1983 the plaintiff brought a motion seeking to join the insurers as defendants in place of the deceased defendant. This motion was not moved. Another motion in similar terms was issued in January 1984, but this was not proceeded with either. In April 1984, a third motion in similar terms was brought before the Court. This was heard in the High Court in February 1985, when it was ordered that the insurers should nominate a person to defend the action and, in default of so doing, that the Court would join the insurers as a co-defendant to the proceedings.

"The Court pointed out that the fact that the defendant had expressly and unambiguously conceded the issue of liability would not of itself make it reasonable for a plaintiff to assume that he could defer the institution of proceedings beyond the limitation period....The Court also held that the mere fact that the vehicle damage aspect of the plaintiff's claim had been settled directly with the plaintiff's insurers could not be construed as an unambiguous indication that liability in respect of the plaintiff's personal injury claim was being conceded."

On appeal to the Supreme Court, Henchy J held that there was nothing in the insurer's conduct to support the submission of Counsel for the plaintiff that the insurers had impliedly promised or assured that they would not rely on the invalidity of the proceedings. In the circumstances the Court held that the case for an estoppel against the defendant had not been made out.

In *Curran -v- Carolan & Boyle Limited*[8] the plaintiff suffered injuries on 1 October 1986 while working as a painter employed by the defendant. The ladder on which the plaintiff had been working had not been properly secured and as a result the ladder moved or slipped, causing the plaintiff to fall to the ground. By letter dated 10 March 1989, the insurance company representing the defendant declined to nominate a solicitor to accept service of proceedings on behalf of the defendant. It asked that details of the alleged negligence should be set out in the first instance in a letter rather than in a Statement of Claim. In a subsequent telephone conversation, the plaintiff's solicitor indicated that he had proceedings drafted and that he intended to serve same directly on the defendant. The defendant's insurers asked the plaintiff's solicitor to refrain from issuing the proceedings as they were continuing their investigations into the matter. In order to facilitate the defendant's insurers the plaintiff's solicitor by letter dated 6 April 1989 furnished a plain copy of the Plenary Summons and Statement of Claim to the insurers. This was accompanied by a letter stating that the plaintiff's solicitor was not prepared to defer the issue of proceedings any further, as the action would become statute barred. The plaintiff's solicitor telephoned the insurance company again at the beginning of May 1989. Again he indicated that, as he was under pressure due to the time limits involved, he intended to issue proceedings and to serve same directly on the defendant. In response, the insurers again requested him not to issue proceedings as the company was trying to clarify matters. On 17 May 1989, the plaintiff's solicitor wrote stating that unless a reply was furnished within fourteen days, proceedings would then issue. Two further attempts were made by the plaintiff's solicitors to contact the representative of the insurance company by telephone, but in the event proceedings did not issue until after the period allowed under the Statute of Limitations had expired.

Johnson J in the High Court stated that he was satisfied that the proceedings did not issue due to the fact that two requests to refrain from so doing had been made by the insurance company. He held that this was conduct which had legitimately led the plaintiff's solicitor to conclude that the Statute of Limitations would not be pleaded against him. The Judge held that this was sufficient to take the case outside "the uncompromising judgement of Mr Justice Henchy in *Doran -v- Thompson*." Accordingly, he held that the defendants were estopped from pleading the Statute of Limitations against the plaintiff.

Ryan v Conolly

In *Ryan -v- Connolly* the plaintiff suffered injuries on 26 April 1995 when his motorcycle was struck by the first named defendant's car which had unexpectedly emerged from a side road. On 23 May 1995 the usual warning letter was sent by the plaintiff's solicitor directly to the defendants, who were advised to pass the letter to their insurers, which in turn they duly did. By letter dated 11 July 1995 the defendant's insurers requested certain information in relation to the plaintiff's claim. A reply was furnished by the plaintiff's solicitor on 1 September 1995 and, by letter dated 9 July 1996 the insurers wrote to the plaintiff's solicitor informing him that they had obtained a medical report. They also informed him that they had settled the plaintiff's car damage claim directly with his own insurers. The defendant's insurers asked whether the plaintiff's solicitor would be in a position to discuss settlement of the action. By letter dated 24 September 1996, the plaintiff's solicitor replied that he was not in a position to enter into settlement negotiations as he was awaiting a medical report. The defendant's insurers made three further requests of the plaintiff's solicitor to see if he was ready to enter into settlement negotiations. These requests were made prior to the expiry of the limitation period on 25 April 1998. There was one further request to enter into settlement negotiations, which was made on 2 July 1998. Ultimately, the plaintiff's solicitor wrote seeking the nomination of a solicitor to accept service of the proceedings on behalf of the defendant. The Plenary Summons issued on 11 December 1998.

There were two issues before the Court. The first was whether the Court could look at "without prejudice" correspondence to determine the preliminary issue in relation to estoppel and the pleading of a defence under the Statute of Limitations. The Court answered this question in the affirmative. The second question was whether the defendants were precluded in the circumstances from maintaining a plea under the Statutes of Limitations. In a unanimous decision, delivered by the Chief Justice, the Supreme Court cited the general statement of

principle as set out by Griffin J in *Doran -v- Thompson*. The Court went on to point out that it was not necessary that the representation by the insurers should be one "positively incapable of more than one possible interpretation." However, a party could not rely on a strained or fanciful interpretation of the statement or representation. The Court held that such a party must show that it was reasonable in the circumstances for him to construe the words used by the other party in a sense which would render it inequitable for that party to rely on the defence under the Statute of Limitations.

The Court also pointed out that the fact that the defendant had expressly and unambiguously conceded the issue of liability would not of itself make it reasonable for a plaintiff to assume that he could defer the institution of proceedings beyond the limitation period. The Court stated that in the absence of a statement by an insurance company from which it was reasonable to infer, in the event of proceedings not being issued in time, that it would not rely on a defence under the Statute of Limitations, there was no reason in principle why the insurance company should be estopped from relying on such a defence.

The Court then looked at the evidence put forward on affidavit by the plaintiff's solicitor. The Court held that with "commendable restraint" the plaintiff's solicitor had stated that the correspondence had indicated to him that the insurance company was anxious to engage in settlement discussions. The Court held that there was no justification for inferring from the correspondence that any defence under the Statute of Limitations would not be relied upon if the case was not settled and proceedings were not issued within the appropriate limitation period. The Court held that while the insurance company was interested to enter into negotiations for a settlement, there was nothing in the correspondence to indicate that they were effectively treating the case as one in which any defence on liability was being abandoned, still less as one in which they regarded the institution of proceedings as superfluous because any defence under the Statute of Limitations would not be raised if proceedings were instituted outside the limitation period.

The Court also held that the mere fact that the vehicle damage aspect of the plaintiff's claim had been settled directly with the plaintiff's insurers could not be construed as an unambiguous indication by the defendants that liability in respect of the plaintiff's personal injury claim was being conceded. A *fortiori*, such action could not be read as a representation that if proceedings were issued outside the limitation period, no defence under the Statute of Limitations would be raised. Accordingly, the Court reversed the decision given in the High Court on the preliminary issue and held that the defendants were not precluded from relying on a defence under the Statute of Limitations.

Conclusions

Based on the decisions cited above, it is possible to tentatively set out the following as being the principles applicable to this area:-

* In order to establish an estoppel against the defendant, there will have to be some representation or conduct on the part of the insurers or their legal representatives which make it reasonable for the plaintiff's solicitor to assume that if proceedings are not issued within the appropriate limitation period, no point would be taken by the defendant in that regard.

*While the conduct or representation relied upon by the plaintiff to establish the estoppel need not be capable of only one interpretation, it must be an interpretation which it is reasonable to draw from the words or conduct of the defendant or his insurers or legal representatives.

*A mere admission of liability *simpliciter* will not be sufficient to establish an estoppel against the defendant in relation to a plea under the Statute of Limitations.

*The fact that the defendant's insurers invite the plaintiff and his legal advisors to enter into settlement negotiations will not of itself be sufficient to establish an estoppel against the defendant from subsequently relying upon the Statute of Limitations. Similarly, the mere holding of settlement negotiations would probably not be sufficient to create an estoppel.

*A request by the defendant's insurers to the plaintiff's solicitor to hold off issuing proceedings may be sufficient to subsequently prevent the defendant relying upon a defence under the Statute of Limitations in the event that proceedings are issued out of time.

While the decisions cited in this article were all personal injury actions, the same issues have arisen in actions which did not involve personal injuries.[9] Any lawyer acting for a plaintiff in relation to proposed proceedings would do well to remember the cautionary remarks of the Chief Justice in the penultimate paragraph of his Judgement in *Ryan -v- Connolly*, as follows:-

"It has to be pointed out that, in cases such as this, the expense which a plaintiff's solicitor incurs on his client's behalf in issuing a Plenary Summons in order to prevent the Statute running is comparatively small; the consequence, by contrast, of refraining from issuing proceedings can be extremely serious."●

1 Unreported, Supreme Court, 31 January 2001.
2 1978 IR 223
3 Ibid., p.225
4 [1971] IR 90
5 [1957] Lloyds L. Rep. 396. For a consideration of the equivalent statutory provision in Irish Maritime Law, see *Carlton -v- O'Regan* [1997] 1 ILRM 370.
6 1985 IR 586
7 1987 IRLM 95
8 Unreported, High Court, 26 February 1993
9 See *Smith -v- Ireland & Others* [1983] ILRM 300; and *Tate -v- Minister for Social Welfare* [1995] 1 IR 418.

JUDICIAL REVIEW OF PLANNING DECISIONS - SECTION 50 PRACTICE & PROCEDURE

Garrett Simons BL provides a comprehensive overview of the special judicial review procedures governing challenges by way of judicial review to planning and development decisions under section 50 of the Planning and Development Act 2000. *

Introduction

This article is concerned with the special judicial review procedure under Section 50 of the Planning and Development Act 2000, which in practice now applies to most planning cases. At the outset, it is convenient to note that this procedure does not apply to all decisions by a planning authority, or by An Bord Pleanála. For example, the various decisions of a planning authority in the context of the making and varying of the statutory development plan are subject to conventional judicial review.[1] Similarly, a determination made by An Bord Pleanála in relation to an agreement in respect of social and affordable housing,[2] or as to points of detail under a planning condition,[3] is not governed by Section 50.

It would also appear that Section 50 only applies to the final decision to grant or to refuse planning permission and not to interim decisions of an informal nature which might be made in relation to any particular matter arising in the course of an appeal or application.[4] A challenge to an interim decision does, of course, run the risk that it might be dismissed as being premature;[5] this, however, is a matter going to the merits of the judicial review application rather than to procedure.

In the case of a planning authority, the special judicial review procedure applies to two types of decision. First, a decision on an application for permission under Part III of the Act. This category would include a decision on an application for approval (properly, a subsequent planning permission) pursuant to an outline planning permission, but would not include the consideration by the planning authority of points of detail left over for agreement between the developer and the planning authority under a condition attached to a planning permission.[6] Secondly, a decision by the local authority as to whether to proceed with proposed local authority development under Section 179. Local authority development in its own functional area is exempted development but certain prescribed development is subject to a form of public consultation procedure.

In the case of An Bord Pleanála, a wider range of decisions are protected by the special judicial review procedure. Specifically, three types of decision are covered. First, a decision on any appeal or referral. This category includes not only decisions on an appeal from a decision by a planning authority on an application for planning permission but extends to any appeal. This produces the anomalous result that Section 50 applies to some decisions of An Bord Pleanála in circumstances where the equivalent decision of the planning authority, at first instance, is subject to conventional judicial review.[7] For example, in connection with the revocation of planning permission, the decision of An Bord Pleanála, on an appeal, is subject to Section 50,[8] whereas the planning authority's decision at first instance is not.[9] The second category of decisions protected are those of An Bord Pleanála in respect of environmental impact assessment of local authority development. The third category of decisions are those in relation to the compulsory acquisition of land.[10]

Nature of relief sought

The provisions of Section 50 are triggered where there is a challenge to the validity of a decision: a person shall not question the validity of a prescribed decision other than by way of an application for judicial review under Order 84. The High Court will look to the substance of the relief sought in legal proceedings, and the fact that a formal order of *certiorari* quashing a decision is not sought does not necessarily indicate that the validity of the decision is not being questioned.[11]

Time Limits

The time limits for the issuing and serving of proceedings are modified under Section 50(4). Under the previous legislation, the time limits were generally two months from the date of the *giving* of the decision. Under Section 50(4) the relevant period is eight weeks. Moreover, the dates from which the period is reckoned are different. In the case of a decision on an application for planning permission, or on an appeal or referral, the period is eight weeks commencing on the date of the decision. [12] This is not necessarily the date on which notification of the decision is received. In the case of the other prescribed decisions *viz.* those in connection with proposed local authority development under Section 179; the environmental impact assessment of local authority development under Section 175; or in discharge of compulsory acquisition functions under Part XIV, the period is eight weeks commencing on the date on which notice of the decision was first published. In reckoning the time periods, the first day of the eight week period should be included, and the last day excluded.[13] In order to comply with the time limits, it is necessary that the proceedings be issued and served on all the statutory parties within the prescribed period.[14] Partial compliance is not possible.[15]

Extension of time

Section 50(4)(a)(iii) empowers the High Court to extend the prescribed period. Under the previous legislation, the time limits were absolute and the High Court had no jurisdiction to extend time.[16] Once the time period had expired, even an invalid planning permission was immune from challenge.[17] This new provision remedies a possible defect in the previous legislation: the absence of any exception to the time limits led to allegations that the previous legislation may have been unconstitutional.[18]

The provision is phrased in the negative: 'the High Court shall not extend the period [...] unless it considers that there are good and sufficient reasons for doing so'. Although similar wording is used in Order 84 rule 21, it is probable that cases in respect of that rule will be of limited assistance as a guide to the application of Section 50(4)(a)(iii), for the following reasons. First, one of the factors militating against the exercise of the discretion to extend time in conventional judicial review viz. prejudice to third parties, is effectively built-in to applications under Section 50. Save in cases where the developer himself is the applicant, an application for judicial review will almost always result in prejudice in terms of blighting a planning permission. If the absence of such prejudice were to assume the same significance in the case of Section 50 as in conventional judicial review, there would be very few extensions of time granted. Secondly, the primary counterpoint to insistence on strict compliance with time limits is the reluctance on the part of the courts to allow a legal wrong to remain unrighted, even in the case of appreciable delay. This consideration cannot apply with the same force to judicial review of planning decisions where the rights of a third party objector will generally be less than, and outweighed by, those of the developer.[19] The courts have recognised on a number of occasions that there is a need for short time limits in respect of challenges to planning permissions.[20] Thirdly, the test for delay must be more objective in the context of the judicial review of planning decisions: those hostile to a development cannot overcome the problem of delay by finding someone ignorant of the relevant facts to mount a challenge.[21]

In the circumstances, it is probable that the main focus in any application to extend time will be on the conduct of the applicant and, in particular, as to whether or not the delay on his or her part has been contributed to by the developer. For example, if the delay was caused by some defect in the public notices which the developer is required to publish then it would seem equitable that the time period be extended. It may also be the case that a more forgiving standard should be applied in cases where the developer himself seeks to challenge the decision; the element of prejudice is obviously lessened.[22] (There would, however, appear to be less excuse for delay on the part of the developer as he is unlikely to be unaware of the issuing of the decision).

The fact that the time period for the taking of judicial review proceedings can be extended may present concerns to persons purchasing land with the benefit of planning permission. Under the previous legislation, once the two month period had expired, the planning permission was immune from challenge.[23] Under the new scheme, the possibility of a late challenge cannot always be ruled out. It remains to be seen how conveyancing practice adopts to this new change: a cautious purchaser may seek to protect himself by some form of indemnity from the vendor. Alternatively, a warranty might be sought to the effect that there had been compliance in respect of those aspects of the application for planning permission (for example, public notices) which might otherwise ground an application to extend time.

Application for Leave

It would appear from the scheme of Section 50 that an applicant must satisfy three interlocking criteria before leave to apply for judicial review may be granted. First, the applicant must demonstrate that there are 'substantial grounds' for contending that the decision is invalid or ought to be quashed. Secondly, the applicant must establish that he or she has a 'substantial interest' in the matter which is the subject matter of the application. Thirdly, the applicant must either have participated in the planning process, or show to the satisfaction of the High Court that there were good and sufficient reasons for not making objections, submissions or observations. (There is an exception to this third requirement in the case of prescribed bodies; a member state of the European Communities; or a state which is a party to the Transboundary Convention).

The relationship between the three criteria is unclear. The second and third criteria are introduced on a formal basis for the first time by Section 50; to an extent, however, elements of same had been subsumed under the heading of 'substantial grounds'[24] under Section 82(3A) & (3B) of the Local Government (Planning and Development) Act, 1963 (as amended).[25] It was also the case that under the previous legislation, an applicant was subject to the requirement of Order 84 rule 20(4) to demonstrate a 'sufficient interest' in the subject matter of the application for judicial review.[26]

Difficulties abound when one attempts to separate out the three statutory criteria to their constituent elements. For example, the second criterion 'substantial interest' would appear to represent a variation on the conventional standing requirement of 'sufficient interest' under Order 84 rule 20(4). Yet, one of the significant indicators in the test of 'sufficient interest' (as revised in *Lancefort Ltd. v. An Bord Pleanála*)[27] viz. the extent to which the applicant for judicial review had participated in the planning process and, in particular, had raised the legal objections subsequently relied upon in the judicial review proceedings, has been hived off, in part, to the third criterion. Specifically, the High Court must be satisfied, apparently as a matter separate to '*substantial interest*', that the applicant had made submissions or observations, or, in the case of an appeal or referral, was a party to same (or an observer). The criterion 'substantial interest' also

"The fact that the time period for the taking of judicial review proceedings can be extended may present concerns to persons purchasing land with the benefit of planning permission. Under the previous legislation, once the two month period had expired, the planning permission was immune from challenge. Under the new scheme, the possibility of a late challenge cannot always be ruled out."

"It remains to be seen whether a public interest will be regarded as a 'substantial interest' for the purpose of Section 50. The better view would appear to be that it should be.41 The planning legislation places emphasis on the right of public participation. If public participation is to be excluded at the level of judicial review, one would have expected that express language would have been used."

appears to cede part of its natural territory to the criterion 'substantial grounds'. One of the reforms effected by the introduction of a test of 'substantial grounds' under the previous legislation was to exclude an applicant from relying on a technical defect in the application for planning permission in circumstances where he or she was not prejudiced by same; O'Higgins J. put it in pithy terms - 'The argument, in my view, is only available to somebody in the real world and not in the abstract'.[28] Approached from first principles, this requirement might be thought to be an aspect of 'substantial interest', whereas the caselaw in connection with the previous legislation appears to have treated it as part of the criterion 'substantial grounds'.

A more fundamental criticism is that the requirement that an applicant establish 'substantial grounds' does away with the need for a separate standing requirement.

Strictly speaking it may not be necessary to parse the three criteria as each must be satisfied before leave to apply for judicial review may be granted. Accordingly, the High Court may not have to attribute the various considerations to any specific criterion. It would have been helpful, however, had a greater effort been made in the legislation to articulate any intended points of distinction.

Substantial interest

As stated above, Section 50 introduces a requirement that an applicant have a 'substantial interest' in the matter which is the subject of the judicial review application. It is further provided that a substantial interest is not limited to an interest in land or other financial interest.[29] To the extent that the language used is different from that of 'sufficient interest' under Order 84 rule 20(5), it is to be assumed that the criterion of 'substantial interest' was intended to introduce a different standard. The draftsman gives no indication, however, as to what this other standard might involve.

Under the previous legislation, the issue of whether or not a particular applicant had standing to bring judicial review proceedings had been treated as a mixed question of law and fact. Factors to be considered were the impact of the development on the applicant personally;[30] the public interest in upholding the rule of law;[31] and the public interest in planning and environmental matters.[32] It is submitted that the first of these factors survives the introduction of Section 50 unscathed; an applicant who is personally affected by the proposed development will continue to have *locus standi*. The second and third factors, however, might well be attenuated.

Traditionally, the public law remedies admitted of an element of *actio popularis*; see, for example, *E.S.B. v. Gormley*:[33] 'the permission is invalid not by reason of prejudice or disadvantage to the person challenging it but by reason of a want of power and jurisdiction in the planning authority'. The distinction between *locus standi*, and the court's jurisdiction to refuse relief as a matter of discretion where the applicant for relief had no real interest in the proceedings and was not a person aggrieved by the decision, is emphasised in the decision of the Supreme Court in *State (Abenglen Properties Ltd.) v. An Bord Pleanála*.[34]

It is submitted that this element of actio popularis will be modified by the requirement for 'substantial interest', and that it will no longer be enough for an applicant simply to insist on compliance with the rule of law. Although it is expressly provided that the criterion of 'substantial interest' does not require an interest in land or other financial interest, it is difficult to believe that a generic interest in the rule of law would be regarded by the courts as substantial. Indeed, even prior to the new legislation, an impatience with pedantic litigants was evident from certain judgments.[35] Again, as in the case of 'substantial grounds', the term substantial may be contrasted with the term 'procedural'. It could be argued that in the absence of a more development-specific concern, a person invoking the rule of law alone, has a procedural interest only.

If the foregoing is correct, then it is unclear whether even the addition of the public interest in the environment (the third factor identified above) will allow a litigant without a property or financial interest to shade it, and achieve a substantial interest. The notion of a public interest litigant, which had previously been adverted to in litigation under the planning legislation,[36] had evolved into a more concrete concept with decisions such as those of Denham J. in *Lancefort Ltd. v. An Bord Pleanála*,[37] or of O'Higgins J. in *Springview Management Company Ltd. v. Cavan Developments Ltd.*[38] An analogy was drawn with constitutional cases, where the courts had also accepted a move from victim related standing to one of public interest. Denham J. stated that: 'Environmental issues by their very nature affect the community as a whole in a way a breach of a personal right does not. Thus the public interest element must carry some weight in considering the circumstances of environmental law cases and the locus standi of the parties'.[39]

Although the concept had initially been put forward as part of an analysis of the *locus standi* of limited liability companies, it was soon extended to personal litigants with the decision in *Murphy v. Wicklow County Council*.[40] Kearns J. held that the applicant in that case had demonstrated a genuine interest in the matter and was in a position to present expert evidence on a range of points, all of which were pertinent to the huge stake the public at large had in relation to the proper and lawful management of the Glen of the Downs.

It remains to be seen whether a public interest will be regarded as a 'substantial interest' for the purpose of Section 50. The better view would appear to be that it should be.[41] The planning legislation places emphasis on the right of public participation. If public participation is to be excluded at the level of judicial review, one would have expected that express language would have been used. Instead, it is simply provided that a substantial interest is not limited to an interest in land or other financial interest.

There is an argument to be made that in certain cases a public interest litigant has a stronger claim to standing than even a neighbour or other individual more directly affected.[42] A public interest litigant may be in a position to mount a more carefully selected, focused, relevant and well argued challenge than a private litigant. One of the objectives of a standing requirement is to avoid the crank litigant: it would seem to follow from this that the quality of presentation which a litigant is able to bring to a case should be a relevant factor in determining standing. It is submitted that this should inform the interpretation of 'substantial interest'. An analogy can be drawn with constitutional challenges: it appears that the inability, for pragmatic reasons, of suitably qualified plaintiffs to take an action may allow other less directly affected plaintiffs to proceed.[43]

Limited liability companies

The change from 'sufficient' to 'substantial' does not appear to advance (by alteration or clarification) the legal position in connection with limited liability companies. The law in this regard had been clarified by decisions such as *Blessington Heritage Trust Ltd. v. Wicklow County Council*,[44] *and Lancefort Ltd.*, and it is submitted that these authorities are unaffected by the change in language.

The ordinary rules in relation to standing apply, with necessary modifications, to limited liability companies. The fact that a company's property or financial interests may be affected by the planning decision being challenged would, as in the case of a natural person, appear to be sufficient to found standing.[45] It is important to note, however, that for any property interest to be relied upon, the relevant property must be held by the company itself. It is not possible for the members of a company to seek to have their own property interests imputed to the company in order to supply a 'substantial interest': the fact that members of the company have property rights does not in some way afford the company a property right.[46] The legal person of the company is capable of holding property in its own right and thus it is not necessary to have regard to the property of its members. It is only in the case of an anthropomorphism such as *bona fides* that it is necessary to look through to the members of the company.

In circumstances where it is sought to found standing by reference to the public interest, it is submitted that characteristics (such as, for example, the promoters' commitment to environmental affairs) may be imputed to the company. The Supreme Court in *Lancefort Ltd.* had recognised that there were valid reasons for which persons concerned with planning or environmental issues might legitimately decide to associate in the form of a limited liability company,[47] and the fact of incorporation should not *per se* be a bar to standing. It also appeared from the majority judgment in Lancefort Ltd. that not even the fact that a company was incorporated after the planning decision under review had been made would be fatal to standing in circumstances where there was an identity of interest between persons who had objected at an earlier stage and the applicant company. The standing of the company in such cases should then fall to be determined on the same basis as in the case of individual litigants seeking to assert a public interest; whether or not this might constitute a 'substantial interest' has been discussed above.

It would appear to follow from all of the foregoing that the fact that individual members of a company would have standing in their own right does not necessarily indicate that the company would have standing. This depends on the basis on which standing is founded. In the case of public interest litigation, it is submitted that the interposing of a company between the individual members of the company and the court does not affect the issue of standing. Conversely, if the objective of the litigation is to protect private property interests, it would seem that the property interests engaged must be those of the company, and not its individual members.

