The Bar Review

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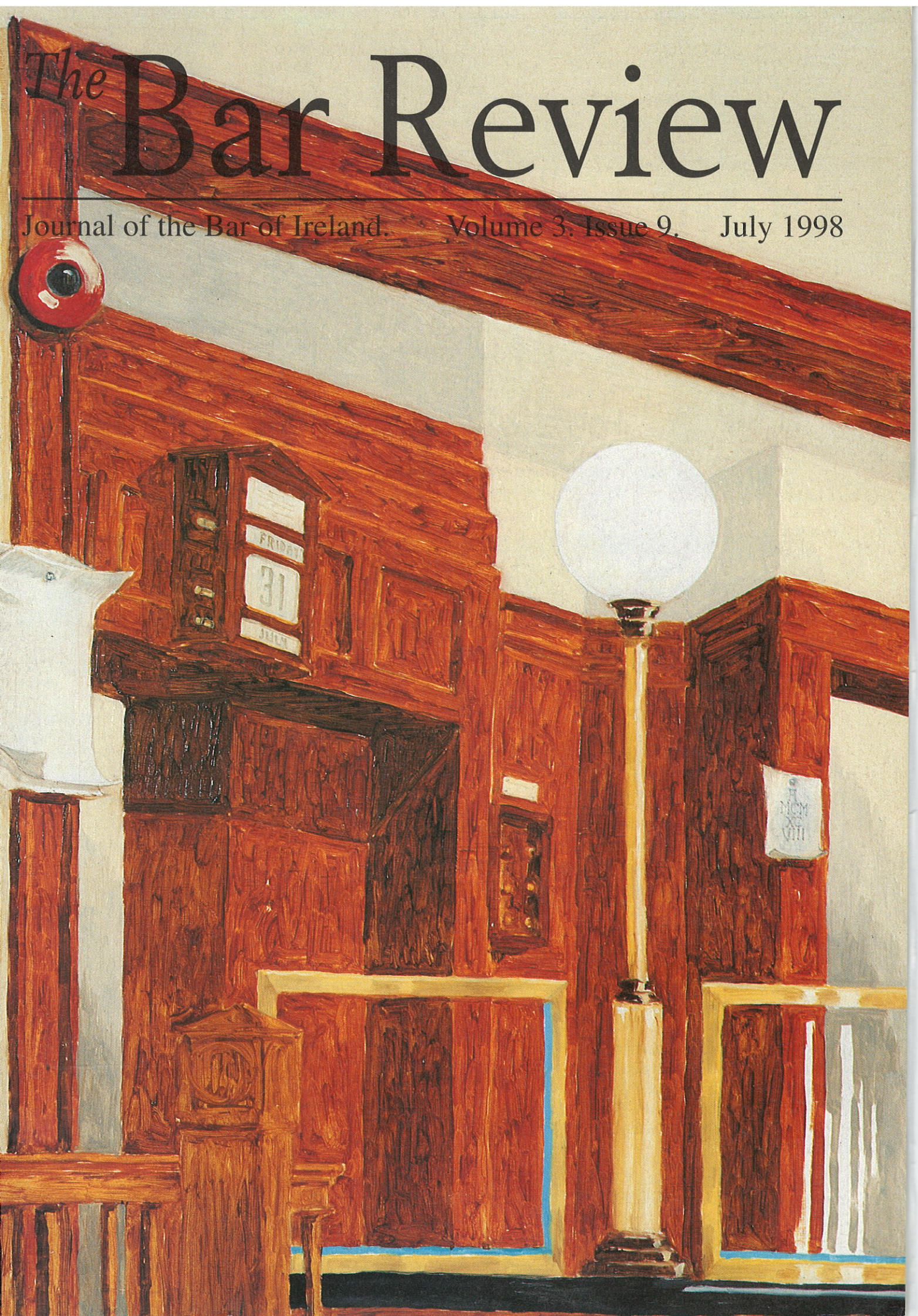

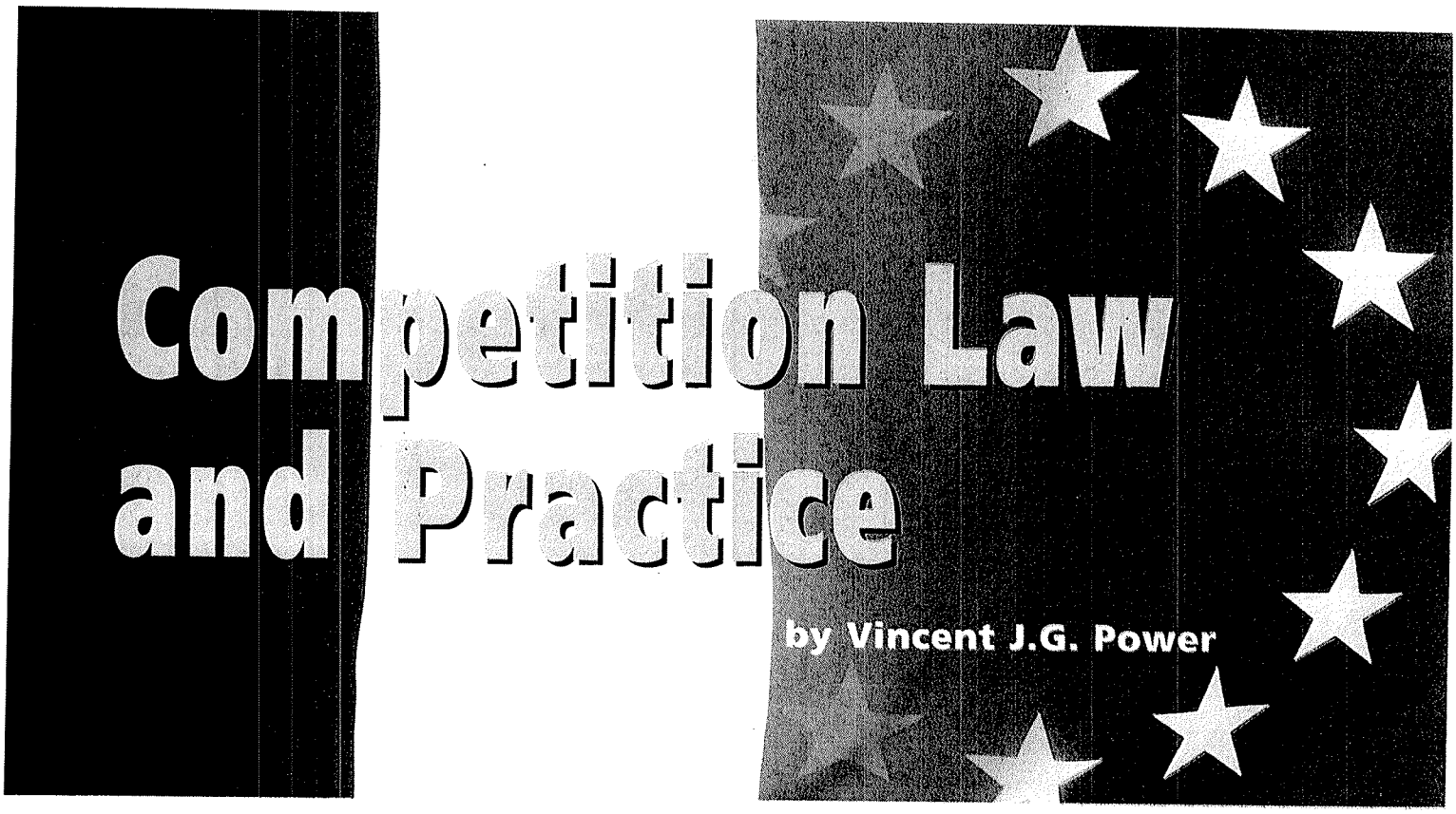

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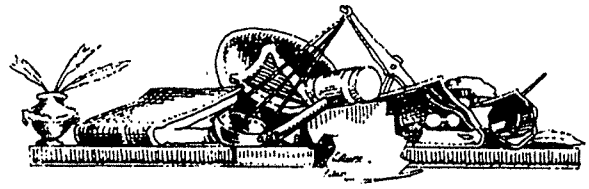

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The Franco-Irish Lawyers Association

The Franco-Irish Lawyers Association (FILA) which was formed on the 24th May, 1998, are inviting new members to join. The aims of the group are to promote and foster the knowledge of French law in Ireland and to promote professional and social links between Irish and French lawyers and law firms.

Any lawyer can join as an 'ordinary member' whilst those holding a Diplôme de Français Juridique are entitled as of right to be admitted to the association. The annual subscription for an ordinary member is £20, while the cost to firms or corporate bodies is £100 per annum.

The diploma in Legal French has been running for three years, and is organised jointly by the Law Society and the Alliance Française. The main modules are the French legal system, Civil and Commercial law. Language modules are also run in conjunction with the legal syllabus.

There will be events organised in the future, by the Association, following on the success of their first event, a conference on 'Buying property in France' looking at the legal and practical aspects of buying in France. For details on membership and other information, please contact Fabienne Henry at 088-2769198.

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IBA Seminar in Dublin

The International Bar Association is holding a seminar - *What's New in Law Firm Management: People, Financing and Technology Issues Today*, in Dublin on the 5-6th November. Topics include;

- Law Firm Governance: Leadership v Management
- Partnership & Proprietorship Issues
- Money Matters
- Getting the Best out of your People

Speakers include John Meagher, Deputy Chairman of Independent Newspapers Ltd. (Ireland) and Michael Simmons, Chairman of the Practice Management and Technology Committee of the IBA. A formal dinner is being hosted by John O'Donoghue, Minister for Justice, Equality and Law Reform in Dublin Castle.

Those wishing to attend should contact the IBA Conferences and Seminars Department, 271 Regent Street, London W1R 7PA, England. Tel: 0044-171-629-1206.

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Telethon '98

The producers of the Telethon '98 for People in Need, registered a contribution by members of the Bar of £1,280, from one days collection in the Law Library. This will be distributed to charitable organisations who have applied for funding.

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Barrister of the Year

Barbara Hewson, a member of the Irish Law Library, was elected 'Barrister of the Year' by the Lawyer magazine. This new award recognises barristers' achievements within the profession and in legal practice in general. Barbara is renowned for her work raising awareness of the rights of pregnant women.

●

Copyright Seminar

The Copyright Association of Ireland is organising a seminar on remedies for copyright infringement as pertaining to the new Copyright Amendment Bill. This is being held on Friday 24th July, in the University Industry Centre, University College Dublin, Belfield, Dublin 4. Speakers include Professor Robert Clark, Jonathan Newman and Michael Freegard, with John Gordon, SC acting as Chairman.
The cost is £55 for Copyright Association members, £80.00 for non-members and £20.00 for students. Please contact Heather Lougheed at 661 4844 or email her at heather.lougheed@imro.ie for registration forms.

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Legal Eagles take flight

The inaugural meeting of the 'Legal Eagles Travel Club' – a joint initiative between barristers and solicitors, was held on the 17th June 1998 at the Incorporated Law Society.

Membership is not restricted to solicitors or barristers, as legal executives and secretaries are welcome to join the club, which aims to make skiing holidays more reasonably priced for everyone.
For further information, please contact: Theresa Lowe, Barrister, at the Law Library (8720622) or Philip O'Riada, Solicitor at (4506859).

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Conference on Criminal Assets

The University of Limerick are hosting a conference on the Confiscation of Criminal assets: Law and Procedure on 4th September, 1998. Speakers include the Minister for Justice, Equality and Law Reform, John O'Donoghue, TD and the Chief Officer and Legal Officer of the Criminal Assets Bureau. Further information is available from the Centre for Criminal justice, University of Limerick, tel: 061-202344 / 202533

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End of Term

The Trinity Term ends on Friday, 31st July. Michaelmas Term commences on Monday, 5th October and ends on Monday, 21st December 1998.

Barristers & Confidentiality

It is deplorable that advice given by counsel to a Government or to a Government Minister or to any client, can be read in the columns of a daily newspaper. The leaking of counsel's opinion, whether it be to inflict political damage or to act as a shield against political attack, must be condemned. In political life just as in ordinary life, immediate advantage ought to be foregone in the interests of the greater good. Confidence in the administration of justice is, without question, a greater good than any political point scoring.

The role played by a barrister in the administration of justice is one which has been evolving over hundreds of years - and one which is still evolving. Accordingly, one cannot find in any one place a comprehensive list of all the rights and duties, obligations and privileges of a barrister. Notwithstanding that, any description of a barrister's relationship with his client in every jurisdiction in the free world stresses that what passes between barrister and a client is totally confidential.

The courts have traditionally regarded the confidentiality of the relationship as being essential to the administration of justice. Accordingly, a judge will not allow a party to litigation to be questioned on communications made between that party and his legal adviser. A court will not order the discovery of documents which pass between a litigant and his legal adviser. A barrister is under a duty not to communicate to any third person information entrusted to him by or on behalf of his lay client, and not to use such information to his client's detriment or to his own or another client's advantage. This duty continues at all times after the relation of counsel and client has ceased and after the death of his client, and subsists, unless he had the consent of his client to make such communication. This rule of confidentiality is imposed even in cases where to waive it would yield important or relevant evidence.

Total confidentiality must exist between barrister and client. That fact ought to be known and appreciated by everybody who practises as a barrister or avails of the services of members of the Bar. It applies whether the client is a private client or a Government department. It applies whether the advice is given by a barrister in private practice or by the Attorney General as legal adviser to the Government. If counsel's opinion is to be published (whether selectively or in its entirety) then, logically, there has been a waiver of all confidentiality. Counsel must be entitled to ensure that the persons who are considering the opinion that has been released to the media are also shown the instructions upon which that opinion was based.

An opinion and the reasons for it are open to misinterpretation unless the information upon which the opinion is based is also available. In the case of an opinion to a Governmental minister this could mean that ministerial memoranda and departmental documents could also end up in the public domain. This type of client/barrister relationship would be disastrous for the proper administration of justice. It is in the public interest that the relationship of confidentiality should be maintained. Selective leaking of counsel's opinion is an abuse of the client/barrister relationship.

Ireland's Place in International Commercial Arbitration

THE ATTORNEY GENERAL, DAVID BYRNE, SC

In recent years, many countries have enacted legislation governing the resolution of disputes in international trade and commerce. The adoption in 1985 by the United Nations Commission on International Trade Law (UNCITRAL) of a Model Law on international commercial arbitration ('The Model Law') was a seminal event in the modern history of international arbitration.

The Model Law was a development on the UNCITRAL rules for international arbitration adopted in 1976. Some years ago the Irish branch of the International Chamber of Commerce considered the amendment of the existing law in Ireland and a committee which I chaired was established to examine alternatives and make recommendations. These recommendations resulted in the drafting of a Bill incorporating the Model Law which was presented to Government in the spring of last year, and became law on 20 May of this year in the Arbitration (International Commercial) Act, 1998.

This development was necessary. As the 1954 Arbitration Act makes no distinction between domestic and international arbitration, the law governing international commercial arbitration in Ireland was, until May of this year contained in the 1954 Act. One may confidently assume that the drafters of the 1954 Act did not have in mind international commercial arbitration, which was then in its infancy. There are many respects in which the 1954 Act was inadequate, but most especially because of the Case Stated procedure. Arbitrators and lawyers engaged in international arbitration are very wary of statutory provisions providing for judicial supervision except in clearly defined and restricted circumstances and certainly not during the life of the arbitration itself. Their principal concern is related to the delay involved in protracted court hearings with consequent cost escalation.

The Act will enable Ireland and its professionals to play a more important role in international arbitration. For some time it has been the ambition of arbitrators, lawyers and business people to attract arbitrations to this country. It is believed that Ireland would be an attractive venue for a number of reasons, including our common law background (which often governs the law of the contract in dispute), the perception of Ireland as a neutral country, English being the local language, ease of access, good telecommunications infrastructure and the excellent legal and other professional services available. Ireland's attraction will be greatly enhanced by the enactment into our law of the Model Law. This will introduce widespread international acceptability, certainty to the law, and the elimination, or at the most – and only with the parties' unanimous consent – a restricted form of judicial supervision.

From my experience as a former member of the ICC Court of Arbitration in Paris, I am convinced that business people involved in international trade who might be expected to require an international arbitration service, are more concerned with the speed of resolution of a dispute, and cost containment, than they are with the legal precision of the result. This is particularly so when such people are being advised by lawyers experienced in international arbitration, and when the arbitrators are either appointed by the parties themselves and thus have their confidence, or are appointed by an institution such as the ICC Court, thereby ensuring confidence in the arbitrators chosen.

I am quite satisfied that the enactment of the Model Law, which is compatible with the ICC Rules recently promulgated, is a very important first step on the road to providing a sophisticated framework for the resolution of disputes in the international arena.

The enactment of new legislation in this area is most fortuitous in that it coincides with the development by the Bar Council of a major International Arbitration Centre in its Law Library Building in Church Street in Dublin. The Centre provides purpose built facilities for international arbitration, including large hearing rooms, a simultaneous translation service, video conferencing and state of the art electronic services. The Bar Council will be marketing the Centre abroad and a large potential market in international commercial arbitration has been identified.

Ireland has a pool of highly experienced international arbitrators who are able to provide the necessary services to international commercial companies wishing to conduct arbitration in Ireland. The King's Inns has included Arbitration Law and Practice as a compulsory subject in the final year for Bar students. The Bar Council has included arbitration as part of its continuing legal education for practising barristers. The Incorporated Law Society of Ireland has a large panel of arbitrators for various types of disputes. Qualifications to become a member of the Law Society panel include, for example, Fellowship of the Chartered Institute of Arbitrators, or a Diploma in Arbitration Law from the Dublin Institute of Technology, and qualifications awarded by other bodies.

For a number of years now, the Irish branch of the Chartered Institute of Arbitrators and the Dublin Institute of Technology have organised a one-year course in Arbitration Law and Practice. Successful participants are awarded the graduate Diploma in Arbitration Law. The Chartered Institute has also organised three special fellowship courses for lawyers in Ireland, and University College Dublin has established a post-graduate course in international commercial arbitration.

These developments should be given widespread publicity so that Irish companies engaged in international trade and

commerce may be aware of the necessity to include dispute resolution clauses in their international contracts at the time of negotiation.

The combination of all these factors at this time provides great opportunity for arbitrators and lawyers providing arbitration services. For companies engaged in international trade it provides security – the security that is provided by an arbitral award which has res judicata between the parties to the dispute and which may therefore be enforced compulsorily in many countries of the world.

The recently retired chairman of the International Court of Arbitration of the ICC, M. Alain Plantey, commented in a recent article;

> "Arbitration requires a great deal of work, a great deal of information, and increased specialisation by legal firms, as well as on the part of corporate lawyers and State legal advisers. It also calls for very highly qualified arbitrators at both legal and procedural levels. Of all these requirements the most important one is quality. That is why there is a growing need for international lawyers . . .The parties concerned in an arbitration understand nowadays that their credibility depends on the goodwill they show in carrying out their awards, even when the awards are not in their favour. The law should not be merely theoretical but should actually be applied. It is therefore fortunate that year after year, the idea that arbitration is a genuine method of settling the most delicate of international disputes is becoming more firmly established."

The Choice of the Model Law

The first task of the committee set up by the ICC was to examine various alternatives for the establishment of an appropriate statutory regime in Ireland to ensure that Ireland was a user-friendly venue for international commercial arbitration. I consulted widely with interested bodies in Dublin and London and drew heavily on the knowledge and experience of many of my colleagues on the ICC Court and also the secretariat of the ICC Court in Paris.

The widespread, though not the unanimous view, was that Ireland should opt for the adoption of the Model Law rather than follow any other precedent such as the Arbitration Act, 1996 in England or any of the other statutory provisions then being enacted in a number of other countries around the world. This is not to say that these other statutory provisions were not closely examined and in fact in some instances were the inspiration for some provisions in the Irish Act.

There were two compelling reasons for the incorporation of the Model Law into Irish law. First, it would provide instant international recognisability which was regarded as being of paramount importance in the attraction of international arbitration to Ireland. Second, it provided certainty of the law governing arbitration. It was also regarded as important that the Model Law should be imported into Irish law in a completely unamended form. This was done by including the Model Law in a Schedule to the Act. Any variations, modifications or developments of the Model Law thought appropriate would be included in the body of the Act itself. This would ensure that international practitioners would know that the Schedule contained the Model Law as they knew it and any modifications could be found quite simply in one place in the Act itself. It was noted that a number of other countries did not adopt this course but rather amended the Model Law itself. However, this course did not commend itself to our committee as it tended to undermine the international recognisability of the statutory regime governing international arbitration in Ireland.