The main distinction between a corporate litigant and an individual litigant is in relation to costs. A concern had been expressed in a number of cases that a company might be used to shield individual litigants from liability for legal costs. The Supreme Court have indicated in *Lancefort Ltd. v. An Bord Pleanála*[48] that this concern might be addressed by the making of an order for security for costs under Section 390 of the Companies Act, 1963. Laffoy J. was more explicit in *Village Residents Association Ltd. v. An Bord Pleanála*,[49] In response to an argument that the provision of security for costs might be a *quid pro quo* for affording *locus standi*, Laffoy J. stated as follows:

> "In my view, when the court is invited on a challenge to standing to infer that objectors to planning decisions have clothed themselves with limited liability for the less than pure motive of conferring immunity against costs on themselves and the challenge is successfully resisted, on a subsequent attempt to resist an application for security for costs by the company, the *bona fides* of the members of the company requires cautious consideration." [50]

Failure to participate

The requirement to demonstrate a 'substantial interest' is supplemented by an additional statutory requirement as to participation in the planning process. Specifically, as stated above, Section 50(4)(c) provides that leave to apply for judicial review shall not be granted unless the applicant shows to the satisfaction of the High Court either that the applicant had made objections, submissions or observations during the planning process, or that 'there were good and sufficient reasons' for not making such objections, submissions or observations. To a large extent, this statutory requirement was foreshadowed by the majority judgment of the Supreme Court in *Lancefort Ltd. v. An Bord Pleanála*[51] wherein it was indicated that failure to raise a ground of objection before the relevant planning body might preclude an applicant from relying on such a ground in subsequent judicial review proceedings.[52] The impact, if any, of the new legislative provision on this

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principle is unclear. To the extent that the legislative provision is less demanding (in that it focuses on the fact of participation, without there being any express requirement to have raised specific grounds of objection), it might be argued that it should be interpreted as intended to temper the harshness of the principle in Lancefort Ltd. As against this, the Supreme Court in *Lancefort Ltd.* had detected an onus to raise grounds of objection as part of the requirement (under the previous legislation) to demonstrate a 'sufficient interest'; this may be unaffected by the introduction of the new statutory requirement, in circumstances where there continues to be a parallel statutory requirement to demonstrate a 'substantial interest'.

As stated above, an exception to this requirement to have participated is provided in case of 'good and sufficient reasons'. It is submitted that there are at least two, and possibly three, broad circumstances which would meet this exception. First, where the failure to participate was as a result of some default in compliance with the regulations as to public notice of the application. For example, the nature and extent of the proposed development might not have been properly stated, and this may have lulled the applicant for judicial review into not making an objection.[53]

Secondly, although the particular applicant for judicial review may not have made objections, submissions or observations, his concerns may have been raised before either the planning authority or An Bord Pleanála by others. It would be unwieldy were each and every individual objector required to make his or her own submission to the relevant planning body; it would seem reasonable to allow general representations to be made.[54] This reasoning would seem to apply a *fortiori* to circumstances where individual objectors subsequently associate through the medium of a limited liability company. The company, as applicant in judicial review proceedings, should be allowed to point to the previous participation of its [future] promoters.[55] (The position in relation to security for costs has already been considered above).

The existence of a third possible head requires a consideration of the objective of the new legislative provision. If the mischief which the provision is intended to remedy is to ensure that objections are made to the relevant planning body so as to allow it consider the point and possibly forestall a subsequent judicial review challenge (for example, by deciding to require an environmental impact statement), then provided the objection is made, the identity of the person making the objection would appear to matter not. If this is the case, it would be unnecessary (in contrast to the second head above) for the applicant for judicial review to demonstrate any connection with the person who had actually made the objection.

Stay on Judicial Review Proceedings

The most radical amendment introduced under Section 50 is the making of provision for an application to stay judicial review proceedings in preference to a statutory appeal to An Bord Pleanála.

Although the Supreme Court in *State (Abenglen Properties Ltd.) v. Dublin Corporation*[56] had suggested that the planning legislation represented a self contained administrative code with limited access to the courts, subsequent decisions confirmed the right of an objector to have a decision of the planning authority quashed for want of validity,[57] even in circumstances where the applicants themselves had also sought to appeal to An Bord Pleanála.[58]

Section 50(3) purports to give legislative force to the concept of a self-contained administrative code. The High Court is empowered to stay judicial review proceedings before it pending the making of a decision by An Bord Pleanála in relation to a parallel statutory appeal. Little direction is given under the legislation, however, as to the circumstances in which it would be appropriate to exercise this discretion: the only statutory criterion (which is apparently a condition precedent to the exercise of the power) is that 'the matter be within the jurisdiction' of An Bord Pleanála.

Mechanics of application for stay

Section 50(3) provides for an application to be brought by An Bord Pleanála, or any party to an appeal, to stay judicial review proceedings where the matter is within the jurisdiction of An Bord Pleanála. The limitations on the applicability of section 50(3) should be noted. First, the provision applies only in respect of a decision of a planning authority; a choice of remedies does not arise in the context of judicial review of a decision of An Bord Pleanála. Secondly, there must be an appeal pending before An Bord Pleanála; thus the fact that the applicant for judicial review arguably should have proceeded by way of statutory appeal is irrelevant if neither he nor any other person, in fact, invoked the appeal mechanism. (It should also be noted that the appeal does not necessarily have to be made by the applicant for judicial review, nor, indeed, is it necessary even that the applicant for judicial review be a party to the appeal). Thirdly, the application for a stay can only be made by An Bord Pleanála or a party to an appeal. Generally, there will be a high level of coincidence between the parties to the appeal and those persons joined in the judicial review proceedings whether as respondents or as notice parties. For example, the applicant for planning permission is a mandatory party to both an appeal and judicial review proceedings. Occasionally, however, a person may be a party to the judicial review proceedings (whether under Order 84 rule 22(2) or (6) as a person directly affected, or pursuant to order of the High Court under Section 50(4)(d)(iv)) but not be a party to the appeal.[59]

The application may be brought 'at any time' after the 'bringing' of an application for leave to apply for judicial review. It is submitted that the term 'bringing' envisages a stage equivalent to, or prior to, the making of the application. An application for leave to apply is 'made' upon the issue and service of the Notice of Motion seeking leave to apply for judicial review; *K.S.K.*

"It is submitted that the narrow interpretation is to be preferred to the broad interpretation, as the one best vindicating the rule of law. There is a public interest in ensuring that the conduct of the planning authorities is kept in check.77 In circumstances where a planning authority has breached the limitations imposed on its statutory powers, a remedy should not be denied to an applicant (who in order to obtain leave must demonstrate a 'substantial interest') simply on the basis that there is an alternative forum where the planning merits of the particular decision can be appealed."

Enterprises Ltd. v. An Bord Pleanála.[60] Thus, an application for a stay may be made in advance of the actual hearing of the leave application. An issue would then arise as to which application should be heard first, the application for leave to apply for judicial review, or the application for the stay. On one view, if the purpose of the application for the stay is to expedite the statutory appeal process by staying any competing parallel judicial review proceedings, it would appear more effective to address the application for a stay first, rather than embark on a possibly lengthy hearing on the leave application. As against this, however, in order to identify the issues raised on the judicial review proceedings, it may be necessary to examine in some detail the grounds of challenge advanced in the statement of grounds, and, rather than replicate this exercise at a later stage (in the event of a stay not being granted), it might be more pragmatic to determine the two applications at the one hearing. The precise relationship between the considerations bearing on each of the two applications is unclear but it may be that the respective tests are mutually exclusive. On an application for leave to apply for judicial review, the High Court must determine that there are 'substantial grounds' for contending that the decision of the planning authority is invalid or ought to be quashed, and that the applicant has a 'substantial interest' in the matter. On an application for a stay under Section 50(3), the High Court must consider whether the matter is within the jurisdiction of An Bord Pleanála. If one applies a narrow interpretation to the term 'matter' and renders it as the 'grounds on which the decision is challenged', then it would seem to follow that a finding that there were 'substantial grounds' for challenge, sufficient to justify the grant of leave to apply for judicial review, would indicate that the matter was not a matter within the jurisdiction of An Bord Pleanála but rather a matter of law for the High Court. As against this, it can be argued that as the High Court was strictly not entitled to take discretionary factors into account at leave stage,[61] the competence or otherwise of An Bord Pleanála to address the ground of challenge never formed part of the test of 'substantial grounds'; thus, the consideration mandated by Section 50(3) represents an additional, discrete test and one which is not concluded by a finding of 'substantial grounds' and the granting of leave to apply for judicial review.[62]

Matter within jurisdiction of An Bord Pleanála

The statutory criterion under Section 50(3) is whether or not the matter is within the jurisdiction of An Bord Pleanála. The precise meaning to be attributed to the term 'matter' is unclear, and it is submitted that there are two viable interpretations, a broad one, and a narrow one. On the broad interpretation, the term 'matter' would be rendered as 'the appeal or referral'. Thus, the test would be whether or not the appeal or referral was properly before An Bord Pleanála. This would require consideration of whether or not the defect alleged in the decision of the planning authority subsisted so as to affect the jurisdiction of An Bord Pleanála. The decision of An Bord Pleanála on appeal operates to annul the decision of the planning authority, and thus the fact that the decision of the planning authority may have been invalid does not per se prevent An Bord Pleanála from having jurisdiction to entertain the appeal.[63] Certain defects at the planning authority stage can, however, continue to subsist even before An Bord Pleanála,[64] and in such circumstances An Bord Pleanála does not have jurisdiction to entertain the appeal. For example, a failure to submit an environmental impact statement where required,[65] or the fact that the applicant for planning permission did not have the minimum requisite interest in the lands the subject matter of the application,[66] would render an application for planning permission invalid[67] and any decision to grant planning permission, whether by the planning authority or by An Bord Pleanála, would be voidable. For the purposes of Section 50(3) then, on the wide interpretation, the High Court would simply have to consider whether the legal grounds of challenge raised in the judicial review proceedings were ones which, if well founded, would impact on the jurisdiction of An Bord Pleanála, or were ones which were spent by the time the appeal/application reached An Bord Pleanála. In many cases, the grounds of challenge would fall into the latter category,[68] and, accordingly, it would be open to the High Court to stay the judicial review proceedings on the basis that the matter was within the jurisdiction of An Bord Pleanála.

On the narrow interpretation, the term 'matter' would be rendered as the 'grounds on which the decision is challenged'. This definition would require that, in addition to confirming that the appeal itself was properly before An Bord Pleanála, the High Court would also have to consider whether An Bord Pleanála had the competence to address the issues raised in the judicial review proceedings: were they matters within the board's jurisdiction? This is discrete issue: An Bord Pleanála does not have jurisdiction to determine other than simple questions of law,[69] nor to provide redress for breaches of natural and constitutional justice.[70] The mere fact that an appeal is validly before An Bord Pleanála does not indicate that an appeal is a complete substitute for judicial review. Under the previous legislation,[71] this point was readily illustrated by reference to material contravention of the development plan. An Bord Pleanála took free of the restrictions imposed on the planning authority in connection with granting planning permission for a development which would involve a material contravention of the development plan. Thus, An Bord Pleanála were not compelled to inquire into an allegation that the planning authority had acted ultra vires in granting planning permission in material contravention of the plan; the illegality, if any, was spent by the time the matter reached An Bord Pleanála. The High Court was the only forum in which this issue would have to be canvassed and, in order to vindicate the rule of law, therefore, judicial review ought to be allowed.[72] This narrow interpretation of Section 50(3) would indicate that a stay should not be granted in circumstances where the judicial review proceedings raised issues as to the legality of actions of the local authority or its officials;[73] the validity of notices served;[74] the interpretation of the statutory concept of 'proper planning and [sustainable] development';[75] or procedural requirements.[76]

It is submitted that the narrow interpretation is to be preferred to the broad interpretation, as the one best vindicating the rule of law. There is a public interest in ensuring that the conduct of the planning authorities is kept in check.[77] In circumstances where a planning authority has breached the limitations imposed on its statutory powers, a remedy should not be denied to an applicant (who in order to obtain leave must demonstrate a 'substantial interest') simply on the basis that there is an alternative forum where the planning merits of the particular decision can be appealed. As stated in *P. & F. Sharpe Ltd. v. Dublin City & County Manager*,[78] it would not be just to deprive a party of its right to have a decision quashed for want of validity.●

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1 It is to be noted, however, that certain *grounds* of judicial review are excluded; Section 12 (16).
2 Section 96(5)
3 Section 34(5); *O'Connor v. Dublin Corporation (No. 1)* [2001] 1 I.L.R.M. 58; *State (Fingal Industrial Estates Ltd.) v. Dublin County Council* Supreme Court unreported 17th February, 1983
4 *Huntstown Airpark Ltd. v. An Bord Pleanála* [1999] 1 I.L.R.M. 281 (decision of inspector to refuse to direct production of documents)
5 *Huntstown Airpark Ltd. v. An Bord Pleanála* [1999] 1 I.L.R.M. 281. cf. *Hughes v. An Bord Pleanála* [2000] 1 I.L.R.M. 452
6 Section 34(5). *O'Connor v. Dublin Corporation (No. 1)* [2001] 1 I.L.R.M. 58; *State (Fingal Industrial Estates Ltd.) v. Dublin County Council Supreme* Court unreported 17th February, 1983
7 The courts lean against such a construction where possible; *O'Connor v. Dublin Corporation (No. 1)* [2001] 1 I.L.R.M. 58. It is submitted that in the example cited next in the text, there is no other interpretation open.
8 'Appeal' is defined under Section 2 simply as 'an appeal to the board'
9 The decision is not a *'decision on an application for a permission'*. See *O'Connor v. Dublin Corporation (No. 1)* [2001] 1 I.L.R.M. 58
10 Section 50 has been commenced in respect of decisions of this type; S.I. 449 of 2000
11 *Goonery v. Environmental Protection Agency* High Court unreported 15th July, 1999
12 cf. *Keelgrove Properties Ltd. v. An Bord Pleanála* [2000] 1 I.R. 47; [2000] 2 I.L.R.M. 168. The 'decision' is to be distinguished from the grant; *Henry v. Cavan County Council* High Court unreported 1st February, 2001
13 *McCann v. An Bord Pleanála* [1997] 1 I.L.R.M. 314; [1997] 1 I.R. 264
14 *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128; *Keelgrove Properties Ltd. v. An Bord Pleanála* [2000] 1 I.R. 47; [2000] 2 I.L.R.M. 168; *Murray v. An Bord Pleanála* [2000] 1 I.R. 58 at 64
15 *McCann v. An Bord Pleanála* [1997] 1 I.L.R.M. 314; [1997] 1 I.R. 264
16 *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128; *Blessington Community & District Council Ltd. v. Wicklow County Council* [1997] 1 I.R. 273
17 *Invers Resources Ltd. v. Limerick Corporation* [1987] I.R. 159
18 See, for example, *Blessington Community & District Council Ltd. v. Wicklow County Council* [1997] 1 I.R. 273. The applicants in that case were ultimately held not to have the necessary locus standi to mount a constitutional challenge. The High Court decision in *Brady v. Donegal County Council* [1989] I.L.R.M. 282 indicated that the analogous provisions introduced by the Local Government (Planning and Development) Act, 1976 were unconstitutional. The matter was disposed of on other grounds in the Supreme Court and the point remained open. The reasoning evinced in the subsequent decision in *Tuohy v. Courtney* [1994] 3 I.R. 1 (in the context of the Statute of Limitations), however, suggests that had the courts to consider the matter again the provisions might well have been upheld as constitutional. See also *In re the Illegal Immigrants (Trafficking) Bill, 1999* Supreme Court unreported 28th August, 2000
19 *State (Haverty) v. An Bord Pleanála* [1987] I.R. 485 at 493
20 *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128; *McCann v. An Bord Pleanála* [1997] 1 I.L.R.M. 314; [1997] 1 I.R. 264; *Cavern Systems Dublin Ltd. v. Clontarf Residents Association* [1984] I.L.R.M. 24; In *re the Illegal Immigrants (Trafficking) Bill, 1999* Supreme Court unreported 28th August, 2000 (at p. 41)
21 *R. v. North West Leicestershire District Council ex parte Moses* [2000] 2 J.P.L. 1287
22 The fact that the High Court is now empowered (under Section 50(4)(g)) to amend the planning permission and does not necessarily have to set it aside in its entirely may encourage developers to bring limited challenges to aspects of the planning permission.
23 *Invers Resources Ltd. v. Limerick County Council* [1987] I.R. 159 at 164
24 See *Blessington Community & District Council Ltd. v. Wicklow County Council* [1997] 1 I.R. 273 at 286/7 (requirement to be misled); *Springview Management Co. Ltd. v. Cavan Developments Ltd.* [2000] 1 I.L.R.M. 437 at 441 (prejudice); *Lancefort Ltd. v. An Bord Pleanála* [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401 (requirement to raise objections)
25 Section 19 (3), Local Government (Planning and Development) Act, 1992
26 *Lancefort Ltd. v. An Bord Pleanála* [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401
27 [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401. *See Simons* (1998) 5 I.P.E.L.J. 131
28 *Springview Management Co. Ltd. v. Cavan Developments Ltd.* [2000] 1 I.L.R.M. 437 at 441. See also *Blessington Community & District Council Ltd. v. Wicklow County Council* [1997] 1 I.R. 273. The effect of the introduction of a test of 'substantial grounds' appears to have been to sweep away older cases such as *E.S.B. v. Gormley* [1985] I.R. 129
29 Section 50(4)(d)
30 *Chambers v. An Bord Pleanála* [1992] 1 I.R. 134; *Seery v. An Bord Pleanála* High Court unreported 2nd June, 2000
31 *Murphy v. Wicklow County Council*, High Court unreported 19th March 1999; *E.S.B. v. Gormley* [1985] I.R. 139; *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99; *Attorney General (Martin) v. Dublin Corporation* High Court 12th February, 1979 'Under our constitution it is as much the duty of the State to render justice against itself in favour of citizens as it is to administer the same between private individuals'.
32 See *Blessington Heritage Trust Ltd. v. Wicklow County Council* [1999] 4 I.R. 571 and the cases cited therein.
33 [1985] I.R. 129 at 157
34 [1984] I.R. 381 at 393
35 *Lancefort Ltd. v. An Bord Pleanála* [1999] 2 I.R. 570; [1998] 2 I.L.R.M. 401
36 See, for example, *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99 at 114
37 [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401
38 [2000] 1 I.L.R.M. 437
39 *Lancefort Ltd. v. An Bord Pleanála* [1999] 2 I.R. 270 at 292; [1998] 2 I.L.R.M. 401 at 420
40 High Court 19th March, 1999
41 This appears to have been the view of the Minister for the Environment 521 Dáil Debates 411/412 (14th June, 2000)
42 *R. v. Inspectorate of Pollution ex parte Greenpeace Ltd.* (No. 2) [1994] 4 All E.R. 329. See also *Murphy v. Wicklow County Council*, High Court unreported 19th March 1999
43 Iarnrod Eireann v. Ireland [1996] 2 I.L.R.M. 161 at 190
44 [1999] 4 I.R. 571
45 *Malahaide Community Council Ltd. v. Fingal County Council* [1997] 3 I.R. 383; Lancefort Ltd. v. An Bord Pleanála [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401
46 *Springview Management Company Ltd. v. Cavan Developments Ltd.* [2000] 1 I.L.R.M. 437. cf. R. v. Leicester City Council & Ors. ex parte Blackford and Boothcorpe Action Group Ltd. [2000] J.P.L. 1266 at 1278
47 See also *Village Residents Association Ltd. v. An Bord Pleanála* [2000] 2 I.L.R.M. 59 at 66: 'it would be unwieldy and unwise to try and mount litigation in the name of or on behalf of an unincorporated association'. *R. v. Leicester City Council & Ors. ex parte Blackford and Boothcorpe Action Group Ltd.* [2000] J.P.L. 1266 at 1278
48 [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401
49 High Court unreported 23rd March, 2000
50 See also *R. v. Leicester City Council & Ors. ex parte Blackford and Boothcorpe Action Group Ltd.* [2000] J.P.L. 1266 at 1278 'The costs position can be dealt with adequately by requiring the provision of security for costs in a realistically large sum'.
51 [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401
52 See also *Murphy v. Wicklow County Council* High Court unreported 19th March, 1999. Kearns J. ruled that the applicant did not have locus standi in respect of one particular ground of challenge, viz. the adequacy of an environmental impact statement, for reasons including the fact that the applicant had not participated in the statutory procedure.
53 *Monaghan U.D.C. v. Alf-a-bet Promotions Ltd.* [1980] I.L.R.M. 64
54 *Chambers v. An Bord Pleanála* [1992] 1 I.R. 134
55 *Lancefort Ltd. v. An Bord Pleanála* [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401; *R v. Hammersmith and Fulham L.B.C. ex parte People before Profit Ltd.* (1981) L.G.R. 322.
56 [1984] I.R. 381
57 *P. & F. Sharpe Ltd. v. Dublin City & County Manager* [1989] I.R. 701 at 721. See also *Ardoyne House Management Ltd. v. Dublin Corporation* [1998] 2 I.R. 147
58 As in the cases of *P. & F. Sharpe Ltd. v. Dublin City & County Manager* [1989] I.R. 701; *Tennyson v. Dun Laoghaire Corporation* [1991] 2 I.R. 527; *Ardoyne House Management Ltd. v. Dublin Corporation* [1998] 2 I.R. 147
59 See, for example, the facts of *Village Residents Association Ltd. v. An Bord Pleanála* (No. 2) High Court unreported 23rd March, 2000 where it was suggested that it might be necessary to join the owner of the lands in the proceedings in circumstances where the applicant for the planning permission was a mere lessee.
60 [1994] 1 I.R. 124
61 *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 at 130
62 An analogy might be drawn with the reasoning in *Lancefort Ltd. v. An Bord Pleanála* [1999] 2 I.R. 270 ; [1998] 2 I.L.R.M. 401 where a not dissimilar distinction was drawn between *'substantial grounds'* and *locus standi*.
63 Section 37(1)(b), Planning and Development Act, 2000. See also *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at 52
64 *Hynes v. An Bord Pleanála* (No. 2) High Court unreported 30th July, 1998
65 *Shannon Regional Fisheries Board v. An Bord Pleanála* [1994] 3 I.R. 449; *Maher v. An Bord Pleanála* [1999] 2 I.L.R.M. 198. See also *Max Developments Ltd. v. An Bord Pleanála* [1994] 2 I.R. 121 (failure to seek order of prohibition).
66 For the requirements as to interest, see *Keane v. An Bord Pleanála* [1998] 2 I.L.R.M. 241
67 *Hynes v. An Bord Pleanála* (No. 2) High Court unreported 30th July, 1998
68 For example, an allegation that the proposed development would involve a material contravention of the development plan, or that there had been a failure to comply with public notice requirements, would not normally affect the jurisdiction of *An Bord Pleanála*. (cf. Section 37(2), Planning and Development Act, 2000)
69 *State (Abenglen Properties Ltd.) v. Dublin Corporation* [1984] I.R. 381 at 393
70 *ibid.*; *Eircell Ltd. v. Leitrim County Council* [2000] 1 I.R. 479; [2000] 2 I.L.R.M. 81
71 Specifically, Section 26(3) of the Local Government (Planning and Development) Act, 1963, and Section 14(8) of the Local Government (Planning and Development) Act, 1976. The position is not as clear cut under the Planning and Development Act, 2000 in that under Section 37(2), the issue of material contravention retains some significance before An Bord Pleanála.
72 *Tennyson v. Dun Laoghaire Corporation* [1991] 1 I.R. 527. *cf. Kennedy v. South Dublin County Council* (1998) 5 I.P.E.L.J. 31; *Byrne v. Wicklow County Council* High Court unreported 4th November, 1994
73 *P. & F. Sharpe Ltd. v. Dublin City & County Manager* [1989] I.R. 701; *Tennyson v. Dun Laoghaire Corporation* [1991] 1 I.R. 527; *E.S.B. v. Cork County Council* High Court unreported 28th June, 2000
74 *Ardoyne House Management Ltd. v. Dublin Corporation* [1998] 2 I.R. 147
75 *Eircell Ltd. v. Leitrim County Council* [2000] 1 I.R. 479; [2000] 2 I.L.R.M. 81
76 *Eircell Ltd. v. Leitrim County Council* [2000] 1 I.R. 479; [2000] 2 I.L.R.M. 81; *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497
77 *Eircell Ltd. v. Leitrim County Council* [2000] 1 I.R. 479 at 495; [2000] 2 I.L.R.M. 81 at 97.
78 [1989] I.R. 701 at 721

AN INTERVIEW WITH BARRY SCHECK

Barry Scheck, the distinguished United States defence lawyer and Professor of Law at Cardozo School of Law in New York City, was in Dublin recently to address the Bar Council's conference entitled Crime and Punishment: Retribution or Rehabilitation? He also spoke to ***Mark O'Connell BL*** *about how the Irish and US criminal justice systems compare.*

"How can the Irish system of criminal justice learn from that which exists in the United States?" ponders Barry Scheck. "The answer is quite simple. The best thing you can do is to study our system and avoid the mistakes we have made."

Put another way, Scheck believes that the United States system could benefit greatly by adopting many of the rules and practices which are often criticised by practitioners in the Irish criminal courts.

Firstly, in relation to the death penalty, a topic about which he spoke at some length in the course of his speech on 16 June in the Distillery Building, Mr Scheck states:

> "The US system can certainly learn from the Irish system in relation to the death penalty. The latest amendment to the Irish Constitution was a hell of a good idea which should be followed in the United States."

Secondly, Scheck believes that judges should adopt a flexible approach when handing down sentences. The practice of reviewing sentences, which was struck down by the Supreme Court in the case of the *DPP v Padraig Finn,* (delivered by Keane CJ on 24 November 2000), should be preserved and developed in all jurisdictions.

> "I think there is a role for limited sentence reviews because there can be extreme cases, one way or the other. Sentences may have been too harsh. In many jurisdictions in the US, you can appeal sentences if they're based on certain plainly wrong assumptions or where they are excessively harsh. Under federal law, prosecutors can review sentences if they think judges wrongly applied the law. I'm in favour of limited but not extensive sentence reviews."

Scheck believes that the practice of suspending sentences, which barely survived the *Finn* judgment, is a worthwhile one.

> "Yes, I think there may be cases where they are appropriate. I think it would be a mistake to completely eliminate the power of judges to suspend sentences. In appropriate cases, it may make sense to develop certain standards for the imposition of probation. Frankly, a better way would be to develop more comprehensive institutions to monitor people on what we in the US call supervised release.
>
> "There are lots of interesting technological methods of literally keeping track of people such as ankle bracelets and other kinds of modern tracking devices. There is also a role for urine testing and drug testing. What sentencing studies consistently show is the possible usefulness of 'heightened probation' or very serious supervision of offenders that get supervised on suspended sentences. If you violate a condition, the custodial part of the sentence can be revived. That can be very effective in rehabilitation. I would suggest beefing up the infrastructure so that people who get supervised release sentences can be properly counselled."
>
> "I also think that it's a good thing that the judges have the ability to impose individualised sentences. It is better that judges are not bound by mandatory minimum sentences. Instead, judges can shape the penalty to the individual. The individual's life history and ability to rehabilitate and also that person's involvement in crime are taken into account. One can commit the same offence but certain violations of the same statute can be more egregious and serious than others. It's the role of the judge to take account of all these factors. We have moved way too close to the mandatory minimum sentencing guideline approach to the imposition of punishment. Generally speaking, it has not led to a good outcome in the US. Our judiciary - in particular in the federal courts - is quite unhappy about it."