However, some aspects of the Model Law were considered for possible change.

Art. 1

The scope of the application

The first issue for consideration was whether to adhere to the Model Law by the use of asterisks and footnotes or whether to delete them and include the footnotes in the body of the Schedule. Other jurisdictions such as Scotland and New Zealand favour the latter course. However, following discussions, adherence to the original Model Law was favoured. The use of footnotes is certainly unusual in common law jurisdictions and is more commonly found in civil law jurisdictions. However, since the enactment into law of the Brussels Judgments Convention we are becoming more used to the device of the footnote. In addition, the footnote in the Model Law is for guidance only and it was believed that the transposition of the footnotes into the definition section would elevate the provisions to a status which they did not enjoy in the Model Law, and may have ultimately led to inflexibility in interpretation.

Second, it had to be decided whether to adhere to the nomenclature 'this State' or whether to insert 'Ireland'. Scotland and New Zealand favoured the option of naming the country in question. However, adherence to the original Model Law was favoured for a number of reasons. It avoids any controversy arising from the use of 'Ireland' or 'Republic of Ireland'. For constitutional reasons, the term 'Republic of Ireland' is not used in statutes to describe the State. It also allows for a simpler wording in Art. 35(2) which deals with the official language of the State, and finally, it has the advantage of consistency.

Art. 7

Definition and form of arbitration agreement

The issue here was whether the requirement in the Model Law that an arbitration agreement should be in writing should be retained. Adherence to the Model Law was preferred, noting that Scotland and Canada also adopted this course, and despite recent recommendations for the extension of the definition 'in writing'. (See *'Is the need for writing as expressed in the New York Convention and the Model Law out of step with Commercial Practice?'* - Neil Kaplan QC, *Arbitration International*, Vol. 12, No.1, p.27). By adopting a conservative approach any risk of being in conflict with the enforcement provisions of the New York Convention as contained in Art. II.2 which required the arbitration agreement to be in writing, has been avoided.

Art. 9

Arbitration agreement and interim measures by Court

It was noted that in the statutory enactments in Scotland, New Zealand and India, provision is made for the definition of what constitutes 'an interim measure'. This is also achieved by s.7 of the Act which sets out a list of orders which the High Court may make for the pur-

poses of giving effect to Article 9 or 27 of the Model Law thus providing greater clarity. I will return to this point when dealing with s.7.

Art. 10

Number of arbitrators

The Model Law provides that the parties are free to determine the number of arbitrators and, failing such agreement, the number of arbitrators shall be three. Canada has the same provision. Scotland provides that in default of agreement there shall be a single arbitrator. New Zealand provides that, in default of agreement, there shall be three arbitrators in international arbitration and one in every other case. The law of India giving effect to the Model Law, provides that the parties may determine the number of arbitrators, provided it is not an even number and in default of agreement, there shall be one arbitrator. The law of Singapore implementing the Model Law provides that in default of agreement there shall be a single arbitrator.

However, Germany and Sweden, which closely follow the Model Law, provide that where the parties do not determine the number of arbitrators, the number shall be three.

It is useful to recall in this connection that pursuant to Art. 2(d) of the Model Law the parties' freedom to determine the number of arbitrators includes their right to authorise a third party, for example an arbitration institution, to make that determination. Of course, no problem arises when the matter is covered in arbitration rules which the parties have accepted.

The Model Law designated three arbitrators following Art. 5 of the UNCITRAL Arbitration Rules, 1976 as appearing to be the most common number in international commercial arbitration. Furthermore, the ICC Rules recently promulgated provide that where parties have not agreed on the number of arbitrators, the Court will appoint a sole arbitrator save where it appears to the Court that the dispute is such as to warrant the appointment of three. I think it would be undesirable to foreclose the possibility of the ICC appointing three arbitrators in a large case as is required by the Rules of that Institution. Thus, once again, there was a clear rationale in following the Model Law in unamended form.

Art. 15

Appointment of substitute arbitrator

The statutory provisions in Canada and Scotland follow the Model Law which provides that in the event of an arbitrator's mandate being terminated, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. However, India and New Zealand have an interesting provision dealing with the status of the arbitration which was considered.

India deals with it best as follows:

> (3) Unless otherwise agreed by the parties, where an arbitrator is replaced under subsection (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.
>
> [(a) Where the sole or the presiding arbitrator is replaced, any hearings previously held shall be repeated, and
> (b) Where an arbitrator, other than a sole or a presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.]
>
> (4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

However, having discussed this provision with the secretariat of the ICC Court, I did not favour its inclusion in the Irish Act. Once again this was principally because there was a risk of conflict with the ICC Rules which deal with the retirement or removal of an arbitrator, and his replacement. The Rules provide that when reconstituted, and having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall again take place. In my opinion, this provision adequately covers the situation and leaves the arbitrators with greater flexibility, and it conforms with the Model Law.

Art. 17

Power of Arbitral Tribunal to order interim measures

No modification is suggested in the Canadian law. In India there is only a slight change. However, significant changes are set out in the Scotland provisions, by making an order under Article 17 take the form of an award and applying Articles 31, 35 and 36 accordingly.

For instance, the Scottish model provides as follows:

> 2) An Order under paragraph (1) of this Article shall take the form of an Award and Articles 31, 35 and 36 shall apply accordingly.

The New Zealand law is similar.

Once again it was thought best not to modify the text of the Article itself. However, section 14(3) of the Act, to which I will refer later, applies Articles 35 and 36, unless otherwise agreed by the parties, to orders under Article 17.

Art. 27

Court assistance in taking evidence

This provision in the Model Law is expanded in the body of the Act itself at section 7 to which I shall refer later.

Art. 31

Form and contents of the award

What was of particular interest under this heading were the issues of interest and costs. Canada and Scotland closely follow the Model Law and are, therefore, completely silent on these issues.

New Zealand adds a further sub-paragraph to Art. 31 as follows:

> (5) Unless the arbitration agreement otherwise provides, or the award otherwise directs, a sum directed to be paid by an award shall carry interest as from the date of the award and at the same rate as a judgment debt.

In section 31(7) the statute in India adds a provision for interest between the date on which the cause of action arose and the date on which the award is made. In addition it provides that interest shall be paid at the rate of 18% per annum

from the date of the award to date of payment, unless the award otherwise directs. At sub-paragraph (8) it provides for costs and the definition of costs.

Once again it was thought desirable not to add any specific provisions in the Model Law in the Schedule itself but rather to deal with interest and costs in the body of the Act. Accordingly, section 10 provides for the award of interest and section 11 deals with costs, and I will return to these sections later.

S.49 of the Arbitration Act 1996 in England provided a worthwhile precedent.

Art. 34

Application for setting aside

Article 34(3) of the Model Law is modified by section 13 of the 1998 Act by providing that the time limit specified in that Article shall not apply to an application to the High Court to have an arbitral award set aside on the grounds that the award is in conflict with the public policy of the State. This contrasts with the approach in Scotland where Article 34 is amended adding an additional ground for setting aside as follows:

'The award was procured by fraud, bribery or corruption'.

Section 13 amends sub-paragraph (3) which provides a three month time limit by eliminating any time limit where there is fraud or corruption.

New Zealand also adds fraud and corruption and breach of the rules of natural justice as grounds for setting aside. It also eliminates the three month time limit in cases of fraud and corruption.

It should be noted, however, that Article 34(2)(b) provides that an award may be set aside if the Court finds that the award is in conflict with the public policy of the State. In my opinion, any award procured by fraud, bribery or corruption would be contrary to the public policy of this State and as a consequence would be unenforceable. Consequently, although the Scottish and New Zealand provisions do add clarity, they are probably unnecessary having regard to the specific provision of the original Model Law contained in Article 34(2)(b).

Arbitration (International Commercial) Act 1998

The Act provides by section 4 that the Model Law shall apply in the State. The documents of the UN Commission on International Trade Law and its working group relating to the preparation of the Model Law may be considered in ascertaining the meaning or effect of any provision of the Model Law, see s.5(2).

The High Court is the court specified for the purposes of the Model Law in section 6, and the section specifies that functions of the Court shall be performed by the President of the High Court or such other judge of this Court nominated by him. Arbitrators and lawyers are familiar with this form of specific designation. For instance, the President of the Court of Appeal in Paris is so designated in France.

Section 7(1) will give the High Court the power, in relation to an international commercial arbitration, to make orders similar to those which it can make under section 22 of the Arbitration Act 1954. Such orders include orders in respect of the preservation of any goods which are the subject matter of the arbitral proceedings, security for costs (in non-institutional arbitrations), interim injunctions and the detention, preservation, or inspection of anything which is the subject matter of the arbitral proceedings.

Provision is also made for the making of orders in respect of securing the attendance of witnesses before the arbitral tribunal, the examination of a witness before an officer of the court, the issue of a commission or request for the examination of a witness outside the State or discovery and interrogatories. Under section 8, an arbitral tribunal may, unless otherwise agreed, direct that a party or a witness who gives evidence be examined on oath or affirmation and may administer oaths or take affirmations.

Section 9 provides that parties to an arbitration agreement may agree that the arbitral proceedings shall be consolidated with other arbitral proceedings or that concurrent hearings shall be held.

This section closely follows section 35 of the English Arbitration Act 1996. At common law, unless the parties agree the arbitrators themselves cannot order concurrent hearings without the consent of all parties, even if the same arbitrators had been appointed to resolve each individual dispute (See *Oxford Shipping Company v. Nippon Yusen Kaisha* (1984)3 AER 835).

Section 9 merely codifies the common law by allowing consolidation or concurrent hearings if all the parties agree to it.

Thus section 9 helps to resolve one of the major weaknesses of the use of arbitration which is that, as the matter is consensual, it is not possible for a series of identical claims to be disposed of in the same proceedings. Furthermore, a ruling in one arbitration may not be admissible evidence in later arbitrations, so that the same issues may have to be determined in a series of separate hearings. There are situations in which consolidation makes good sense, for instance in a chain of sales contracts involving the same subject matter or where the question is the construction of a contract which has been used in a related transaction, for instance in reinsurance disputes.

Consideration was also given to the adoption of precedents established in New Zealand and the Netherlands. Whereas those precedents provide for virtually every eventuality, including appeals to the Court, thereby giving a degree of certainty as to the appropriate procedure to be adopted, nonetheless those provisions were overly complicated and tended to undermine party autonomy.

Section 10(1) provides that the parties to an arbitral agreement may agree on the arbitral tribunal's powers regarding the award of interest. Under section 10(2) and (3), unless otherwise agreed by the parties, the arbitral tribunal may award simple or compound interest on all or part of any amount awarded in respect of any period up to the date of the award and from the date of the award or any later date until payment, and on all or part of an amount claimed in the arbitration and paid between the commencement of the arbitration and the making of the award in respect of any period up to the date of payment. This section largely corresponds to Section 49 of the English Arbitration Act 1996.

Section 11(1) of the Act provides that the parties may agree on how the costs of the arbitration are to be allocated and on the costs that are recoverable. Under s.11(2) an agreement of the parties to arbitrate subject to the rules of an arbitral institution shall be deemed to be an agreement to follow the rules of that institution on costs. In ICC arbitrations an arbitral tribunal would not, for instance, be free to deviate from the rules of the ICC. Thus a court would have no jurisdiction over the issue of costs in an institutional arbitration, and so it is very unlikely that the courts in Ireland could exercise any jurisdiction to make an order for security for costs as is the position in England following the

controversial decision of the House of Lords in *Ken Ren* 1995 1 A.L.38. Section 11(3) also provides that 'costs' shall include fees and expenses of the tribunal. S.11(4) provides that where the parties do not agree on the recoverable costs between them the tribunal may, with their consent, determine by award those costs. S.11(5) provides that where the parties do not agree on the recoverable fees and expenses of the tribunal, it may make such a determination in its award. Under s.11(7) where the arbitral tribunal does not make a determination on the costs then an application may be made to the High Court for such a determination. By sub-section (9) where the tribunal makes a determination as to its recoverable fees and expenses under sub-section (5), an application may be made to the High Court for a review of the amount determined by the tribunal. Sub-section (11) goes on to provide that references in section 11 to the fees and expenses of the tribunal include the fees and expenses of any expert appointed by it.

Section 12(1) and (2) provide that an arbitrator, or an employee, agent or advisor of an arbitrator, or an expert appointed under Article 26 of the Model Law, shall not be liable for any act or omission in the discharge or purported discharge of his or her functions unless the act or omission is shown to have been in bad faith. Under s.12(4) an arbitral or other institution or person by whom an arbitrator is appointed or nominated, shall not be liable for any act or omission of the arbitrator, or his or her employees or agents, in the discharge or purported discharge of his or her functions as arbitrator.

The provisions in this section correspond with sections 29 and 74(2) of the English Arbitration Act, 1996. Whereas neither section 12 of the Irish Act nor section 29 of the English Act specifically refer to negligence, they do refer to the underlying principles of negligence, that is, liability for doing something or omitting to do something in the discharge or purported discharge of the functions of an arbitrator. There are similar provisions in New Zealand and Singapore where specific reference is made to exclusion of liability for acts of negligence. Whereas the inclusion of the word 'negligence' may be regarded as desirable, its absence is not a significant disadvantage.

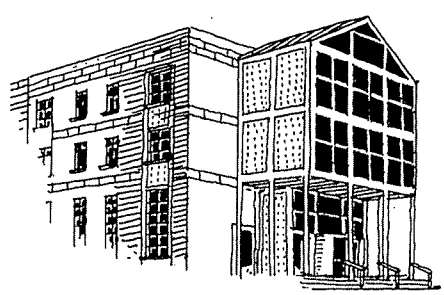
Although none of the working papers prepared for the presentation of the various draft bills in England made any reference to the inclusion or exclusion of the word 'negligence', in my opinion the drafters probably took the view that as the Act was intended to be understood in an international context, it would be sufficient to include the underlying principles of negligence rather than specifically refer to negligence which is, after all, a common law concept. In any event this was the view of our committee.

S.74 of the English Act provides immunity for an arbitral institution. Once again, neither in the Irish section, nor in s.74, is negligence mentioned.

Section 12(6) of the Act provides that a witness before a tribunal shall have the same privileges and immunities as a witness in High Court proceedings. Sub-section (7) provides that a person who is a barrister or solicitor or who holds qualifications obtained in another jurisdiction which are equivalent to those of a barrister or solicitor and who appears in proceedings before a tribunal shall have the same privileges and immunities as barristers and solicitors in High Court proceedings. There is no corresponding provision in the English Act. The Irish section largely corresponds with Article 19.3 of the First Schedule of the New Zealand law.

It is essentially a policy decision whether to include in a statute immunities for arbitrators, arbitral institutions, counsel and expert witnesses. There is a view that such persons or institutions should provide for their own insurance against acts of negligence rather than rely on immunity provisions in national legislation. Accordingly the elimination of such provisions might make arbitration in Ireland more attractive for the parties involved in the arbitration as there would be a right of recovery in appropriate circumstances.

Obviously, it follows that Ireland might then be a less attractive venue for arbitrators and counsel. However, on balance, the inclusion of the immunity provisions was preferred as there appears to be a modern trend for the inclusion of such provisions. In addition, the new ICC Rules provide such immunity. Article 34 of the 1998 ICC Rules provides for an immunity from liability for any act or omission in connection with the arbitration, for arbitrators, the ICC Court and its members, the ICC and its employees and national committees. Articles 35 of the 1997 AAA International Arbitration Rules and 31.1 of the revised LCIA Rules are to similar effect.



Section 14(1) provides that an award shall be enforceable either by action, or by leave of the High Court, in the same manner as a High Court judgment or order. Sub-section (2) provides that an award may be relied on by a party by way of defence, set off or otherwise in legal proceedings in the State.

S.14(3) is modelled on the provision in the New Zealand Arbitration Act. A similar provision was included in the legislation in Scotland. This section is meant to ensure that interim measures of protection ordered by an arbitral tribunal under Article 17 can be enforced through the courts, if necessary. Unlike awards, orders under Article 17 are not covered by Articles 35 and 36. S.14(3) attempts to remedy this.

The sub-section applies specifically to orders made by an arbitral tribunal under Article 17. The term 'award' is defined in section 3 to include an interim award. So, s.14(1) and (2) also cover enforcement of interim awards, whether or not for interim measures of protection. Therefore, when the first three subsections of section 14 are read together, there is no uncertainty about the purpose and scope of s.14(3).

Section 15 deals with the application of Part II to arbitrations commenced before and after the coming into operation of the Bill. Section 16 provides that, except in relation to the recognition or enforcement of an award under the Geneva or New York or Washington Conventions, the Arbitration Acts, 1954 and 1980 shall not apply to an arbitration to which Part II applies.

This special provision removes any doubt as to the applicability of the 1954 Act to international arbitration, and emphasises the purpose of the legislation, namely, to provide an internationally recognisable code of law applicable to international commercial arbitration, thereby placing Ireland among the growing number of countries with a well-recognised sophisticated statutory regime for the resolution of disputes in international trade and commerce. ●

A brief outline of the Juvenile System in Ireland

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The Juvenile Justice System in Ireland is essentially a modified form of that applying to adults. The Childrens' Act, 1908, and its amendments provide the core system and the majority of sanctions available to the courts. The format of criminal prosecution in the Childrens' Court does not differ to any great extent from that pertaining to an adult in the District Court. Upon conviction, however, the function of the court is different. The sentencing regime laid down by the Act is one that, while allowing a deterrent factor and marking the seriousness of the crime, is based on rehabilitation of the young offender.

Despite numerous calls to modernise the Juvenile Justice System there have been no notable amendments in the past ninety years. In 1996, the Government of the day introduced the Childrens' Bill which promised a radical overhaul of the system. That bill was reintroduced by the present Government and is now at Committee stage in the Dáil. It is hoped that we might see a change in the law in the not too distant future. In this paper I hope to outline the law as it now stands and the changes promised by the forthcoming legislation.

Diversion

There is, as yet, no statutory procedure that allows young offenders to be diverted away from formal proceedings in the Childrens' Court. However, the Garda Juvenile Liaison Scheme was established in 1963 to provide an opportunity to divert juvenile offenders from criminal activity, and as an alternative to their being processed through the formal criminal justice system. Young offenders may be dealt with under the scheme if certain conditions are met:

(i) the offender is under 18 years,
(ii) they admit the offence, and
(iii) in the normal course (a) the young person has not been cautioned before and (b) the parents agree to co-operate.

Young offenders who are admitted to the scheme may receive a formal or an informal caution. Any young person formally cautioned is subject to twelve months of supervision by a Juvenile Liaison Officer. Since its inception, statistics show that 89% of the participants in the scheme have reached their eighteenth birthday without being prosecuted for a criminal offence.[1] This relatively low rate of recidivism would suggest that the scheme has been extremely effective in its aim of diverting young people from any further contact with crime or the criminal justice system.

Criminal Procedure in the Childrens' Court

The Childrens' Act of 1908 (hereinafter referred to as 'the Act') provides for the setting up of specific courts for offenders aged between seven and seventeen.[2] These courts should be separate and sit at different times to the normal adult courts. Provision was made in the Courts of Justice Act, 1924[3] for the establishment of special childrens' courts in Cork, Limerick, and Waterford. In the event, only one such court was set up in Dublin, known as the Metropolitan Childrens' Court, now housed in a purpose built premises in Smithfield.

Outside the Dublin Metropolitan Area, juvenile offenders appear in the local District Court, albeit on a different day or at a different time to adult offenders. In the Childrens' Court a criminal prosecution is not dealt with in public in the normal manner.[4] Bona fide members of the press may attend the hearings but they are restricted in their reporting and may not, normally, identify the accused or convicted child.

As outlined above the criminal case before the Childrens' Court does not to any great extent differ from any other criminal prosecution in the District Court. On the first occasion before the court, the arresting Gardaí give evidence of arrest, charge and caution.

If the accused is not legally represented, time will be allowed to seek representation and legal aid may be assigned by the Court. Where applicable, the DPP's directions are sought, the accused may have the right of election, and the District Judge may consider the matter of jurisdiction. The normal District Court remand periods obtain in the Childrens' Court. A child who is not released on bail must be remanded to a place suitable to their age. (See Table) The Act provides that a child may be remanded to a police station where there is no suitable remand place available.

Age of Criminal Responsibility

At the hearing of the case the age of the accused takes on a great significance. A child below the age of seven years is incapable of committing a crime

in law.[5] Between the ages of seven years and fourteen years there is a rebuttable presumption of doli incapax and once the child has attained their fourteenth birthday they are presumed to have full adult responsibility.[6] The law presumes, without possibility of rebuttal, that a child under the age of seven years is doli incapax and is therefore incapable of forming the requisite mens rea to commit a criminal offence.[7] Once the child has reached their seventh birthday[8] the presumption of doli incapax becomes rebuttable by the prosecution. It is unclear how far the prosecution has to go to rebut the presumption. In the United Kingdom it would appear that they must prove that the child knew that their actions were gravely or seriously wrong.[9] In *A. v. D.P.P.*[10] the Queen's Bench Division held that the test was not knowledge of unlawfulness but whether the child knew what it was doing was so seriously wrong that it went beyond mere naughtiness or childish mischief. They further found that the evidence of the child fleeing on the arrival of the police was not of itself sufficient to enable the court to find that the presumption had been rebutted. There are no recent Irish authorities directly on this issue. However in a civil action for malicious injury, Murnaghan J[11] stated that;

> "[t]he onus is on the applicant to satisfy me by evidence that if the fire was caused by children, such children were not doli incapaces either because they were over fourteen or, if between seven and fourteen that they appreciated the consequences of what they were doing".

Once a child has reached the age of fourteen years they are presumed to have the same criminal responsibility as an adult.[12]

Dispositional Alternatives

Upon conviction, the District Judge has a variety of dispositional alternatives open to him under the Act.[13] If he decides to deal with the offender without the imposition of a custodial penalty he may continue by:

a) dismissing the charge,
b) discharging the offender on his entering into a recognisance,
c) discharging the offender and placing him under the supervision of a Probation Officer,
d) committing the offender to the care of a relative or other fit person,
e) ordering the offender to pay a fine, damages or costs,
f) ordering the parent or guardian of the offender to pay a fine, damages or costs,
g) ordering the parent or guardian of the offender to give security for his behaviour,
h) making a Community Service Order.[14]

The following conditions must be met in relation to the option of a Community Service Order: (i) the offence must merit an immediate custodial sentence, (ii) the offender must be aged sixteen years, (iii) the offender must consent to this type of disposition, and (iv) the court must be satisfied that the offender is a suitable person to undertake community service work and that such work is available. Failure to comply with the terms of a Community Service Order may result in a fine in addition to the original sentence, or a custodial sentence.

If the District Judge chooses to proceed by way of custodial sentence, the following alternatives are open to him:

a) sending the offender to an industrial school,
b) sending the offender to a reformatory school,
c) committing the offender to custody in a place of detention,
d) where the offender is a young person by sentencing him to imprisonment.

Again the age of the offender is significant when the court moves to sentence. The Act distinguishes between 'a child' being someone below the age of fifteen years and 'a young person' who is someone between the ages of fifteen years and seventeen years.[15] Section 102(1) of the Act, specifies that 'a child shall not be sentenced to imprisonment or penal servitude for any offence, or committed to prison in default of payment of a fine, damages, or costs.'

Industrial Schools

Both industrial schools and reformatory schools are now referred to as special schools. Section 58 of the Act as amended[16] specifies those liable to be sent to industrial schools. Industrial schools are intended to provide care and education to any child between the ages of seven and fifteen whom a court deems in need of such a placement.

A child under the age of twelve who is charged with an offence punishable in the case of an adult by penal servitude or lesser sentence may be sent to an industrial school. Similarly a child of twelve, thirteen or fourteen who has not previously been convicted of an offence may be sent to such a school. In a criminal prosecution there would appear to be no necessity for the court to proceed to convict before imposing this sanction.[17] The court has the power, regardless of the nature of the charge, to order a child to remain in an industrial school until they reach sixteen years.

A child may not be kept in an industrial school beyond their sixteenth birthday unless the Minister for Education, with the consent of the child's parents or guardians, directs they may stay a further year. The manager of such a school may refuse to admit a child. This normally occurs where either there is no place available or the child has been assessed as being unsuitable for such a placement. As the table illustrates, there are two certified industrial schools in Ireland; St. Joseph's, Clonmel and St. Laurence's, Finglas. Both cater for boys only. No such school is provided for girls.

Reformatories

Convicted children between the ages of twelve and seventeen are liable to be sent to a reformatory. Section 57 of the Act, as amended,[18] deals with such committals. Where a child is convicted of an offence punishable in the case of an adult with imprisonment, the court may send them to a certified reformatory school. The court may order such detention for a period not less than two years but not more than five years.

The period must expire by the time the offender reaches their nineteenth birthday. The Minister for Education may direct that an individual remains for two years beyond nineteen. If the offender is male and sixteen years old and there is no place available in a reformatory school the court may order that he be detained in St. Patrick's Institution for a period not exceeding one month. There are two reformatories for boys,

Table [19]

Centre	Referral	Length of stay	Sex	Age of Entry	No. of Beds	Function
St. Michael's -Finglas Court / Remand only	Courts/Health Boards	Up to three weeks	Boys	under 16 yrs	20	Assessment before
St. Lawrence's Finglas	Courts/Health Boards	1 yr	Boys	under 15 yrs	55	Industrial School
Trinity House, Lusk*	Courts	2-4 yrs	Boys	under 16 yrs	28	Secure Unit / Reformatory
	Courts	Short term	Boys	under 16yrs	2	Remand
St. Joseph's Clonmel	Courts/Health Boards	1-6 years	Boys	under 15 years	75	Industrial School
Oberstown Boys Lusk**	Courts	Short term	Boys	9-15 years	10	Remand
	Courts	2-4 years	Boys	12-16 years	20	Reformatory
Oberstown Girls Lusk***	Courts	Short term	Girls	9-15 years	8	Remand / Assessment
	Courts	2-4 years	Girls	12-16 years	8	Reformatory

Trinity House and Oberstown, providing forty-eight places.

Oberstown Girls Centre is the only reformatory catering for girls, with places for eight offenders between the ages of twelve and sixteen. There is no provision for the detention of a young female offender over the age of sixteen and under the age of seventeen.

Places of Dentention

The Criminal Justice Act, 1960[20] provides that a boy between the ages of sixteen and seventeen may be sentenced to a period of detention in St. Patrick's where the court deems such detention suitable. Male offenders between the ages of seventeen and twenty-one may be sentenced to detention in St. Patrick's as an alternative to imprisonment. There is no equivalent place of detention for female offenders, therefore such offenders are liable to be imprisoned from the age of seventeen.

Imprisonment

A child between the ages of seven and fifteen years may not be sentenced to imprisonment for any offence or committed to prison in default of payment of any fine, damages or costs.[21] However, a young person between the ages of fifteen and seventeen may be imprisoned where the court certifies that they are,

> "of so unruly a character that he cannot be detained in a place of detention provided under this Part of this Act, or that he is of so depraved a character that he is not a fit person to be so detained"

The criteria for the making of such an order were laid down by the Supreme Court in *The State (Holland) v. Kennedy*.[22] The court must conduct an enquiry into the character of the offender and must be satisfied on the evidence that such a certification should issue.

Proposed Reform

The Children Bill 1996 (hereinafter referred to as 'the Bill') proposes, inter alia, to repeal the whole of the Act and its amendments. It introduces a new Juvenile Justice System that incorporates many of the provisions of the Act but in a modern fashion. The Bill aims to provide an interface between the Juvenile Justice System and the Child Care System[23] and it re-enacts and updates the protective provisions of the Act.[24]

The Bill places the Juvenile Liaison Scheme on a statutory basis. The proposed scheme is broader in its scope than that presently obtaining with a larger role for the family of an offender and a potential role for victims. The age of criminal responsibility is to be raised to ten years with a view to its eventual elevation to twelve.[25] The doli incapax rule is to be put on a statutory basis.[26] The legislation does not shed any light on how the prosecution may rebut the presumption. The custody regulations of the Criminal Justice Act 1984[27] as they relate to children are re-enacted with some additions. It is noteworthy that, like the 1984 Act,[28] this Bill incorporates a saver in relation to evidence obtained in breach of its provisions.[29]

Part V of the Bill establishes the Childrens' Court and its jurisdiction. The new court will be a District Court and will have a similar jurisdiction to that of the present Children's Court. It has the power to deal with the majority of criminal matters in a summary manner. Where applicable the child retains their right of election. In the case of manslaughter and offences required to be tried by the Central Criminal Court, the District Judge must send the matter forward.

The Bill embodies the principle that sentencing policy in relation to young offenders should be rehabilitative. It envisages that the District Judge would, in all but the most trivial of matters, obtain, and have regard to, reports from the Probation and Welfare service and/or other social services before imposing any penalty.[30] Custodial penalties should only be used as a last resort.[31]

Under the new regime industrial schools and reformatories are to be abolished and replaced with childrens detention schools. It will be the function of these schools to educate and train children in their care and to promote the child's re-integration into society. The new Bill abolishes the power of the

courts to send children to prison. Section 133 states that 'No court shall pass a sentence of imprisonment on a child or commit a child to prison for any reason.'[32] Thus courts will no longer be able to certify children as unruly or depraved.

The new Bill arose out of the report of the Dáil Select Committee Report on Juvenile Crime.[33] The committee took a holistic approach to the question of juvenile offending, addressing its recommendations to the whole of society rather than only to the criminal justice system. The majority of the committee's recommendations were incorporated into the Bill, as initiated, however we have yet to see whether the proposed reforms will translate into a new Juvenile Justice System. ●

1 An Garda Síochána Annual Report 1996
2 S111(5)
3 S.80
4 S111(4)
5 S.4(5) Summary Jurisdiction Over Children (Ireland) Act, 1884
6 For a fuller discussion of this issue see *The Defence of Infancy* by Conor Hanly (1996) 6 ICLJ 72
7 See the Judgment of Murnaghan J., *Monagle v. Donegal County Council* (1961) Ir. Jur. Rep. 37
8 Prior to the introduction of the Age of Majority Act 1985, there was some debate as to the precise meaning of 'seven'. S.4(1) of that Act silences the debate as it provides that 'the time at which a person attains a particular age expressed in years shall,.....be the commencement of the relevant anniversary of the date of his birth'
9 *R v. Gorrie* (1919) 83 JP 136
10 [1992] Crim.L.R. 34
11 *Monagle v. Donegal County Council* op. cite at page 39
12 *R v. Fitt* [1919] 2 IR 35
13 S.107 as amended
14 Criminal Justice (Community Service) Act 1983.
15 S.131
16 Amended by S.10 of the Children Act, 1941
17 For further discussion see *Custodial Treatment for Young Offenders* by Mary Ellen Ring (1991) 1ICLJ 68
18 Amended by S.9 of the Children Act, 1941
19 Table taken from *Youthful Offending; A Report,* Irish National Teachers Organisation, Dublin, 1995
* Trinity House has two places available for boys under the age of sixteen who are remanded in custody by the courts.
** Oberstown has ten remand places available for boys under the age of fifteen who are remanded in custody by the courts.
*** Oberstown has eight remand places available. However these places may also be filled by children being assessed on behalf of the Health boards
20 S13(2)
21 S.102(1) of the Act
22 [1977] IR 193
23 Sections 41,64 and 217
24 Sections 203 to 215
25 S.40(1),(2) and (3)
26 S.40(4)
27 Criminal Justice Act (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987
28 S.7(3)
29 S.51(2)
30 S.76
31 Section 72
32 First Report of the Dáil Select Committee on Crime: *Juvenile Crime - Its Causes and its Remedies* (1992)

A Question of Balance – Private Rights of Confidentiality against the Public Interest

DANIEL DONNELLY, Barrister and TERENCE O'SULLIVAN, Barrister

The recent decisions of the High Court and Supreme Court in *National Irish Bank Ltd v. Radio Telifis Eireann*[1] have provoked extensive comment in the media. This is largely attributable to the sensational nature of the allegations which were made about the bank's role in facilitating transactions, which, though legal in themselves, may have facilitated the evasion of tax. The precise nature of the transactions is not the subject of the present article. Neither is this article concerned directly with the information which Radio Telifis Eireann obtained which was the subject of these proceedings. Rather, this article considers another aspect of the case which gave rise to media comment, namely the application by the courts of the 'public interest' defence to an action for breach of confidence.

It is generally accepted that there are two typical situations where a plaintiff may seek to restrain a breach of confidence: one is where there was a relationship between plaintiff and defendant of such a type that a duty of fidelity exists between them, and the defendant will be restrained from making use of information acquired in the context of that relationship. The other situation is where the defendant is a stranger to such a relationship, but has acquired confidential information which was communicated between the parties to that relationship.[2] The instant case was of the latter category. It appears that the extent of the duty of confidence may differ in each of these situations.[3]

The background to the case was that the defendant, the state broadcasting organisation, had acquired information from sources within the plaintiff bank which purported to show that the plaintiff had maintained accounts in the name of an insurance company which was based in the Isle of Man. The sums maintained in these accounts had been lodged shortly after the withdrawal of similar amounts from deposit accounts maintained by customers of the plaintiff. It appeared that those customers were at liberty to withdraw from the accounts in the name of the insurance company, in the same manner in which they had previously been at liberty to withdraw from their own accounts. In the circumstances, the defendant stated that it believed that the greater number of these accounts existed for the purpose of evading the payment of tax.

The defendant had acquired the names of some of the persons who had formerly held accounts with the plaintiff and who, it appeared, were now able to avail of this facility. It was admitted by the defendant that the information which it had acquired was confidential, save for the effect of the argument that disclosure was permitted in the public interest.[4] Thus, the decisions of the High Court and Supreme Court do not turn on the nature or extent of the duty of confidentiality, or on the type of information which was subject to the obligation of maintaining confidentiality. The only real argument between the parties was whether the defendant should nonetheless be free to publish the information on the ground that the 'public interest' warranted it.

The Relevance of the Public Interest

It has long been judicially accepted that protection will not be granted to what would otherwise be confidential information in rather ill-defined circumstances where the court felt that some factor was present which justified publication. In the last century, this was explained on the basis that the plaintiff could not conceal an 'iniquity' by means of an action to restrain breach of confidence.[5] In the present century, this has been refined to a statement that disclosure will not be restrained where the public interest justifies it. The categories of case comprised in the 'public interest' are amorphous, and the degree of weight to be given to the 'public interest' is unclear. It may, indeed, vary from case to case. It is also unclear at what stage in the process of adjudication the public interest becomes relevant. The generally accepted view is that the 'public interest' is a defence to what would otherwise be a wrong. Another view, which has received less general approval and application, is that what is normally referred to as the 'public interest' is really a factor, or set of factors to be considered when deciding whether the information in the possession of the defendant can properly be described as 'confidential'.

The Scope of the Public Interest

In one case, Lord Denning defined the breadth of the public interest which may justify the publication of confidential information as extending to 'crimes, frauds and misdeeds'.[6] This encompassed breaches of the criminal law and breaches of statutory duties.[7] It is not clear whether or not this extended to cases of a mere civil wrong.[8] It also seems to extend to cases where there is a danger to the public which the court feels justifies disclosure.[9] Although Lord Denning proposed that a public interest in the disclosure of falsehood should be recognised,[10] this does not seem to have been accepted as being a good cause for disclosure in and of itself.[11] In a later judgment, Lord Denning stated that he did not regard 'iniquity' as being a principle in itself, but as being an instance of a 'just cause or excuse' for breaking confidence.[12] One commentator[13] has described this as a restatement of the 'defence,' focusing on the effects of the plaintiff's conduct on the public rather than on the culpability of the plaintiff's own conduct.

In the instant case, the defendant argued that the information in its possession suggested that a crime, namely tax evasion, had been committed, or might have been committed. It is well-established that the public interest defence encompasses cases where the information relates to the commission of a crime. If it were accepted that the information obtained by the defendant in the present case indicated the existence of tax evasion, there could have been little doubt but that the plaintiff could not have succeeded in protecting its confidence. This was, indeed, conceded by counsel for the plaintiff. The instant case therefore traversed no new ground as to the potential scope of the public interest defence.[14] There was no real discussion of the breadth of the public interest defence in any of the judgments delivered. Counsel for the plaintiff conceded that if customers of the plaintiff admitted that they had participated in the scheme in order to evade tax, they would not be entitled to the protection of confidentiality.[15] However, there is some controversy as to the conclusiveness of the evidence of the commission of a crime which is needed to justify publication.[16]

In the High Court in the instant case, Shanley J. indicated that the public interest which he identified in the freedom of expression under Article 40.6.i of the Constitution was a relevant factor, which might not exist in other jurisdictions. The judgment of Lynch J., who spoke for the majority of the Supreme Court, does not contain a discussion of the ambit of the public interest defence. Keane J. who delivered the majority judgment, referred, without dissent, to a number of English authorities in favour of the view that disclosure may be permitted in the absence of any wrongdoing, but where there might otherwise be a danger to the public.[17] In the High Court, Shanley J. also accepted the existence of such a category.[18] Both Keane and Shanley J. indicated, however, that it would be unwise to attempt to formulate a general statement of the public interest which would justify disclosure, which would apply in every case.

Balancing Conflicting Public Interests

The orthodox view at the present day is to describe the public interest as a defence which may justify the publication of matter which would otherwise be restrained as being the use of confidential information. The majority of decisions seem to accept that the function of the court when faced with a claim that the public interest justifies disclosure is to attempt to balance what are seen as two conflicting interests: (a) that in the preservation of confidences, and (b) that in the disclosure of wrongdoing.[19] This method seems to have been employed both by Shanley J. and by all the judges of the Supreme Court in the instant case.[20] It also appears that the balance may be struck in a different manner depending on the nature of the public interest invoked. Thus, if serious crime is alleged, the courts may be more inclined to favour disclosure, whereas if the wrong alleged is a civil wrong, with largely private repercussions, a court might be more inclined to protect the obligation of confidence.[21] Where the alleged public interest was in preventing the public from being misled, one court refused to carry out the balancing operation at all, on the ground that the defendant had failed to adduce sufficient evidence of the supposed risk to the public.[22]

In the High Court, Shanley J. stated that the conflicting public interests should be balanced at the stage of the balance of convenience. His decision turned on the serious nature of the alleged wrongdoing. He stated that in his opinion, where the confidential information related to the commission or intended commission of serious crime, the public interest in the disclosure of that information would almost always prevail, as such crime was an attack on the State. Counsel for the plaintiff had argued that it was impossible for the court to balance the conflicting interests, as the defendant had not disclosed to the court the information in its possession. Both in the High Court and Supreme Court, all the judges seem to have taken the view that the nature of the information possessed by the defendant was apparent, and that the issue could fairly be considered on that basis.

The majority of the Supreme Court was also willing to decide at the interlocutory stage that the public interest in the disclosure of the alleged wrongdoing outweighed that in the preservation of the confidences of the plaintiff's customers. Lynch J., with whom O'Flaherty and Barrington JJ. agreed, stated that the public interest in defeating wrongdoing might 'outweigh' the public interest in the preservation of confidences. In this case, he held that it did. Keane J., with whom Hamilton C.J. agreed, stated that although 'it would be unwise to attempt a formulation of the public interest which would be applicable in every case, it can be said with confidence that the "balancing" approach suggested by the English authorities can be adopted in this jurisdiction in a case such as the present.'[23]

The judgments of Shanley J. and the majority of the Supreme Court plainly took the view that the public interest in the disclosure of crime had to outweigh that in the preservation of confidential information. Keane J., for the minority, was more guarded, and he attempted to confer some protection on each of these public interests by permitting disclosure only in a limited manner, and otherwise restraining the defendant. This aspect of his judgment is discussed below.

The decision of the majority contrasts vividly with the conclusion of Henry J. in the High Court of New Zealand in *European Pacific Banking Corporation v. Fourth Estate Publications Ltd.*[24] In that case, the plaintiff bank sought (inter alia) an injunction restraining the defendant newspaper publisher from publishing or using information which had come into its possession relating to transactions entered into by the plaintiff's customers. The defendant sought to avail of the public interest defence, on the grounds that the information concerned transactions intended (a) to circumvent New Zealand legislation restricting the ownership of land by foreign persons, and (b) to evade the payment of tax.

Henry J. held that where information was confidential in nature, the plaintiff was prima facie entitled to protection, and the onus was on the defendant to demonstrate that the public interest justified disclosure.[25] Henry J. stated that the exercise of balancing the plaintiff's prima facie right to maintain the confidentiality of the relations with its customers, with the public interest arising out of the alleged nature of the transactions, was attended with difficulty, as neither party had chosen to reveal the information or documents containing it to the court.[26] He did not, however, ultimately decide the application on that ground alone, as he felt that there were other reasons for refusing to apply the public interest defence, which are discussed below.