Scheck urges the Irish authorities to avoid these mistakes.

> "To the extent that there is a desire to correct a certain differential between the way individual judges sentence people charged with similar kinds of crime, you ought to take great care not to repeat the kind of mistakes we have made in the US," he says.
>
> "I think sentencing policy is probably better in Ireland - from what I can see and I don't want to seem like an expert on the Irish criminal system. It seems that at the sentencing stage of a trial, people charged with crimes get a better hearing in Ireland than in the US. I don't know if it's necessarily more lenient. A better way of putting it is to say that in Ireland, they get a fairer crack of the whip."

He also offers advice to those who believe that television cameras should be introduced into Irish courtrooms.

> "I think you should keep the cameras out of the courts here. I am against having cameras in the courtroom. It plainly changes the behaviour of the witnesses. I can't begin to tell you the number of tabloid newspapers that paid money to witnesses who, all of a sudden whether their testimony was true or not, are fatally impeachable because they have taken money from papers like the *National Enquirer.* I know there are plenty of tabloids in Britain

and in Ireland who have been engaged in this type of behaviour. I'm not in favour of television in court but I would hasten to add that I would be in favour of it in those instances where both sides agree. It's more subtle.

"Most lawyers and judges after a while forget about the cameras being there. But the press can corrupt witnesses. And there's also a feedback. It ratchets up attention and all of a sudden everybody is conscious of being second-guessed by their decisions. So a judge may not give Counsel from both sides the opportunity to argue where he thinks it's not good enough for TV. I think it affects the administration of justice. No doubt about it."

The one aspect of the Irish criminal procedure of which he is critical is the judicial practice of summarising cases before juries are sent out.

"To an American, I think that the practice of summing up in Ireland and in Britain is quite frightening," he says. "It's right out of *Rumpole of the Bailey*. If we take the juries seriously as fact finders, and counsel from both sides as advocates, then surely in the present age we should make available transcripts. The judge is supposed to decide the law and the jury should decide the facts. To the extent that the judge is summing up, it certainly allows the judge to interpret the facts rather than the law."

However, he is not in favour of changing the practice of holding a *voir dire* or a trial within a trial.

"We have the same debate in the United States. There are some legal issues which you can fairly anticipate. We call it a *motion in limine*. These can be made prior to the trial or in advance of the issue arising. But it is only appropriate when it really is clear what the factual context is going to be. Most evidentiary issues are decided in the US - as they are decided here- in the middle of the trial, with the jury being sent out of the room. I think there is a certain wisdom in that.

"You don't really know what witnesses are going to say until you hear them on the witness stand, you don't really know how the evidence is going to work out until it's heard. And if all the legal issues could be fairly summed up and the facts could be adduced before the trial starts, then why would we bother to have trials?

"I think that every advocate has had the experience of having a case that looked strong but all of a sudden becomes weak when the witness takes the stand. The opposite can occur as well. There is certain wisdom of having these evidentiary issues decided when they are ripe."

He praises the practice in the Irish courts whereby many criminal law barristers represent at different times the prosecution and the defence.

"Even though most of the work I do is with the people who are accused of crimes, I have assisted prosecution lawyers in lots of cases. It's a shame that there is no tradition of it in the United States. There is no bar, statutory or otherwise, on switching but it doesn't happen. If you are too long on one side or the other, you develop institutional blinders. I wish we adopted the Irish approach in the US."

Scheck acknowledges his own celebrity status as an advocate but he denies that this aspect of his career has involved him in behaviour which would get him into trouble with the guardians of any code of conduct, not least the one supported by the Bar Council of Ireland.

"I think it's a good idea that in Ireland a barrister is not allowed to discuss any case in which he is professionally involved. Furthermore, I really don't like lawyer advertising which is rampant in the United States. They say that lawyers are allowed to do it under the First Amendment to the US Constitution. Certainly I have never done anything which has created difficulties in this regard. It gives me an uneasy feeling to see the practice of law being sold like a bar of soap.

"There's a lot to be said about the ban on lawyers talking about the cases in which they have been involved. Something I found distressing about some of the high profile cases is that people who are literally on your legal team start writing books about the cases where they reveal privileged and confidential information. This happened in the OJ Simpson case where one of the lawyers involved gave an important file to a journalist who wrote a book. A film was later made. There were a lot of inaccuracies and the whole thing was regrettable.

"Horrifying things happen when you're involved in a high profile case. Lots of other lawyers start doing and saying unimaginable things and behaving in ways which are not within the rules of professional responsibility. There is always a difficulty in drawing the line."

Scheck distinguishes himself from other high-profile lawyers:

"By profession, I am a law professor. I have been teaching in the Cardozo Law School for 23 years. My approach to cases which have gained a lot of notoriety is different from colleagues who are in the business of practising law. When you're a law prof, it's not really your business. I suppose I have become a well-known lawyer involved in high profile cases but in the end of the day, I'm an academic."

He has been presented with ethical difficulties but they have never been insurmountable. While he has never written a book about a case in which he has been involved, he is with Peter Neufeld and Jim Dwyer the co-author of *Actual Innocence*, a critically acclaimed study of what is wrong with the criminal justice system in the United States.

Discussion of the new book gets him on to one of his favourite topics.

"The book is about why innocent people are convicted. We used DNA testing to prove that some people have been wrongly convicted. Now there has been up to 87 post-conviction DNA exonerations in the United States, including ten people who have been sentenced to death. It's not so much that DNA can prove people are innocent. That's trivial and we know that. Obviously it identifies the guilty but what's most interesting is that it gives us an opportunity to study these cases where we know for certain that people were stone-cold innocent.

"Our book goes into mistaken eye-witness identification, we tell the real story, we identify the problems in terms of social science, psychological research, criminal solutions, false confession, forensic science, incompetent lawyering and, of course, police misconduct. It's not about DNA, it's about the rest of the system viewed through the prism of post-conviction DNA exonerations. I think that it will be the lasting contribution of DNA to the criminal justice system."

But just how dependable is DNA testing?

"In theory," Scheck answers, "DNA testing is legitimate and correct in terms of scientific principle but there's always human error. DNA might be fool-proof but any fool can do it. There are always going to be problems of contaminating samples, interpretation errors. On the other hand, it's certainly the most robust, accurate and powerful tool that forensic experts have had in a century." ●

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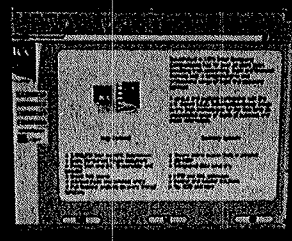

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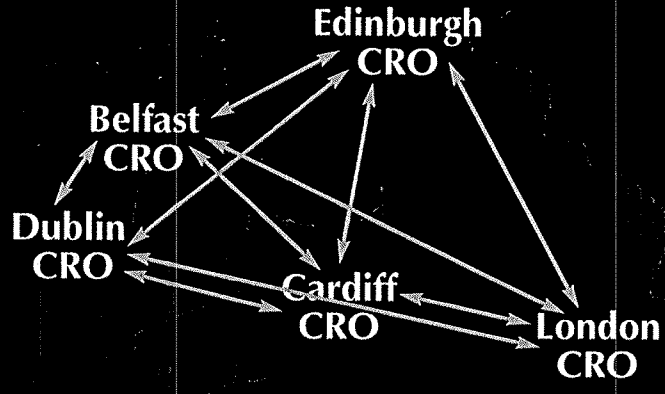

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Legal Update

The BarReview
Journal of the Bar of Ireland. Volume 6, Issue 8

A directory of legislation, articles and written judgments received in the Law Library from the 13th April 2001 to the 8th June 2001.
Judgment Information compiled by the Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

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Administrative Law

Gorman v. Minister for the Environment and Local Government
High Court: **Carney J.**
23/03/2001

Taxi licensing; deregulation; judicial review; statutory instrument permitting extra licences to be issued to existing taxi licence holders (S.I. No.3/2000) had been declared unconstitutional by the High Court; applicants had appealed that decision to the Supreme Court and appeal was pending; respondents had replaced S.I. No.3 with S.I. No.367/2000; applicants seeking judicial review to quash S.I. No.367 as being ultra vires second named respondent; whether the actions of second named respondent in revoking S.I. No.3 constituted an unwarranted interference in the judicial domain by reason of the fact that there was nothing left for the Supreme Court to rule upon on appeal; whether the ministerial repeal prevented the revival of S.I. No.3 in the event of a successful appeal and therefore constituted an unwarrantable interference in the judicial domain; whether S.I. No.367 is severable; whether respondents in introducing S.I. No.367 into law without compensation had mounted an unjust attack on the applicants' constitutionally protected property rights; whether respondents acted in an irrational manner or one which flies in the face of reason or common sense; whether the decision of second named respondent attracted the full rigours of natural and constitutional justice given that he was engaged in a legislative process; whether the applicants had a legitimate expectation to fetter a public body's statutory discretion to adopt a new policy in the public interest.
Held: Repeal provision contained in S.I. No.376/2000 quashed; balance of applicants' claim dismissed.

Superquinn Limited v. Bray U.D.C.
High Court: **Kearns J.**
05/05/2000

Costs; powers of Taxing Master; applicants seeking review of decision of Taxing Master; damage caused by 'Hurricane Charlie' in 1986 had led to widespread claims being brought against various insurers, one of whom, Eagle Star, exercised its subrogation rights to seek recompense via plaintiff against defendants; very technical evidence had been adduced by both sides of a geographical, typographical and meteorological nature; Taxing Master had dramatically reduced the requested fees of defendant's counsel and solicitors; whether the court is in a position to determine appropriate allowances, particularly those of solicitor's instruction fees; whether there was any basis for finding of Taxing Master that the responsibility factor in relation to the defendants' solicitors was not of an enormous dimension; whether the instant case demanded assessment on its own merits as a case comprising unusual facts; whether the Taxing Master erred in that he applied an a priori method of calculation to his consideration of costs, tying the defendants in to the fees marked by plaintiff's solicitor and counsel; whether any ruling of the Taxing Master must set out an analysis of the work, specifics of calculation and reasoning which leads to the determination in respect of fees; whether it would be unjust to allow present instruction fee to defendants' solicitors to stand; whether counsel's fees should be increased in recognition of complexity and degree of preparation which the case entailed and its 'test case' character; s.27(3), Court and Court Officers Act, 1995.
Held: Relief granted in relation to solicitors' instruction fee and counsels' brief fee; refresher fees reduced to £2,000.

Statutory Instruments

Referendum commission (establishment) order, 2001
SI 155/2001

Referendum commission (establishment) (no. 2) order, 2001
SI 156/2001

Referendum commission (establishment) (no. 3) order, 2001
SI 157/2001

Referendum commission (establishment) (no. 4) order, 2001
SI 158/2001

Agency

Library Acquisition

Bogaert, Geert
Commercial agency and distribution agreements law and practice in the member states of the European Union
3rd edition
The Hague Kluwer Law International 2000
W118

Agriculture

Statutory Instruments

Agriculture, food and rural development (delegation of ministerial functions) order, 2001
SI 147/2001

Agriculture, food and rural development (delegation of ministerial functions) (no.2) order, 2001
SI 148/2001

Diseases of animals act, 1966 (foot-and-mouth disease)(export and import of horses) order, 2001
SI 105/2001

Diseases of animals act, 1966 (foot-and-mouth)(import restrictions)(no. 2)(amendment) order, 2001
SI 107/2001

Diseases of animals act, 1966 (restriction on movement of certain animals) order, 2001
SI 121/2001

Diseases of animals act, 1966 (section 29A(4)) order, 2001
SI 80/2001

Diseases of animals act, 1966 (prohibition in respect of certain imported horses, greyhounds, machinery, vehicles and equipment) order, 2001
SI 81/2001

Diseases of animals act, 1966 (foot and mouth disease) (restriction on artificial insemination)
SI 144/2001

Diseases of animals act, 1966 (section 29A(4)) (No. 2) order, 2001
SI 149/2001

Diseases of animals act, 1966 (foot-and-mouth disease) (restriction on movement of persons) order, 2001
SI 160/2001

Diseases of animals act. 1966 (foot-and-mouth disease) (export and movement restrictions) (revocation) order, 2001.
SI 166/2001

Foot and mouth (restriction on movement)(no. 3)(amendment) order, 2001
SI 90/2001

Foot and mouth (restriction on movement)(no. 4)(amendment) order, 2001
SI 91/2001

Foot and mouth disease (restriction of import of vehicles, machinery and other equipment)(amendment) (no. 3) order, 2001
SI 106/2001

Foot and mouth disease (restriction of import of vehicles, machinery and other equipment) (amendment) (no. 2) order, 2001
SI 84/2001

Foot-and-mouth disease (hay, straw and peat moss litter) (amendment) order, 2001
SI 86/2001

Foot-and-mouth-disease (restriction of import of horses and greyhounds) (no. 2) (amendment) order, 2001
SI 109/2001

Infectious diseases (maintenance allowances) regulations, 2001
SI 119/2001

Animals

Statutory Instruments

Diseases of animals act, 1966 (foot-and-mouth disease)(export and import of horses) order, 2001
SI 105/2001

Diseases of animals act, 1966 (foot-and-mouth)(import restrictions)(no. 2)(amendment) order, 2001
SI 107/2001

Diseases of animals act, 1966 (restriction on movement of certain animals) order, 2001
SI 121/2001

Diseases of animals act, 1966 (section 29A(4)) order, 2001
SI 80/2001

Diseases of animals act, 1966 (prohibition in respect of certain imported horses, greyhounds, machinery, vehicles and equipment) order, 2001
SI 81/2001

Diseases of animals act, 1966 (foot and mouth disease) (restriction on artificial insemination)
SI 144/2001

Diseases of animals act, 1966 (section 29A(4)) (No. 2) order, 2001
SI 149/2001

Diseases of animals act, 1966 (foot-and-mouth disease) (restriction on movement of persons) order, 2001
SI 160/2001

Diseases of animals act. 1966 (foot-and-mouth disease) (export and movement restrictions) (revocation) order, 2001.
SI 166/2001

Foot and mouth (restriction on movement)(no. 3)(amendment) order, 2001
SI 90/2001

Foot and mouth (restriction on movement)(no. 4)(amendment) order, 2001
SI 91/2001

Foot and mouth disease (restriction of import of vehicles, machinery and other equipment)(amendment) (no. 3) order, 2001
SI 106/2001

Foot and mouth disease (restriction of import of vehicles, machinery and other equipment) (amendment) (no. 2) order, 2001
SI 84/2001

Foot-and-mouth disease (hay, straw and peat moss litter) (amendment) order, 2001
SI 86/2001

Foot-and-mouth-disease (restriction of import of horses and greyhounds) (no. 2) (amendment) order, 2001
SI 109/2001

Arbitration

Library Acquisition

Gaillard, Emmanuel
Fouchard Gaillard Goldman on international arbitration
The Hague Kluwer Law International 1999
C1250

Bail

Director of Public Prosecutions v. Murphy
High Court: **O'Donovan J.**
20/11/2000

Bail; application to revoke; statutory interpretation; penal servitude; respondent sentenced to term of three years penal servitude on 27th April, 1997; respondent then admitted to bail pending the determination of a judicial review application in respect of that sentence; judicial review application refused on 1st March, 2000; respondent then voluntarily surrendered himself at prison but was refused admission and his cash bail was returned to him; applicant seeks orders revoking respondent's admission to bail and directing his return to prison to serve balance of sentence imposed; whether s.11, Criminal Law Act, 1997, has the effect of retrospectively altering the nature and condition of a sentence of penal servitude imposed prior to the passing of the Act; whether respondent had the legitimate expectation that the sentence of penal servitude imposed would expire three years later; s.21, Interpretation Act, 1937.
Held: Relief refused.

D.P.P. v. Desmond
High Court: **Kelly J.**
25/04/2001

Bail; murder charges; presumption of innocence; limitations on right to bail; applicant had considerable history of failure to honour bail terms; applicant had disappeared from jurisdiction using an alias shortly after bodies of deceased found; whether there is a reasonable probability that, if granted bail, applicant would not appear for trial; whether there is a probability that witnesses would be

interfered with if bail is granted; whether delay in bringing applicant to trial would justify his being released on bail.
Held: Application refused.

Company Law

Gasco Limited, In re
High Court: **McCracken J.**
05/02/2001
Company; winding up; directors; restriction; official liquidator seeks restriction orders against three named respondents; liquidator unable to locate monthly accounts for 1997 and 1998; whether first-named respondent was a shadow director of the company; whether from December, 1997, to date of winding up first named respondent effectively ran company on his own; whether there is evidence of serious irresponsibility by first named respondent during the last few months of the trading life of the company; whether second and third named respondents behaved honestly and responsibly in relation to the conduct of the affairs of the company; ss. 149, 150, Companies Act, 1990.
Held: Restriction order made against first-named respondent.

Statutory Instrument

Statistics (business accounts) order, 2001
SI 191/2001
This Order shall come into operation on the 1st day of April, 2001 and shall expire on the 31st day of December 2005

Contract

Blackall v. Blackall
High Court: **Finnegan J.**
06/06/2000

Contract; real property; partition or sale of premises; premises held by parties as tenants in common; Circuit Court ordered that premises be sold to the purchaser; defendants refused to comply with this order delaying the sale; during the period of delay the premises greatly appreciated in value; defendants now appeal from subsequent decision of Circuit Court on an application for directions by the solicitor having carriage of the sale; whether or not an enforceable agreement concluded; whether the payment of the deposit was a condition precedent or a condition of the contract; whether bidding may be reopened on the grounds that the failure of the purchaser to pay the deposit was improper conduct; Partition Acts, 1868 - 1874.
Held: Appeal dismissed; defendants bound by original sale.

A.W.G. Development Fund Limited v. Woodroe Limited
High Court: **Herbert J.**
25/01/2001

Contract; breach of contract; defendant company seeking payment under agreement between plaintiff company and defendant; plaintiff company had as its object the provision of funds in the form of grant assistance to help create new employment opportunities in Dungarven; plaintiffs refused to make second payment of £200,000 under the agreement on the grounds that defendants had not complied with conditions regarding the numbers of permanent full time jobs created; whether defendant is correct in contending that workers who had been employed for 5 days were employed by defendant in full time positions for the purpose of the agreement; whether "permanent" in the context of the agreement implied jobs for life or until retirement or rather is used to distinguish casual, seasonal and other forms of periodic employment; whether the use of the term "within" in the absence of a clear indication to the contrary signifies a time-frame inside of which the specified jobs were to be created but without any requirement as to the duration of any particular job thereafter; whether it could be reasonably considered to have been the intention of the parties in entering into this agreement that one party should be exposed to a risk of serious financial disadvantage as a consequence of events over which it had practically and legally almost no control; whether a break in service should be disregarded for the purpose of determining an indicator of a likely intention of becoming a long term employee of the defendant; whether defendant had within 8 months after the commencement date created not less than 10 jobs in Dungarven.
Held: Defendant had complied with conditions of the agreement and was entitled to be paid the second sum by the plaintiff.

Sweeney v. National University of Ireland Cork
High Court: **Smyth J.**
09/10/2000

Copyright; passing off; interlocutory injunction; plaintiff, trustee of the estate of James Joyce, seeks interlocutory injunction restraining defendant from publishing anthology before determination of passing off action; defendant sought permission to include a number of extracts from works of James Joyce in proposed educational anthology; plaintiff had stipulated that permission would only be forthcoming if licence fee of £7,000 sterling was paid and 1922 original edition of 'Ulysses' used; defendants sought to use extracts from a readers edition of 'Ulysses', allegedly published during period when copyright to same had expired; permission to publish extracts had been granted by editor of readers edition; whether damages an adequate remedy if plaintiff were to succeed in claim for permanent injunction at trial of action.
Held: Interlocutory injunction granted; alleged loss not quantifiable or capable of compensation by award of damages; statutory entitlement to publish was a matter of fact and degree that could only be established at full hearing of action.

Criminal Law

B.F. v. Director of Public Prosecutions
Supreme Court: Keane C.J., Murphy J., **Geoghegan J.**
22/02/2001

Sexual offences; delay; juvenile offender; appellant had been charged with sexual offences and was fourteen years old at time of their alleged commission; whether delay of three years and nine months in initiation of prosecution excessive and inexcusable, in particular where well-founded hope that appellant might not be tried; whether, in the case of a criminal offence allegedly committed by a child or young person, special duty on State authorities over and above normal duty of expedition to ensure a speedy trial.
Held: Appeal allowed; injunction ordered against respondent from proceeding further with the prosecution.

Gilligan v. Ireland
Supreme Court: **Denham J.,** Murphy J., Geoghegan J.
24/10/2000

Special Criminal Court; right to jury trial; certificate of D.P.P.; applicant seeking inter alia an order staying his prosecution on the grounds that the Offences Against the State legislation is unconstitutional and in violation of various articles of the European Convention of Human Rights and that the Proclamation by the Government of Ireland of 26th May, 1972 is no longer valid; whether the application for leave to apply for judicial review was brought promptly; whether the application raised issues which had already been determined by the Court; whether, having regard the nature of the argument made in relation to the continued existence of the Proclamation of 1972 and the reliefs sought, proceedings should be brought by way of plenary summons; whether, given that criminal trials should be heard with reasonable expedition, order should be granted staying trial; ss.35 & 47, Offences Against the State Act, 1939; Articles 6, 14 & 15, European Convention on Human Rights
Held: Appeal dismissed while recognising right of applicant to institute substantive proceedings for declaratory relief.

Dunne v. D.P.P.
High Court: **Kearns J.**
23/03/2001

Criminal; fair trial; inspection of evidence by defence; judicial review; applicant seeking inter alia order prohibiting his trial for robbery; applicant had been accused of committing

robbery at a service station; video tape relating to service station on date of robbery had not been made available to accused, nor was any explanation furnished for its non existence or non production; whether Gardai had been given the relevant tapes; whether delay of accused in seeking to inspect the tapes compels the court to exercise its discretion against granting relief; whether the absence of the material rendered it impossible for the trial judge to give appropriate instructions to the jury; whether any injustice would be done to the applicant; whether the court should intervene to restrain a trial were an unfair trial can be avoided by directions and proper charges given to the jury by the trial judge.
Held: Relief denied.

The People (D.P.P.) v. Heeney
Supreme Court: **Keane C.J.,** Denham J., Murphy J., Murray J., Hardiman J.
05/04/2001

Criminal; appeal; double jeopardy; plea bargaining; appellant pleaded guilty and was sentenced in Circuit Criminal Court on charges of unlawful carnal knowledge and sexual assault; Court of Criminal Appeal was satisfied that trial judge was unduly lenient and substituted in each case a greater sentence; whether Court of Criminal Appeal should have had regard to the fact that discussions had taken place in chambers prior to the trial between the trial judge and counsel for the prosecution and defence following which the appellant changed his plea to guilty; whether Court of Criminal Appeal should have had regard to the concept of double jeopardy and for that reason imposed a lesser sentence than that deemed appropriate at first instance.
Held: Appeal allowed; Court of Criminal Appeal obliged to have regard to chain of circumstances in which respondent participated which led to the appellant's plea of guilty and sentence; no question of appellant being tried again in respect of a charge of which already acquitted; Order of Court of Criminal Appeal discharged and substituted with Order affirming Circuit Court sentences.

Library Acquisition

Mewett and Manning on criminal law
3rd edition
Canada Butterworths 1994
M500.C16

Statutory Instrument

Criminal justice act, 1999 (part III) (commencement) order, 2001
SI 193/2001

Criminal Justice (Legal Aid) (Amendment Act) Regulations, 2001
SI 124/2001

District court (criminal justice) rules, 2001
SI 194/2001

Employment

O'Donovan v. The Minister for Justice, Equality and Law Reform
High Court: **O'Neill J.**
09/10/2000

Employment; offer; judicial review; applicant had been informed of fact that letter had been issued by respondent promoting him to higher position in his employment; applicant never received letter, as soon after its issue respondent requested its return; applicant seeks various reliefs, *inter alia* order of *certiorari* quashing decision of respondent to withdraw letter of appointment and declaration that applicant is entitled to hold and does hold position allegedly offered in letter; whether offer contained in letter required express acceptance by applicant before appointment would be effected; whether letter issued by respondent appointed applicant to his/her position or merely offered that appointment subject to acceptance of applicant; whether respondent acted ultra vires his powers in purporting to withdraw letter of appointment to applicant; whether, if applicant was not in fact appointed to the higher position, a recision of that appointment could take place; whether application was brought promptly; whether the process of correspondence could justify the delay; whether, in the absence of prejudice to respondent, the Court should exercise its discretion in favour of extending time for bringing of proceedings.
Held: Relief refused; time for bringing of proceedings extended.

Library Acquisition

Blanpain, Roger
European labour law
7th edition
The Hague Kluwer Law International 2000
W131.5

Statutory Instruments

Coras Iompair Eireann pension scheme for regular wages staff (amendment) scheme (confirmation) order, 2001
SI 93/2001

Employment regulation order (hairdressing joint labour committee), 2001
SI 96/2001

Employment regulation order (contract cleaning (city and county of dublin) joint labour committe), 2001.
SI 184/2001

Employment regulation order (contract cleaning (excluding the city and county of dublin) joint labour committee), 2001
SI 185/2001

European Law

Library Acquisitions

Blanpain, Roger
European labour law
7th edition
The Hague Kluwer Law International 2000
W131.5

Bogaert, Geert
Commercial agency and distribution agreements law and practice in the member states of the European Union
3rd edition
The Hague Kluwer Law International 2000
W118

Statutory Instrument

European communities (import restrictions (foot-and mouth disease)) (revocation) regulations, 2001
SI 120/2001

Fisheries

Statutory Instruments

Aquaculture (licence application) (amendment) regulations, 2001
SI 145/2001

Cod (fisheries management and conservation) order, 2001
SI 114/2001

Cod (fisheries management and conservation)(no.2) order, 2001
SI 183/2001

Haddock (fisheries management and conservation) order, 2001
SI 182/2001

Hake (fisheries management and conservation) order, 2001
SI 115/2001

Horse Mackerel (prohibition on fishing) order. 2001
SI 181/2001

Mackerel (prohibition on fishing) order, 2001
SI 159/2001

Monk (fisheries management and conservation) order, 2001
SI 116/2001

Freedom of Information

Statutory Instruments

Freedom of information act, 1997 (prescribed bodies) regulations, 2001
SI 126/2001

Freedom of information act, 1997 (prescribed bodies)(no. 2) regulations, 2001
SI 127/2001

Freedom of information act, 1997 (prescribed bodies) (no. 3) regulations, 2001
SI 128/2001

Garda Síochana

Dooner v. Garda Síochana (Complaints) Board
High Court: **Finnegan J.**
02/06/2000

Complaints procedure; judicial review; natural and constitutional justice; audi alterem partem; complaint made against the applicant Garda; applicant had been notified of complaint but material portions of the complaint had not been included in notification; applicant seeks orders quashing decision of first named respondent (Garda Síochána Complaints Board) concluding that a breach of discipline on his part may have been disclosed, and seond named respondent (Garda Commisioner) indicating his intention to deal with complaint made against applicant by way of "advice"; whether in the absence of certain relevant details on the notification of complaint issued to him the applicant was at a serious disadvantage in responding to the complaint; whether applicant should have been afforded an opportunity to make submissions as to the proposed penalty; whether applicant ought to be granted leave to amend his statement grounding the application for judicial review; whether decisions of first named respondent were unreasonable or irrational; s. 7 (4)(a), Garda Síochána (Complaints) Board Act, 1986; O. 124, r. 1, Rules of the Superior Courts.
Held: Orders of *certiorari* granted. Amendment to statement allowed.

Brady v. Minister for Finance
High Court: **Murphy J.**
26/03/2001

Assessment of damages; personal injury; post traumatic stress disorder; applicant, member of Gardaí, assaulted and injured while on duty; whether assault led to post traumatic stress disorder; whether respondent's delay in authorising treatment for same has in turn contributed to various subsequent medical complaints.

Held: Award of damages of £32,5000 made, of which £25,000 relates to past pain and suffering, £2,500 relates to future medical expenses and £5,000 relates to injuries received as a direct consequence of the assault.

Insurance

Statutory Instruments

Long-term care insurance (relief at source) regulations, 2001
SI 130/2001

Medical insurance (relief at source) regulations, 2001
SI 129/2001

International Law

Library Acquisition

Gaillard, Emmanuel
Fouchard Gaillard Goldman on international arbitration
The Hague Kluwer Law International 1999
C1250

Landlord & Tenant

Library Acquisition

Report of the Commission on the private rented residential sector
Department of the environment and local government
Dublin Stationery Office July 2000
N93.1.C5

Legal Aid

Statutory Instrument

Criminal Justice (Legal Aid) (Amendment Act) Regulations, 2001
SI 124/2001

Licensing

Library Acquisition

Woods, James V
Liquor licensing laws of Ireland
3rd edition (March 2001)
Limerick James V Woods 2001
N186.4.C5

Medical Law

Statutory Instruments

Long-term care insurance (relief at source) regulations, 2001
SI 130/2001

Medical insurance (relief at source) regulations, 2001
SI 129/2001

Medicinal products (control of paracetamol) regulations, 2001
SI 150/2001

Negligence

Furey v. Suckau
High Court: **O'Caoimh J.**
14/07/2000

Negligence; road traffic accident; plaintiff acting on behalf of deceased husband who was killed in accident; plaintiff alleging defendant guilty of negligence; whether the impact in question occurred near the line dividing main carriageway from hard shoulder on side of road occupied by deceased; whether defendant's vehicle was stationary at time of accident; whether essential liability rests with deceased on the basis that the portion of defendant's vehicle over the white line occupying at least three feet of carriageway on which deceased was driving; whether some liability should rest with the defendant for failing to position his vehicle in the correct position on the road.
Held: Essential liability for accident rested with deceased; twenty percent of liability rested with defendant; order for damages will be made in the light of such findings.

Library Acquisition

McCracken, Robert
Statutory nuisance
London Butterworths 2001
N38.8

Pensions

Statutory Instruments

Coras Iompair Eireann pension scheme for regular wages staff (amendment) scheme (confirmation) order, 2001
SI 93/2001

National pensions reserve fund act, 2000 (establishment day) order, 2001
SI 113/2001

Planning

Electricity Supply Board v. Cork County Council
High Court: **Finnegan J.**
28/06/2000

Planning permission; judicial review; applicant granted planning permission and in reliance on permission commenced works; subsequently, permission revoked by respondent pursuant to its statutory powers; applicant seeks judicial review of this decision; whether there had been a change in circumstances since the grant of permission; whether respondent was wrong in law in deciding that works had not been commenced at the date of its decision; whether applicant denied opportunity to make appropriate submissions on matters which respondent considered of importance to its decision to revoke planning permission; whether respondent failed to observe fair procedures; whether respondent's decision was unreasonable and irrational; s.30, Local Government (Planning and Development) Act, 1963 as amended.
Held: Order of *certiorari* granted.

Seery v. An Bord Pleanála
High Court: **Finnegan J.**
02/06/2000

Leave to apply for judicial review; planning permission; challenge to decision of An Bord Pleanála to grant planning permission; allegations of non compliance of application for planning permission with relevant planning regulations; decision allegedly based on inaccurate information; whether there are substantial grounds for contending that the decision is invalid or ought to be quashed; whether the applicants have sufficient interest and accordingly, *locus standi*; s. 82(3B), Local Government (Planning and Development) Act, 1963 as amended.
Held: Leave granted.

Lancefort Limited v. An Bórd Pleanála
High Court: **Morris J.**
23/07/1997

Planning; judicial review; *locus standi*; domestic effect of EU legislation; applicant seeks leave to appeal to the Supreme Court or, alternatively, an order of reference to the European Court of Justice; second and third named respondents (Ireland and Attorney General) challenge applicant's *locus standi* and also seek leave to appeal to Supreme Court on this issue; whether previous decision of High Court dismissing applicant's claim involves a point of law of exceptional public importance; whether it is desirable in the public interest that an appeal should be taken to the Supreme Court; whether Court is bound to disregard merits of original decision when determining whether point of law of exceptional public importance exists; whether Council Directive 85/337/EEC was properly transposed into domestic law; whether first named respondent is obliged to have regard to same, irrespective of domestic law with regard to the planning process; whether applicant has *locus standi* to apply for judicial review or to invoke Article 43 of the Constitution in this instance; s. 82, Local Government (Planning and Development) Act, 1963.
Held: Leave to appeal granted.

Dublin Corporation v. O'Callaghan
High Court: **Herbert J.**
13/02/2001

Planning; enforcement notices; defendant alleged to have constructed, without necessary grant of planning permission, balustrade surrounding flat roof of single storey rear return together with steel staircase giving access to same; enforcement notice served on defendant by complainant; whether decision to serve enforcement notice must be in form of order of City Manager and Town Clerk or his/her duly delegated officer or may be taken informally by such person; whether Oireachtas intended that the making of a decision by a planning authority to serve an enforcement notice must have been attended by some formality; whether notice itself can constitute record on foot of which Courts may review decision to serve enforcement notice; s. 31(1)(a), Local Government (Planning and Development) Act, 1963; s. 60(1), Local Government (Dublin) Act, 1930; s. 17(2)(c), City and County Management (Amendment) Act, 1955.
Held: The District Judge was not correct in law in holding that the enforcement notice was valid and lawful notwithstanding fact that no Manager's order was made sanctioning the decision to serve the said notice.

Statutory Instruments

Planning and development act, 2000 (commencement) order, 2001
SI 153/2001

Planning and development (licensing of outdoor events) regulations, 2001
SI 154/2001

Practice & Procedure

Bio-Medical Research Limited v. Delatex
Supreme Court: Keane C.J., Murray J., **Fennelly J.**
21/12/2000

Jurisdiction; Brussel's Convention; contract; plaintiff company, domiciled in Ireland, had had an unwritten distribution agreement with defendant company, registered in France; plaintiffs had sent a letter in 1997 to defendants revoking any exclusivity which might have existed in the distribution agreement; plaintiff had issued proceedings in Ireland for arrears and damages six days before defendants had issued proceedings in France; whether case should be heard in Ireland or France; whether the obligation in question for the purposes of Article 5(1) of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Brussels 1968, is the obligation of the defendant to distribute the plaintiff's goods, which obligation is therefore one to be performed in France where courts accordingly have jurisdiction; whether the obligation to pay is the relevant obligation for the purposes of jurisdiction in respect of the claim that the agreement was terminated; whether the relevant obligation is the obligation to give notice which is an obligation to be performed in France; whether the letter revoking exclusivity suggested that the notice was justified by any contractual term; whether the jurisdiction clause applies to the question of the exclusivity of an agreement for distribution of goods sold in France; whether there was any purpose in granting the amendment sought; s.3, Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988; Section 2, Article 5(1), Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Brussels, 1968.
Held: Appeal dismissed; Irish courts have jurisdiction; leave to amend certificate on plenary summons denied.

Silverdale & Hewett's Travel Agencies Ltd. v. Italiatour Ltd.
High Court: **Finnegan J.**
07/11/2000

Delay; issue arises in the context of a claim for breach of contract; first named defendant seeks an order pursuant to inherent jurisdiction of the court dismissing the proceedings on ground of inordinate and inexcusable delay; whether plaintiff guilty of inordinate and inexcusable delay; whether circumstance that third named defendant has gone into liquidation is one which renders the delay prejudicial to first named defendant; whether non availability of second named defendant as a witness is as a matter of probability as a result of the plaintiff's delay; whether fact that first named defendant could have issued current Motion at much earlier stage, but chose to delay doing so until limitation period with regard to institution of substantive proceedings had expired, is a relevant consideration in determining balance of justice; whether balance of justice is in favour of or against the proceeding of the case.
Held: Relief refused; plaintiff guilty of inordinate and inexcusable delay; balance of justice favours allowing the case to proceed.

Ochre Ridge Limited v. Cork Bonded Warehouses Limited
High Court: **O'Neill J.**
20/12/2000

Practice and procedure; security for costs; plaintiff had commenced proceedings against defendant seeking specific performance of a contract for assignment of a lease; proceedings had arisen from failure to conclude negotiations regarding the development of premises by a certain date and subsequent forfeiture of deposit; whether the first named defendant has discharged the onus of proving insolvency or otherwise inability to pay at the appropriate time; whether the appropriate time in respect of which the Court must determine inability to pay is the point in time where the defendant seeking security has been successful in his defence; whether defendants have a stateable defence to plaintiff's claim; whether plaintiffs have demonstrated special circumstances which would move the Court to exercise its discretion against ordering the security for costs sought; s.390, Companies Act, 1963.
Held: Application refused.

Aquatechnologie Limited v. National Standards Authority of Ireland
Supreme Court: Keane C.J., **Murphy J.,** Murray J.
10/07/2000

Practice and procedure; discovery; appellant seeking judicial review of decision of first-named respondent to deny the appellants an agreement certificate in respect of their product (plastic piping); appeal against two orders of High Court refusing appellant's application for discovery of certain documents by first-named respondent and refusing appellant's application to amend statement of grounds; appellant sought discovery of all documentation in the possession of first-named respondent concerning applications for certification by third parties in respect of polythene piping; first-named respondent had already made discovery to the appellant of all documentation concerning their application for a certificate; whether documents sought were relevant to the issue of legitimate expectation; whether discovery could be sought in order to establish discrimination when this issue did not from part of the statement of grounds; whether documents were relevant to alleged breach of Article 30, E.C. Treaty; whether suggested basis for granting of discovery was speculative; whether documents sought in discovery were directly or indirectly relevant to any of issues between the parties; whether appellant could amend statement of grounds with view to adding various reliefs on ground that at no time was it told that its product was not a 'proper material' for purpose of building regulations; whether appellant's delay in making an application to amend is excusable.
Held: Order refusing discovery upheld; application for leave to amend statement of grounds granted.

Gilmartin v. Judge Murphy
High Court: **Kearns J.**
23/02/2001

Practice and procedure; criminal; judicial review; remittal; applicant had been sentenced for drink driving and insurance offences; he had not been offered legal aid in the District Court and no inquiry had been made as to his means; applicant seeking *certiorari* quashing his conviction; respondents accepted that the sentences imposed were made in excess of jurisdiction; whether matter should be remitted to the District Court; whether applicant can plead *autrefois convict* or *acquit* given that he could never have been required to serve any part of his sentences; whether absence of legal representation in the circumstances rendered respondents' orders void by reason of denial of natural justice; whether absence of legal representation on its own or in conjunction with the sentences imposed constituted circumstances which suggest the court should exercise its discretion against remittal; whether applicant established any prejudice that would outweigh the public interest in seeing a prosecution being brought against him in due course of law; O.84, r.26(4), Rules of the Superior Courts.
Held: Order of *certiorari* granted; order made for remittal to the District Court.

Statutory Instruments

District court districts and areas (amendment) and variation of days (shannon and sixmilebridge) order, 2001.
SI 186/2001

District court districts and areas (amendment) and variation of days, (trim) order, 2001
SI 192/2001

District court (criminal justice) rules, 2001
SI 194/2001

Records & Statistics

Statutory Instrument

Statistics (business accounts) order, 2001
SI 191/2001
This Order shall come into operation on the 1st day of April, 2001 and shall expire on the 31st day of December 2005

Refugees

Gabrel v. Minister for Justice, Equality and Law Reform
High Court: **Finnegan J.**
15/03/2001

Aliens; asylum procedures; applicant seeks leave to apply by way of judicial review for various reliefs with regard to refusal of asylum application, inter alia, order of certiorari quashing deportation order; whether leave should be granted on grounds that deportation order is irrational and void in that it does not specify date by which applicant is required to leave the State or country to which she is to be deported; whether applicant moved promptly in bringing proceedings with regard to certain reliefs sought; whether there is good reason for extending periods within which these applications should be made; whether nature of "manifestly unfounded" asylum procedure demands promptness; O. 84, r. 21, Rules of the Superior Courts; s.5, Illegal Immigrants Trafficking Act, 2000; s.5, Refugee Act, 1996.
Held: Leave to bring judicial review proceedings granted

Library Acquisition

Bar Council of Ireland
Bar Council Conference on: Asylum and refugee law
Dublin Bar Council of Ireland 2001
C205.C5

Road Traffic

D.P.P. v. Morrison
High Court: **O'Caoimh J.**
29/11/2000

Road traffic; drunken driving; practice and procedure; defective summons; district judge dismissed charges against respondent due to omission of reference to relevant statutory provision in summons; appellant requested statement of case to determine whether district judge was correct in law in dismissing charge on this basis; whether statement of offence on summons setting forth accusation against respondent sufficient to allow case to proceed; whether statutory provision relating to consequential disqualification is a provision relating to a penalty in the strict sense as known to the criminal law; whether summons did refer in all aspects to the ingredients of the offence and set forth the relevant enactments; whether in these circumstances there was no defect in fact in the summons; whether the inclusion of a reference to the statutory provision would best be described as a counsel of perfection; whether, even if district judge felt in any way that prejudice might have been suffered by respondent, district judge obligated to either proceed with the case there and then, to adjourn the case without amending the summons or to amend summons and grant an adjournment, if this was considered necessary; whether fact that no request was made at any stage to seek to amend summons prior to commencement of case was relevant consideration; s. 26, Road Traffic Act, 1995.
Held: Decision of district judge not correct in law; case remitted back to District Court to allow it to proceed.

D.P.P. v. Stewart
High Court: **Kearns J.**
06/04/2001

Road traffic offence; arrest; case stated; defendant motorcyclist was detained for the purposes of search for possession of a controlled drug; within very short period of time Garda got a smell of intoxicating liquor from defendant; defendant stepped outside Garda car and refused to provide breath specimen; whether defendant could be considered at the time of his arrest under s.12(3) of the Road Traffic Act, 1994, to be in charge of a mechanically propelled vehicle as defendant was already at that specific point in time detained under s.23(1) of the Misuse of Drugs Act, 1977.
Held: Defendant was in charge of motorcycle.

Shipping

Library Acquisition

Licensing of passengers boats (exemption) regulations, 2001
SI 172/2001

Sport

Library Acquisition

Barnes, John
Sports and the law in Canada
3rd edition
Canada Butterworths 1996
N186.6.C16

Taxation

Criminal Assets Bureau v. McDonnell
Supreme Court: Murray J., Hardiman J., **Geoghegan J.**
20/12/2000

Revenue; assessment for tax liability; appellant seeks to overturn judgment entered on foot of what High Court found to be final and conclusive income tax assessment; whether moneys claimed were due and owing at date of issue of proceedings; whether assessment made, which includes profits and gains that may have been gained unlawfully, constitutes an assessment in accordance with statutory provision which provides that, where a person makes default in delivery of a statement in respect of any income tax under a specific statutory schedule, the inspector shall make an assessment on the person concerned in such sum as according to best of inspector's judgment ought to be charged on that person; whether service of notice of appeal or, alternatively, appeal against refusal to accept appeal prevent assessment becoming final and conclusive; whether fact that by date of High Court hearing defendant's appeal against refusal by inspector to hear initial appeal had been decided against him, by reason of his failure to appear and prosecute same, rendered initial appeal invalid *ab initio*; whether there was at all material times a default of appeal within meaning of statutory provisions; whether appeal against assessment of tax and appeal against inspector's refusal of such appeal can be considered as a separate and distinct process.
Held: Appeal allowed; that if appeal against refusal of inspector to receive appeal from assessment is pending at institution of proceedings, assessment is not "final and conclusive" so as to allow summary judgment thereon; that any assessment made which includes profits or gains that may have been gained unlawfully constitutes an assessment in accordance with statutory provision which provides that, where a person makes default in delivery of a statement in respect of any income tax under a specific statutory schedule, the tax inspector shall make an assessment on the person concerned in such sum as according to best of inspector's judgment ought to be charged on that person.

Statutory Instruments

Capital gains tax (multipliers)(2001) regulations, 2001
SI 125/2001

Income tax (employment) regulations, 2001
SI 135/2001

Income tax (relevant contracts) regulations, 2001
SI 131/2001
The regulations are consequential on the alignment from 1 January 2002 of the income tax year with the calendar year and the operation of a short preceeding tax year covering the period from 6 April to 31 December 2001.

Taxes (electronic transmission of certain revenue returns) (specified provision and appointed day) order, 2001
SI 112/2001

Telecommunications

Statutory Instruments

Wireless telegraphy (Carraigaline uhf television programme retransmission) (amendment) regulations, 2001
SI 189/2001

Wireless telegraphy (uhf television programme retransmission) (amendment) regulations, 2001
SI 190/2001

Torts

Library Acquisition

McCracken, Robert
Statutory nuisance
London Butterworths 2001
N38.8

Tourism

Library Acquisition

Liddy, Pat
Dublin a celebration from the 1st to the 21st century
Dublin Dublin Corporation 2000
N286.T6.C5

Transport

Statutory Instruments

Iarnrod Eireann - Irish Rail (Dublin Connolly - Maynooth) (Coolmines level crossing) order, 2001
SI 174/2001

Licensing of passengers boats (exemption) regulations, 2001
SI 172/2001

Wardship

K., In re
Supreme Court: **Denham J.,** McGuinness J.(agreed with Denham J.), **Geoghegan J.**
19/01/2001

Wardship; appellant is the sister and joint committee of the person of the ward of court; the ward now requires round the clock nursing and attention; the applicant claims the Northern Area Health Board is under a constitutional and statutory duty to provide the necessary assistance; judicial review proceedings were commenced but were stayed pending an application for directions before the President of the High Court; the President refused the application as it should have been brought by the committee of the estate of the ward; whether the applicant had sufficient interest to bring the application; whether the President was correct in dismissing the claim.
Held: Matter remitted to the President to consider both the merits of the case and the appropriate procedures.

European Judgments received in the Law Library up to 8/6/01

Information compiled by Lorraine Brien, Law Library, Four Courts.

C-36/98 Spain v Council of the European Union
Court of Justice of the European Communities
Judgment delivered 30/1/2001
(Legal basis-Environment-Council decision approving the Convention on cooperation for the protection and sustainable use of the river Danube-Article 130s(1) and (2) of the EC Treaty (now, after amendment, Article 175(1) and (2)EC)-Concept of 'management of water resources')

C-165/98 Mazzoleni & Anor v Eric Guillaume & Ors
Court of Justice of the European Communities
Judgment delivered 15/3/2001
(Freedom to provide services-Temporary deployment of workers for performance of a contract-Directive 96/71/EC-Guaranteed minimum wage)

C-278/98 Netherlands v Commission
Court of Justice of the European Communities
Judgment delivered 6/3/2001
(EAGGF-Clearance of accounts-1994-Cereals, beef and veal)

C-17/99 French Republic v Commission
Court of Justice of the European Communities
Judgment delivered 22/3/2001
(State aid-Rescue and restructuring aid-Procedure for the examination of
State aid-Failure to order a Member State to disclose the requisite information)

C-33/99 Fahmi & Anor v Bestuur van de Sociale Verzekeringsbank
Court of Justice of the European Communities
Judgment delivered 20/3/2001
(Article 41 of the EEC-Morocco Cooperation Agreement-Article 3 of Regulation (EEC) No 1408/71-Social security-Article 7 of Regulation (EEC) No 1612/68-Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 EC and 43 EC)-Freedom of movement for persons-Non-discrimination-Recipients of an invalidity pension no longer residing in the competent Member State-Amendment of the legislation on study finance)

C-62/99 Betriebsrat der bofrost josef v Bofrost josef H. Boquoi
Court of Justice of the European Communities
Judgment delivered 29/3/2001
(Reference for a preliminary ruling-Article 11(1) and (2) of Directive 94/45/EC-Information to be made available by undertakings on request-Information intended to establish the existence of a controlling undertaking within a Community-scale group of undertakings)

C-215/99 Jauch v Pensionsversicherungsanstalt der Arbeiter
Court of Justice of the European Communities
Judgment delivered 8/3/2001
(Social security for migrant workers-Austrian scheme of insurance against
the risk of reliance on care-Classification of benefits and lawfulness of the residence condition from the point of view of Regulation (EEC) No 1408/71)

C-261/99 Commission v French Republic
Court of Justice of the European Communities
Judgment delivered 22/3/2001
(Failure of a State to fulfil obligations-State aid incompatible with the
common market-Recovery-No absolute impossibility of implementation)

C-265/99 Commission v French Republic
Court of Justice of the European Communities
Judgment delivered 15/3/2001
(Failure by Member State to fulfil obligations-Article 95 of the EC Treaty (now, after amendment, Article 90 EC)-Tax on motor vehicles)

C-266/99 Commission v French Republic
Court of Justice of the European Communities
Judgment delivered 8/3/2001
(Failure of Member State to fulfil its obligations-Quality of surface water intended for the abstraction of drinking water-Directive 75/440/EEC-Conditions of drinking water abstraction in Brittany)

C-273/99 P Connolly v Commission
Court of Justice of the European Communities
Judgment delivered 6/3/2001
(Appeal-Officials-Disciplinary proceedings-Suspension-Statement of reasons-Alleged misconduct-Articles 11,12 and 17 of the Staff Regulations-Equal treatment)

C-325/99 G V de Water v Staatssecretaris van Financien
Court of Justice of the European Communities
Judgment delivered 5/4/2001
(Tax provisions - Harmonisation of laws-Excise duties-Directive 92/12/EEC-Chargeability of duty-Release for consumption of products subject to excise duty-Notion-Mere holding of a product subject to excise duty)

C-404/99 Commission v French Republic
Court of Justice of the European Communities
Judgment delivered 29/3/2001
(Failure by a Member State to fulfil its obligations-Sixth VAT Directive-Taxable amount-Exclusion-Service charges)

C-494/99 Commission v Hellenic Republic
Court of Justice of the European Communities
Judgment delivered 5/4/2001
(Failure by a Member State to fulfil its obligations-Failure to transpose Directive 94/56/EC)

C-83/00 Commission v Netherlands
Court of Justice of the European Communities
Judgment delivered 15/3/2001
(Failure by a Member State to fulfil its obligations-Failure to transpose Directive 97/24/EC-components and characteristics of two or three-wheel motor vehicles)

C-97/00 Commission v French Republic
Court of Justice of the European Communities
Judgment delivered 8/3/2001
(Failure by a Member State to fulfil its obligations-Failure to transpose Directive 97/52/EC)

C-147/00 Commission v French Republic
Court of Justice of the European Communities
Judgment delivered 15/3/2001
(Failure of a Member State to fulfil obligations-Quality of bathing water -Inadequate implementation of Directive 76/160/EEC)

C-176/00 Commission v Hellenic Republic
Court of Justice of the European Communities
Judgment delivered 8/3/2001
(Failure by a Member State to fulfil its obligations-Failure to transpose Directives 96/24/EC and 96/25/EC)

C-266/00 Commission v Grand Duchy of Luxembourg
Court of Justice of the European Communities
Judgment delivered 8/3/2001
(Failure by a Member State to fulfil its obligations-Directive 91/676/EEC)

Library Acquisitions

Information compiled by Sinead Curtin, Law Library, Four Courts.

Bar Council of Ireland
Bar Council Conference on: Asylum and refugee law
Dublin Bar Council of Ireland 2001
C205.C5

Barnes, John
Sports and the law in Canada
3rd edition
Canada Butterworths 1996
N186.6.C16

Report of the Commission on the private rented residential sector
Department of the environment and local government
Dublin Stationery Office July 2000
N93.1.C5

Blanpain, Roger
European labour law
7th edition
The Hague Kluwer Law International 2000
W131.5

Gaillard, Emmanuel
Fouchard Gaillard Goldman on international arbitration
The Hague Kluwer Law International 1999
C1250

Liddy, Pat
Dublin a celebration from the 1st to the 21st century
Dublin Dublin Corporation 2000
N286.T6.C5

McCracken, Robert
Statutory nuisance
London Butterworths 2001
N38.8

Mewett and Manning on criminal law
3rd edition
Canada Butterworths 1994
M500.C16

Woods, James V
Liquor licensing laws of Ireland
3rd edition (March 2001)
Limerick James V Woods 2001
N186.4.C5

European Directives implemented into Irish Law up to 8/6/01

Information compiled by V Curley & E Moloney, Law Library, Four Courts.