An Alternative Approach

Some judges have nonetheless taken the view that the so-called 'public interest defence' is really a factor which displaces the obligation of confidence completely. This view has been expressed both extra-curially and ex cathedra by the Australian judge and author W.M.C. Gummow.[27] Although Keane J. adverted to this theory in the minority judgment, he did not adopt it.[28] Indeed, all of the judges in the High Court and Supreme Court employed the 'balancing' theory. Gummow J. explained his theory in *Corrs Pavey Whiting & Byrne v. Collector of Customs,*[29] as being that information would 'lack the necessary attribute of confidence if the subject matter [was] the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.'[30]

Gummow J. returned to this theme in the later case of *Smith Kline & French Laboratories Ltd v. Department of Community Services and Health.*[31] In that case, the plaintiffs had submitted information to the defendants for the purposes of obtaining approval to market and sell a drug formulated in a certain fashion. The plaintiff sought to restrain the defendant from using the information submitted for the purposes of evaluating an application from another party seeking approval for the marketing of the same drug formulated in a different manner. Gummow J. refused to grant the injunction sought. The defendant had relied in part on the 'public interest' defence. As to this, Gummow J. stated that "it is not a question whether there is some 'public interest' defence to the alleged breach of an obligation by [the defendant], but rather one of content of any such obligation in its inception."[32] His conclusion was as follows:

(i) "an examination of the recent English decisions shows that the so-called 'public interest' defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence, and

(ii) "equitable principles are best developed by reference to what conscionable behaviour demands of the defendant not by "balancing" and then overriding those demands by reference to matters of social or political opinion."[33]

It may be noted that there were also English[34] and New Zealand[35] decisions where the same plaintiff sought the same relief in similar circumstances against the public drug licensing authorities. In each case, it was held that the information given by the plaintiff had been given in confidence, and that a duty of confidentiality arose. However, it was also held that the obligation of confidence did not extend to prohibiting the authorities from using the information for the purposes of considering the applications of rival producers of the drug. The decisions therefore turned on the scope of the duty of confidentiality rather than on the public interest defence, and appear therefore to be close to the approach advocated by Gummow J.

Notwithstanding those decisions, however, judicial endorsements of Gummow J.'s theory seem to be rather equivocal.[36] Indeed, in *Corrs Pavey* itself, Gummow J. was dissenting in the statement which he made.[37] Although Gummow J. regarded the 'balancing' method as being an invitation to judicial idiosyncrasy, it is far from clear that his favoured method is any less susceptible to the same criticism. Indeed, some might think it worse as it denies the very existence of confidentiality in cases where it would ordinarily be considered to exist, though subject to the requirements of the 'public interest.'[38]

A Third Approach

One commentator, Pizer,[39] considers Gummow J.'s method to be one which inclines in favour of confidentiality and against disclosure. He describes it as a 'red light' theory towards disclosure.[40] He prefers a 'balancing' exercise, but he proposes a model which permits the courts to take into account a set of factors which relate to the circumstances of the actual or intended disclosure.[41] Therefore, he states that the availability of the public interest 'exception' depends upon whether or not the circumstances support disclosure. The circumstances which he feels merit consideration are:

(i) the identity of the discloser,
(ii) the identity of the disclosee,
(iii) the timing of the disclosure, and
(iv) the discloser's beliefs at the time of disclosure.

This is a more flexible test than that proposed by Gummow J., and, indeed, is rather more fluid than the simpler 'balancing' test used by the judges in the instant case. If it had been applied in the instant case, it would have permitted an overt consideration of factors such as the defendant's status as a statutory broadcasting organisation, with statutory duties of impartiality, and the identity of the proper persons to receive the information. These elements were no doubt considered to a greater or lesser degree in any event, but they do not appear explicitly in the majority Supreme Court judgment of Lynch J.[42] Shanley J., it may be noted, did refer to the defendant's statutory obligations of impartiality. Keane J., for the minority of the Supreme Court, laid great stress on the identity of the proper persons to receive the information, as will be seen.

The Nature of the Defence

Assuming that the public interest is properly described as a defence rather than as a factor to be considered in deciding on the extent of the obligation of confidence, there is still one further refinement to be considered. It is not entirely clear whether the public interest, as a defence, operates as a complete defence, blocking the plaintiff's entitlement to any relief, or whether it is a form of discretionary 'bar,' which prevents a plaintiff from obtaining injunctive relief, but may not be a complete defence to his action. There are a number of judicial statements which express some support for the latter view.[43] However, if the public interest does indeed justify disclosure, so as to defeat a claim for interlocutory relief, it is felt that the same public interest, if made out on oral evidence at the trial, should equally be a defence to a claim for damages or a permanent injunction, for the same reasons.[44]

In the present case, Shanley J. stated, in refusing the injunctions sought, that the plaintiff should be left to its remedy in damages. While this may carry a faint suggestion that the defence operated as a bar to the injunctive relief only, it is felt that this does not indicate that the judge

felt that the plaintiff would succeed at trial. Rather, it is felt that this statement was an acknowledgement that the defendant might fail to make out the defence on oral evidence at the trial of the action.

The Public Interest and the Doctrine of 'Clean Hands'

Some judges have identified the public interest defence with the doctrine that he who seeks equitable relief must come with clean hands. Thus, Isaacs J. stated that protection would be denied

> "[w]here the right relied on, and which the court of equity is asked to protect or assist, is itself to some extent brought into existence or induced by some illegal or unconscionable conduct of the plaintiff, so that protection for he claims involves protection for his own wrong."[45]

The doctrine of 'clean hands' no doubt applies to claims for equitable relief arising out of a breach of confidence, just as it applies to any claim for equitable relief. However, it is felt that the public interest is really a separate factor. One distinction between the two is that the 'public interest' need not necessarily be something which relates to the plaintiff's conduct. In other words, it appears to be something which supervenes over the plaintiff's rights rather than some factor in his conduct which disentitles him to relief.[46] The other side of this coin is that the public interest need not of itself relate to the plaintiff's conduct. Furthermore, if the public interest were no more than an aspect of the clean hands doctrine, it might not arise if the duty of confidentiality arose independently of the alleged wrongdoing, which, it may be noted, describes the present case.[47] In the instant case, Keane J., in the minority judgment in the Supreme Court, referred to the clean hands doctrine. However, he seemed to regard it as being distinct from the public interest defence.[48]

The Public Interest at the Interlocutory Stage

In the High Court, Shanley J. regarded the public interest as being a factor to be taken into consideration in assessing whether or not the balance of convenience favoured the granting of an injunction. In this, he followed the earlier English Court of Appeal decision in *Lion Laboratories Ltd v. Evans.*[49] The attitude taken by the members of the court in that case was that a plaintiff would ordinarily be entitled to relief if he established that the defendant was using or threatening to use confidential information. However, if the defendant established that there was a serious defence on the grounds that the public interest justified disclosure, then an injunction would be refused at the interlocutory stage.[50] If the ground of public interest relied on by the defendant related to serious wrongdoing, the injunction would be more likely to be refused. It is explicit in the judgment of Stephenson L.J. that he felt that damages would be adequate compensation for the plaintiff if it succeeded at the trial.[51] The other members of the court did not expressly refer to this issue.[52] In a later case, *Attorney General v. Observer Ltd,*[53] Sir John Donaldson M.R. adopted a stricter test – that an injunction might be refused if the defendant established a 'serious defence of public interest [that] is very likely to succeed at trial.'

In the instant case, Shanley J. concluded that an injunction should not be granted, but that the plaintiff should be left to seek its remedy in damages at the trial of the action. In deciding whether or not to grant an injunction, Shanley J. stated that the appropriate test in deciding whether or not to grant interlocutory relief was that set out in *Campus Oil Ltd v. Minister for Industry and Energy (No. 2).*[54] He stated that he first had to be satisfied that there was a serious question to be tried. There was little difficulty in establishing this. Shanley J. stated that the next question was the adequacy of damages as a remedy for the plaintiff. The judge was satisfied that damages would not be an adequate remedy in the circumstances of this case, on the ground that publication would be likely to cause the plaintiff to lose customers, and the extent of the plaintiff's consequent financial loss would be unquantifiable. Given that damages were not an adequate remedy, the next question was that of the balance of convenience.[55]

Shanley J. considered that the competing public interests which he identified, namely that in the preservation of confidences, and that in the disclosure of wrongdoings, fell to be considered at the stage of the balance of convenience. He stated that (for reasons to which reference has already been made) in the case before him, he preferred this second aspect of the public interest to the first. He indicated that his evaluation of the balance of convenience was based on affidavit evidence, and that it was quite possible that the court of trial might take a different view. He also indicated that the defendant remained bound by its statutory duties of objectivity and impartiality.[56]

At least in the argument before the Supreme Court, it had apparently been accepted by counsel for each side that the balance of convenience did not provide clear guidance as to the proper result in the case. The majority judgment of the Supreme Court upheld Shanley J.'s decision, but did not enter into a discussion of the criteria to be applied in deciding whether or not to grant an injunction. It would appear that they implicitly approved of Shanley J.'s formulation of the test.

In the minority judgment, Keane J. agreed that the usual criteria governing the grant or refusal of interlocutory injunctions did not govern the instant case.[57] He did, however, give some consideration to them. He appears to have accepted that damages would not be an adequate remedy for the plaintiff, as if the injunction were refused, the relationship of confidentiality would be at once destroyed. On the other hand, he also considered that if the court granted the injunction, this would in a sense cause irreparable damage to the defendant, as it would be inhibited in its function of transmitting news 'as it happens'.[58]

Keane J. seems to have approved of the test stated in the *Lion Laboratories* decision. The information in the defendant's possession was undoubtedly confidential. Keane J. then stated that the essential issue was whether or not the defendant had established a public interest in disclosure which 'outweighed' that in confidentiality. In this regard, he agreed with the judgment of Shanley J. that the defendant had established a strongly arguable case that the public interest justified the disclosure. However, since he took the view that the defendant should still only be entitled to publish the information to the relevant authorities, he would have granted an injunction in restricted terms. This aspect of the case is discussed below.

One may contrast the decision in the New Zealand case of *European Pacific Banking Corporation v. Fourth Estate Publications Ltd.*[59] which had some sim-

ilarities to the instant case. In that case, Henry J. held that he could not properly decide upon the applicability of the public interest defence at the interlocutory stage. He gave two grounds. First, if he permitted publication, the plaintiff would effectively have been deprived of the relief which it sought. Publication then would in effect deprive the plaintiff of protection permanently. It is to be noted that both Shanley and Keane JJ. effectively came to the same conclusion in the instant case, as they each held that damages would not be an adequate remedy for the plaintiff. The second reason given by Henry J. for refusing to permit the publication of the confidential information at this stage was that there was no element of urgency. The transactions at issue in that case had occurred a number of years previously. The information had already been made available to the relevant authorities. That, of course, is a point of distinction between that case and the instant one, though it may be thought to support the view of Keane J. rather than that of the majority of the Supreme Court.

Pizer has described the approach used in *Lion Laboratories* (and, it would seem, in the instant case) as being a "pretrial 'balancing of the public interests' test."[60] He takes the view that the application of the balance of convenience test (albeit in perhaps modified form) can be described as 'anti-disclosure,' as it is intended by its nature to preserve the status quo. The judgment of the majority of the Supreme Court in the instant case seems to show that this test does not necessarily lean against disclosure.

The Burden and Standard of Proof

Lord Denning M.R. stated in *Initial Services Ltd v. Putterill*[61] that the burden of establishing that the public interest favoured disclosure lay on the defendant at the interlocutory stage. Similarly, in *European Pacific Banking Corporation v. Fourth Estate Publications Ltd*,[62] Henry J. stated that if information were prima facie confidential, then the onus lay on the defendant to demonstrate that publication was justified.[63] Lord Denning, it should be noted, seems to have been less than consistent on this point. In *Hubbard v. Vosper*,[64] he stated that a defendant should not be restrained from publishing if he had a "reasonable defence of public interest."[65] He drew an analogy with the rule that an injunction will not be granted to restrain the publication of allegedly defamatory material if the defendant claims that he will be able to prove justification. Later cases[66] have not followed this statement, and the decisions of the High and Supreme Courts in the instant case hold that the defendant must show that the public interest favours disclosure.

If one accepts the theory that the public interest is a defence to what would otherwise be a wrong, it seems correct that the defendant must bear the burden of establishing that the defence applies. If one adopts the alternative approach of Gummow J., then it is possible that, at least in some cases, the onus might be on the plaintiff to show that publication should not be allowed. Pizer, however, thinks that Gummow J.'s test leans against disclosure, and that it still imposes the burden on the defendant to show that disclosure should be allowed.[67] The Law Commission for England and Wales has recommended that the burden should be placed on the plaintiff to show that the balance of the public interests favours non-disclosure.[68] This is clearly a 'pro-disclosure' theory, and whatever its political attractions, it does not represent the preponderance of judicial opinion at the present time.

Assuming that the burden of proof lies on the defendant, the next question which arises is that of the standard of proof required for the defendant to raise the defence successfully at the interlocutory stage. Lavery's[69] view is that the defendant must show that there are 'reasonable grounds' to believe that the public interest justifies disclosure. This is based in part on a comment of Wood V.-C. in *Gartside v. Outram*,[70] to the effect that a 'mere roving suggestion...[of fraud]' would not justify disclosure of otherwise confidential material. It may be the case that the standard of proof will vary with the gravity of the alleged 'misdeed' on the part of the plaintiff.

In the instant case, the defendant appears to have succeeded in raising the defence without production of documentary or other proof of the alleged wrongdoing. Rather, affidavits were filed on behalf of the defendant averring to a belief that the plaintiffs were involved in the operation of a scheme which could have the effect of facilitating tax evasion. After setting out the defendant's understanding of the manner in which the scheme operated, the defendant's director of news deposed that:

> 'The nature and structure of the scheme permitted investors to evade their tax liabilities and [the defendant] is satisfied from information in its possession that the greater part of the investors of [sic] the scheme invested in it for this reason.'[71]

The defendant's affidavit also stated that given the service fee charged for use of the scheme, there seemed to be no rational motive for using the scheme other than the evasion of tax. Furthermore, the defendant claimed that it had information from employees of the plaintiff to the effect that the plaintiff had targeted 'sensitive' accounts, for the purpose of promoting this scheme. The identity of these sources was not revealed, nor were their statements exhibited. However, the judges of the Supreme Court found it significant that the plaintiff did not attempt to deny this allegation.

It seems that both High Court and Supreme Court were of the view that the gravity of the misdeeds alleged was sufficient to justify publication, even in the absence of direct evidence of the wrongdoing. Lynch J., speaking for the majority of the Supreme Court, concluded that the affidavit filed by the defendant established a 'strong prima facie case that at least the majority of the [customers who invested in the plaintiff's scheme] were doing so for the purposes of tax evasion.'[72] Keane J., in the minority, also found that the defendant had established a 'strongly arguable' case that the public interest justified disclosure. He stated that the fact that the scheme, by its nature, might facilitate tax evasion, was not of itself sufficient to justify disclosure. There might well be legitimate reasons for using it. However, the fact that the defendant claimed to have evidence from the plaintiff's employees of the deliberate targeting of 'sensitive' accounts, coupled with the plaintiff's failure to rebut this allegation, was sufficient evidence for the defendant to establish a strongly arguable case that the public interest justified disclosure.

The Breadth of Publication Permitted

The importance of the instant decision, aside from its immediate repercussions, probably lies in the decision of the majority of the Supreme Court that

there was no need to impose any limitation on the extent of publication by the defendant which would be permitted.

It appears that, at least in the Supreme Court, counsel for the plaintiff argued that the defendant should furnish the information in its possession to the regulatory authorities, but to no one else. The majority of the Supreme Court declined to confine the scope of publication in this manner, stating that the alleged tax evasion was 'a matter of genuine interest and importance to the general public and especially the vast majority who are law abiding tax payers.'[73]

Although the majority indicated that there was a public interest in maintaining the confidences, they do not appear to have given any consideration to the weight which should be given to that public interest. The majority did counsel prudence on the part of the defendant if it chose to publish the names of any of the plaintiff's customers who it alleged had availed of the scheme.

Keane J., with whom Hamilton C.J. concurred, dissented. He held that the plaintiff should have been entitled to injunctions restraining the defendant from publishing the information to anyone other than the party with a direct interest in receiving the information and a responsibility to act on it, namely, in this case, the Revenue Commissioners. Keane J. emphasised that the proposed publication by the defendant had consequences which went beyond the immediate repercussions on the plaintiff and its customers:

> "The existence of an efficient banking system based on a confidential relationship between the individual banks and their customers is a central feature of a modern economy. To give [the defendant] an unfettered licence to publish the names of every customer involved in the ... [s]cheme where they had no information in their possession in relation to the particular accounts that wrongdoing has, or will, take place would be to effect a major inroad into that confidential relationship, which is warranted neither by principle nor authority."[74]

He therefore, would have granted an injunction to the plaintiff, restraining the defendant from publishing information identifying the plaintiff's customers or their accounts, save where (a) they were in possession of information indicating that a named customer had evaded or intended to evade the payment of tax, and (b) they had given that information to the Revenue Commissioners, and (c) they had notified the customer and the plaintiff that they intended to publish the customer's name, unless the customer applied to the court to restrain publication.[75]

In coming to this conclusion, Keane J. approved of and applied the approach taken by Sir John Donaldson M.R. in *Francome v. Mirror Group Newspapers Ltd.*[76] In that case, the defendant possessed information which tended to suggest a breach of the rules of the Jockey Club. The Court of Appeal granted an injunction to restrain publication. The court held that a general publication by the defendant could not be in the public interest, as that would have been adequately served by disclosure to the Jockey Club or the police. Any wider publication would serve the interests of the defendant, rather than of the public. Sir John Donaldson M.R. made the trenchant comment that "[the media] are peculiarly vulnerable to the error of confusing the public interest with their own interest."[77]

Pizer[78] proposes a test under which, if it is first established that the public interest would be advanced by disclosure, a court would then examine the circumstances surrounding the disclosure or proposed disclosure. The balancing of public interests would take place in the context of those circumstances. Thus, the circumstances of disclosure become one of the factors to be considered in balancing the public interests. This approach may provide a filter with which the sceptical judge, influenced by the comment of Sir John Donaldson, may separate enlightened self-interest on the part of the commercial media from the interest of the community at large.

Lavery[79] suggests that broad publication should be permitted where the danger to the public or the fraud on the public was such that a wide publication was justifiable, or where the authority which had the proper interest in receiving the information was unlikely to act on it. In the instant case, there could have been little doubt that the Revenue Commissioners would have acted on the information if it had been disclosed to them.[80] The comments of Shanley J. suggest that he felt that there was a sufficient wrong on the State and its citizens to justify broad publication. As against that, it would seem that the Revenue Commissioners were the correct body to act on behalf of the public (and the Exchequer) in order to remedy the alleged wrong. This was the view taken by Keane J. and Hamilton C.J.

If the approach of Gummow J. were accepted, it might seem more appropriate to define a category of persons to whom the defendant might be at liberty to communicate otherwise confidential information. The confidential obligation might be said to be cast in such a way that the information was confidential as against all the world save those persons who have a special interest or duty in the investigation of a defined species of wrongdoing. Indeed, in *Corrs Pavey Whiting & Byrne v. Collector of Customs*,[81] Gummow J., in his dissenting judgment, expressed the view that where the subject matter of the allegedly confidential information disclosed the actual or apprehended existence of a crime, civil wrong or serious misdeed, the information could not be regarded as confidential so as to preclude publication to a party with a 'real and direct' interest in redressing that wrong or misdeed.

It is also notable that the Revenue has a statutory power enabling it to apply to court to require a financial institution to furnish full particulars of all accounts maintained by an individual for a period of ten years prior to the date of the application.[82] In considering that power, Murphy J. noted that "[t]he legislature has balanced the interests of the individual against those of the community at large ..."[83] If that is indeed the case, the question arises whether the courts should re-balance the scales. In other words, if the legislature has provided a mechanism under which the Revenue Commissioners may intervene in the banker-customer relationship for the purposes of investigating the tax affairs of a customer, then one might have thought that the courts would abide by that legislative decision, and permit disclosure only to that body. In any event, it does not appear that any argument along these lines was made in the instant case.

Conclusion

It is arguable that the approach of Keane J. was the correct one in the circumstances. Keane J.'s approach upheld, in so far as possible, each of the two public interests which all of the judges identified: that in the preservation of confidences in the commercial context and that in the prevention of wrongdoing. It may be argued that the decision of

the majority of the Supreme Court to permit a broad publication is open to objection as favouring this second limb of the public interest at the expense of the first. In that regard, the decision can be seen as giving the 'green light' to disclosure, at the expense of the banker-customer relationship.

A degree of scepticism was probably justifiable as to the positions of each of the parties to the action. Keane J., indeed, said that "the postures adopted by the bank and RTE respectively are not fully justified."[84] While the plaintiff undoubtedly wished to protect the confidences of its customers, it no doubt had the protection of its own position and reputation in mind. The defendant may have regarded itself as bound to investigate allegations of wrongdoing. Whether or not it had a duty to do so, it also stood to gain attention as a result, and would ultimately benefit financially. It would appear that the greater part of comment on the decision has viewed with favour the position of the defendant, and has consequently applauded the end result.[85] Since most of this comment has come from commercial media bodies, there is little cause for surprise.[86] ●

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1 Unreported High Court judgment of Shanley J., 6th March 1998, 1998 No. 1306 P., affirmed by the Supreme Court, unreported, 20th March 1998, 1998 No. 51.

2 See the judgment of Lynch J. at 15. Cf. *Lord Ashburton v. Pape* [1913] 2 Ch. 469, 475 per Swinfen Eady J. '[A court of equity will] restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged.' The existence of two categories has been acknowledged in later cases: *Commonwealth v. John Fairfax & Sons Ltd.* (1980) 147 C.L.R. 39, 50 per Mason J. *Smith Kline & French Laboratories (Australia) Ltd v. Department of Community Services and Health* [1990] F.S.R. 617, 637 per Gummow J.

3 Gummow J. in *Smith Kline & French Laboratories (Australia) Ltd v. Department of Community Services and Health* [1990] F.S.R. 617, at 637, referring, inter alia, to *Boardman v. Phipps* [1967] 2 A.C. 46.

4 See the judgment of Shanley J. at 8-9 and 13.

5 *Gartside v. Outram* (1857) 26 L.J. Ch. (n.s.) 113.

6 *Initial Services Ltd v. Putterill* [1968] 1 Q.B. 396, 405.

7 In *Initial Services Ltd v. Putterill* [1968] 1 Q.B. 396, the Court of Appeal held that the public interest defence could apply in a case where the defendant alleged that the plaintiff had been party to illegal price fixing, which fell short of being a crime. In *In re A Company's Application* [1989] 3 W.L.R. 265, Scott J. held that the defence could apply in a case where the defendant claimed that the plaintiff had been guilty of a breach of financial services regulations.

8 In *Weld-Blundell v. Stephens* [1919] 1 K.B. 520, the Court of Appeal held that the public interest defence did not apply in a case where the defendant had disclosed a confidential document which libelled a third party.

9 For instance, the danger to the public arising out of the practices of the Church of Scientology: *Hubbard v. Vosper* [1972] 2 Q.B. 84; *Church of Scientology v. Kaufman* [1973] R.P.C. 627.

10 *Woodward v. Hutchins* [1977] 2 All E.R. 751.

11 An Australian court rejected this argument: *Castrol Australia Pty Ltd v. Em Tech Associates Pty Ltd* (1980) 33 A.L.R. 31. Meagher, Gummow and Lehane summarise the position in mordant fashion: 'There has been little enthusiasm in Australia for this further attempted intrusion into equitable principle of Lord Denning's views of the ideal world'; *Equity: Doctrines and Remedies* (3rd ed., 1992), § 4123. Another Australian court rejected arguments that the preservation of confidentiality in relation to car designs amounted to an attempt to mislead the public, and that the public interest therefore weighed against injunctive relief: *David Syme & Co. Ltd v. General Motors-Holden's Ltd* [1984] 2 N.S.W.L.R. 294. For a general discussion, see Lavery, op. cit., at 190 et seq.

12 *Fraser v. Evans* [1969] 1 Q.B. 349, 362.

13 Pizer, *The Public Interest Exception to the Breach of Confidence Action: Are the Lights About to Change?* (1994) 20 Monash U. L. Rev. 67, 73.

14 Controversy does exist as to the breadth of the public interest. There are conflicting authorities as to whether it can be said to justify the publication of material which reveals the possible commission of a tort or civil wrong. Another issue is whether there can be a public interest in ensuring the truthfulness of publicity. Lord Denning M.R. thought that there was (see *Woodward v. Hutchins* [1977] 2 All E.R. 751).

15 See the judgment of Keane J. at 17.

16 Cf. W. Johnston, *Banking and Security Law in Ireland* (1998), § 3.51: 'It seems, therefore, according to the Supreme Court, that disclosure to the public at large is in the public interest not just where there is wrongdoing but where there is a suspicion of wrongdoing.'

17 See pages 6-7 of his judgment, referring to *Hubbard v. Vosper* [1972] 2 Q.B. 84; *Beloff v. Pressdram Ltd* [1973] 1 All E.R. 241; *Lion Laboratories Ltd v. Evans* [1985] 1 Q.B. 526; *Schering Chemicals Ltd v. Falkman* [1981] 2 All E.R. 321.

18 See page 10 of his judgment.

19 See, e.g., *Attorney General v. Guardian Newspapers Ltd* (No. 2) [1988] 3 W.L.R. 766, 807 per Lord Goff of Chieveley; X. v. Y. [1988] 2 All E.R. 648, 653 per Rose J.

20 Although counsel for the defendant in the instant case seems to have placed his case on the footing that an 'iniquity' would deprive the information of its protection: see the judgment of Lynch J. at 12-13.

21 See Pizer, op. cit., 76, 87-90. Also note *A. v. Hayden* (1984) 156 C.L.R. 532, 545-6 per Gibbs C.J.:
'The public interest does not, in every case, require the disclosure of the fact that a criminal offence, however trivial has been committed. And the administration of justice, although a fundamental public interest, is not an exclusive public interest...'

22 *David Syme & Co. Ltd v. General Motors-Holden's Ltd* [1984] 2 N.S.W.L.R. 294.

23 At page 9 of his judgment.

24 [1993] 1 N.Z.L.R. 559.

25 [1993] 1 N.Z.L.R. 559, 564.

26 [1993] 1 N.Z.L.R. 559, 564.

27 See Meagher, Gummow and Lehane, op. cit., § 4123.

28 Judgment of Keane J. at 8.

29 (1987) 74 A.L.R. 428.

30 (1987) 74 A.L.R. 428, 450. Gummow J. was in a minority of one in making this statement: cf. Jenkinson J. (with whom Sweeney J. agreed) at 432.

31 [1990] F.S.R. 617.

32 [1990] F.S.R. 617, 662.

33 [1990] F.S.R. 617, 663.

34 *R. v. Licensing Authority, ex parte Smith Kline & French Laboratories Ltd* [1989] 2 W.L.R. 378, affirming [1988] 3 W.L.R. 896.

35 *Smith Kline & French Laboratories Ltd v. Attorney General* [1989] 1 N.Z.L.R. 385, appeal allowed on different grounds, [1991] 1 N.Z.L.R. 560.

36 See Pizer, op. cit., 91-93. Earlier dicta to similar effect are *Fraser v. Evans* [1969] 1 Q.B. 349, 362 per Lord Denning M.R. and *Malone v. Metropolitan Police Commissioner* [1972] Ch. 344, 377 per Megarry V.-C.

37 Jenkinson J. (with whom Sweeney J. agreed) held that if the defendant could show that the information showed the existence of a 'misdeed' or other wrong, the consequence was that the court would decline to restrain a breach of confidence: *Corrs Pavey Whiting & Byrne v. Collector of Customs* (1987) 74 A.L.R. 428, 432.

38 Cf. *W. v. Egdell* [1990] 2 W.L.R. 471, and the gloss of Meagher, Gummow and Lehane, loc. cit., on it.

39 Op. cit., at 85-6.
40 Op. cit., 85-6, 103 et seq.
41 Op. cit., 78 et seq.
42 At page 18 of his judgment, Lynch J. did give a 'warning' that "as a State body RTE should co-operate with other State authorities having regulatory functions in the matter..."
43 *Weld-Blundell v. Stephens* [1919] 1 K.B. 520, 534 per Warrington L.J.; *Church of Scientology v. Kaufman* [1973] R.P.C. 627, 631 per Goff J.
44 Pizer, op. cit., 93-95, theorises that the only reason why the public interest might operate as a bar to an interlocutory claim, but not as a defence to the action itself, would be to deter wholesale invasion of confidential relationships. Of course, this is exactly the question which arises whenever the public interest is invoked, so there seems to be no logical reason to allow some remedies for breach of a confidential obligation, but to refuse others.
45 *Meyers v. Casey* (1913) 17 C.L.R. 90, 124. Also, in *Weld-Blundell v. Stephens* [1919] 1 K.B. 520, 533-4, 547-8, the 'iniquity' defence was explained as turning on the clean hands doctrine.
46 See Ricketson, *Public Interest and Breach of Confidence*, (1979) 12 Melbourne U. L. Rev. 176, 179.
47 Ricketson, loc. cit., notes that "[i]n the context of breach of confidence it is easy to envisage cases where there might be a very strong 'public interest' in the disclosure of certain information, but no fraud or impropriety on the part of the person(s) seeking to keep it confidential."
48 At page 5 of his judgment. Pizer, op. cit., at 72-3, states that the clean hands doctrine applies if the impropriety has an immediate and necessary relation to the equity sued for. He states that this relationship will only be present if the obligation of confidence arose when the misconduct occurred.
49 [1985] 1 Q.B. 526.
50 [1985] 1 Q.B. 526, 551 per Griffiths L.J. It would appear that in the instant case, counsel for the defendant argued the case on this basis: see the judgment of Keane J. at 5.
51 [1985] 1 Q.B. 526, 545.
52 Other cases where the public interests were 'balanced' at the stage of the balance of convenience were *Distillers Co. (Biochemicals) Ltd v. Times Newspapers Ltd* [1975] Q.B. 613, 623 per Talbot J.; *Attorney General v. Observer Ltd* [1989] 2 F.S.R. 3, 9 per Millett J.; [1989] 2 F.S.R. 15, 18-9 per Sir John Donaldson M.R.
53 [1989] 2 F.S.R. 15, 18.
54 [1983] I.R. 88.
55 The adequacy of damages as a remedy for the plaintiff is normally described as being one of the factors to be considered in deciding where the balance of convenience lies. However, referring to the adequacy of damages as a stage in itself does not appear to alter the substance of the test.
56 Under section 18(1) of the Broadcasting Act 1960.
57 At page 11 of his judgment.
58 Ibid.
59 [1993] 1 N.Z.L.R. 559.
60 Op. cit., at 89, note 142.
61 [1968] 1 Q.B. 396.
62 [1993] 1 N.Z.L.R. 559.
63 A similar view was expressed by Street C.J. in *David Syme & Co. Ltd v. General Motors-Holden's Ltd* [1984] 2 N.S. W.L.R. 294, 299. See also *A. v. Hayden* (1984) 156 C.L.R. 532, 545-6 per Gibbs C.J.
64 [1972] 2 Q.B. 84.
65 [1972] 2 Q.B. 84, 96-7.
66 *Lion Laboratories Ltd v. Evans* [1985] 1 Q.B. 526, 538 per Stephenson L.J., 548 per O'Connor L.J., both citing the judgment of Sir David Cairns in *Khashoggi v. Smith* (1980) 124 S.J. 149.
67 Op. cit., at 86.
68 *Breach of Confidence*, Report No. 110 (1981), at 140.
69 P. Lavery, *Commercial Secrets: The Action for Breach of Confidence in Ireland* (1996), 217-8.
70 (1857) 26 L.J. Ch. (n.s.) 113, 114.
71 Quoted at page 10 of the judgment of Lynch J.
72 Judgment of Lynch J. at 17. Cf. the view of W. Johnston, op. cit. at § 3.51.
73 Judgment of Lynch J., at 16-17.
74 Judgment of Keane J., at 14.
75 Judgment of Keane J., at 16.
76 [1984] 2 All E.R. 408.
77 [1984] 2 All E.R. 408, 413. See also *Initial Services Ltd v. Putterill* [1968] 1 Q.B. 396, 405-6 per Lord Denning M.R.; *In re A Company's Application* [1989] 3 W.L.R. 265. In the same vein, Lord Wilberforce stated that "there is a wide difference between what is interesting to the public and what it is in the public interest to make known": *British Steel Corporation v. Granada Television Ltd* [1981] A.C. 1096, 1168. The same observation was made in *David Syme & Co. Ltd v. General Motors-Holden's Ltd.* [1984] 2 N.S.W.L.R. 294, 298 (per Street C.J.), 310 (per Samuels J.A.). In *Corrs Pavey Whiting & Byrne v. Collector of Customs* (1987) 74 A.L.R. 428, Jenkinson J. (with whom Sweeney J. agreed) stated (at 430) that where confidential information was communicated to one with a proper interest in receiving it, the circumstances of the disclosure would normally result in a duty on the recipient to maintain confidentiality, except in seeking redress or punishment. In other words, if in the instant case, the court had permitted disclosure only to the Revenue Commissioners, the Revenue Commissioners might have remained bound by a duty of confidentiality save in so far as their responsibilities dictated otherwise.
78 Op. cit., at 70, 78 et seq.
79 Op. cit., at 215.
80 As indeed they have: see *The Irish Times*, 9th June 1998, at 16. The Revenue has power under section 908 of the Taxes Consolidation Act 1997 (formerly section 18 of the Finance Act 1983) to direct a bank to furnish particulars of accounts maintained with it. It appears that, at least partly as a result of the immediate controversy, the Revenue wishes to increase its powers of investigation. See *The Sunday Times*, 14th June 1998, at 2. According to this report, the Revenue Commissioners desire the power to obtain access to bank accounts where there are 'reasonable grounds to believe that certain accounts are, or may be, used in a tax evasion scheme.' This report also states that the Revenue proposes the imposition of an express duty on financial institutions to inform the Revenue Commissioners if they become aware that an 'investment product' can be used to facilitate tax evasion.
81 (1987) 74 A.L.R. 428, 450.
82 Section 908 of the Taxes Consolidation Act 1997. Certain formal requirements set out in the section must be met. See the judgment in *J.B. O'C v. P.C. D.* (1984) 3 I.T.R. 153. The Revenue Commissioners may also apply under section 908(4) for an order prohibiting the transfer or dealing with assets of a person which are in the custody of the financial institution without the consent of the court.
83 *J.B. O'C v. P.C. D.* (1984) 3 I.T.R. 153, 154. Murphy J. is now, of course, a member of the Supreme Court, though he did not sit on the instant appeal.
84 At page 13 of his judgment.
85 See, e.g., M. McGonigle, *The Irish Times*, 31st March 1998, sub tit. *'This decision enhances the reputation of the press and the judiciary.'*
86 It will have been noticed that the present authors do not share the benign view of the media expressed by the writer of the 'opinion' piece in the June 1998 issue of this *Review* (*'Confidentiality v. Public Interest,'* (1998) 3 B.R. 369). One might equally argue that elements of the media attempt to form or manipulate public opinion rather than to inform it. It is far from apparent that the media are the proper organs to perform the 'important role in disclosing information which is in the public interest and not merely of public interest.' Since media organs often have an interest of their own to protect, the obvious question is: quis custodiet ipsos custodes? ●

Legal Update

The Bar Review
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Judgment information compiled by the Legal Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative

O'Ceallaigh v. An Bord Altranais
High Court: **Mc Cracken J.**
26/05/1998

Judicial review; natural and constitutional justice; domiciliary midwife; alleged professional misconduct; removal of applicant from the midwives' division of the register of nurses by order of the High Court; whether correct procedures followed; whether respondent satisfied that matter was in the interest of the public to remove name of applicant from register; whether breach of principle of audi alteram partem; whether applicant given reasonable advance notice and an opportunity to present her case; ss. 38 & 44, Nurses Act, 1985
Held: Application dismissed

O'Ceallaigh v. Fitness to Practice Committe of An Bord Altranais
High Court: **McCracken J.**
22/05/1998

Judicial review; natural and constitutional justice; fair procedures; private disciplinary hearing; complaints made against applicant on the basis of professional misconduct; disciplinary hearing conducted by respondent; whether respondent complied with fair procedures and natural justice; whether applicant entitled to call independent expert witnesses to give evidence at hearing; whether respondent's decision to hold hearing in private was irrational and unreasonable; whether breach of natural justice and fair procedures in not allowing experts to be present at hearing; s. 38(4) Nurses Act, 1985
Held: Application dismissed

Article

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

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Housing (Accommodation Provided by Approved Bodies) Regulations, 1992 (Amendment) Regulations, 1998
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Agriculture

Library Acquisition

International Grains Agreement 1995
Dublin Stationery Office [1997]
Done at Strasbourg 8 November 1990. Entered into force internationally on 1 September 1993. Signed by Ireland on 15 October 1996. Ratified by Ireland on 28 November 1996. Entered into force for Ireland on 1 March 1997. Laid before Dail Eireann by the Minister for Foreign Affairs. Pn.5042
C10.C5

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Diseases of Animals (Bovine Spongiform Encephalopathy) (Specified Risk Material) (Amendment) Order, 1998
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(DIR 94/47, 77/101, 79/373)

Animals

Statutory Instrument

Diseases of Animals (Bovine Spongiform Encephalopathy) (Specified Risk Material) (Amendment) Order, 1998
SI 144/1998

Arbitration

Library Acquisition

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2nd ed Cato, D Mark
London Lloyds of London Press 1997
N398

Commercial Law

Article

Review of MSF Guide to Profit Sharing, ESOPS and Equity Participation
Thornton, Fiona
11(1998) ITR 273

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Restraint of Trade and Business Secrets Law and Practice
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FT Law & Tax 1996
N266.2

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Inland Post Amendment (No 58) Scheme, 1998
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Inland Post Amendment (No 59) Scheme, 1998
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Company Law

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Restraint of Trade and Business Secrets Law and Practice
Mehigan, Simon
London Ft Law & Tax 1996
N266.2

Competition

Sibra Building Company Limited v. Ladgrove Stores Limited
Supreme Court: **Hamilton C.J., O'Flaherty J., Barron J.**
08/05/1998

Restrictive covenants; land sold subject to a restrictive covenant preventing use as a licensed premises; whether covenant an unreasonable restraint of trade; whether doctrine of restraint of trade applies to restrictive covenants imposed on the sale of land; whether restrictive covenant in breach of s. 4 Competition Act, 1991; whether parties to restrictive covenant were undertakings within meaning of s. 3 Competition Act, 1991
Held: Restrictive covenant not an unreasonable restraint of trade; parties to restrictive covenant were not undertakings within meaning of s. 3 Competition Act, 1991; restrictive covenant not in breach of s. 4 Competition Act, 1991

Articles

The Carrigaline Case and EC Competition Rules
Carney, Tom
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Developments in Competition Law
Doran, Michael
1998 ILTR 118

Constitutional

Melly v. Moran
Supreme Court: **O'Flaherty J., Murphy J., Lynch J.**
28/05/1998

Detention; committal; legality; person of unsound mind; application for leave to bring legal proceedings against doctor; whether detention of plaintiff in a psychiatric hospital lawful; whether defendants failed to exercise reasonable care in detention of plaintiff; whether substantial grounds that defendants had not acted with reasonable care; ss. 163 & 260 Mental Treatment Act, 1945
Held: Leave granted to bring proceedings against defendants

Kiernan v. Harris
High Court: **O'Higgins J.**
12/05/1998

Temporary committal; legality; person of unsound mind; application for leave to bring legal proceedings against defendants; whether defendants acted in good faith and with reasonable care in committing plaintiff; whether the proposed second named defendant acted as an agent for the Gardaí; s. 206 Mental Treatment Act, 1945; s. 5 Mental Treatment Act, 1953
Held: Leave to proceed against the first and second named defendants granted on the basis of want of reasonable care; leave to proceed against third named defendant refused

Haughey v. Mr. Justice Moriarty
High Court: **Geoghegan J.**
28/04/1998

Judicial review; certiorari; declaratory relief; separation of powers; breach of Constitutional rights; privilege; challenge to parliamentary resolution establishing Tribunal; challenge to discovery orders made without notice to plaintiffs; whether the Taoiseach acted ultra vires in establishing a Tribunal to inquire into payments made to the first plaintiff; whether the parliamentary resolution establishing Tribunal valid and constitutional; whether the terms of reference of the Tribunal clear and unambiguous; whether the parliamentary resolution breached the constitutional rights of the plaintiffs; whether infringement of plaintiffs' rights to privacy, equality, property; whether breach of first named plaintiff's right to privilege; whether the appointment of a Judge as Sole Member of the Tribunal infringes the separation of powers; whether legislation consistent with the Constitution; whether Tribunal conducted in accordance with fair procedures; whether discovery orders relating to bank accounts ought to have been made on notice to the plaintiffs; whether interference with the right to privacy could be a reasonable interference having regard to the public interest; Tribunal of Inquiry (Evidence) Act, 1921; Tribunal of Inquiry (Evidence) (Amendment) Act, 1997; The Ethics and Public Office Act, 1995; Arts. 15, 34, 40, 43 of the Constitution
Held: Lack of fair procedures in obtaining discovery orders but unfairness not so fundamental as to render void the proceedings of the Tribunal; plaintiffs entitled to reasonable opportunity to object to the orders of discovery; plaintiffs entitled to an explanation of any ambiguities in the Terms of Reference; no entitlement to privilege; all other relief refused