Diseases of Animals Act, 1966 (Foot and Mouth Disease) (Export and Movement Restrictions) Order, 2001
SI 110/2001
DIR 2001/234/EC

Diseases of animals act, 1966 (foot and mouth disease) import restrictions) (no.4) order, 2001
SI 118/2001
DIR 2001/172EC

European Communities (Beet Seed) Regulations, 2001
SI 142/2001
DIR 66/400/EC

European communities (licensing of drivers) regulations, 2001
SI 168/2001
DIR 91/439

Acts of the Oireachtas 2001 (as of 29/05/2001)

Information compiled by Damien Grenham, Law Library, Four Courts.

1/2001	Aviation Regulation Act, 2001 Signed 21/02/2001 Si 47/2001 (Establishment Day)
2/2001	Customs And Excise (Mutual Assistance) Act, 2001 Signed 09/03/2001
3/2001	Diseases Of Animals (Amendment) Act, 2001 Signed 09/03/2001
4/2001	Broadcasting Act, 2001 Signed 14/03/2001
5/2001	Social Welfare Act, 2001 Signed 23/03/2001
6/2001	Trustee Savings Banks (Amendment) Act, 2001 Signed 28/03/2001
7/2001	Finance Act, 2001 Signed 30/03/2001
8/2001	Teaching Council Act, 2001 Signed 17/04/2001
9/2001	Electricity (Supply) (Amendment) Act, 2001 Signed 17/04/2001
10/2001	Housing (Gaeltacht) (Amendment) Act, 2001 Signed 23/04/2001

Bills in progress up to the 29/05/2001

Information compiled by Damien Grenham, Law Library, Four Courts.

ACC bank bill, 2001
1st stage- Dail

Activity centres (young persons' water safety) bill, 1998
2nd stage - Dail **[p.m.b.]**

Adventure activities standards authority bill, 2000
2nd stage - Dail

Aer Lingus bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Agriculture appeals bill, 2001
2nd stage - Dail *(Initiated in Seanad)*

Carer's leave bill, 2000
2nd stage - Seanad (initiated in Dai)

Censorship of publications (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Central bank (amendment) bill, 2000
2nd stage - Seanad *(Initiated in Seanad)*

Children bill, 1999
Committee - Dail

Children bill, 1996
Committee - Dail

Companies (amendment) bill, 1999
2nd stage - Dail **[p.m.b.]**

Companies (amendment) (no.4) bill, 1999
2nd stage - Dail **[p.m.b.]**

Company law enforcement bill, 2000
Committee - Dail

Containment of nuclear weapons bill, 2000
Committee - Dail
(Initiated in Seanad)

Control of wildlife hunting & shooting (non-residents firearm certificates) bill, 1998
2nd stage - Dail [p.m.b]

Corporate manslaughter bill, 2001
2nd stage - Dail **[p.m.b.]**

Courts bill, 2000
2nd stage - Dail

Courts and court officers bill, 2001
1st stage - Dail

Criminal justice (illicit traffic by sea) bill, 2000
1st stage - Dail

Criminal justice (temporary release of prisoners) bill, 2001
1st stage -Dail

Criminal justice (theft and fraud offences) bill, 2000
Committee -Dail

Criminal law (rape)(sexual experience of complainant) bill, 1998
2nd stage - Dail **[p.m.b.]**

Dormant accounts bill, 2001
1st stage - Dail

Dumping at sea (amendment) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Eighteenth amendment of the Constitution bill, 1997
2nd stage - Dail **[p.m.b.]**

Electoral (amendment) bill, 2000
Committee- Seanad

Electoral (amendment) (donations to parties and candidates) bill, 2000
Committee - Dail **[p.m.b.]**

Electoral (control of donations) bill, 2001
2nd stage - Dail **[p.m.b.]**

Employment rights protection bill, 1997
2nd stage - Dail **[p.m.b.]**

Energy conservation bill, 1998
2nd stage - Dail **[p.m.b.]**

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2nd stage - Dail [p.m.b]

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1st stage - Dail

European convention on human rights bill, 2001
1st stage - Dail

Family law bill, 1998
2nd stage - Seanad

Fisheries (amendment) bill, 2000
Committee - Dail *(Initiated in Seanad)*

Fisheries (amendment) (no.2) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Freedom of information (amendment) bill, 2000
2nd stage - Dail **[p.m.b.]**

Harbours (amendment) bill, 2000
Committee - Seanad

Health (miscellaneous provisions) bill, 2000
1st stage - Dail

Health (miscellaneous provisions) (no.2) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Health insurance (amendment) bill, 2000
Committee - Dail

Heritage fund bill, 2001
1st stage - Dail

Home purchasers (anti-gazumping) bill, 1999
1st stage - Seanad

Horse and Greyhound racing bill, 2001
1st stage - Dail

Human rights bill, 1998
2nd stage - Dail **[p.m.b.]**

Industrial designs bill, 2000
Committee - Dail

Industrial relations (amendment) bill,2000
Report -Dail *(Initiated in Seanad)*

Interpretation bill, 2000
1st stage - Dail

Irish nationality and citizenship bill, 1999
Report - Dail *(Initiated in Seanad)*

Landlord and tenant (ground rent abolition) bill, 2000
2nd stage - Dail **[p.m.b.]**

Licensed premises (opening hours) bill, 1999
2nd stage - Dail **[p.m.b.]**

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1st stage - Dail

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2nd stage -Dail

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2nd stage - Seanad (Initiated in Dail)

Local Government (planning and development) (amendment) bill, 1999
Committee - Dail

Local Government (planning and development) (amendment) (No.2) bill, 1999
2nd stage - Seanad

Local government (Sligo) bill, 2000
2nd stage -Dail **[p.m.b.]**

Mental health bill, 1999
2nd stage - Seanad (Initiated in Dail)

Motor vehicle (duties and licences) bill, 2001
1st stage - Dail

National stud (amendment) bill, 2000
Committee - Dail

Nitrigin eireann teoranta bill, 2000
Committee - Dail

Official secrets reform bill, 2000
2nd stage - Dail **[p.m.b.]**

Ordnance survey Ireland bill, 2001
2nd stage - Dail *(Initiated in Seanad)*

Organic food and farming targets bill, 2000
2nd stage - Dail [p.m.b]

Partnership for peace (consultative plebiscite) bill, 1999
2nd stage - Dail **[p.m.b.]**

Patents (amendment) bill, 1999
Committee - Dail

Postal (miscellaneous provisions) bill, 2001
1st stage -Dail

Prevention of corruption (amendment) bill, 1999
1st stage - Dail **[p.m.b.]**

Prevention of corruption (amendment) bill, 2000
Committee - Dail

Prevention of corruption bill, 2000
2nd stage - Dail **[p.m.b.]**

Private security services bill, 1999
2nd stage- Dail **[p.m.b.]**

Private security services bill, 2001
1st stage - Dail

Proceeds of crime (amendment) bill, 1999
Committee - Dail

Prohibition of ticket touts bill, 1998
Committee - Dail **[p.m.b.]**

Prohibition of female genital mutilation bill, 2001
2nd stage - Dail **[p.m.b.]**

Protection of employees (part-time work) bill, 2000
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Protection of patients and doctors in training bill, 1999
2nd stage - Dail **[p.m.b.]**

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2nd stage - Seanad

Public representatives (provision of tax clearance certificates) bill, 2000
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Radiological protection (amendment) bill, 1998
Committee- Dail *(Initiated in Seanad)*

Refugee (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

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2nd stage - Dail

Registration of lobbyists bill, 1999
1st stage - Seanad

Registration of lobbyists (no.2) bill 1999
2nd stage - Dail **[p.m.b.]**

Regulation of assisted human reproduction bill, 1999
1st stage - Seanad **[p.m.b.]**

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2nd stage - Dail **[p.m.b.]**

Road traffic bill, 2001
1st stage -Dail

Road traffic reduction bill, 1998
2nd stage - Dail **[p.m.b.]**

Safety health and welfare at work (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Safety of united nations personnel & punishment of offenders bill, 1999
2nd stage - Dail **[p.m.b.]**

Seanad electoral (higher education) bill, 1997
1st stage - Dail **[p.m.b.]**

Seanad electoral (higher education) bill, 1998
1st stage - Seanad **[p.m.b.]**

Sea pollution (amendment) bill, 1998
Committee - Dail

Sea pollution (hazardous and noxious substances) (civil liability and compensation) bill, 2000
2nd stage - Dail

Sex offenders bill, 2000
Report - Dail

Shannon river council bill, 1998
Committee - Seanad

Solicitors (amendment) bill, 1998
Committee - Dail **[p.m.b.]** (Initiated in Seanad)

Standards in public office bill, 2000
2nd stage - Dail

Statute law (restatement) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Statute of limitations (amendment) bill, 1999
2nd stage - Dail **[p.m.b.]**

Succession bill, 2000
2nd stage - Dail **[p.m.b.]**

Sustainable energy bill, 2001
2nd stage -Dail *(Initiated in Seanad)*

Telecommunications (infrastructure) bill, 1999
1st stage - Seanad

Tobacco (health promotion and protection) (amendment) bill, 1999
Committee -Dail **[p.m.b.]**

Trade union recognition bill, 1999
1st stage - Seanad

Transport (railway infrastructure) bill, 2001
2nd stage - Dail *(Initiated in Seanad)*

Tribunals of inquiry (evidence) (amendment) (no.2) bill, 1998
2nd stage - Dail **[p.m.b.]**

Tribunals of inquiry (amendment) bill, 2001
2nd stage - **[p.m.b.]**

Twentieth amendment of the Constitution bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution bill, 1999
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Twenty-first amendment of the constitution (no.2) bill, 1999
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Twenty- first amendment of the constitution (no.3) bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.4) bill, 1999
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Twenty- first amendment of the constitution (no.5) bill, 1999
2nd stage - Dail [p.m.b]

Twenty-first amendment of the constitution bill, 2001
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.2) bill, 2001
2nd stage - Seanad

Twenty-second amendment of the constitution bill, 2001
Committee - Dail

Twenty-third amendment of the constitution bill, 2001
Committee - Seanad

Twenty- fourth amendment of the constitution bill, 2001
2nd stage -Dail

Twenty- fifth amendment of the constitution bill, 2001
2nd stage - Dail **[p.m.b.]**

Udaras na gaeltachta (amendment)(no.3) bill, 1999
Report - Dail

UNESCO national commission bill, 1999
2nd stage - Dail **[p.m.b.]**

Valuation bill, 2000
Committee - Dail

Vocational education (amendment) bill, 2000
Committee- Dail

Waste management (amendment) bill, 2001
Committee - Dail

Waste management (amendment) (no.2) bill, 2001
2nd stage - Dail *(Initiated in Seanad)*

Whistleblowers protection bill, 1999
Committee - Dail

Youth work bill, 2000
Committee - Dail

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Abbreviations

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

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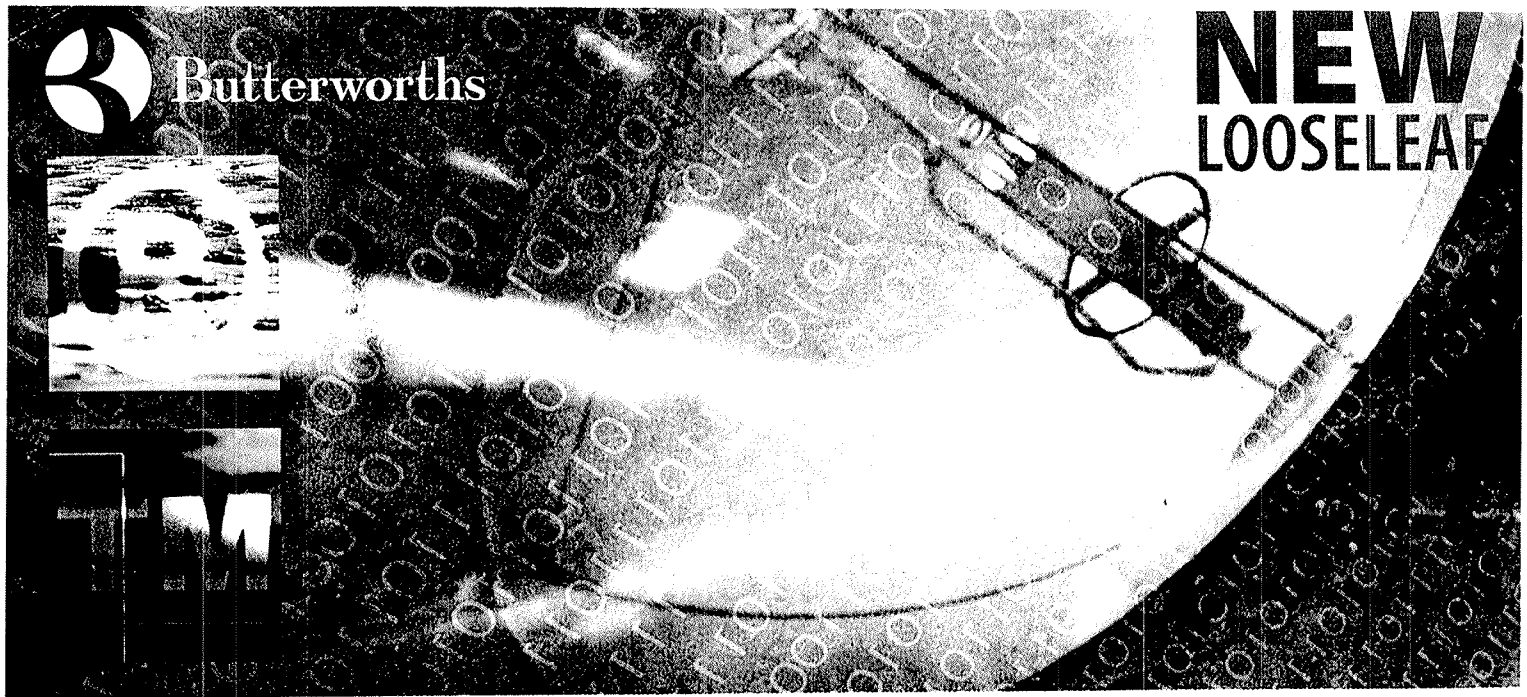

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THE TREATY OF NICE & REFORM OF THE COMMUNITY COURTS

*Liz Heffernan BL explains the changes to the jurisdiction of the European Court of Justice and of the Court of First Instance introduced by the Treaty of Nice**

Introduction

The Treaty of Nice was signed on 26 February 2001 and is expected to enter into force on 1 January 2003 following ratification by each of the fifteen member states. This article does not address the consequences of Ireland's No vote to ratification of the Treaty, but seeks to describe and assess the reforms introduced by the Treaty relating to the jurisdiction of the Community Courts. The Treaty is the culmination of the Intergovernmental Conference convened in February 2000 to tackle the so-called "Amsterdam leftovers," those issues of institutional reform left unresolved by the Treaty of Amsterdam. The principal focus of IGC 2000, and of the publicity surrounding its negotiations, was reform of the political institutions. Thus, the Treaty addresses such delicate issues as the size and composition of the Commission, the weighting of votes in the Council and the extension of qualified majority voting. From the standpoint of the legal practitioner, however, the proposed changes to the structure and operation of the Community courts represent a more significant development.

The Impetus for Reform

The Treaty of Nice is designed to prepare the institutions for enlargement to a union of at least twenty-seven member states. In the case of the judicial branch, the new provisions are also inspired by an urgent need to remedy overburdened dockets and the attendant inefficiencies in the administration of justice. In Luxembourg, the problem of docket control is by no means new. For several years the Court of Justice has been waging a losing battle to keep pace with the organic growth of Community litigation.[1] The Court of First Instance, created in 1989, has played its part in alleviating caseload pressures. But the benefit of an additional Community forum has been offset by several factors, such as the Kirchberg's unique multilingualism, the exclusivity of the Court's jurisdiction over requests for preliminary rulings, a steady rise in the number of appeals to the Court from decisions of the CFI, and the challenging extensions of judicial jurisdiction introduced by the Treaties of Maastricht and Amsterdam. These days, the CFI, no less than the Court, is working at the limits of its capacity.[2] Both courts are afflicted with burgeoning caseloads and the manifold side-effects of congestion.

From the point of view of the legal practitioner, an increase in the length of proceedings is the most telling symptom of the malaise. The duration of direct actions before the Court of Justice has been on the rise since 1996 - a temporary decline following the creation of the CFI having run its course - and currently stands at 24 months. The average length of proceedings before the CFI is 27 months and an appeal to the Court an additional 19 months. The length of preliminary reference proceedings - on average 21 months[3] -- is an even more serious indictment of the current system. For the litigant, the time and expense of the preliminary reference sojourn in Luxembourg must be added to the proceedings before the referring national court.

"These days, the CFI, no less than the Court, is working at the limits of its capacity.2 Both courts are afflicted with burgeoning caseloads and the manifold side-effects of congestion. From the point of view of the legal practitioner, an increase in the length of proceedings is the most telling symptom of the malaise."

IGC 2000

Notwithstanding the extent of the caseload crisis, reform of the judicial system was not tackled at Amsterdam nor included in the initial agenda of IGC 2000, largely for political reasons. Eventually, the issue was added to the miscellany of secondary items to be addressed at IGC 2000, but only after the judiciary publicized the issue, both officially and

To accommodate a uniquely large and potentially unwieldy bench, the Court shall sit in chambers of three and five judges as well as a new Grand Chamber of eleven judges (replacing the current practice of sitting in grand plenum and small plenum as well as chambers of three and five judges).14 Plenary session, with a quorum of eleven, will be reserved for exceptional cases, as provided in the Statute, or when a member state or Community institution that is party to the proceedings so requests."

extra-judicially,[4] and the President of the Court, Judge Rodriguez Iglesias, took the unprecedented step of airing his concerns in the press.

Debate on judicial reform at IGC 2000 focused on the submissions of the Community Courts, the Commission, the Friends of the Presidency Group, and individual member states.[5] The European Bar was also represented in the guise of a report by the Council of the Bars and Law Societies of the European Union which shed some welcome light on the perspective of the litigant and practitioner.[6]

Certain official reports proved particularly influential in shaping the reforms ultimately adopted, as well as those rejected, at Nice. The Court of Justice and the CFI published their views on the caseload dilemma in a May 1999 paper on the future of the judicial system.[7] The Courts' Paper is cast as a springboard for debate: the tone is reflective rather than directive, the Courts discussing the pros and cons of various reforms without endorsing any one, much less presenting a vision of where they see themselves ten or twenty years down the line. The Commission took up the reins by setting up an independent working party under the chairmanship of former president of the Court, Ole Due. The Due Report,[8] published in January 2000, contains a more aggressive analysis of the issue, endorsing some reform proposals and rejecting others. Finally, the Friends of the Presidency Group (consisting of legal experts from the member states and political institutions) was more intimately involved in IGC 2000, monitoring the negotiations, submitting draft texts and hammering out compromise forumulae.[9]

The Reforms

An eclectic range of reforms was mooted in advance of IGC 2000. Proposals ranged from modest tinkering with current practice and procedure to radical ideas for restructuring the system. Several minor but important changes have been introduced since then, such as empowering the Court of Justice to dispense with oral hearings in certain cases[10] and extending the circumstances in which it may respond to requests for preliminary rulings by reasoned order.[11] Recently, steps have also been taken to expedite proceedings before the CFI.

The following were among the broader issues canvassed at IGC 2000: limiting the number of judges on the Court and the CFI; giving both courts the power to amend their Rules of Procedure; making the CFI the principal forum for direct actions; establishing specialised courts or tribunals; and introducing a mechanism to filter appeals within the Community court system. Understandably, the bulk of attention was devoted to the preliminary ruling procedure, the very heart of the problem. Suggested reforms included limiting the referral powers of the national courts, giving the Court of Justice a discretionary jurisdiction over requests for preliminary rulings, conferring a preliminary rulings jurisdiction on the CFI, and establishing specialised preliminary rulings courts.

At IGC 2000, the search for consensus on substantive reform was intrinsically linked to method. At issue was not only the nature and extent of reform but also the means and timing. Should the Conference redesign the system or maintain its current structure? Should it adopt any one of the proposed changes or a combination of same? Should the Conference decide these issues or delegate decision-making to the Council? And should these decisions be made now or postponed until the next IGC? At the end of the day, the spirit of compromise so emblematic of intergovernmental conferences enveloped the judicial reform agenda. The Conference opted to renovate rather than redesign the judicial architecture and, at the same time, to make the system more adaptable to change in the future. Thus, it adopted some specific proposals, rejected others, left to the Council the resolution of many of the details, and declared the debate to be on-going.

The following is a summary of the key changes contained in the Treaty of Nice.[12]

1. Flexibility

The role and operation of the Court of Justice and the CFI is set out in the EC Treaty, the Statute of the Court (which is contained in a separate protocol to the Treaty) and the Courts' Rules of Procedure. The Treaty of Nice re-organises these legal instruments so as to ensure a proper hierarchy among the various provisions and to render them more amenable to future amendment. In particular, the Council will be empowered to amend all parts of the Statute (except for Title 1 which deals with the appointment and replacement of judges and advocates-general). This will enable the Community to adopt a wider range of future reforms without recourse to the cumbersome process of Treaty amendment.

Regrettably, the Treaty is less generous with regard to the Rules of Procedure. At the current time, changes to the Rules are subject to the unanimous approval of the Council. The Conference rejected a proposal that the Court of Justice and the CFI be equipped to modify their practices and procedures, a power that other courts, such as the European Court of Human Rights and the United States Supreme Court, take for granted. Instead, the Council will continue to have the final say over amendments to the Rules, although its approval will now be based on a qualified majority vote rather than unanimity. This seems an unduly restrictive approach, particularly since the Conference also made provision for the transfer from the Rules to the Statute of certain matters of special concern to the member states, such as the rules governing languages.

2. Composition of the Courts

A "quick fix" to the problem of overburdened dockets is the appointment of additional judges. Bolstering the ranks of the

judiciary might clear the dockets but arguably at an unacceptable price. As the Court of Justice warned at the last enlargement, an increase in its current membership of fifteen could transform the plenary session from a collegiate court to a deliberative assembly while extensive recourse to decision-making by chambers could pose a threat to the consistency of Community law.[13] The problem is not merely one of numbers. Traditionally, each member state appoints one judge to the Court and a second to the CFI, an entitlement not explicitly recognized in the EC Treaty but one that the member states are anxious to retain. But what will happen post-enlargement when, ultimately, as many as twenty-seven member states stake a claim to national representation on the Court of Justice?

As between the seemingly irreconcilable demands of operational efficacy and national representation, the Conference came down squarely on the side of the member states. The new version of Article 221 entrenches the principle that the Court of Justice shall consist of "one judge from each Member State." To accommodate a uniquely large and potentially unwieldy bench, the Court shall sit in chambers of three and five judges as well as a new Grand Chamber of eleven judges (replacing the current practice of sitting in grand plenum and small plenum as well as chambers of three and five judges).[14] Plenary session, with a quorum of eleven, will be reserved for exceptional cases, as provided in the Statute, or when a member state or Community institution that is party to the proceedings so requests.

Clearly, the Grand Chamber will serve as the storm centre in the new arrangement, handling cases currently heard in plenary session. Whereas, under the current practice, the Small Plenum is constituted on an informal, *ad hoc* basis, the membership of the Grand Chamber will comprise the President of the Court, the presidents of the chambers of five judges and other judges appointed under conditions laid down in the Rules of Procedure. Understandably, fears have been expressed that the composition of the Grand Chamber may be influenced by national interest and that it may create a sense of judicial hierarchy at the Court.[15] A more serious concern is whether the Court, sitting in its various guises, will be able to maintain the jurisprudential integrity that it central to its constitutional mandate.

As for the plenary session, the Court may decide, after hearing the views of the advocate-general, that a case of exceptional importance, however defined, should be referred to the "full court." Precisely how the full court will function is an open question. A packed, plenary session seems at odds with the Court's valued tradition of collegiate decision-making. On the other hand, adjudication of these exceptional cases by a number less than the full compliment may raise concerns about the unity of the bench and the equality of national representation.

The new Article 224 provides that the CFI shall comprise "at least one judge per Member State." The Conference recognized that increasing the membership of the CFI is a less risky proposition not least because any threat to the consistency of Community law can be tackled on appeal by the Court of Justice. Given the CFI's expanded role under the Treaty of Nice, a larger bench will prove beneficial. Apparently, COREPER has given the nod to an increase in six judges at the CFI, although a system for rotating appointments has yet to be settled. Provision is also made for the CFI to sit in many and varied guises, in accordance with the Rules of Procedure: in chambers of three and five judges, in a Grand Chamber, as a full court and as a single judge.[16]

The Conference resisted calls to eliminate or reduce the role of the advocate-general at the Court of Justice. It also decided against including advocates-general in a rotational scheme for the distribution of judicial posts at the Court. The number of advocates-general remains unchanged at eight and may even be increased by unanimous vote of the Council at the request of the Court. However, the opinion of the advocate-general will no longer be obligatory. Under the new version of Article 223, the advocate-general will issue an opinion only on cases which "require his involvement," namely, those which the Court considers raise some new point of law.[17] Relieved of the duty to opine purely as a matter of form, the advocates-general should be able to concentrate on the challenging cases, where their contribution is needed most. Finally, under the new version of Article 224, the Statute may provide for the CFI to be assisted by advocates-general. Opinions vary as to whether such a move is necessary or desirable. The CFI has rarely availed of its existing power to appoint one of its own to perform the function *ad hoc* in a particular case.

3. Direct Actions

One of the most significant and attractive features of the changes adopted at Nice is an expanded role for the CFI. Potentially, the CFI will become the primary forum for direct actions, a secondary forum for preliminary rulings and an appellate forum for decisions from newly-created judicial panels. The CFI will no longer be simply "attached to" the Court. The new version of Article 220 will affirm that ensuring that the law is observed will be the task of both courts, each within its own jurisdiction. At the same time, the Treaty of Nice contains various safeguards to ensure that the Court of Justice has the final say on the interpretation of Community law.

"The significant step taken at Nice was to remove the exclusivity of the Court's jurisdiction over preliminary rulings. Under the new Article 225(3), the CFI "shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute." The proposed role for the CFI marks a profound shift in traditional thinking which associates preliminary rulings with the Court's uniquely constitutional function."

The jurisdiction of the CFI over direct actions has gradually increased from the initial grants over staff and competition cases conferred by the Single European Act. At the current time, the CFI hears actions brought by individuals or legal persons and the Court actions instituted by member states or Community institutions. Under the new version of Article 225, the CFI shall have jurisdiction over all actions or proceedings brought under Article 230 (proceedings against a decision), Article 232 (action for failure to act), Article 235 (action for damages), Article 236 (staff cases) and Article 238 (contractual disputes to which the Community is a party), "with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice."

Jurisdiction over other classes of action or proceeding may be conferred on the CFI by subsequent amendment to the Statute. The current practice of allowing appeals from the CFI's decisions on points of law will continue.

Although the new Article 225 falls short of declaring the CFI the first judicial forum for all direct actions, it embodies an important change in emphasis. As regards these classes of actions, adjudication by the CFI will become the rule rather than the exception. This is a natural and desirable development. As the legal system matures, it is appropriate that the CFI and the Court should pursue their respective vocations, the former as a general trial court and the latter as an appellate supreme court. Much will depend upon the division of competence between the Court and the CFI and, specifically, the choice of those direct actions for which the Court will retain exclusive competence. The Due Report contains a number of pragmatic suggestions guided by the principle that direct access to the Court should be limited to "those actions for which a rapid judgment is essential to avoid serious problems in the proper functioning of the Community institutions."[18] This is particularly important if, as we shall see, the Court retains the lion's share of preliminary rulings. In a declaration attached to the Treaty of Nice, the Conference calls upon the Court of Justice and the Commission to consider the division of competence between the two courts (particularly in the area of direct actions) and to tender proposals when the Treaty enters into force.

4. Judicial Panels

The most innovative change to the current system is the introduction of a new form of judicial institution, the specialised judicial panel. Under Article 225a, the Council "may create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas." The judicial panels will be attached to the CFI and their jurisdiction and *modus operandi* will be defined by Council decision. The decisions of a judicial panel may be appealed to the CFI on points of law only, unless the Council decision establishing a particular panel also provides for appeals on matters of fact. There will be a further right of review by the Court of Justice in exceptional cases where there is a serious risk to the unity or consistency of Community law.

The concept of specialised judicial panels was inspired in part by the burden of staff cases which has dogged case management in Luxembourg from the outset. Thus, in a declaration attached to the Treaty of Nice, the Member States call on the Council to set up a judicial panel for staff cases as soon as possible. Another likely candidate is trademark cases, currently adjudicated by the Alicante Boards of Appeals established under the Community Trade Mark Regulation. The possibility of creating a judicial panel for cases under the future Community patent has also been mooted.

Judicial panels will be a welcome compliment to the extended role of the CFI over direct actions and hold the promise of significant caseload relief in areas that are a particular drain on judicial resources. The concept of specialisation within the judicial system is also an attractive development, although not one that should be give free rein. Most cases are not amenable to simple categorisation and it may be imprudent to assume that the factors that lend staff and intellectual property cases to specialised treatment apply to other, wide-ranging areas of Community law.

5. Preliminary Rulings

Appropriately enough, the preliminary ruling procedure took centre stage on the judicial reform agenda at IGC 2000. Requests for preliminary rulings comprise over half of the cases filed at the Court of Justice and are the greatest single drain on judicial resources. But reform of the preliminary ruling procedure is a uniquely delicate issue. The lynchpin of the system, preliminary rulings have enabled the Court of Justice to nurture the development of Community law and to shepherd its uniform application throughout the member states. The procedure also underscores the role of the national courts in the Community legal order and provides citizens with indirect access to the Court of Justice. Hence a reluctance, even unwillingness, on the part of the member states to upset the *status quo* notwithstanding the pressing need for reform. Given the range and depth of the various proposals to amend the preliminary ruling procedure, the modesty of the projected changes is striking.

The significant step taken at Nice was to remove the exclusivity of the Court's jurisdiction over preliminary rulings. Under the new Article 225(3), the CFI "shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute." The proposed role for the CFI marks a profound shift in traditional thinking which associates preliminary rulings with the Court's uniquely constitutional function. It is too early to predict, however, whether there will be any radical change in practice. The Treaty of Nice creates a potential rather than an actual jurisdiction for the CFI. Whether - and, if so, when and how - the CFI delivers preliminary rulings has yet to be determined. The specific areas in which the CFI may exercise jurisdiction are as yet undefined but will probably be limited. They might, for example, include the technical and other fields that the CFI currently tackles under the rubric of direct actions. But devising an effective and efficient means of delegating the more routine requests for preliminary rulings to the CFI while retaining the so-called "important" cases for the Court, presents an intractable challenge. Absent a workable solution, the Court will doubtless be reluctant to loosen its grip over preliminary rulings.

Even within the conferred jurisdiction, there are safeguards against excluding the role of the Court altogether. First, the CFI may refer a case to the Court for a ruling where the CFI considers that the case requires "a decision of principle likely to affect the unity or consistency of Community law." Secondly, in exceptional circumstances, decisions of the CFI on questions referred for a preliminary ruling may be reviewed by the Court "under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected." These provisions allow for a good deal of subjectivity in determining those requests which will be reserved to the Court. If the objective is to reduce the length of proceedings, it will be important to ensure that recourse to the Court is truly exceptional and that the participation of the CFI does not simply add an additional tier of review.

Regrettably, the Treaty of Nice makes no attempt to reduce the volume of requests for preliminary rulings emanating from the national courts. Notwithstanding the many and varied proposals of the Due Report and others, the Conference decided against altering the mechanics of the procedure. Thus, the role of the national courts and the terms and conditions under which cases are currently referred will remain

unchanged. Retention of the *status quo* will assuage the concerns of many but it will not lead to any significant reduction in the length of proceedings. For the time being at least, we can assume that preliminary rulings will continue to be an enormous drain on resources at the Court of Justice.

Concluding Remarks

The Treaty of Nice signals an important step in the evolution of the Community's judicial system. Taken collectively, the reforms should go some way towards alleviating current pressures and preparing for future challenges. In particular, an enhanced role for the CFI and the creation of new judicial panels should strengthen the judicial system and enable the Court of Justice to concentrate on its fundamental, constitutional tasks. It is difficult to predict the impact of many of the projected reforms. Certainly, it will take some time before the effects are felt in practice, even with respect to the more immediate changes. The devil will be in the details, many of which have yet to be decided. The starting point is clarification of the division of competence between the Court and the CFI. Similarly, the promised reductions in the length of proceedings will depend in large measure on how the Court's appellate jurisdiction is defined. Legal issues aside, the success of the reforms is linked to the provision of adequate financial and administrative resources, especially at the CFI.

For advocates of radical reform, the decision to renovate rather than redesign the judicial architecture is a disappointment. Given the overburdening of the Community courts and the daunting prospect of enlargement, the package of reforms adopted at Nice seems too modest, standing alone, to guarantee effective, lasting solutions to the caseload crisis. From this perspective, Nice may be viewed as an opportunity lost. The reticence of the Conference to opt for dramatic change is explained in part by the cautious tenor of the Courts' own submissions and the occasionally conservative stance of the Due Report. But the decisions taken at Nice must also be seen in the broader context of IGC 2000. As against the Commission and Council, reform of the Courts generated relatively little controversy or political interest. This begs the question whether a multi-purpose intergovernmental conference is the optimum forum for reform of the judicial branch. In any event, only time will tell whether IGC 2000 has paved the way for the effective administration of justice or condemned courts and litigants alike to continued gridlock.

To be fair, the Treaty of Nice is intended to mark the continuation rather than the culmination of the reform process. As noted, several of its provisions lay the groundwork for future developments without necessarily committing the courts to their adoption. Moreover, the Community already has an eye to the next intergovernmental conference, scheduled for 2004. The increased flexibility in the rules governing the judicial system should be a boon to its evolution provided other core values, such as legal certainty, are not threatened. The Community must ensure that reform does not become so piecemeal and protracted as to undermine the integrity of the rule of law. Flexibility, after all, is a poor substitute for a lasting vision of the design of the judicial system. It is hoped that the continuing debate will generate more fundamental thought on such important issues as the relationship between the national and Community courts and the legitimate expectations of European citizens in the administration of justice.●

** This article was completed before the referendum on Ireland's ratification of the Nice Treaty.*

1 Statistics shed some light on the extent of the caseload crisis. In 1995, for example, 415 new cases were filed at the Court of Justice, 287 cases closed and 619 cases pending. By 1998, there had been a dramatic rise to 485 new cases, 420 cases closed and 748 cases pending. Last year, 503 new cases were filed, 526 cases decided and 873 cases pending. Particularly troublesome has been the steady rise in the number of requests for preliminary rulings. For example, the 264 requests received in 1998 represents a 87% increase since 1990.

2 Last year, the CFI received 398 new cases and disposed of 344 as opposed to 238 new cases and 348 cases closed in 1998.

3 Up from 12.6 months in 1983 and 17.4 months in 1990.

4 See, e.g., John Cooke, *European Judicial Architecture: Back to the Drawing Board* (1999) 5:1 *Bar Review* 14.

5 The fate of judicial reform at IGC 2000 also attracted some academic commentary. *See, e.g.*, Cathryn Costello, *Preliminary Reference Procedure and the 2000 Intergovernmental Conference* (1999) 21 D.U.L.J. 40; Hjalte Rasmussen, *Remedying the Crumbling EC Judicial System* (2000) 37 C.M.L. Rev. 1071; Anthony Arnull, *Judicial Architecture or Judicial Folly? The Challenge Facing the European Union* (1999) 24 E.L. Rev. 516.

6 *Contribution from the CCBE for the Intergovermental Conference*, CONFER/VAR 3966/00, 18 May 2000.

7 *The Future of the Judicial System of the European Union - Proposals and Reflections.*

8 *The Report by the Working Party on the Future of the European Communities' Court System.*

9 *See, e.g.*, Friends of the Presidency Group (Court of Justice and Court of First Instance), *IGC 2000: Proceedings on amendments to be made to the Treaties with regard to the Court of Justice and the Court of First Instance*, CONFER 4747/00, Brussels, 31 May 2000.

10 See Article 44a of the Rules of Procedure.

11 See Article 104(3) of the Rules of Procedure.

12 Two other reforms are worthy of note. First, a new Article 229a will allow the Council, acting unanimously, to attribute to the Court of Justice responsibility for settling disputes regarding industrial property rights. Secondly, the new version of Article 230 will formally recognize the right of the European Parliament to institute an action for annulment under Article 230 (on an equal footing with the Council and the Commission).

13 *Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union* (May 1995) at 16.

14 Under Article 17 of the Statute, the Grand Chamber will have a quorum of nine judges.

15 See, e.g., the comments of Mr. Justice Niall Fennelly, *The Treaty of Nice: Reform of the Community Courts*, Irish Centre for European Law Conference, Dublin, February 2001.

16 Article 50 of the Statute.

17 Article 20 of the Statute.

18 *Due Report*, at 25.

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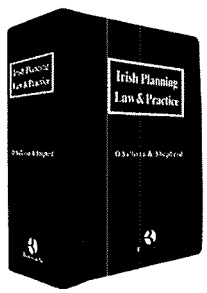

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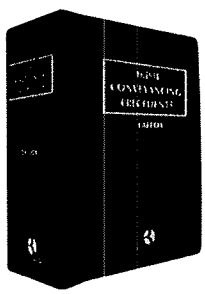

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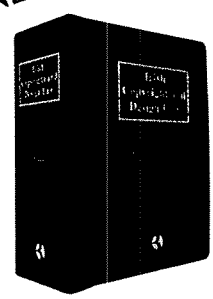

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IRELAND AND EUROPE'S FUTURE INTEGRATION

The following is the full text of the speech of the Attorney General, ***Michael McDowell SC,*** *delivered in June 2001 to the Lawyers' Group of the Irish Institute of European Affairs, on the subject of European integration and enlargement.*

Introductory

When I was asked a few weeks ago to speak this evening at the Institute of European Affairs, I have to say that I anticipated that I would be addressing you in the context of a Yes decision on the Nice Treaty referendum. That context has not materialised and I have had to reflect on whether the substance of what I proposed to say should be radically altered as a consequence. I have decided to stick with the message that I intended to convey; at the same time I want to take on board the outcome of the referendum.

Because the outcome of the Nice referendum is still a matter of controversy, I am conscious that what I have to say here tonight might be seen to contribute to that controversy. At the outset therefore, can I stress what will become increasingly obvious - namely that I am speaking here in a personal capacity - not on behalf of the Government. I make, therefore, what has become a recurring, routine plea in addresses like this - a plea not to be half heard, half-read, half understood or reduced to a misleading sound-bite.

Can I say at the outset that I was personally in favour of ratification of Nice because I believe that it is necessary to separate the issues of enlargement and integration; that the Nice outcome was largely successful in doing so; that the success of the Taoiseach and others at Nice to a large extent lay in preventing federalists from "handcuffing" enlargement to their own version of integration; and that once enlargement had been given the green light by ratification it would have been possible to confront the federalist agenda head on without being accused of being selfish.

It was always apparent to me that Nice would contain little by way of self interested "good news" for the Irish voter; I had hoped that we could have rolled up our sleeves to face debate on the future of Europe without handing to our opponents in that debate the ammunition to the effect that we were obstructing the process of enlargement.

Europe: A Partnership of States or a State Itself

While the reasons for the No decision remain to be teased out, I have little doubt that one major factor which influenced the electorate either not to support Nice or else to come out and vote against it was a widespread perception that developments in Europe were taking a turn, or moving in a direction, that caused deep unease. If I may use rather neutral language at the outset, there is a general perception that the European project is being energetically driven towards the creation of a "European State" with a much greater pooling of political sovereignty and with major implications for the independence of member states - particularly smaller nation states such as Ireland.

The concept of European Statehood lies at the centre of much of the reforms being canvassed in the context of the Inter Governmental Council being planned for 2004.

"Sooner or later the voters of Europe will make a choice between the continuance of the European Project as it now is - a "Partnership of Member States" with complex articles of partnerships and institutions of partnerships set out and defined in its treaties and case law - or as a sovereign "European State" with its own constitution. "

should Irish Ministers have a constitutionally free hand to participate in Council meetings whose decisions can effectively abrogate the terms of the Constitution itself in adopting directives and making regulations? An Irish Minister is, in Irish law, the creature of the Constitution. While under European law his or her colleagues in the EU Council of Ministers are entitled to assume full power and discretion, as a matter of Irish law an Irish Minister need not necessarily be a legal or constitutional plenipotentiary on the part of the Irish State or people.

You will note that I have not used the terms "super-state" or "federal state" or "federation of nation states". That is not because I feel those terms lack meaning; it is because they are frequently used by their proponents or opponents to convey an idea that can be denied, withdrawn or qualified if they evoke opposition. When Joschke Fischer, Foreign Minister of the German Federal Republic, made his Humboldt University speech, he set out a clearly federalist agenda. On its anniversary, he chose very different language in London.

When he spoke a few weeks ago here at the IEA, he was careful to the point of scrupulousness to avoid stoking the verbal fires of federalism. Like Lewis Carroll's "Cheshire Cat", the Humboldt agenda disappeared leaving nothing but a smile. Supporters of federalism have a tendency to fly balloons, haul them down, reconfigure them slightly, and fly them again - depending on geographical location and wind conditions.

There is also a different tendency on the part of some others to obfuscate their ambitions and intentions in a vague verbal miasma in which the European project is described as "sui generis" and "unique". These descriptions are, of course, correct insofar as they go. But they don't go very far in terms of analysis or prediction.

I was interested to note what the retiring Portuguese Secretary of State for European Affairs, Seixas Da Costa is reported to have said earlier this year in the context of a "Treaty of Competences". He stated that the EU had theretofore "thrived on ambiguity" and warned against any attempt to agree on a final model by 2004, particularly among the present 15 member states to the exclusion of the applicant countries.

The concept of "thriving on ambiguity" is, of course, well known. But for ambiguity to be a success in the long term, there has to be some working consensus and a maintenance of trust in the short term. If that consensus or trust breaks down, or if matters are forced prematurely to an unambiguous decision, the voters of Europe will cut through the political rhetoric of ambiguity and give their judgement on the issues as they understand them.

If the IGC proposed for 2004 takes place (and although planned, it is by no means a foregone conclusion), it will only succeed to the extent that the people of Europe agree with and go along with its conclusions.

Every European member state, at some stage, faces a "date with its voters" if the 2004 IGC project is to yield change which significantly alters the nature of the European Union or its relationship with its member states. In that context the intelligence of the electorate is not to be underestimated; if they want to create a "European State", they alone will do so. If that idea does not attract them, no amount of studied ambiguity, no stratagem of labelling or re-labelling, no appeals to the "sui generis" or "unique" nature of the European project will blind them to the substance and the implications of what is on offer. Nor will money.

And dressing up such a constitution in a harmless sounding veil as a "treaty of competences" won't wash either. Indeed, repeated calls made for "clarification" and "simplification" of the Treaties have a superficial attractiveness especially to anyone who has ever attempted to penetrate the verbal thickets which we now describe as "treaties". But perhaps the reason that they are complex, impenetrable to the citizen, and more akin to a lengthy legal contract than to a constitution is precisely because they represent a modus vivendi for the member states as partners, not a model or a template or a constitution for a European State.

Sooner or later the voters of Europe will make a choice between the continuance of the European Project as it now is - a "Partnership of Member States" with complex articles of partnerships and institutions of partnerships set out and defined in its treaties and case law - or as a sovereign "European State" with its own constitution.

I personally favour the "Partnership of Member States" model; "federalists" favour the "European State" model. Either model is, of course, the stuff of legitimate political ambition and debate; but in my personal judgement, the "Partnership of Member States" approach is the most likely to win and retain the hearts, minds and loyalties of the peoples of Europe. Creation of a European State is, in my judgement, very unlikely to command widespread support.

The Proposed Forum On Europe

In this context I personally warmly welcome the decision of the Taoiseach and the Government to establish a national Forum on Europe. I have pointed out on several occasions since my appointment that European affairs are not properly debated within Irish democracy. Voters are treated, instead, to a political Punch and Judy show, in which opinions tend to form around opposite and somewhat extreme poles. The real centre ground of ordinary people's opinions is not adequately addressed. The real options are not spelt out or teased out. Instead we have had a stultifying polarised debate, underpinned by the veneer of a stultifying Dáil cross party consensus.

If someone forthrightly states his or her own view, instead of

welcoming it for what it is, a personal view, there is uproar that any individual or contrary viewpoint should be expressed. The Forum will, I hope, allow for a very free exchange of ideas and opinions.

A narrowly based, "hot house" federalist view of the needs and future of the European Union which characterises other views as both morally flawed and intellectually Neanderthal is not pretty to behold. In my personal judgement, federalists who favour the creation of a European State do themselves little justice and no favours by portraying those who are not in agreement with them as moral and intellectual untermenschen. Those citizens who, like me, strongly support Ireland's membership of the EU and its enlargement as a "Partnership of Member States", with partnership institutions, rules, dispute procedures and shared competences feel very alienated when our ambitions for Europe are categorised as less European than those of the "European State" lobby.

I personally believe that the partnership model is not merely legitimate - I feel it is more practical, more robust, more durable, more historical, more democratic and more in tune with the true spirit of Europe, which is complex, diverse and heterogeneous.

The Drive For A European State

It is my personal view that the negotiation of a Constitution for Europe - whether described as such or dressed up as a "treaty of competences" at this point is arguably previous and possibly quite unwise. To impose, or to attempt to impose, on an EU of 27 Member States, a constitutional order devised by 15 of them is to say the least morally and democratically dubious.

The drive to create a Europe with the attributes of a State is the ambition of what, I think, is only a minority, albeit an important and well placed minority, of Europeans. In recent times we have heard proposals for a great variety of attributes of a sovereign European State:

- a Constitution
- a justiciable Bill of Rights.
- Citizenship (since Maastricht)
- the power to prosecute, try and punish citizens (the Corpus Juris proposal)
- direct taxation (by Europe)
- tax harmonisation for the Member States
- defence capacity
- a two tier parliament modelled on the German model
- a directly elected president
- a Union Government

Few if any of these proposals carry popular significant support. While many of these proposals have been put forward separately, they constitute, in the round, the indiciae of a European State in substance - it matters little whether it is described as a super-state or a federal state.

I fully accept that these political categorisations and labels cannot be black and white and that in politics there are few exact or scientific terms of art. But, like the elephant, we know a federal State when we see it, regardless of whether we can define it. These proposals are not coming forward from the people. They are being devised by a narrow class of activist office-holders, elected and unelected; most of the proposals appear to me to have all the potential for electoral take off of early experiments in steam powered flight. This has not inhibited their propagation.

Is it really realistic to expect voters to put them out of their minds when they ask themselves the fairly basic question: "Do I want to encourage the process of European integration?" The problem of course is that the inner circle of federalism, whether in the corridors of the Commission, or the European Parliament, or the wings of Council meetings, has the upper hand and the initiative in setting the agenda.

If this is the agenda articulated variously by the Commission, by the European Parliament and by statesmen such as President Rau, Chancellor Schröder, and Foreign Minister Fischer, should we be completely surprised if voters, when given a rare chance, attempt to pass judgement on it? It can well be argued that the Nice outcome was effectively quite neutral on these choices. It can be argued with some considerable force that the outcome of Nice was deliberately tailored to be "without prejudice" to the Partnership/State choice. That was, and is, my view of the outcome of Nice.

But to expect voters not to have one eye on the "Partnership/State" issue when considering the merits of Nice was perhaps, in retrospect, a little unrealistic. That is why, I believe, the Forum should allow all issues to be addressed.

My personal regret at the defeat of Nice is that the likely outcome of enlargement will be to tip the balance decisively in favour of the "Partnership of States" approach and that the likelihood of a "European State" emerging would be dramatically reduced by enlargement. That is why I favour enlargement sooner rather than later. I also believe that the democracies which were formerly part of the "Warsaw Pact" have a moral entitlement to secure their liberty and prosperity by joining the E.U.

"That an Irish Minister should be technically at large free to negotiate a regulation or directive which as a matter of European and Irish law the Oireachtas is absolutely bound to accept is a striking proposition; that the Oireachtas should eschew and abdicate any prior consultative right or role in the process leading to the adoption of a regulation or directive appears, on the face of it, greatly at odds with the spirit of the Constitution."

I personally feel that the enlargement agenda is distinguishable from many aspects of the integration agenda. I certainly feel that it would be wrong to rush our fences on the future nature of the E.U., in order to present the applicant countries with a fait accompli.

I believe that, as far as Irish voters are concerned, it is essential to develop and articulate our own view of Europe's future with which the Irish are generally happy and for which the Irish Government can stand with some degree of confidence.

Ireland's Domestic Democratic Deficit

Pausing here, a legal issue of fundamental importance arises. If the "sole and exclusive power to make laws for the State vests in the Oireachtas and not in any other legislative authority"(as Article 15.2 of the Constitution provides), should Irish Ministers have a constitutionally free hand to participate in Council meetings whose decisions can effectively abrogate the terms of the Constitution itself in adopting directives and making regulations?

An Irish Minister is, in Irish law, the creature of the Constitution. While under European law his or her colleagues in the EU Council of Ministers are entitled to assume full power and discretion, as a matter of Irish law an Irish Minister need not necessarily be a legal or constitutional plenipotentiary on the part of the Irish State or people.

It is for the Irish people and legislature to decide the policy terms on which Irish Ministers will vote or act at EU Council Meetings. They are subject to Irish law - constitutional and statutory. Such discretion as they enjoy, as a matter of Irish law, results either from an express or implied constitutional authority.

The very first proposition to be noted is that such Ministers must meet and act as a "collective authority". Save in so far as they exercise statutory authority as corporations sole, they are obliged to have the authority of Government, express or implied, for what they do as Ministers. They are collectively responsible to Dáil Éireann.

They exercise what is described at Article 28.2 of the Constitution as the "executive power of the State". It is beyond contradiction that whatever the "executive power of the State" may include, it does not include the legislative power to make laws for the State.

Negotiation and conclusion of the State's external agreements and liabilities is classically seen as part of the "executive power of the State". But it is by no means clear, I think, as a matter of Irish constitutional theory, that the Government or any individual Minister, has the unlimited and unfettered right to oblige the State to make laws even to the point of abrogating established constitutional rights. The obligation to transpose European directives into Irish law rests constitutionally with the Oireachtas. The Oireachtas cannot constitutionally abdicate that function.

From a procedural point of view, it is far easier for an Irish Minister to agree on a European level to a directive with far reaching legal and constitutional consequences than it is to sponsor the most simple piece of domestic legislation.

That an Irish Minister should be technically at large free to negotiate a regulation or directive which as a matter of European and Irish law the Oireachtas is absolutely bound to accept is a striking proposition; that the Oireachtas should eschew and abdicate any prior consultative right or role in the process leading to the adoption of a regulation or directive appears, on the face of it, greatly at odds with the spirit of the Constitution. With any other legislative measure, the Oireachtas has the power to reverse a decision with which it disagrees. A Minister who makes a delegated legislative decision himself faces the sack; the decision itself faces reversal. That is the legal context in which statutory instruments are usually made.

But in the context of the European Union, a regulation or directive is effectively irreversible once made. Insofar as it delimits and curtails the terms of constitutional rights and guarantees, such a measure has the status of sovereign legislation. It is remarkable, therefore, that present legislative practice has imposed no prior obligation of consultation in routine legislative matters and an obligation to seek at least the consent of the Oireachtas where such a measure would inevitably control or delimit Constitutional guarantees.

Prior consultation may be inconvenient in general, and in many areas might be very inconvenient. But the Danes have lived with that inconvenience and it may well be that the Oireachtas, if it is proposing to restore the people's confidence on European issues, might claim for itself what is arguable its clear entitlement under the Constitution - the role of ensuring that those elected to make laws in Ireland have a real and effective prior role in the legislative process in EU matters.