De Rossa v. Independent Newspapers Limited
High Court: **Kinlen J.**
03/04/1998

Libel; criminal contempt; right to trial by jury; whether the defendant is entitled to a trial by jury in accordance with the Constitution; whether the issues to be resolved were questions of fact or of law; whether the D.P.P. rather than the plaintiff was the appropriate person to process the matter; Articles 30 & 38 of the Constitution
Held: Issue was whether the articles were a contempt of court; trial by judge alone

Contract

Article

Relevant Contract Tax in Practice
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Some Reflections on Denny Judgment
Giblin, Bartholmew Herbert
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Copyright, Patents & Designs

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Copyright Law Perspectives from a Neighbouring Island
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Digital Works and Irish Copyright Law
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More European Union Harmonisation Measures in Copyright Law – New Rights Explained
Clark, Robert W
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Irish Copyright Law Reform – the Copyright (Amendment) Bill, 1998, and Beyond
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Performers and Copyright – Where is the Equity?
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The Insanity Defence Revisited
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The Proceeds of Crime Act, 1996 an Overview
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The Taxman Cometh!! Penalties and the Criminal Law
Hunt, Patrick
11(1998) ITR 288

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Done at Strasbourg 20 April 1959. Entered into force internationally on 12 June 1962. Signed by Ireland on 15 October 1996.
Instrument of Ratification deposited by Ireland on 28 November 1996.
Entered into force for Ireland on 26 February 1997.
Laid before Dail Eireann by the Minister for Foreign Affairs.
Pn.5040
C10.C5

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and Annex with Notifications made by Ireland upon Ratification, Declarations, Reservations and Objections Dublin Stationery Office [1997]
Concluded at Vienna on 20 December 1988. Signed by Ireland on 14 December 1989. Entered into force internationally on 11 November 1990.
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Pn.4403
C10.C5

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Department of Justice, Equality and Law Reform
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M544.C5

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Criminal Justice (Legal Aid) (Amendment) (No.2) Regulations, 1998
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Detention of Offenders (Castlerea) Regulations, 1998
SI 158/1998

Temporary Release of Offenders (Castlerea) Rules, 1998
SI 157/1998

Customs & Excise

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(REG 2185/96)

Employment

O' Connor v. Judge Carroll
Supreme Court: **Hamilton CJ., Murphy J., Barron J.**
26/05/1998

Application for costs; employment dismissal action; claim for costs against a trial Judge; confusion as to facts of case; whether dismissal constructive or express; whether respondent erred in refusing to allow evidence related to a constructive dismissal to be adduced; whether applicant should have been afforded an opportunity of exploring all facts relating to the termination of her employment before the respondent; whether mala fides on the part of the respondent; whether error lay in clarification of the facts; whether Judge properly joined as party to Judicial Review proceedings
Held: Appeal dismissed; no evidence of mala fides on the part of the respondent

Nolan Transport (Oaklands) Limited v. Halligan
Supreme Court: **O'Flaherty J., Denham J., Barrington J., Murphy J., Lynch J.**
15/05/1998

Employment; trade unions; industrial action; industrial action carried out by trade union after secret ballot; whether bona fide trade dispute existed; whether purpose of industrial action to compel non-member employees to join union; whether secret ballot carried out in accordance with s. 14 Industrial Relations Act, 1990; whether trade union enjoyed protection of s. 13 of Industrial Relations Act, 1990 if secret ballot not properly carried out

Held: Bona fide trade dispute existed; purpose of industrial action was not to compel non-member employees to join union; secret ballot not carried out in accordance with s. 14 Industrial Relations Act, 1990; trade union enjoyed protection of s. 13 of Industrial Relations Act, 1990 even though secret ballot not properly carried out

Dornan Research and Development Limited v. The Labour Court
High Court: **Geoghegan J.**
13/05/1998

Judicial review application; dismissal; sexual harassment; right of appeal; claim for compensation for constructive dismissal on the grounds of sexual harassment; whether the procedures for appealing a decision of the defendant to the Circuit Court and the High Court are unconstitututional; whether the difference between the appeal procedures under the Employment Equality Act, 1977 and the Unfair Dismissals Act, 1977 infringes the Constitution; ss. 26 & 27 Employment Equality Act, 1977; s. 10(4) Unfair Dismissals Act, 1977
Held: Application for judicial review refused; appeal procedures constitutional

Articles

Some Reflections on Denny Judgment
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Pn.4404
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Bradley, John A
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Occupational Pension Schemes (Disclosure of Information) Regulations, 1998
SI 112/1998

Environmental Law

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Waste Management (Licensing) (Amendment) Regulations, 1998
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SI 164/1998

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SI 147/1998

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SI 165/1998

Waste Management (Transfrontier Shipment of Waste) Regulations, 1998
SI 149/1998

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SI 148/1998

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European Union

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The Carrigaline Case and EC Competition Rules
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Taxation and the Euro – 1998 Finance Act Provisions
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Pn.5040
C10.C5

Statutory Instrument

European Communities (Amendment of Waste Management act, 1996) Regulations, 1998
SI 166/1998

Evidence

People (D.P.P.) v. McGinley
Supreme Court: **Hamilton C.J., Denham J., Barrington J., Keane J., Murphy J.**
20/05/1998

Evidence; bail applications; hearsay evidence tendered that applicant would interfere with witnesses; admissibility of hearsay evidence in context of bail applications; whether bail applicant entitled to require evidence against him to be given on oath; whether particular reasons would justify hearsay evidence being admitted
Held: Bail applicant entitled to have evidence against him given on oath; particular reasons may justify the admission of hearsay evidence; hearsay evidence inadmissible in circumstances of case

Statutory Instrument

District Court (Bankers' Books Evidence) Rules, 1998
SI 170/1998

Family

Library Acquisition

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Done at New York on 20 June 1956.
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Pn.4400
C10.C5

Fisheries

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Cod (Restriction on Fishing) (No 4) Order, 1998
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Hake (Restriction on Fishing) (No 3) Order, 1998
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Monkfish (Restriction on Fishing) (No 2) Order, 1998
SI 135/1998

Housing

Statutory Instruments

Housing (Accommodation provided by Approved Bodies) Regulations, 1992 (Amendment) Regulations, 1998
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Housing (Improvement Grants) (Thatched Roofs) Regulations, 1990 (Amendment) Regulations, 1998
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Article

Working Within the Framework of Future Article III: 2 GATT 1994 proceedings
Carney, Tom
1998 ILTR 101

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Pn.4402
C10.C5

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Entered into force for Ireland on 25 October 1995.
Laid before Dail Eireann by the Minister for Foreign Affairs.
Pn.4400
C10.C5

Exchange of notes constituting an agreement between the government of Ireland and the government of the United States of America concerning employment of

dependents of employees assigned to official duty in the territory of the other party.
Dublin Stationery Office [1997]
Done at Washington on 1 August 1997
Entered into force for Ireland on 1 August 1997.
Laid before Dail Eireann by the Minister for Foreign Affairs.
Pn.4404
C10.C5

International Grains Agreement 1995
Dublin Stationery Office [1997]
Done at Strasbourg 8 November 1990.
Entered into force internationally on 1 September 1993. Signed by Ireland on 15 October 1996. Ratified by Ireland on 28 November 1996.
Entered into force for Ireland on 1 March 1997.
Laid before Dail Eireann by the Minister for Foreign Affairs.
Pn.5042
C10.C5

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and Annex with Notifications made by Ireland upon Ratification, Declarations, Reservations and Objections Dublin Stationery Office [1997]
Concluded at Vienna on 20 December 1988. Signed by Ireland on 14 December 1989. Entered into force internationally on 11 November 1990. Instrument of Ratification deposited by Ireland on 3 September 1996.
Entered into force for Ireland on 2 December 1996.
Laid before Dail Eireann by the Minister for Foreign Affairs.
Pn.4403
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Legal Aid

Article

Civil Justice and Legal Aid in the UK – a Glimpse at the Future
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Criminal Justice (Legal Aid) (Amendment) (No.2) Regulations, 1998
SI 160/1998

Licensing

Royal Dublin Society v. Revenue Commissioners
High Court: **Barr J.**
27/05/1998

Judicial review; certiorari; statutory interpretation; application for theatre licence refused; whether premises constitute a 'place of public entertainment' for the purposes of obtaining a licence; interpretation of word 'theatre'; application of ejusdem generis rule; s.7 Excise Act, 1835; ss.20 & 21 Intoxicating Liquor Act, 1927
Held: Relief refused

Local Government

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Housing (Accommodation Provided by Approved Bodies) Regulations, 1992 (Amendment) Regulations, 1998
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Medical Law

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Irish Medicines Board (Competent Authority) Order, 1998
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Pensions

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Pensions Revenue Law and Practice Finance Act 1997
McLoughlin, Aidan
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M336.34.C5

Planning

Mc Carthy v. Mc Grath
High Court: **Geoghegan J.**
15/05/1998

Planning permission; prior application for leave to seek Judicial Review; time limit; whether application made within prescribed statutory time; whether co-appellants were served with the application for leave to bring Judicial Review proceedings within the prescribed statutory time; whether co-appellants were parties to the appeal to An Bord Pleanála; s 19(3), Local Government (Planning and Development) Act, 1992
Held: Application for leave properly constituted

Practice and Procedure

Lismore Homes Limited v. Bank of Ireland Finance Limited
Supreme Court: **Barrington J., Lynch J., Barron J.**
11/02/1998

Security for costs; plaintiff companies put into receivership by security holder; actions brought by plaintiffs alleging wrongdoing by security holder and receiver; criteria governing grant of security for costs; whether court entitled to look to strength of parties' cases; whether security holder and receiver responsible for insolvency of plaintiffs; s. 390 Companies Act, 1963
Held: Security for costs ordered in favour of some defendants

Todd v. Judge Murphy
High Court: **Geoghegan J.**
15/05/1998

Judicial Review; transfer of criminal trial; publicity; jurisdiction of District Court Judge; whether Judge erred in law in exercising his jurisdiction in light of publicity; whether danger of a prejudiced jury; whether s 32, Courts and Court Officers Act, 1995 is constitutionally invalid
Held: Application refused

Articles

Rules of the Superior Courts Order 11 - Service Outside the Jurisdiction
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Duties of Disclosure and the Elective Patient – a Case for Informed Consent
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4 (1998) MLJI 25

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Property

DBP Construction Limited v. Industrial Credit Corporation
Supreme Court: **Hamilton C.J., Keane J., Barron J.**
21/05/1998

Sale of property; negligence; breach of contract; property mortgaged to the respondents; default in repayments; property sold; whether property sold at a gross under value; whether solicitor failed to give advice to plaintiffs in relation to transaction; claims for negligence and breach of contract dismissed; whether trial judge erred in law and fact; whether findings of the trial judge were against the evidence and the weight of the evidence
Held: Appeal dismissed

Articles

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Phelan, Sarah Marie
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19/05/1998

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Held: Court not entitled to look to intention of testatrix

Mulhern v. Brennan
High Court: **McCracken J.**
26/05/1998

Will; construction; testamentary disposition; interpretation of phrase "dying without issue"; each of the four sons died without issue after the death of the testator; whether the gifts only took effect where the beneficiary died without issue during the lifetime of the testator; consideration of whether there was a contingency; presumption against intestacy considered
Held: Last son takes absolutely; gifts took effect upon the death of the beneficiaries without issue at any time, whether before or after the death of the testator

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Held: Amount of increase is income of widow; income tax payable on amount of increase

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Pn.4402
C10.C5

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Dublin Stationery Office [1997]
Done at New York on 20 June 1956. Entered into force internationally on 25 May 1957. Instrument of accession deposited by Ireland on 26 October 1995. Entered into force for Ireland on 25 October 1995.
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Pn.4400
C10.C5

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commenced on signing

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s 24-28 commenced 19/06/1996
rest commenced on signing

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2nd stage - Seanad

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1st stage - Seanad [P.M.B.]

Tribunals of Inquiry (Evidence) (Amendment) (No.2) Bill, 1998
1st stage - Dail [P.M.B.]

Turf Development Bill, 1997
Committee - Dail

Urban Renewal Bill, 1998
Committee - Dail

Abbreviations

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

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Citing the M.I.B.of Ireland as a co-defendant

In the case of *Nicholas Devereux v. the Minister for Finance and Motor Insurers' Bureau of Ireland*, the plaintiff claimed to have suffered severe personal injuries, loss and damage as a result of being permitted to jolt violently whilst travelling as a passenger in a troop carrier truck owned by the First Named Defendant. Allegedly the troop carrier made a stop to avoid an unidentified and untraced motorist and in the process the Plaintiff was thrown forward and badly injured.

The Bureau was sued due to the involvement of the unidentified and untraced motorist, pursuant to the provisions of the Motor Insurers' Bureau of Ireland Agreement of 1988.

In those circumstances counsel on behalf of the Bureau applied in the Common Law Motions list for an order dismissing the proceedings against the Second Named Defendant, asserting that the proceedings were misconceived and not in accordance with Clause 2 of the Agreement dated the 21st of December 1988 and made between the Minister for the Environment and the Bureau.

Mr Justice O'Sullivan delivered his judgment on the 10th of February 1998 thus;

> "the Second Named Defendant seeks an order dismissing the proceedings against it on the basis that the said proceedings are misconceived and not in accordance with Clause 2 of the agreement dated the 21st of December 1988 and made between the Minister for the Environment and the Motor Insurers' Bureau of Ireland."

Clause 2 of the agreement states:
M.I.B. of I. hereby agrees that a person claiming compensation (hereinafter referred to as 'the claimant') may seek to enforce the provisions of this Agreement by;

1. making a claim to M.I.B. of I. for compensation which may be settled with or without admission of liability,

   or

2. citing as co-defendants M.I.B. of I. in any proceedings against the owner or user of the vehicle giving rise to the claim except where the owner and user of the vehicle remain unidentified or untraced, or

3. citing M.I.B. of I. as sole defendant where the claimant is seeking a court order for the performance of the Agreement by the M.I.B. of I. provided the claimant has first applied for compensation to the M.I.B. of I. under sub-clause (1) of this clause, and has either been refused compensation by the M.I.B. of I. which the claimant considers to be inadequate.

Clearly the Bureau can be sued either as a sole defendant under Clause 2.3 or as a co-defendant under Clause 2.2. Prima facie the instant proceedings are misconceived under Clause 2.2 because it is common cause that the owner and user of the vehicle remain unidentified or untraced.

The Plaintiff says that Clause 6 overrides Clause 2.2. Clause 6 of the agreement states;

> "In the case of an accident occurring on or after the 31st day of December, 1988, the liability of the M.I.B. of I. shall extend to the payment of compensation for the personal injury or death of any person caused by the negligent driving of a vehicle in a public place, where the owner or user of the vehicle remains unidentified or untraced.

> "On careful consideration I find that there is no conflict between the Clauses. It is perfectly possible and correct to construe Clause 6 as clarifying the liability of the Bureau where the motorist is untraced. Clause 2.2 applies only where the owner and user of the vehicle remain identified and traced. In this case the Bureau must be cited as a sole defendant under Clause 2.3, therefore the proceedings are misconceived. In these circumstances I will make an order dismissing the proceedings against the Second Named Defendant with the costs of this motion awarded in favour of the applicant."

In reaching this decision, Mr Justice O'Sullivan considered counsel's note of an ex tempore judgment delivered on the 14th October 1996 by Mr Justice Morris, in a case entitled *Patricia Kavanagh v. Mary Reilly and the Motor Insurers' Bureau of Ireland.* Mr Justice Morris held that;

> "The Court in these proceedings is asked to oversee the provisions of the Agreement of the 21st December 1988 between the Minister and the Bureau. The Minister and the Bureau have worked out an arrangement which is comprised in the provisions of this Agreement relating to the compensation of persons injured by uninsured and untraced and unidentified motorists. The claimants are to be compensated under the form agreed and provided for in the terms thereof and it is provided at Clause 2 sub-section 3 that a party seeking to enforce the agreement should do so citing the Bureau as a sole defendant.

> "The Plaintiff had joined the Bureau as a co-defendant. It is not therefore in conformity with the provisions of the Agreement. I believe that the Bureau is entitled to make complaint in relation to this. The Bureau have no intention of taking the Plaintiff short in its requirement that it be sued as sole Defendant, and the claims of the Plaintiff against the Bureau will be dealt with on its merits. At this stage the provisions of the Statute will not be raised as the Bureau considers that it does not arise.

> "In my view the Court should not intervene with the provisions of the Agreement which have been set forth between the Minister and the Bureau or put an inappropriate burden on the Bureau in relation to its responsibility under the Agreement. The Agreement has been worked out carefully between the parties and there is in my view a logic and good business sense behind the provisions of the agreement. In these circumstances I believe it is correct and proper that the Plaintiff should conform with it and I will therefore strike out the proceedings but I will make no order as to the costs of this Application."

It is submitted that the appropriate situation in which to cite the Bureau as a co-defendant is where the offending motorist is identified and traced but uninsured.

— Morgan Jones, Barrister

Time is Money – The Impact of the Term Directive on Irish Copyright Law

NIALL O'HANLON, Barrister

Introduction

The European Communities (Term of Protection of Copyright) Regulations, 1995, (hereinafter 'the Regulations'), give effect to Council Directive No. 93/98/EEC of 29 October, 1993, (hereinafter the 'Term Directive'), harmonising the term of protection of copyright and certain related rights. This Article examines Regulations 1 through 9 of the Statutory Instrument.

Regulation 1

Summary

The title of the Statutory Instrument implementing the Regulations is specified in Regulation 1, as is the commencement date, which is 1st of July, 1995.

Regulation 2

Summary

Definitions of a variety of terms are set out in Regulation 2 and these are referred to at appropriate points in the Commentary on the Regulations which follow.

Regulation 3

Summary

The term of copyright subsisting in a work (literary, dramatic, musical or artistic), shall be the lifetime of the author of the work and a period of 70 years after the author's death, (post mortem auctoris or pma), irrespective of the date when the work is published or otherwise lawfully made available to the public.This Regulation transposes into Irish law, Article 1(1) of the Term Directive.

Regulation 3 modifies the following sections and subsections of the Copyright Act 1963 (hereinafter referred to as the Act), insofar as they fix the term of copyright protection;

- s8(4) and (5) - copyright in literary, dramatic and musical works,
- s9(5), (6) and (7) - copyright in artistic works,
- s51(3) and (4) - copyright in Government publications.

Although Regulation 3 provides that copyright shall, inter alia, subsist for a period of 70 years pma, the terms of Regulation 9 make it clear that such period of time shall be calculated from the first day of January of the year following the year in which the death of the author occurs. The terms of Regulation 9, prima facie, amount to a restatement of equivalent provisions in s8(4) and s9(5) of the Act.

Commentary

(i) The term of protection accorded to works under the copyright legislation comprises two components;
- the variable component - the life time of the author, and
- the fixed component - 70 years pma

The major change effected by Regulation 3 is to extend the fixed component of the term of protection from 50 to 70 years pma. A summary of the changes effected by the Regulations in respect of works is shown in Table 1.

(ii) The term of protection provided by Regulation 3 applies irrespective of when,
- the work is published, or
- otherwise lawfully made available to the public.

Accordingly, if a literary, dramatic or musical work is neither anonymous nor pseudonymous, (for which see Regulation 4), it would seem that it is no longer possible to defer commencement of the fixed component of the term of protection by ensuring that none of the acts set out in s8(5) of the Act are done before the death of the author. These acts are;
- the publication of the work,
- the performance of the work in public,
- the offer for sale to the public of records of the work, and
- the broadcasting of the work.

S8(5) provided that where none of the preceding acts had been done before the death of the author then copyright would continue to subsist for a period of 50 years from the end of the year during which the first of those acts to be done was done.

The conclusion that s8(5) no longer has such an effect is premised on a Court holding that the latter three acts have been subsumed into the alternative criteria set out in Regulation 3 of 'or other-

DURATION OF PROTECTION OF WORKS		
PUBLISHED / IDENTITY	YES	NO
KNOWN	70 years p.m.a. [Regulation 3]	70 years p.m.a. [Regulation 3]
UNKNOWN	70 years post publication [Regulation 4(1)]	70 years post creation [Regulation 5]

wise lawfully made available to the public'.