There is also a very strong case for a complete re-think on the way in which the Oireachtas gives its consent to the exercise of the "options and discretions" clause in Article 29.5.6° of the Constitution. Present practice and theory in this area is somewhat tentative.

As a former member of the Oireachtas and as a lawyer and as a citizen, I find myself gravely troubled by the failure of parliamentarians over the last generation, of all parties and opinions, to vindicate the people's rights and to fulfil their constitutional role. I have to say that I find myself very much in sympathy with much of the critique offered by one of my predecessors, John Rogers SC, on the absence in practice of real democratic input and accountability in what are potentially vital aspects of legislation affecting our rights as citizens.

"In short, it seems to me that there is a strong case, in terms of democracy, constitutionalism and autonomy for a far-reaching reform of the interaction of the Oireachtas with European policy and legislation affairs. I fully acknowledge that it would be folly to equate the most technical and obscure regulation or directive with major policy oriented legislation and that any reform, to be worthwhile, will have to make practical discrimination between them."

In short, it seems to me that there is a strong case, in terms of democracy, constitutionalism and autonomy for a far-reaching reform of the interaction of the Oireachtas with European policy and legislation affairs. I fully acknowledge that it would be folly to equate the most technical and obscure regulation or directive with major policy oriented legislation and that any reform, to be worthwhile, will have to make practical discrimination between them.

My point is that the spirit of the Constitution and quite possibly its words, demand of the Oireachtas a quite different approach to EU matters. Regulations and directives can no longer be the exclusive concern of MEPs, Ministers and technocrats. They are the direct and unavoidable concern of TDs and Senators.

I could add that a full blooded and committed reform in this area would require not merely that the Oireachtas be given greatly increased resources; it would also demand that a core of consciousness, adequately resourced, be created at the centre of Government to ensure that the collective responsibility of the Cabinet and its procedures, have full effect in relation to these European matters.

Doubtless it will be argued that such measures will increase the complexity of Government; the price of full democratic accountability is, of course, not inconsiderable. However, the added value in terms of integrity and trust in the process may well pay rich rewards in the future, not least in bringing public opinion and Government policy on Europe into harmony.

The Third Pillar and Other Developments

The emergence since Maastricht of a competence for the European Union to create an area of freedom, security and justice, and the provisions in the Treaty of Amsterdam concerning police and judicial cooperation have been seen by some as the opportunity to create a uniform or, at least, harmonized system of criminal law for the member states.

It is my personal view that the principle of subsidiarity is of major significance here. That principle is often misunderstood; it is not a principle that the competent centre should devolve responsibility and choice to the maximum degree among component states. Subsidiarity means (and I quote the Oxford Dictionary):

"The principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more local level".

This principle, we are told, is a cornerstone of Europe. Note it is the central authority that is to have the subsidiary function - not the member states. How does such a notion gel with the more elaborate federalist plans on offer at the moment?

The phrase "area of freedom security and justice" and the concept of "police and judicial cooperation" are by no means a mandate for creeping uniformity and approximation in the area of criminal law and criminal justice as ends in themselves. We are privileged to have a criminal justice system with jury trial, liberal constitutional entitlement to bail, habeas corpus, proof beyond reasonable doubt, adversarial trial and a neutral non investigative independent judiciary. This common law heritage is something of great value and of constitutional status. It is, and has been, tried and tested not only here but throughout the common law world - a region where tyranny has never held sway, a region that has, on more than one occasion, formed the last bastion against tyranny and the moral arsenal from which tyranny was vanquished.

"The Corpus Juris project which springs from no popular demand or initiative suggests that the European Union should be invested with the power to establish a public prosecution service for E.U. federal crimes; to establish an E.U. Criminal Court with no jury; to try and convict EU citizens and to jail them. This project remains on the federalist agenda; it might be time that the need for it was critically examined. Is it consistent with the principle of subsidiarity?"

In that context, the Corpus Juris project which springs from no popular demand or initiative suggests that the European Union should be invested with the power to establish a public prosecution service for E.U. federal crimes; to establish an E.U. Criminal Court with no jury; to try and convict EU citizens and to jail them.

This project remains on the federalist agenda; it might be time that the need for it was critically examined. Is it consistent with the principle of subsidiarity? Is there any significant element in Irish public opinion that has heard of it - let alone wishes for it? Third Pillar measures have potentially profound implications for our civil liberties and legal autonomy. Yet they can become binding upon the Irish State by a process that has little or no parliamentary involvement, little governmental scrutiny, and virtually no public awareness. The agenda for Third Pillar measures is driven from outside this country with little or no domestic public debate.

As one of the relatively few common law jurisdictions in the E.U. Ireland has a particular interest that Third Pillar measures are not imposed on us by stealth or inadvertence. This area of law, above all others, is of profound significance constitutionally and legally to the nature of our society; a very different approach to our involvement with the Third Pillar is needed if the process is to be carried forward.

The Charter Of Fundamental Rights And Freedoms

Last year I participated in a conference on the Charter at Trier. The Irish Government, among others, strongly resisted the proposal made at Nice to give the Charter Treaty status and the subsequent proposal to incorporate it by reference in Article 6 of the Treaty.

The Taoiseach made it clear that Ireland did not want to accord the Charter constitutional status either at European or at national level. Our position was shared by other states which did not want to establish a new broadly based function for the ECJ. As a result, the Charter was dealt with as a political proclamation.

I have to say that I am a little troubled now to see the Charter filtering into European Law as though it had been formally

ratified by the Member States to become a justiciable component of the Acquis Communautaire. My own belief, as stated last year in Trier, was that the incorporation of the Charter into the Treaties would have been rejected by the people in a referendum. It is disturbing to see indications that enthusiasts for a federal European Constitution are already developing the beginnings of a jurisprudence based on the charter.

I would add that the Taoiseach and Minister Cowen have expressed a reluctance to regard the process which led to the Charter becoming the model for further significant proposals for the IGC planned for 2004.

The Need For Self Confidence

My fourth and last point this evening concerns the evolution of Irish attitudes to the EU. I do not accept the notion that the Irish electorate does not want the EU to enlarge or does not want to admit new member states. Perhaps a small proportion of voters holds those views but the leading spokesmen of the No campaign disavowed any hostility to enlargement *per se*. I believe that the great majority of Irish voters want the EU to succeed and want to remain part of that success.

I have mentioned before that it is perfectly natural for Irish voters' attitudes to the EU to vary in accordance with our status as a net recipient or net contributor. EU transfers to Ireland have played, and continue to play, a very significant role in our economic transformation. Suggestions, therefore, that we are a society of ingrates who, having crossed the moat, are attempting to pull up the drawbridge on other applicants are, I think, unjustified.

I presume that Ireland, like every other member state, predicates its European policies and actions on what is termed "enlightened self interest". That is not to be equated with cynicism or greed. We have a collective interest in the success of the European project and as Irish per capita income approaches and exceeds the European average, we have all the more reason to re-evaluate where our enlightened self interest really lies.

If we have a collective interest in the success of the European project, we also have an interest in participating in the future planning of that project. We have as much right as any member state to develop and articulate and advocate our view of the future architecture of the European Union. It would, I suggest, be folly to await the worked out proposals of the Commission, or of the various think tanks and sponsored researchers or, for that matter, to await the proposals of the larger players such as Germany or France. If we believe, as I personally do, that a Europe based on the idea of a partnership of member states is the model with which Irish people most identify, we should use the forthcoming Forum to elaborate that view. Furthermore, I think we should promote our view with a considerable degree of self confidence. The hand of an Irish Government at any IGC would be unmeasurably strengthened by the emergence of a clear view as to where the Irish people stand - a view understood by other member States.

Sometimes, enthusiasts for European statehood justify their more ambitious (and perhaps less realistic) projects by reference to the need to maintain a degree of momentum in the development of Europe. There is an unstated assumption that the European project favoured by them is like a bicycle - unless it is driven forward, it will fall sideways. This mind set is used to justify a rather tightly knit, highly subsidised activism towards a federal model of Europe. If, they say, the project falters or does not "progress" it will collapse.

For my part, I concede that there are certain projects in history which need to be sustained by a degree of momentum. But the danger of such momentum-based justifications is that other interests and perspectives and insights are cast aside in enthusiasm or out of fear of letting the project floun der or die. A robust European project needs four wheels - so that it can go forward if, when and at the pace the people of Europe decide. Another down side of this mind set is impatience or dismissiveness towards doubters and dissentients. In the context of the EU, it is quite customary to have opponents of federalism dubbed as Euro-sceptics. Here I must profess a slight feeling of resentment. Those of us who are committed to a Europe based on a partnership among nation states are not sceptical about Europe --we are, on the contrary, strongly committed to our vision of Europe which we regard as legitimate, realistic, historically feasible, politically sustainable and democratically accountable. These ideals are every bit as challenging as the federalists' project of European statehood and, perhaps, they are a good deal more practicable.

To that I would add that the creation of a European state that is not subtended by a cohesive integrated and largely homogenous society may not simply be an unrealistic ambition, it might also be the recipe for democratic, cultural and, ultimately, economic disaster. To create the levers and institutions of great power without a corresponding political, cultural and economic and identity and cohesion might not simply be naive folly; it might easily create a moral and political power vacuum from which something much more lethal might spring. This is not argument based on scepticism; it is argument based on caution. Our collective and individual liberties and rights are not necessarily available for experiment on the test bench of enthusiasts who do not command the confidence, yet alone the imaginations, of the peoples of Europe.

From an Irish perspective, our sense of identity and independence is an uplifting force; our membership of a partnership-based Europe has also been an uplifting force. It does not follow that the creation of a single European state with twenty or twenty seven or more semi-autonomous regions would prove more successful for us in terms of peace, prosperity, liberty or quality of life.

I argue that we must not allow the forthcoming Irish in Europe debate to become too polarised. We should not allow ourselves to be silenced by a sense of gratitude nor inhibited by a sense of relative size. Europe is at the moment a partnership of nation states and has succeeded as such; it is perfectly possible for Ireland and Irish people to make a rational, dispassionate but friendly and committed assessment of the future Europe we want to see. We need not take our cue from those who have, perhaps, a head start in the debate. Nor should we necessarily take our inspirations from the European centre. The unspoken assumption by federalist proponents of Europe that "he who is not for their view of Europe is against Europe itself" is, I think, unconvincing, unhistorical and arrogant.

Our priority must be to take an active role in developing and articulating a model of Europe which we want to see. If we confine ourselves to commenting on the plans of others, and to giving occasional polite throat clearances of disapproval, we surrender the political issue to others. There is a sharp division between the federalist project and what Irish people want. It is not just a difference of timing or emphasis. And we should be sufficiently self confident to say so. ●

THE "POLITICAL" ROLE OF THE ATTORNEY GENERAL ?

Conleth Bradley BL

Introduction

It is not surprising that the Attorney General, as the adviser to the executive arm of government on matters of law and legal opinion, becomes regularly embroiled in complex legal issues which have significant political consequences. In recent times, however, the current holder of the Office, speaking in a personal capacity, has made significant contributions to issues dominating the political agenda. Arising from these personal interventions, heightened public interest and increased media attention is being focused on the personality who holds the office rather than the office itself. Indeed it is somewhat ironic that the Attorney, although not actually a member of the Government, is perhaps the most influential of all those who sit around the cabinet table. The Constitution provides for an imperfect separation of powers. While the Attorney General does not symbolise a "fusion of powers" in the same way as for, example, the Lord Chancellor in England, in reality his role as the Government's legal adviser results in his having an influence over the executive, and *pro tanto*, through the Whip system, the legislature, as well as in the appointment of judges.

Accountability

By comparison, in the recent decision of the Supreme Court in *Sinnott v. The Minister for Education & Others*1 there are discernable signs of a re-emphasis on a strict interpretation of the separation of powers. Hardiman J. in particular appeared to issue the following warning to his judicial colleagues who strayed into areas which he viewed to be the preserve of the executive and legislative arm of government:

> ".....In my view, conflicts of priorities, values, modes of administration or sentiments cannot be avoided or ignored by adopting an agreed or imposed exclusive theory of justice. And if judges were to become involved in such an enterprise, designing the details of policy in individual cases or in general, and ranking some areas of policy in priority to others, they would step beyond their appointed role. The views of aspirants to judicial office on such social and economic questions are not canvassed for the good reason that they are thought to be irrelevant. They have no mandate in these areas. And the legislature and the executive, possessed of a democratic mandate, are liable to recall by the withdrawal of that mandate. That is the most fundamental, but by no means the only, basis of the absolute necessity for judicial restraint in these areas. To abandon this restraint would be unacceptably and I believe unconstitutionally to limit the proper freedom of action of the legislature and the executive branch of government....."

Should such constraints be placed on the publicly expressed personal views of the Attorney General ?

The Office finds its legal basis2 as guardian of the public interest in Section 6 of the Ministers and Secretaries Act 1924 and its constitutional function by virtue of Article 30 of the Constitution. Interestingly, Casey,3 when analysing the independence of the Attorney General, has commented:

> ".....Mr. Michael McDowell TD, of the Progressive Democrats, agreed that it would be unacceptable for the Attorney General to be responsible to the House in respect of advice he gave the Government - his client. But he was concerned that the Attorney should be accountable to the public in some form for his decisions in his role as protector of the Constitution and upholder of individuals' constitutional rights....."

This precise question of the accountability of the Attorney General was examined by the Whitaker Constitutional Review Group Report which made four key recommendations and conclusions:

* The Constitution should expressly permit delegation of the Attorney General's functions to another senior lawyer with the approval of the Taoiseach.

* Accountability should remain through the Taoiseach.

* The Attorney General need not be a member of the Oireachtas.

* The Attorney General was the best person to decide what should be done if the public interest role of the Attorney General ran counter to the obligation to act as a legal adviser to the government.

However, what of current controversies ?

Europe - a domestic democratic deficit

One of the most interesting features of the Attorney General's address to the Institute of European Affairs on the 18th of June, 2001 concerned his views as to whether or not there was a domestic democratic deficit in Ireland. At the beginning of his address the Attorney stated that he was speaking in a personal capacity and not on behalf of the Government:-

> "I make therefore what has become a recurring routine plea in addresses like this - a plea not to be half heard, half read, half understood or reduced to a misleading sound bite."

The address by the Attorney General to the Institute of European Affairs requires careful reading. While it contains an analysis of the issues that face Ireland at a very important time in our relationship with other countries both in and outside the European Union, the Attorney posed the following question:-

> ".....If the sole and exclusive power to make laws for the State vests in the Oireachtas and not in any other legislative authority (as Article 15.2 of the Constitution provides) should Irish Ministers have a constitutionally free hand to participate in Council meetings whose decisions can effectively abrogate the terms of the Constitution itself in adopting directives and making regulations?"

The Attorney stated that while under European law an Irish Minister's

colleagues in the EU Council of Ministers were entitled to assume full power and discretion, as a matter of Irish law an Irish Minister need not necessary be a "legal or constitutional plenipotentiary" on the part of the Irish State or people. It was therefore for the Irish people and legislature to decide the policy terms on which Irish Ministers would vote at the EU Council meetings and they would be subject to Irish law both constitutional and statutory. He opined that such discretion as Ministers enjoyed as a matter of Irish law resulted from an express or implied constitutional authority.

He then went on to examine the collective authority of Irish Ministers. Apart from when Ministers exercise statutory authority as corporations sole they were obliged to have the authority of Government, express or implied, for what they did as Ministers and were collectively responsible to D†il _ireann and therefore exercised what is constitutionally described as the executive power of the State. The Attorney added:-

> "It is beyond contradiction that whatever the executive power of the State may include it does not include the legislative power to make laws for the State."

Therefore while the negotiation and conclusion of the State's external agreements and liabilities was perceived to be part of the executive power of the State, it was by no means clear "as a matter of Irish constitutional theory, that the Government or any individual Minister, has the unlimited and unfettered right to oblige the State to make laws even to the point of abrogating established constitutional rights. The obligation to transpose European Directives into Irish law rests constitutionally with the Oireachtas. The Oireachtas cannot constitutionally abdicate that function."

The Attorney General stated that from a procedural perspective it was far easier for an Irish Minister to agree on a European level to a directive with far reaching legal and constitutional consequences than it was to sponsor the most simple piece of domestic legislation:-

> "That an Irish Minister should be technically at large free to negotiate a regulation or directive which as a matter of European and Irish law the Oireachtas is absolutely bound to accept is a striking proposition; that the Oireachtas should eschew and abdicate any prior consultative right or role in the process of leading to the adoption of a regulation or directive, appears on the face of it, greatly at odds with the spirit of the Constitution. With any other legislative measure, the Oireachtas has the power to reverse a decision with which it disagrees. A Minister who makes a delegated legislative decision himself faces the sack; the decision itself faces reversal. That is the legal context in which statutory instruments are usually made. But in the context of the European Union, a regulation or directive is effectively irreversible once made. Insofar as it delimits and curtails the terms of constitutional rights and guarantees, such a measure has the status of sovereign legislation. It is remarkable, therefore, that present legislative practice has imposed no prior obligation of consultation in routine legislative matters and an obligation to seek at least the consent of the Oireachtas where such a measure would inevitably control or delimit constitutional guarantees."

The suggestion that the Oireachtas should propose a scheme whereby it can engage in prior consultation in relation to European law is attractive. The Attorney's criticism centred on the failure of parliamentarians of all generations to vindicate the people's rights and to fulfil their constitutional role. He suggested that there was a strong case in terms of "democracy, constitutionalism and autonomy" for a far reaching reform of the interaction of the Oireachtas with European policy and legislation affairs while acknowledging that it would be folly to equate the most technical and obscure regulation or directive with major policy orientated legislation. In consequence, any reform in order to be worthwhile would have to make practical discrimination between the technical and obscure on the one hand and the policy orientated legislation on the other. Essentially the Attorney suggested that Regulations and Directives could no longer be the exclusive concern of "MEPs, Ministers and technocrats" and were, rather, "the direct and unavoidable concern" of TDs and Senators.

The aforementioned sentiments of the Attorney General are quintessentially political. The direction of his focus was essentially at government and parliament. However, his views as set out above in relation to Ireland's domestic democratic deficit should also be seen in the context of the recent decision of the Supreme Court in *Maher v. The Minister for Agriculture, Rural Development, Ireland and the Attorney General*4 where it was argued by the applicant, unsuccessfully, that the Minister for Agriculture, Food and Rural Development did not have legal authority to make certain "milk quota" regulations.

On one interpretation it could be argued that this decision unanimously (Keane CJ, Denham J, Murphy J, Murray J and Fennelly J) rejected the 'spirit' of the views set out by the Attorney General in relation to Ireland's domestic democratic deficit in that the Supreme Court held that the Minister in making the milk quota regulations was not determining principles and policies and therefore was not purporting to legislate. Rather, he was simply implementing the policies and principles in accordance with the general principles of Community law and therefore there was no breach of Article 15.2.1 of the Constitution.

It has to be stressed, however, that the Attorney in making his comments was (a) speaking in a private capacity and (b) did not refer to any individual case. However, one of the ironies of the address given by the Attorney General is the fact that the Attorney General was a respondent in the *Maher* case and as the *legitimus contradictor* in any challenge to the constitutionality of legislation, he along with the Minister and Ireland (the State) defended the making of the milk quota regulations by arguing on lines directly inimical to the substance of his address to the Institute of European Affairs.

A number of issues arise in this context. Firstly, the Attorney General is a political creature. An examination of inter alia the nature of his or her appointment, the manner in which the office is held, the nature of the bodies who seek his or her advice, and the termination of the office all emphasise the political characteristics of the office. To try and distinguish the political from the legal in this context is almost impossible.

Secondly, as with the holder of every Constitutional Office one has to examine the nature of the personality involved. An examination of the array of Attorney Generals who have served the country reveals a varied mix of personalities. For example the current Attorney General was a high profile and vocal politician and parliamentarian and formerly a member of two political parties. He was also a media commentator having a regular column in a Sunday newspaper for a number of years. While his more recent comments on the "European question" have drawn criticism from some politicians and lawyers, this is not be the first (nor indeed presumably the last) occasion on which the comments of the Attorney General will have a controversial impact.

Conclusion

Given that the Attorney General, in some areas, exercises a quasi judicial role and defends the constitutionality of impugned legislation in litigation, his private views expressed in a public forum will continue to resonate controversially. While the media will concentrate on any apparent disparity between his views and those of his political masters and clients (the executive arm of government), the juxatposition of these views in the context of litigation in which he is a party will also provide a focus for future debate.●

1 Unreported, Supreme Court, 12 July 2001. See the judgments of Keane C.J., Denham J., Murphy J., Murray J., Hardiman J., Geoghegan J., and Fennelly J.

2 Under statute the Attorney General is responsible for the Parliamentary Draftsman's office, the Law Reform Commission, the Chief State Solicitor's Office, the estates of those dying with no next-of-kin, and for advising the Commissioners of Charitable Donations and Bequests. The Prosecution of Offences Act 1974 transferred most of the prosecution powers of the Attorney General to the Director of Public Prosecutions.

3 Casey, *The Irish Law Officers*, p. 71

4 Unreported, Supreme Court, 30 March 2001.

REFUGEE LAW & PROCEDURE (PART II)

Wesley Farrell BL and Conor Gallagher BL complete their overview of Irish refugee law and procedures.

Application at Port of Entry and Initial Review

When a person who seeks asylum arrives at a port of entry to Ireland, the Immigration Officer must inform such person, where possible in a language that the person understands, that he or she is entitled to seek a declaration from the Minister for Justice and that he or she is entitled to consult a solicitor and the United Nations High Commissioner for Refugees including the Representative for Ireland [hereinafter "the U.N. High Commissioner].[1] However, the Immigration Officer's role is ministerial and not adjudicative. Therefore, the Immigration Officer has no role in substantive decision-making regarding the recommendation to the Minister: that is the role of the Commissioner. The Immigration Officer also has no power to deport any asylum applicant. The Immigration Officer must interview the applicant as soon as practicable after such arrival[2] and, where necessary and possible, with the assistance of an interpreter.[3] This interview shall seek to establish the same information as the interview held by the Authorised Officer of the Commissioner (set out below).[4] The Immigration Officer must keep a record of the interview and copies must be furnished to both the applicant and the Commissioner.[5] The Authorised Officer of the Commissioner uses the record of the interview as part of the adjudication.

Application to the Refugee Applications Commissioner

The Commissioner's function is to investigate the application for a declaration for the purpose of ascertaining whether a declaration should be given.[6] When the Commissioner receives an application, he or she must give to the applicant, without delay, a statement in writing specifying, where possible in a language that he or she understands,

(a) the procedures to be observed in the investigation of applications,
(b) the entitlement of the applicant to consult a solicitor,
(c) the entitlement of the applicant to contact the [U.N.] High Commissioner,
(d) the entitlement of the applicant to make written submissions to the Commissioner,
(e) the duty of the applicant to co-operate with the Commissioner and to furnish information relevant to his or her application, and,
(f) the obligation of the applicant to notify the Commissioner of his or her address in Ireland.[7]

When a person makes an application, he or she must complete an asylum questionnaire, a legal document, which must be returned within five working days to the Commissioner.[8] Failure to return this questionnaire within the time period may result in an application being found to be manifestly unfounded (see below).[9]

Following the initial application, the Immigration Officer or Authorised Officer of the Commissioner takes the applicant's fingerprints, provided the applicant is over 14, in order to detect any duplicate applications.[10] The applicant is then issued with a temporary residence certificate and is entitled to remain in the State until the final determination of his or her application, or the date on which his or her application is withdrawn, or the date on which his or her application is transferred to another Dublin Convention country.[11]

Investigation Procedures

The Commissioner investigates the asylum application by interviewing the asylum applicant, by requesting information to be provided from persons and bodies and by considering documentation received.

Interview

When an asylum seeker makes an application, he or she is interviewed by an Authorised Officer(s)[12] of the Commissioner, with the assistance of an interpreter where necessary and possible, for the purpose of establishing:

"(a) whether the person wishes to make an application for a declaration and, if he or she does so wish, the general grounds upon which the application is based,

(b) the identity of the person,
(a) the nationality and country of origin of the person,
(b) the mode of transport used and the route travelled by the person to the State,
(c) the reason why the person came to the State, and
(d) the legal basis for the entry into or presence in the State of the person...."[13]

These interviews can be lengthy and sometimes a second interview may be required to clarify details. If an applicant fails to attend a scheduled interview with an Authorised Officer of the Commissioner, a second opportunity is given to the applicant to attend. If the applicant does not show on the second occasion without reasonable cause, the Commissioner must make a recommendation that the applicant shall not be declared a refugee.[14] The Authorised Officer of the Commissioner must keep a record of the interview and must furnish a copy to the applicant.[15] The Authorised Officer of the Commissioner must furnish a report in writing in relation to the application to the Commissioner.[16]

Provision of Information

The Commissioner may request any person or body to make inquiries and to furnish information in his or her or its possession or control that the Commissioner may reasonably require.[17] The Commissioner may seek information from the Minister for Justice or the Minister for Foreign Affairs; however, this may be withheld in the interest of national security or public policy.[18]

The Commissioner must furnish the applicant and the High Commissioner for Refugees, whenever so requested by him or her, with copies of any reports, documents or representations in writing submitted to the Commissioner relating to the application and investigation and the Commissioner must furnish an indication in writing of the nature and source of any other information in relation to the application which has come to the Commissioner's notice during the investigation, except information supplied by another state in confidence.[19]

Consideration of Documentation

The Commissioner investigates all documentation received in relation to the application including the asylum application form, the asylum questionnaire, any report from the initial interview and any other reports and documentation received by the Commissioner regarding the applicant's application.