(iii) It will no longer be possible in the case of an engraving, as was the position under s9(6) of the Act, to defer commencement of the fixed component of the term of protection, by ensuring that publication of such engraving does not occur before the death of the author.

(iv) In the case of a photograph the fixed component of the term of protection will no longer commence from the end of the year in which the photograph is first published, as was the position under s9(7) of the Act.

(v) The term of protection for photographs has been significantly increased. A photograph will now also secure the variable component of the term of protection - the lifetime of its author.

(vi) In transposing the Term Directive into Irish law the option, provided by Article 6, of separately identifying and protecting photographs which are original, in the sense that they are the author's own intellectual creation, has not been taken up.

(vii) In the case of copyright in any original literary, dramatic or musical work to which the government is entitled Regulation 3:-
- substitutes the lifetime of the author and 70 years pma for 50 years from the end of the year in which the work was first published provided for under s51(3)(b) of the Act;
- removes the possibility of perpetual copyright, under s51(3)(a) of the Act, in respect of unpublished works.

(viii) In the case of copyright in an artistic work which belongs to the Government Regulation 3:
- substitutes the lifetime of the author and 70 years pma for 50 years from the end of the year in which the work was first published, provided for under s51(4)(a) of the Act, in the case of a photograph or engraving;
- extends the term of protection from 50 years from the end of the year in which the work was made, provided for under s51(4)(b), to the lifetime of the author and 70 years pma in the case of any other artistic work.

Regulation 4(1)

Summary

Where a work is anonymous or pseudonymous, any copyright in the work shall continue to subsist for a period of 70 years after the work is published or otherwise lawfully made available to the public.

Regulation 4(1), transposes into Irish law the first sentence of Article 1(3) of the Term Directive, modifying s15(2)(a) of the Act, which deals with the first publication of anonymous or pseudonymous works other than photographs.
By virtue of Regulation 9 the 70 year period commences from the first day of January of the year following the year in which the work is published or otherwise lawfully made available to the public. The terms of Regulation 9, prima facie, amount to a re-statement of an equivalent provision contained within s15(2)(a) of the Act.

Commentary

(i) Under Regulation 4(1) the term of protection is lengthened from 50 to 70 years.

(ii) Unlike s15(2)(a), Regulation 4(1) does not continue the reference to 'first' publication although this would seem to be implicit from a reading of the provision.

(iii) The stated criterion for commencement of the term of protection is widened from 'publication' to the work being 'published or otherwise lawfully made available to the public'.

(iv) The Regulation requires that the work be published or otherwise lawfully made available to the public. If the work is made available to the public in an unlawful manner it appears that such act would not be sufficient to trigger the protection period provided for in Regulation 4(1). However could the same be said of a publication which was not lawful?

(v) Unlike the position under s15(2)(a), photographs are now treated in the same fashion as other anonymous or pseudonymous artistic works.

(vi) As noted in (ii) above, the criterion has changed from first publication being anonymous or pseudonymous to the work being anonymous or pseudonymous. The Regulations do not expressly deal with a situation in which the identity of the author becomes known or the author identifies himself prior to the work being published or otherwise lawfully made available to the public.

Regulation 4(2)

Summary

Where;
- the pseudonym adopted by the author leaves no doubt as to the authors identity, (Part I) or
- if the author discloses his or her identity during the period of 70 years after the work is published or otherwise lawfully made available to the public;

the term of protection applicable shall be that provided for in Regulation 3, i.e. the lifetime of the author and 70 years pma (Part II)

The Regulation transposes into Irish law the second sentence of Article 1(3) of the Term Directive which is similar in wording to Article 7(3) of the Berne Convention for the Protection of Literary and Artistic Works, (hereinafter the Berne Convention). The Regulation is without prejudice to s15(2)(b) of the Act, which provides that s15(2)(a), (which has been modified by Regulation 4(1)), shall not apply to any work as respects which, at any time before the end of the period mentioned in the subsection, it is possible for a person, without previous knowledge of the facts, to ascertain the identity of the author of the work by reasonable enquiry.

Commentary

There are now three situations in which Regulation 4(1) will not apply:
(1) where it is possible to ascertain the identity of the author - s15(2)(b)
(2) where the pseudonym adopted leaves no doubt as to the authors identity - Regulation 4(2) - Part I
(3) where the author discloses his or her identity - Regulation 4(2) - Part II

(1) Section 15(2)(b)

(i) Whilst Regulation 4(2) is expressly stated to be without prejudice to s15(2)(b), very significant changes have been made to the circumstances in which the test set out in the subsection will operate.
- Originally the test set out in s15(2)(b) could only have effect

in relation to a literary, dramatic or musical work or an engraving, which was first published, anonymously or pseudonymously), during the lifetime of the author. In such a case, where the requirements of the test were satisfied, at any time before the end of the term of protection provided for in s15(2)(a) (50 years from first publication), to the lifetime of the author and 50 years pma provided for by s8(4) (literary, dramatic and musical works) and s9(5)(engravings).

However, if a literary, dramatic or musical work or an engraving was published, (anonymously or pseudonymously), after the death of the author, satisfaction of the requirements of s15(2)(b) would merely result in the s15(2)(a) term of protection, (50 years from date of publication), being replaced, in the case of literary, dramatic and musical works by the s8(5) term (50 years from, inter alia, first publication) and in the case of an engraving, by the s9(6) term (50 years from first publication), thus rendering application of the s15(2)(b) test academic.

Now, under Regulation 3, where a work has been published, the term of protection shall be the lifetime of the author and 70 years pma, irrespective of the date when the work is published. Accordingly s15(2)(b) now has the potential to vary the term of protection of a work even where such a work has been published posthumously.

- The test set out in s15(2)(b) operates in the context of s15(2)(a), which has been significantly modified by Regulation 4(1).

(ii) Under the test set out in the Act all that is required is that it is possible to ascertain the authors identity by reasonable enquiry. There is no requirement that anybody should actually make such an enquiry.

(2) Regulation 4(2) - Part I

It is suggested, that Regulation 4(2) - Part I, will apply provided doubt as to the authors identity is resolved at any time prior to first publication or the work being made available to the public for the first time.

Regulation 4(2) lacks clarity in areas, e.g. who specifically must be in doubt as to the author's identity. It is suggested that the approach of s15(2)(b) is preferable, which states where it is possible for a person without previous knowledge of the facts, to ascertain the identity of the author by reasonable enquiry.

(3) Regulation 4(2) - Part II

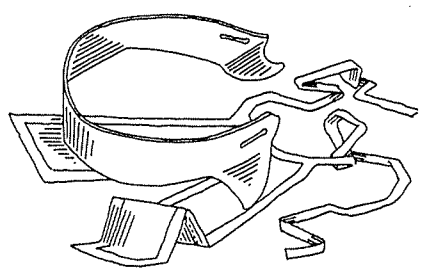
The wording of this Part gives rise to the following questions:

- Must the author make the disclosure personally or can such disclosure be made through a representative, for example, a literary agent or solicitor?
- Does the requirement that an author disclose his or her identity during the period of protection afforded by Regulation 4(1), preclude the possibility of a posthumous disclosure within such period?
- If disclosure can be made through a representative, what would be the effect of such disclosure, if made inadvertently or in breach of the author's wishes? Even if such disclosure was not sufficient, for the purposes of Part II, it would be likely to satisfy the requirements of s15(2)(b)?
- If disclosure to any person other than the author is sufficient, e.g. a solicitor or literary agent, will the reason for such disclosure, (for example, is it for the purpose of communication to the general public or for some other unrelated reason), be a factor in determining whether the requirements of Part II have been satisfied?

Regulation 5

Summary

Where the term of protection is not calculated from the death of the author or authors of the work, and the work has not been published or otherwise lawfully made available to the public within 70 years of its creation, protection shall terminate.



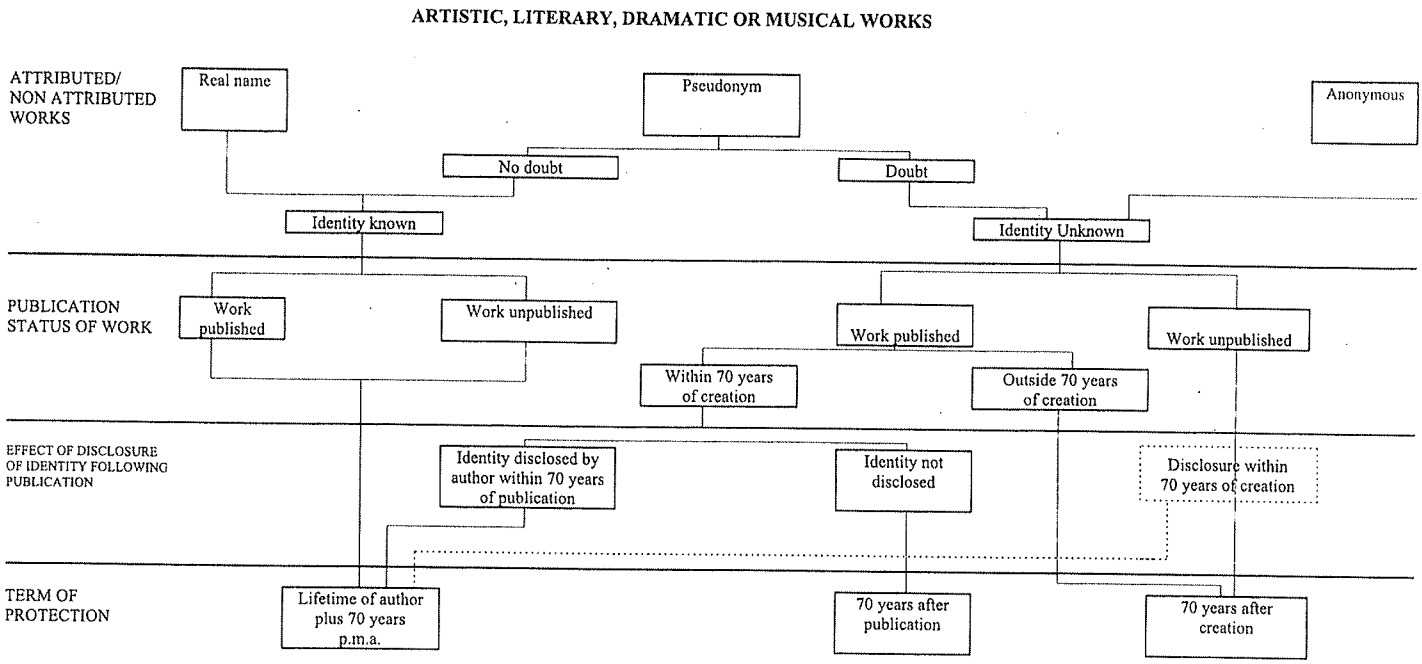
The Regulation, which transposes into Irish law Article 1(6) of the Term Directive, modifies s8(5), s9(6) and (7) and s51(3) and (4) of the Act. By virtue of Regulation 9 the 70 year period of protection shall be calculated from the first day of January of the year following the year in which the work is created.

Commentary

The flowchart contained in Diagram 1 summarises the combined impact of Regulations 3 to 5.

(i) It is submitted that the fixed component of the term of protection is calculated from the death of the author in the following circumstances.
- Where the identity of the author is known from the time the work is created, i.e. where the author uses his/her real name.
- Where the pseudonym adopted by the author leaves no doubt as to the authors identity - (Regulation 4(2) - Part I).
- Where the work is anonymous or pseudonymous and is so published or otherwise lawfully made available to the public, (provided such publication etc. occurs within 70 years of the creation of the work), but the author discloses his or her identity during the period of protection afforded by Regulation 4(1) - (Regulation 4(2) - Part II).
- Where the work is anonymous or pseudonymous but disclosure of identity occurs prior to publication (provided such disclosure occurs within 70 years of the creation of the work).
- Where it is possible to ascertain identity in accordance with the criteria set out in s15(2)(b) of the Act.

It is submitted that in each of the circumstances outlined above the term of protection set out in Regulation 3 will apply. It is suggested that disclosure of identity, in the case of an anonymous or pseudonymous work, in the absence of a work being published or otherwise lawfully made available to the public, may be effective to bring such a work within the terms of Regulation 3 provided such disclosure is made within 70 years of the creation of such a work. However, the Regulations do not expressly provide for this scenario and a conservative



approach would suggest that an individual in such a case should both publish the work and disclose his or her identity. It is unlikely that disclosure of identity in the case of an anonymous or pseudonymous work, outside the term of protection provided by Regulation 5, (70 years from creation), would be effective to bring such a work within the term of protection afforded by Regulation 3, for the following reasons:

- Regulation 5 provides that, inter alia, if the work has not been published or otherwise lawfully made available to the public within 70 years of its creation the protection shall terminate.
- An interpretation which allowed the revival of the term of protection under Regulation 3 in such circumstances would weaken the efficacy of Regulation 8.

Strictly, the fixed component of the term of protection of a work, is not calculated from the death of the authors of a work, in the case of works of joint authorship, (the wording of the Regulation), but under s16(3) of the Act, from the death of the author who died last.

Regulation 6

Summary

Copyright subsisting in a cinematograph film shall continue to subsist until the end of the period of 70 years after the death of the last of the following persons to survive, namely;

- the principal director,
- the author of the screenplay,
- the author of the dialogue,
- the composer of music specifically created for use in the cinematograph film.

The Regulation, which transposes into Irish law Article 2(2) of the Term Directive, modifies s18(2) of the Act, dealing with copyright in cinematograph films, by significantly extending the term of protection available to this subject matter.

By virtue of Regulation 9, the fixed component of the term of copyright shall be calculated for the first day of January of the year following the death of the last surviving person.

Commentary

(i) There is a change in the criterion for the commencement of the fixed component of the term of protection, from first publication to the death of the last of one of four identified categories of person to survive.

(ii) The duration of the fixed component of the term of protection has been increased from 50 to 70 years.

(iii) The variable component of the term of protection now depends upon the lifespan of the longest surviving person within the four identified categories, thus the variable component can no longer be indefinitely extended by withholding publication of the film. As against this however, it will now be possible to engage in commercial exploitation of the film by publication without, ipso facto, invoking the commencement of the fixed component of the term of protection.

(iv) Presumably more than one person can be the author for the purposes of this Regulation. If this is possible, the provision could be open to manipulation by adding young persons to the list of authors.

(v) Article 2(1) of the Term Directive states that the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors and that Member States shall be free to designate other co-authors. This provision of the Term Directive has not been transposed into Irish law by the Regulations.

(vi) Article 3(3) of the Term Directive dealing with the duration of related rights, states that the rights of producers of the first fixation of a film shall expire 50 years after the fixation is made. However, if a film is lawfully published or lawfully communicated to the public during this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. The term 'film' which is defined in broader terms than under the Copyright Act, 1963, shall designate a cinematographic or audio-

visual work or moving images, whether or not accompanied by sound. This provision of the Term Directive has not been transposed into Irish law by the Regulations.

(vii) The combined effect of Articles 2(1) and 3(3) is to create two sets of rights in cinematographic or audiovisual works, that is;
- a copyright under Article 2(2) which is attributable to the principal director as author or one of the co-authors, and
- a related right under Article 3(3) which is attributable to the producer.

Whilst there is no bar on an author (or authors) of the cinematographic or audiovisual work assigning copyright to a producer, the ability of Member States to designate the producer as a co-author would seem to be constrained by the clear statement in Article 3(3) of the nature of producers rights.

(viii) The combined effect of Regulation 6 and s18(3) of the Act is to confer on the producer of a cinematographic film an extended term of copyright. It is submitted that this represents a failure to properly transpose the relevant provisions of the Term Directive. The correct approach would require:
- The designation of the principal director as an author of a cinematograph film with an entitlement to copyright of a duration as specified in Regulation 6, (Article 2 (2) of the Term Directive).
- The modification of the related rights of the producer of a cinematograph film, as contained in s18(3) of the Act, (and described as copyright), by the provisions of Article 3(3) of the Term Directive.

(ix) Regulation 7(1) makes reference to s17(3) of the Act, which deals with commissioned works - Regulation 6 makes no reference to the equivalent provisions relating to cinematographic films - namely s18(3) of the Act.

Regulation 7(1)

Summary

The term of protection as respects the rights of the maker of a sound recording in such a sound recording (or, as the case may be, where a person commissions the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the recording is made in pursuance of that commission, that person, in the absence of an agreement to the contrary) shall expire 50 years after the sound recording is made.

Regulation 7(1), which transposes into Irish law the first sentence of Article 3(2) of the Term Directive, modifies s17(2) of the Act which deals with copyright in sound recordings.

By virtue of Regulation 9 the 50 year period of protection runs from the first day of January of the year following the year in which the recording is made.

Commentary

(i) Regulation 7(1) modifies s17(2) of the Act, by providing that the term of protection is to run from the date on which the recording is made rather than from the end of the year in which the recording is first published.

(ii) The duration of the term of protection, which is a fixed period, remains unaltered at 50 years although, it is possible, at any time during such term of protection to substitute the fixed term provided for by Regulation 7(2), (see below), provided specified conditions are satisfied. The combined effect of Regulations 7(1) and 7(2) is to allow a sound recording to benefit from two fixed terms of protection of up to 100 years.

(iii) It will no longer be possible, as was the case under s17(2), to indefinitely extend the term of protection by deferring publication of the subject matter.

Regulation 7(2)

Summary

Notwithstanding Regulation 7(1), if the sound recording is lawfully published or lawfully communicated to the public, during the period of 50 years after its making, the term of protection as respects rights in the recording shall expire 50 years from the date of the first such publication or the first such communication to the public whichever is the earlier.

Regulation 7(2) transposes into Irish law the second sentence of Article 3(2) of the Term Directive.

By virtue of Regulation 9, the period of protection runs from the first day of January of the year following the year in which the sound recording is first lawfully published or first lawfully communicated to the public, whichever is the earlier.

Commentary

(i) Regulation 7(2) reinstates the references to first publication contained in s17(2) of the Act, for the purpose of determining the fixed component of the term of protection in respect of published sound recordings.

(ii) Unlike s17(2) and Regulations 3, 4 and 5, Regulation 7(2) explicitly states that the first publication must be lawful.

(iii) Regulation 7(2) broadens the criteria for commencement of the fixed term of protection from first publication to include first communication to the public.

Regulation 7(3)

Summary

The term of protection as respects the rights of a broadcasting organisation in a broadcast shall expire 50 years after the first transmission of the broadcast. The Regulation, which transposes into Irish law Article 3(4) of the Term Directive, modifies s19(2) of the Act which deals with copyright in television and sound broadcasts. By virtue of Regulation 9, the 50 year period of protection runs from the first day of January of the year following the year in which the first transmission of the broadcast occurs.

Commentary

(i) The term of protection remains unchanged at 50 years.

(ii) Regulation 7(3) changes the criteria for commencement of the term of protection from the first making of the broadcast to the first transmission of the broadcast.

(iii) The Regulation no longer continues the distinction made in s19 between television and sound broadcasts.

(iv) The Regulation makes reference to first transmission however it does not explicitly state whether such transmission must be lawful.

(v) Whilst the Regulation makes reference to a broadcasting organisation, the Act only makes provision, in s19(1), for copyright to subsist in every television and sound broad-

cast made by Radio Eireann from a place in the State and in s19(3), for Radio Eireann to be entitled to any copyright subsisting in a television or sound broadcast made by Radio Eireann from a place in the State.

(vi) The Regulation refers to the transmission of a broadcast which seems to be a tautology. Although the term transmission is not defined in the Regulations, s19(2) of the Act defines a television broadcast as meaning visual images broadcast by television together with any sounds broadcast for reception along with those images whilst a sound broadcast means sounds broadcast otherwise than as part of a television broadcast.

Regulation 8

Summary

Regulation 8 confers rights, equivalent to the economic rights conferred on owners of copyright by the Act of 1963, in respect of a work (literary, dramatic, musical or artistic), or subject matter, (recording, broadcast or film), in relation to which the term of protection has expired, and publication has not previously occurred. The equivalent rights shall expire 25 years from the date on which the work or subject matter was first lawfully published or lawfully communicated to the public.

By virtue of Regulation 9 the 25 year period of protection runs from the first day of January of the year following the year in which first lawful publication or lawful communication to the public occur.

Commentary

(i) The term 'subject matter' does not appear in Regulation 8 and is used for the purpose of convenience.

(ii) Neither Regulation 8, nor the Statutory Instrument generally, deal with the term of protection for copyright in published editions of works which remains unchanged at 25 years under s20 of the Act.