Written Submissions

The applicant or any person concerned with the application may make written submissions to the Commissioner at any time, but not later than seven working days after the interview and the Commissioner must take account of these representations.[20]

Burden and Standard of Proof

The Refugee Act, 1996 does not explain the burden and standard of proof which should be applied by the Commissioner. The Commissioner has a duty to investigate the application for a declaration of refugee status[21] and the applicant has a duty assist the investigation.[22] Therefore, the burden is shared between the Commissioner and the applicant. It is suggested by the U.N.H.C.R. Handbook that the duty to ascertain and evaluate all relevant facts, "... is shared and, if the account is credible and there are no good reasons for not doing so, the claimant should have the benefit of the doubt."[23]

The standard of proof applied is less than the civil standard - on the balance of probabilities - because if this standard applied the recognition rate of refugee status would be very small. Therefore the standard applied is "whether it is possible, and not improbable, that the applicant is a refugee."[24]

Manifestly Unfounded Applications

At any time after the receipt of an application, the Commissioner may decide that the application is manifestly unfounded or that there is no basis to the claim for asylum.[25] However, the applicant is always entitled to an interview with an Authorised Officer of the Commissioner.[26]

Commissioner's Recommendation

Following the investigation, the Commissioner must prepare a written report of the results of the investigation, his or her findings and recommendation whether or not the applicant should be declared a refugee.[27] The Commissioner must send a copy of the report to the applicant and to his or her solicitor, if known. The U.N. High Commissioner must be informed of the recommendation[28] and must be sent a copy of the report if so requested.[29] In the case of an application found to be manifestly unfounded, the Commissioner must send a copy of the negative recommendation and reasons for it to the above-mentioned parties.[30]

If the recommendation is that the applicant should be declared a refugee, the Commissioner must as soon as may be, furnish the report to the Minister for Justice.[31] If the recommendation is that the applicant should not be declared a refugee, the Commissioner must send written notice to the applicant that, within 15 working days from the sending of the notice, he or she may appeal against the recommendation to the Tribunal and may request an oral hearing.[32] If the negative recommendation is on grounds of a manifestly unfounded application, the applicant may appeal on papers alone against the recommendation to the Tribunal within 10 working days from the sending of the notice.[33]

Where the applicant has not appealed within the relevant period, the Commissioner must furnish the report, as soon as may be, to the Minister for Justice.[34]

The Refugee Appeals Tribunal

Appeals from the Commissioner's recommendation can be made to the Refugee Appeals Tribunal within 15 working days from the Commissioner's written notice, or 10 working days in the case of an application found to be manifestly unfounded.[35] The Tribunal is independent in the performance of its functions[36] and consists of a Chairman and ordinary members, each of whom must have no less than 5 years experience as a practising barrister or practising solicitor. The Tribunal is grouped into divisions of one member[37] and the business to be transacted by each division is assigned by the Chairperson.[38]

Appeals are brought to the Tribunal by notice in writing specifying the grounds of appeal.[39] The Tribunal must transmit a copy of this notice to the Commissioner and notify the U.N. High Commissioner of the making of the appeal.[40]

The appeal must be made on 'Form 1'[41] set out in the First Schedule of the Refugee Act 1996 (Appeals) Regulations 2000[42] or, in the case of an application found to be manifestly unfounded, on 'Form 2'[43] set out in the Second Schedule of the

Regulations. 'Form 1' has eight sections: (1) Personal Details, (2) Legal Representation, (3) Grounds of Appeal, (4) Oral Hearing, (5) Documentation, (6) Submissions at Oral Hearing, (7) Witnesses, (8) Communications to the Tribunal. 'Form 2' has five sections: (1) Personal Details, (2) Legal Representation, (3) Grounds of Appeal, (4) Documentation, (5) Communications to the Tribunal. 'Form 2' does not have sections regarding the oral hearing as this form of appeal may only be made on the papers alone.

The appeal is a complete reconsideration of the application. The appeal should be treated as a de novo hearing, although this is not technically the case. The 'Grounds of Appeal' section should indicate to what extent it is contended that the recommendation of the Commissioner erred in fact and / or law. The appellant may submit additional information to the Tribunal that was not available to the Commissioner. If additional information is submitted, the 'Grounds of Appeal' must state why the information was not available to the Commissioner and also the precise relevance of this information to the case.[44]

Provision of Information

The Commissioner must furnish the Tribunal with copies of any reports, documents or representations in writing submitted to the Commissioner relating to the application and investigation, and the Commissioner must furnish an indication in writing of the nature and source of any other information in relation to the application which has come to the Commissioner's notice during the investigation,[45] except information supplied by another state in confidence.[46] The Tribunal may request the Commissioner to make further inquiries to provide further information as the Tribunal considers necessary[47] and may request the Commissioner to provide written observations concerning any matter arising on the grounds of appeal.[48]

The Tribunal must furnish the applicant and his or her solicitor, if known, and the U.N. High Commissioner, whenever so requested by him or her, with copies of any reports, observations, or representations in writing or any other document furnished to the Tribunal by the Commissioner, copies of which have not been previously furnished, and an indication in writing of the nature and source of any other information relating to the appeal which has come to the Tribunal's notice in the course of the appeal[49], except information supplied by another state in confidence.[50]

Oral Hearing

Where an applicant seeks an oral hearing for the purpose of an appeal,[51] the Tribunal must fix a time and date for the oral hearing and must send notice, not less than seven working days before such date, to the applicant and his or her legal representative, if known, and to the Commissioner.[52] The notice may be delivered in person or by prepaid registered letter.[53] When the notice has been sent by prepaid registered letter, the notice is deemed duly served on the third working day after the day it was sent.[54] The Tribunal enables the applicant and the Commissioner or the Authorised Officer of the Commissioner to be present at the hearing and present their case in person or through a legal representative or other person.[55] The oral hearing must be held in private;[56] however the U.N. High Commissioner may be present to observe proceedings.[57] The Tribunal must, where necessary, use its utmost endeavours to procure the attendance of an interpreter to assist at the hearing.[58]

Witnesses

The Notice of Appeal may include a request to the Tribunal to direct the attendance of witness(es) before the Tribunal.[59] The Tribunal must determine whether the proposed witness be directed to attend having regard to the nature and purpose of the evidence proposed to be given as indicated in the Notice of Appeal.[60] The Tribunal may direct in writing any person to give evidence to the Tribunal at an oral hearing and to produce any document or thing in his or her possession or control,[61] except where the Minister for Justice or the Minister for Foreign Affairs directs that the document or thing be withheld in the interest of national security or public policy.[62] The notice of the oral hearing from the Tribunal must include the names of any witness directed by the Tribunal to attend the oral hearing.[63] A witness who is directed to attend an oral hearing must be present only for the duration of his or her evidence.[64]

Conduct of the Oral Hearing

The Tribunal must in conducting the oral hearing:

(a) ensure that the applicant and the Commissioner, and their legal representatives if any, and the [U.N.] High Commissioner, if present, are informed of the order of proceedings which the Tribunal proposes to adopt;
(b) conduct the oral hearing as informally as is practicable, and consistent with fairness and transparency;
(c) decide the order of appearance of the applicant and the Commissioner and any witnesses;
(d) ensure that the oral hearing proceeds with due expedition; and
(e) allow for the questioning of the applicant, witnesses and the Commissioner.[65]

The Tribunal may hear appeals together, subject to the agreement of the applicants concerned and the Commissioner, where it appears to the Tribunal that in two or more appeal cases:

(a) some common matter arises in both or all of them;
(b) they relate to members of the same family; or
(c) the Tribunal otherwise considers it reasonable and just that the appeals should be heard together.[66]

Burden and Standard of Proof

As in the Commissioner's case, the Refugee Act 1996 does not explain the burden and standard of proof which should be applied by the Tribunal. The Tribunal may direct further investigations to be carried out, using the Commissioner to carry out investigations[67] and the applicant continues to have a duty in assisting the Tribunal.[68] Therefore, it can be said that the burden is shared three ways between the Tribunal, the Commissioner and the applicant.

Again, as in the Commissioner's case, the standard of proof applied is less than the civil standard - on the balance of probabilities - and is "whether it is possible, and not improbable, that the applicant is a refugee."[69]

Adjournments and Withdrawals

The Tribunal may adjourn a hearing in the interest of justice.[70] Where an applicant fails to attend an oral hearing of the Tribunal, the Tribunal must affirm the recommendation of the Commissioner unless, within three working days after the date of

the oral hearing, the applicant furnishes the Tribunal with an explanation that satisfies the Tribunal that he or she had reasonable cause for not attending.[71] An applicant may withdraw an appeal to the Tribunal by sending notice of withdrawal to the Tribunal.[72] The Tribunal must then notify the Minister for Justice and the Commissioner of the withdrawal.[73]

The Decision of the Tribunal

The Tribunal may affirm the Commissioner's recommendation that the applicant should not be declared a refugee or may set aside the Commissioner's recommendation and recommend that the applicant be declared a refugee.[74] Alternatively, in the case of an appeal from a recommendation that the applicant's case is manifestly unfounded, the Tribunal may affirm the Commissioner's recommendation that the application is manifestly unfounded or may set aside the Commissioner's recommendation and remit the application to the Commissioner to carry out an investigation for the purpose of ascertaining whether a declaration should be given.[75]

The Tribunal must communicate its decision and reasons for that decision to the applicant and his or her solicitor, if known, and the High Commissioner for Refugees. Also, the Tribunal must communicate its decision and the reasons for it and a copy of the Commissioner's report to the Minister for Justice, except where the Tribunal's decision is to remit the application to the Commissioner to carry out an investigation.[76]

The Minister's Decision

Where the Commissioner's report or the Tribunal's decision, furnished to the Minister for Justice, includes a recommendation that the applicant should be declared to be a refugee, the Minister for Justice must give the applicant a written declaration that the applicant is a refugee[77], except in the case where the Minister considers a declaration should not be granted in the interest of national security or public policy.[78]

Where the recommendation is that the applicant should not be declared to be a refugee, the Minister may refuse to give the applicant such a declaration.[79] The Minister for Justice must notify the U.N. High Commissioner of the giving of or refusal to give a declaration.[80] Where the Minister has decided to refuse to give a declaration, he or she shall send to the applicant a notice in writing stating that,

(a) his or her application for a declaration has been refused,
(b) the period of entitlement of the applicant to remain in the State... has expired, and
(c) the Minister [for Justice] may make [a deportation] order... requiring the applicant to leave the State....[81]

Deportation

The Minister for Justice may make a deportation order in respect of a person whose application for asylum has been refused, requiring that person to leave the State within such period as may be specified in the order and to remain thereafter out of the State.[82] This may have future implications on the freedom of movement of such persons who have been excluded from Ireland and whose countries are applying for future European Union membership. Where the Minister for Justice proposes to make such a deportation order, he or she must notify the applicant in writing of the proposal and of the reasons for it and, where necessary and possible, the applicant shall be given a copy of the notification in a language that he or she understands.[83] An applicant may consent to the making of the deportation order within fifteen working days of the sending to him or her of the notification and thereupon the Minister for Justice must arrange for the deportation as soon as practicable.[84]

Within fifteen working days of the sending of the notification, the applicant may make representations in writing to the Minister for Justice setting out why he or she should not be deported.[85] Before deciding the matter, the Minister for Justice must take into consideration any representations made in relation to the proposal.[86] In determining whether to make a deportation order in relation to the applicant the Minister must have regard to:

(a) the age of the person;
(b) the duration of residence in the State of the person;
(c) the family and domestic circumstances of the person;
(d) the nature of the person's connection with the State, if any;
(e) the employment (including self-employment) record of the person;
(f) the employment (including self-employment) prospects of the person;
(g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
(h) humanitarian considerations;
(i) any representations duly made by or on behalf of the person;
(j) the common good; and
(k) considerations of national security and public policy.[87]

The Minister must notify the applicant in writing of his or her decision whether or not to make a deportation order and of the reasons for it and, where necessary and possible, the person must be given a copy of the notification in a language that the person understands.[88]

If an applicant has consented to the making of a deportation order, and is not deported within three months of the making of the order, the order shall cease to have effect, although another deportation order can be issued.[89] An applicant who has been ordinarily resident in the State for five years or longer and is engaged in business in the State must not be deported unless three months' notice in writing of deportation is given.[90]

Judicial Review

Section 5(1) of the Illegal Immigrants (Trafficking) Act 2000 [hereinafter "the 2000 Act"] sets out that the validity of certain decisions, determinations, recommendations and orders, made pursuant to the Refugee Act 1996, the Immigration Act 1999 and the Aliens (Amendment) (No. 2) Order 1999[91] cannot be challenged other than by way of an application for judicial review. The following decisions, determinations, recommendations and orders may be judicially reviewed:

(a) A refusal of leave to land, to an alien coming from a place outside of the State other than Great Britain and Northern Ireland, if the Immigration Officer is satisfied of certain facts,[92]
(b) A determination of the Commissioner or a decision of the Tribunal in relation to the application of the Dublin Convention,[93]

(c) A recommendation by the Commissioner as to whether or not an application is manifestly unfounded,[94]

(d) A recommendation by the Tribunal as to whether or not an application is manifestly unfounded,[95]

(e) A recommendation by the Commissioner as to whether or not an applicant should be declared a refugee,[96]

(f) A decision of the Tribunal to affirm or set aside the Commissioner's recommendation,[97]

(g) A decision by or on behalf of the Minister for Justice to refuse an application for refugee status,[98]

(h) A refusal by the Minister for Justice to declare that an applicant is a refugee,[99]

(i) A decision by the Minister for Justice to revoke a declaration of refugee status,[100]

(j) The Minister for Justice's notification in writing to an asylum applicant of his or her proposal to make a deportation order and the reasons for it,[101]

(k) The Minister for Justice's notification in writing to an asylum applicant of his or her decision whether or not to make a deportation order and the reasons for it,[102]

(l) A deportation order made by the Minister for Justice,[103]

(m) An exclusion order against any non-national made by the Minister for Justice.[104]

A judicial review application under Section 5 of the 2000 Act, while founded on the general principles that apply in administrative law proceedings, is subject to more restrictive measures than an ordinary application under Order 84 Rules of the Superior Court. These restrictive measures include:

* The time limit applicable;[105]
* The fact that the application for leave is on notice;[106]
* The priority to be given to applications;[107] and
* The standard and burden of proof.[108]

Time Limitation

One of the most striking measures is the time limitation of 14 days within which an application for leave to apply for judicial review must be made. The time period commences on the date the person was notified of the decision, determination, recommendation or order,[109] which time period can be extended by the High Court where there is "good and sufficient reason."[110] Some reassurance of the ambit of this discretion can be obtained from the comments of the Supreme Court in the case of In Re Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill, 1999, when it considered and approved the constitutionality of the section and referred to "the wide discretion of the High Court."[111] The Supreme Court specifically referred to difficulties applicants may encounter with regard to access to information and discovery[112] as possibly constituting "a good and sufficient reason for extending the time within which to apply for leave to apply for judicial review."[113]

Notice

An application for leave to apply for judicial review cannot be made ex parte and must "be made by motion on notice... to the Minister [for Justice] and any other person specified for that purpose by Order of the High Court."[114]

Priority

The High Court must give such priority as it reasonably can, having regard to all the circumstances, to the disposal of proceedings in that court under Section 5 of the 2000 Act.[115]

Standard and Burden of Proof

The standard that applies for the granting of leave to apply for judicial review in refugee cases is similar to that under the planning code[116] and some other legislative enactments.[117] In order to successfully obtain leave for judicial review under section 5 of the 2000 Act, the High Court must be "satisfied that there are substantial grounds."[118] In interpreting the planning code, the standard that has been held to apply is that an application for leave must be "reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous."[119] The Supreme Court held in the case of In Re Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill, 1999 that the above definition by Carroll J. was appropriate to applications under the 2000 Act.[120] This has been applied recently in the High Court in *P, L. and B. v. The Minister for Justice, Equality and Law Reform.*[121] This judgment has been certified as a decision giving rise to a point of exceptional public importance and is currently under appeal to the Supreme Court. The clarification, which should be provided by this appeal and other forthcoming High Court decisions, is keenly awaited.

The High Court, in *P, L. and B. v. The Minister for Justice, Equality and Law Reform*, has held that a low standard of proof - to establish a stateable case - is not "appropriate on an inter partes hearing."[122] The High Court has adopted the standard as contained in *Mass Energy Limited v. Birmingham City Council*[123] to the effect that "we should grant leave only if we are satisfied that [the applicant's] case is not merely arguable but is strong; that is to say, is likely to succeed."[124] The result of this is that, "...where the Court seems to have all the relevant material and have heard full argument at the leave stage on an inter partes hearing, the Court is in a better position to judge the merits than (sic) is usual on a leave application. It may then require an applicant to show a reasonably good chance of success if he is to be given leave."[125]

As with the case of the planning code,[126] there is a comparable paradox in the relationship between Section 5(2)(b) of the 2000 Act, whereby an applicant can be refused leave to apply for judicial review if he or she has not demonstrated "substantial grounds", and Section 5(3)(a) of the 2000 Act, whereby the High Court may still certify that its decision involves a point of law of exceptional public importance and thereby grant leave to appeal to the Supreme Court. This is the only means by which an appeal from a refusal to grant leave can be entertained, except where the High Court determination involves a question as to the validity of any law having regard to the provisions of the Constitution.[127] The Supreme Court pointed out that it is not within the competence of the Oireachtas to circumscribe or abridge the remedy of habeas corpus protected and guaranteed by Article 40.4.2° of the Constitution.[128]

The Supreme Court in the case of In Re Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill 1999, has approved section 5 of the 2000 Act which was designed to ensure that the judicial review process could not be used to delay a person's departure where no substantial case can be made which would warrant postponement.[129] ●

1 Sections 8(1)(b) 1996 Act
2 Section 8(1)(a) 1996 Act
3 Section 8(2) 1996 Act
4 Section 8(2) 1996 Act
5 Section 8(2) 1996 Act
6 Section 11(1) 1996 Act
7 Section 11(8) 1996 Act
8 The requirement to complete the asylum questionnaire within the time limit is an administrative rule of the Commissioner.
9 Section 12(4)(f) 1996 Act
10 Section 9A 1996 Act
11 Section 9 1996 Act
12 Section 11(2) 1996 Act
13 Section 8(2) 1996 Act
14 Section 11(9) 1996 Act
15 Section 8(2) 1996 Act
16 Section 11(2) 1996 Act
17 Section 11(4)(a) 1996 Act
18 Section 11(4)(b) 1996 Act
19 Section 11(7) 1996 Act
20 Section 11(3) 1996 Act
21 Section 11(1) 1996 Act
22 Section 11(8)(e) 1996 Act
23 U.N.H.C.R. Handbook on Procedures and Criteria for Determining Refugee Status, Para. 196
24 "The Refugee Act, 1996 and its amendments", Brian Ingoldsby (Department of Justice, Equality and Law Reform)
25 'Manifestly unfounded claims' are defined in Section 12(4) 1996 Act,
"In this section "a manifestly unfounded application" means an application-
(a) which does not show on its face any grounds for the contention that the applicant is a refugee,
(b) in relation to which the applicant gave clearly insufficient details or evidence to substantiate his or her application,
(c) in relation to which the Commissioner is satisfied that the applicant's reason for leaving or not returning to his or her country of nationality does not relate to a fear of persecution,
(d) in relation to which the applicant did not reveal following the making of an application under section 8 that he or she was travelling under a false identity or was in possession of false or forged identity documents and did not have reasonable cause for not so revealing,
(e) in relation to which the applicant, without reasonable cause, made deliberately false or misleading representations of a material or substantial nature in relation to his or her application,
(f) in relation to which the applicant, without reasonable cause and in bad faith, destroyed identity documents, withheld relevant information or otherwise deliberately obstructed the investigation of his or her application,
(g) in relation to which the applicant deliberately failed to reveal that he or she had lodged a prior application for asylum in another country,
(h) in relation to which the applicant submitted the application for the sole purpose of avoiding removal from the State,
(i) prior to which the applicant had made an application for a declaration or an application for recognition as a refugee in a state party to the Geneva Convention, and the Commissioner is satisfied that his or her application was properly considered and rejected and the applicant has failed to show a material change of circumstances,
(j) by an applicant who is a national of or has a right of residence in a state party to the Geneva Convention in respect of which the applicant has failed to adduce evidence of persecution,
(k) by an applicant who, after making the application has, without reasonable cause, left the State without leave or permission or has not replied to communications addressed to the person from the Commissioner, or
(l) prior to which the applicant has been recognised as a refugee under the Geneva Convention by a state other than the State, has been granted asylum in that state and his or her reason for leaving or not returning to that state does not relate to a fear of persecution in that state.
26 Section 11(2) 1996 Act
27 Section 13(1) 1996 Act
28 Section 13(2) 1996 Act
29 Section 13(3)(a) 1996 Act
30 Section 12(1)(b) 1996 Act
31 Section 13(3)(d) 1996 Act
32 Section 13(3)(b) 1996 Act
33 Section 12(5) 1996 Act
34 Section 13(3)(c) 1996 Act [The Act does not appear to clearly provide for the report to be provided to the Minister following a finding that the application is manifestly unfounded if no appeal is made; however, this is the practice.]
35 Section 16(1) 1996 Act
36 Section 15(2) 1996 Act
37 Second Schedule Paragraph 11 1996 Act
38 Second Schedule Paragraph 13 1996 Act
39 Section 16(3) 1996 Act [This section refers to Section 13(2)(b) which should read Section 13(3)(b)]
40 Section 16(4) 1996 Act
41 Section 9(1) Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
42 Statutory Instrument 342 of 2000
43 Section 14 Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
44 Section 3 First Schedule of the Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
45 Section 16(5) 1996 Act
46 Section 16(13) 1996 Act
47 Section 16(6) 1996 Act
48 Section 16(7) 1996 Act
49 Section 16(8) 1996 Act
50 Section 16(13) 1996 Act
51 Section 16(10) 1996 Act
52 Section 9(2) Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
53 Section 7(2) Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
54 Section 7(3) Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
55 Section 16(11)(c) 1996 Act
56 Section 16(14) 1996 Act
57 Section 16(15) 1996 Act
58 Section 16(11)(d) 1996 Act
59 Section 9(3)(a) Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
60 Section 9(3)(b) Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
61 Section 16(11)(a) 1996 Act
62 Section 16(11)(b) 1996 Act
63 Section 9(2) Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
64 Section 9(3)(d) Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
65 Section 10 Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
66 Section 11 Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
67 Section 16(6) 1996 Act
68 Section 11(8)(e) 1996 Act
69 "The Refugee Act, 1996 and its amendments", Brian Ingoldsby (Department of Justice, Equality and Law Reform)
70 Section 12 Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
71 Section 16(2A) 1996 Act and Section 13 Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
72 Section 16(9) 1996 Act
73 Section 4 Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
74 Section 16(2)(a)-(b) 1996 Act and Section 5 Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
75 Section 16(2)(c)-(d) 1996 Act and Section 5 Refugee Act, 1996 (Appeals) Regulations, 2000 (Statutory Instrument 342 of 2000)
76 Section 16(17) 1996 Act
77 Section 17(1) 1996 Act
78 Section 17(2) 1996 Act
79 Section 17(1) 1996 Act
80 Section 17(1) 1996 Act
81 Section 17(5) 1996 Act
82 Section 3(1) and 3(2)(f) Immigration Act, 1999
83 Section 3(3)(a) Immigration Act, 1999
84 Section 3(4)(c) Immigration Act, 1999
85 Section 3(3)(b) Immigration Act, 1999
86 Section 3(3)(b)(i) Immigration Act, 1999
87 Section 3(6) Immigration Act, 1999
88 Section 3(3)(b)(ii) Immigration Act, 1999
89 Section 3(8) Immigration Act, 1999
90 Section 3(9)(b) Immigration Act,1999
91 Statutory Instrument No. 24 of 1999
92 Section 5(1)(d) 2000 Act
93 Sections 5(1)(j),(l) and (m) 2000 Act
94 Section 5(1)(g) 2000 Act
95 Section 5(1)(f) 2000 Act
96 Section 5(1)(h) 2000 Act
97 Section 5(1)(i) 2000 Act
98 Section 5(1)(f) 2000 Act
99 Section 5(1)(k) 2000 Act
100 Section 5(1)(n) 2000 Act
101 Section 5(1)(a) 2000 Act
102 Section 5(1)(b) 2000 Act
103 Section 5(1)(c) 2000 Act
104 Section 5(1)(e) 2000 Act
105 Section 5(2)(a) 2000 Act
106 Section 5(2)(b) 2000 Act
107 Section 5(4) 2000 Act
108 Section 5(2)(b) 2000 Act
109 Section 5(2)(a) 2000 Act
110 Section 5(2)(a) 2000 Act
111 *In Re Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill*, 1999 Unreported, 28 August 2000 at page 44
112 *In Re Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill*, 1999 Unreported, 28 August 2000 at page 48
113 Section 5(2)(a) 2000 Act
114 Section 5(2)(b) 2000 Act
115 Section 5(4) 2000 Act
116 Section 82(3B)(a) of the Local Government (Planning and Development) Act, 1963 (as amended by the Local Government (Planning and Development) Act 1992, Section 19(3))
117 e.g. Roads Act, 1993 (as amended by the Roads (Amendment) Act, 1998), the Irish Take-over Panel Act, 1997 and the Fisheries (Amendment) Act, 1997.
118 Section 5(2)(b) 2000 Act
119 *McNamara v. An Bord Pleanala* (No. 1) 1995 2 I.L.R.M. 125 at 130.
120 *In Re Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill*, 1999 Unreported, 28 August 2000 at page 45
121 *P, L. and B. v. The Minister for Justice, Equality and Law Reform and the Attorney* General Judgment of Smyth J. delivered 2nd January 2001
122 *P, L. and B. v. The Minister for Justice, Equality and Law Reform and the Attorney* General Judgment of Smyth J. delivered 2nd January 2001 at page 29
123 [1994] Env. L.R. 298.
124 *Mass Energy Limited v. Birmingham City Council* [1994] Env L.R. 298 at 307
125 Taken from the case of *R v. Cotswold District Council ex parte Barrington Parish Council 75* P and C.R. 515 at 530, which were endorsed by Kelly J in *Gorman and Others v. The Minister for the Environment and Others* [unreported, 7 December 2000] as to "make a great deal of sense" and applied by Smyth J. at page 32 of the judgment in P, L and B. v. Minister for Justice, Equality and Law Reform
126 Section 82(3B) (a) and (b) of the Local Government (Planning and Development) Act, 1963 (as amended by the Local Government (Planning and Development) Act, 1992, Section 19(3)
127 Section 5(3)(b) 2000 Act
128 *In Re Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants* (Trafficking) Bill, 1999 Unreported, 28 August 2000 at page 49
129 For further analysis of this decision see Illegal Immigrants (Trafficking) Act, 2000; Kathy Skelly B.L. and Mary Feeney B.L.; Bar Review December 2000 Volume 6 Issue 3.

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