(iii) Regulation 8 confers rights equivalent to the economic rights conferred on owners of copyright by the Act. Accordingly to the extent that the Act confers moral rights these are not transferred under Regulation 8.

Regulation 8 states, inter alia, 'Any person who, ...for the first time lawfully publishes or lawfully communicates to the public a previously unpublished ... work [or subject matter] ... shall, ...be entitled to rights ...'

This wording gives rise to the question of whether the 'first time' requirement to be read as applying to both dissemination options (i.e. publication and communication to the public) or to publication only?

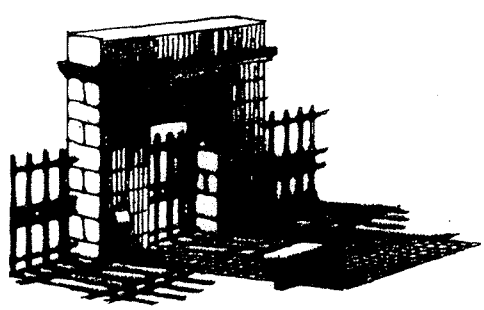
Regulation 9

Summary

Where a provision of these Regulations provides that a term of protection, (including a term of copyright), shall expire a specified period of time after, or, as the case may be shall subsist or continue to subsist for a specified period of time after, the happening of any event, that period of time shall be calculated from the 1st day of January of the year following the said event and a reference in a provision aforesaid to such a period of time shall be construed accordingly. Regulation 9 transposes into Irish law Article 8 of the Term Directive.

Commentary

(i) The term of protection provided under the Regulations comprises of two components, namely a variable component, the duration of which varies with the lifespan of the author and a fixed component of;
- 70 years in the case of literary, dramatic, musical or artistic works and cinematographic films.
- 50 years in the case of sound recordings and broadcasts.
- 25 years in the case of works or subject matters mentioned in (a) and (b) in respect of which the criteria set out in Regulation 8 can be satisfied.



Regulation 3 provides that the term of copyright 'subsisting...shall be the lifetime of the author ... and a period of 70 years after the authors death'. However, under Regulation 9, the period of 70 years is to be calculated from the first day of January of the year following the death of the author. On a purely literal interpretation it is submitted, that a gap of up to 12 months could exist between the death of the author and the commencement of the 70 year term.

On the other hand, the use of the word 'subsisting' arguably gives rise to a presumption of continuity, accordingly one single term of protection rather than two separate terms is created. The difficulty with this is that the presumption of continuity is undermined by the wording of, for example, Regulation 6 which states: 'The copyright subsisting...shall continue to subsist...'. If the word 'subsisting' gives rise to a presumption of continuity then the phrasing of Regulation 6 is tautological.

Also Regulation 9 provides that the period of time shall be *calculated* from, rather than commence from, the 1st day of January of the year following the said event.

A court would be likely to adopt a teleological approach when construing the Regulation. However in the event of a court finding such a gap in the Regulation the following arguments could be made:

The Term Directive

Article 1(1) of the Term Directive states: 'The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for 70 years after his death, ...' A copyright owner would most likely argue that the State had failed to properly transpose the provisions of the Term Directive into Irish law and seek to place reliance in this context on the Francovich decision.

The Berne Convention

Article 7(1) of the Berne Convention states: 'The term of protection granted by this Convention shall be the life of the author and fifty years after his death.'

The Berne Convention also provides, under Article 7(5): 'The term of protection subsequent to the death of the

author...shall *run* from the date of death...but such [term] shall always be deemed to begin on the first of January of the year following the death...'

Article 7(5) gives rise to the following issues. Ireland is a signatory to and has ratified the Berne Convention, though it has yet to ratify the Paris Act as it is obliged to do under the GATT/TRIPS Agreement. Under the dualist theory of international law, an Irish court is precluded from giving legal force to international treaties in that it must refuse to regard the provisions of such treaties as part of domestic law unless incorporated into it by the Oireachtas.8 However a Council Resolution of the European obliges Member States to undertake to accede to, inter alia, the Paris Act of the Berne Convention, before 11th January 1995.[9]

This raises the question of whether an individual copyright owner could seek to place reliance on Article 7(5) of the Berne Convention by invoking the terms of the Resolution.

In this instance the position is less certain.[10] In the Manghera case[11], the European Court of Justice found a Council Resolution incapable of engendering private rights; however, in *R v Tymen*[12] the Court found that a Council Resolution, like a Directive, provided a valid defence in Community Law for an individual charged with violation of Member State legislation enacted in contravention of such Resolution.

Were the requirements of the Council Resolution to be expressed in the form of a Directive then the position of an individual copyright would seem to be much more clearcut following the Francovich decision.[13]

Conclusion

The overall impact of the Term Directive on Irish law is to extend the period of copyright and related rights protection thus affording owners further opportunities to derive income from their rights. In this instance time, quite literally, is money. •

1. Statutory Instrument No. 158 of 1995
2. O.J. No. L290, 24.11.1993, p.9.
3. Paris Act, 24 July 1971.
4. *Francovich and Boniface v. Italy* [1991] ECR 5359; [1992] IRLR 84
5. See en 3
6. Agreement on Trade Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods (15th December 1993).
7. See generally Byrne and McCutcheon, *The Irish Legal System* 3rd Ed. (1996), at p.725.
8. For an application of this doctrine see *In re O Laighleis* [1960] IR93 and *Norris v Attorney General* [1984] IR36.
9. Referred to in Chang, *Moral Rights and the Irish Music Industry*, (1995) C.L.P. 243.
10. See generally Lasok and Bridge, *Law and Institutions of the European Communities*, 5th Ed., (1991) at pp156-7
11. Case 59/75: *Pubblico Ministero v Flavia Manghera* [1996] ECR 91, [1976] 1 CMLR 557.
12. Case 269/80: *R v. Tymen* [1981] ECR 3079, [1982] 2 CMLR 111.
13. See en 4

Criminal Liability for Environmental Pollution

GARRET SIMONS, Barrister

Causing or permitting

The main offences in connection with pollution are described in terms of causing or permitting. For example, under the water pollution legislation, it is an offence to cause or permit the entry of polluting matters to waters, and under the air pollution legislation, it is an offence to cause or permit an emission from premises in such a quantity, or in such a manner, as to be a nuisance. It is necessary therefore to examine what is required by these concepts. In particular, it must be considered whether the offences are ones of strict liability. It seems that 'causing' is the wider concept, and that convictions should normally be in respect of that offence.[1]

The leading English case is *Alphacell Ltd v. Wrothwell*.[2] There, the House of Lords gave a very literal interpretation to the term 'cause';

> "It seems to me that, giving the word 'cause' its ordinary and natural meaning, anyone may cause something to happen, intentionally or negligently or inadvertently without negligence and without intention... The appellant clearly did not cause the pollution intentionally and we must assume that they did not do so negligently. Nevertheless, the facts... to my mind make it obvious that the appellants in fact caused the pollution. If they did not cause it, what did?"

Thus, it was held that although the appellant company had not intended to cause pollution, it had in fact caused the pollution by the active operation of its plant. The whole complex operation which led to the pollution was deliberately conducted by the appellant company and the fact that a defect occurred without its negligence did not affect the cause of the pollution.

The decision in *Alphacell Ltd v. Wrothwell* has been followed by the Irish High Court in *Maguire v. Shannon Regional Fisheries Board*:[3] Lynch J. held that a pig farmer was to be regarded as having caused deleterious matter to fall into waters even in circumstances where the escape arose from an unexplained fracture in a pipe;

> "As regards the question of whether the appellant caused the deleterious matter to fall into the Finaway River one can enter into esoteric discussions as to the proximate cause, the causa causans and causa sine qua non, but to do so is to depart from common sense reality. No doubt the immediate or proximate cause of the flow of whey into the river was the fracture of the pipe but who caused the whey to be present in the pipe and therefore to escape into the river. The answer must surely be the activities of the appellant in running his piggery in the vicinity of the Finaway River and therefore the answer must be that it was the appellant who caused the whey to fall into the river."

This literal approach to the interpretation of the term 'cause' involves a finding that the offence of 'causing' is one of strict liability i.e. there is no requirement for the prosecution to establish an intention to cause the pollution. This is a matter which will be discussed below. The following examples illustrate the breadth of the offence.

(1) Latent defects in piping

A company which had purchased premises with defective piping was responsible for causing pollution notwithstanding that the piping had been installed before it had purchased the premises, and that as far as the company was concerned the defect in the piping was latent.[4]

(2) *Contamination by third party*

It seems that where a defendant has established a system for the deliberate discharge of [treated] matter into waters, then it is to be regarded as having caused the entry of any polluting matter carried in its discharge, even in circumstances where the contamination of its otherwise treated discharge is caused by the introduction of polluting matter by a third party.[5]

(3) *Unexpected results*

The facts that the results of an action are unexpected, as for example, where a person pours polluting matter into a drain in the mistaken belief that it leads to a public sewer and not

to a river, does not affect causation: if the person disposing of the polluting matter did not cause the pollution, then who did?[6]

(4) *Storage of polluting matter*
It appears to be more difficult to establish that a person responsible for the storage of polluting matter has caused its entry to waters. In circumstances where there has been a conscious discharge,[7] it appears irrelevant to the issue of causation that the contamination of the discharge by polluting matter was unintentional and/or caused by the fault of some third party.

The courts appear to take the view that a person who operates a system of discharge does so at his peril. Conversely, in the case of the passive storage of effluent which could not discharge into waters save by an act of God, or by the active intervention of a stranger,[8] the element of forseeability becomes more important. Thus, unforeseen acts of vandalism may have the effect that the vandals, and not the person responsible for the storage of the effluent, are to be regarded as having caused the entry.[9]

An offence of strict liability?

It remains unclear whether the offence of causing is one of strict liability or not, i.e. must the defendant have intended to cause the entry. Whereas the High Court has indicated that it is an offence of strict liability and that, accordingly, there is no need to establish intention or even negligence,[10] the Supreme Court appears divided on the issue.

When *Shannon Regional Fisheries Board v. Cavan County Council* came before the Supreme Court,[11] the majority (O'Flaherty and Blayney J.J.) held that it was not necessary on the facts to determine whether or not Section 171 of the Fisheries (Consolidation) Act, 1959 created an offence of strict liability; Keane J. in a comprehensive dissenting judgment, however, identified a distinction between offences of strict liability and offences of absolute liability, finding that Section 171 did have a mental element by way of defence.

The matter is complicated further in the context of certain offences, by the intrusion of a statutory defence of reasonable care. Again to take an example from the water pollution legislation, it is a defence to a prosecution for causing or permitting the entry of polluting matter to waters, for the accused to prove that he took all reasonable care to prevent the entry to waters.

Keane J. (dissenting) in *Shannon Regional Fisheries Board v. Cavan County Council* identified an intermediate range of offences in which while full proof of intention is not required and proof of the prohibited act prima facie imports the commission of the offence, the accused may avoid liability by proving that he took reasonable care; Section 171 fell into this category. In reaching this conclusion, Keane J. made a number of findings, set out below, which may be contrasted with the decision of Lynch J. in *Maguire*:

(i) The offence under Section 171 is not a trivial offence – it carries a maximum penalty of a fine of IR£25,000 and/or five years imprisonment. The courts should not assume that a wealthy corporation which recklessly or even deliberately pollutes the environment is guilty only of a quasi-criminal offence carrying little opprobrium;

(ii) If the objective of treating an offence as one of strict liability is to encourage greater vigilance, it is difficult to understand why a defence of reasonable care should be excluded – it would seem to encourage more lax standards on the part of a potential polluter to know that the expenditure of time and money on the taking of appropriate measures is going to avail him none;

(iii) The constitutional right to a trial in due course of law is relevant – to make every crime an offence of absolute liability would be to remove a fundamental protection of the Constitution.

Comment

The analysis put forward by Keane J. whereby the onus of establishing reasonable care is on the accused, probably has the effect that the test for causation remains the same. The prosecution need only establish the act of pollution; the burden of establishing reasonable care (or the absence of negligence) is then shifted to the defence. Accordingly, the cases discussed above remain relevant in so far as the issue of causation is concerned, but not necessarily in respect of the question of guilt. The distinction between active discharge operations and passive storage operations would appear to be irrelevant to this defence.

Keane J.'s analysis appears to mirror the provisions of the various statutory offences in that reasonable care is a matter to be proved by the defence, presumably on the balance of probabilities.[12] Section 3(5) of the Local Government (Water Pollution) Act, 1977 (as amended), for example, provides that it shall be a defence to a charge of committing an offence under the section for the accused to prove that he took all reasonable care to prevent the entry to waters to which the charge relates by providing, maintaining, using, operating, and supervising facilities, or by employing practices or methods of operation, that were suitable for the purpose of such prevention.

The implications of Keane J.'s dissent may be even further reaching, however. On the facts of *Shannon Regional Fisheries Board v. Cavan County Council*, it was conceded that the defendant local authority had caused the pollution; the local authority sought, however, to rely on the fact that it was under a statutory duty to receive sewage and attributed its inability to do so properly to the failure of central government to provide it with the necessary funding to upgrade its sewage treatment facilities. Keane J. accepted that the pollution was the result, not of the absence of reasonable care on the part of the local authority, but of the failure of the Minister of the Environment to provide them with the necessary monies.

Conversely, the majority[13] held that even if the offence was not one of strict liability, the fact that the local authority claimed that it had no alternative to do so, does not alter the character of its action in deliberately discharging imperfectly treated sewage into a river.

The broad interpretation taken by Keane J. to the concept of reasonable care so as to capture what effectively amounts to legal duress, is to be noted. Whereas, it is obvious that cases such as *Maguire* (where the farmer had spent considerable sums of money on equipment) would have to be reassessed to accommodate any defence of reasonable care, the relevance of the defence to facts such as in the Cavan County Council case would not have been as readily apparent.

Corporate offences

Particular provision is made under the various pieces of environmental legislation for offences committed by corporations. For example, Section 23 of the Local Government (Water Pollution) Act, 1990 provides;

> 'Where an offence... has been committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a person being a director, manager, secretary or other office of that body corporate, or a person who was purporting to act in any such capacity, that person shall also be guilty of an offence and liable to be proceeded against and punished as if he were guilty of the first mentioned offence.'

Similar provisions are to be found at Section 11 of the Air Pollution Act, 1987, and at Section 8 of the Environmental Protection Agency Act, 1992.

These provisions clearly envisage that a company may be convicted of an offence under the environmental legislation; so do the various provisions creating offences by reference to the conduct of 'any person'. The issue of corporate liability for crime is far from clear, however, and may need to be reassessed in the light of the dissenting judgment of Keane J. in *Shannon Regional Fisheries Board v. Cavan County Council.*

The difficulty arises in attributing guilt to the legalistic person of the company: this is usually done by identifying the actions of some person in the company as being those of the company itself. Generally, only the acts of those who may be regarded as being the controlling mind and will of the company, may give rise to criminal liability on the part of the company itself.[14] Thus, the actions of junior employees cannot normally be imputed to the company itself.

It was sought to overcome this difficulty in England in *National Rivers Authority v. Alfred McAlpine Homes East Ltd*[15] on the basis of strict liability. The offence of causing does not require an intention to pollute; accordingly, an employer is liable for pollution resulting from its own operations carried out under its essential control, save only where some third party acts in such a way as to interrupt the chain of causation. Thus the company was held to be liable for the acts of two junior employees which had led to cement being washed into a stream.

Equally, in *R. v. Environmental Protection Agency ex parte Shanks & McEwan (Teeside) Ltd*[16] it was held that a company had knowingly caused a deposit of controlled waste other than in accordance with a licence where the company knowingly operated and held out its site for the reception and deposit of waste. It was further held, in the circumstances, that it was unnecessary to show more specific knowledge on the part of senior management regarding the particular unauthorised deposit.

With respect, the concepts of strict liability, and vicarious liability, are distinct, and it does not necessarily follow from the fact that a statute is interpreted as creating a strict liability offence, that vicarious liability is also imposed.

The matter is further complicated where the offence of causing admits of a defence of reasonable care, as, for example, under Section 3(5) of the Local Government (Water Pollution) Act, 1977 (as amended). It is a defence for the accused to show that 'he' took all reasonable care. The use of the word 'he' indicates that the test of reasonable care is personal to the accused. Where the accused is an employer, the acts to be considered are those of the employer and not any negligent acts of his employees which he had taken reasonable care to prevent. The defence expressly recognises that pollution may be caused notwithstanding the taking of reasonable care; thus, in the context of the conduct of an employer, it cannot be intended to impose vicarious liability for all acts of an employee. It would seem to follow that a company, as employer, could only properly be convicted where the defence failed to establish that a person representing the controlling mind and will of the company took reasonable care. Thus, it would appear that a company could only be convicted of an offence where that offence was committed with the consent or connivance of, or to be attributable to any neglect of senior officers in the company and that, accordingly, a prosecution of an 'officer' of the company will always be appropriate wherever the company itself is convicted. ●

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1 Per Murphy J. in *Shannon Regional Fisheries Board v. Cavan County Council* High Court unreported 21st December, 1994.
2 [1972] A.C. 824
3 [1994] 3 I.R. 580
4 *R. v. C.P.C. (U.K.) Ltd, The Times* 4th August, 1994
5 *National Rivers Authority v. Yorkshire Water Services Ltd* [1995] 1 A.C. 444
6 *F.J.H. Wrothwell Ltd v. Yorkshire Water Authority* [1984] Crim. L.R. 43
7 Or a system which will result in a discharge in the case of a defective pump, as in Alphacell Ltd. itself.
8 *Impress (Worcester) Ltd v. Rees* [1971] 2 All E.R. 357; the facts of which were distinguished in *Alphacell Ltd v. Woodward* [1972] A.C. 824 at 847.
9 *National Rivers Authority v. Wright Engineering Co. Ltd* [1994] 4 All E.R. 281
10 *Maguire v. Shannon Regional Fisheries Board* [1994] 3 I.R. 580; *Shannon Regional Fisheries Board v. Cavan County Council* High Court (Murphy J.) unreported 21st December, 1994.
11 [1996] 3 I.R. 267
12 See, by analogy, *Convening Authority v. Doyle* [1996] 2 I.L.R.M. 213
13 O'Flaherty and Blayney J.J.
14 *Tesco Supermarkets Ltd v. Nattrass* [1972] A.C. 153
15 [1994] 4 All E.R. 286
16 [1997] J.P.L. 824

Strict Liability of Traders under European Community Law

EUGENE REGAN, Barrister

European Community (EC) regulations place various obligations on traders and operators in the agricultural sector who are in receipt of subsidies provided by the Common Agricultural Policy. The fulfilment of such obligations are guaranteed by the provision of bank securities which may be forfeited should the requisite obligations not be fulfilled. In many instances, through no fault of the trader, it may prove impossible to fulfil the obligations laid down in EC regulations, yet the grounds for avoiding the repayment of the aid in question and/or avoiding the forfeiture of the related securities are so restrictive that one may argue that a rule of strict liability applies.

A trader, who gets into difficulties in complying with EC regulations, due to exceptional or unforeseen circumstances traditionally relied on the concept of force majeure in seeking relief from the relevant authorities. For reasons set out below, seeking relief from one's obligations under EC regulations on grounds of force majeure rarely succeeds and even if one succeeds a trader will usually only obtain a partial relief from the full financial consequences of non-compliance with the rules.

Consequently traders tend to have recourse to the more general legal principles developed by the European Court when seeking redress from the consequences of a strict application of regulations but with very limited success.

However, a recent judgment of the European Court in *Landbrugministeriet v. Steff-Houlberg Export I/S and Nowaco A/S*[1] has to some extent, broken new ground in regard to the question of strict liability. This judgment should assist traders in arguing their case with national and EC authorities against a strict application of EC regulations when, due to factors outside their control, they find they are simply unable to comply with the letter of the law. This judgment, the details of which are set out below, would suggest that a rule of strict liability in such cases, does not necessarily apply.

EC Regulation - Force Majeure

EC law provides a specific mechanism by which traders may seek to avoid the imposition of penalties by the authorities for failure to fulfil their obligations under EC Rules. The mechanism, found in most regulations in the agricultural sector, is provided by the concept of force majeure.

This concept was defined by the European Court in *Internationale Hanldelsgesellschaft v. Einfuhr - Und Vorratsstelle*[2]

> "The concept of force majeure is not limited to absolute impossibility but must be understood in the sense of unusual circumstances outside the control of the importer or exporter, the consequences of which in spite of the exercise of all due care, could not have been avoided except at the costs of excessive sacrifice."[3]

The European Commission in a Notice on the concept of force majeure adopted the definition in *Internationale Hanldelsgesellschaft*[4] and concluded that;

1. Force majeure is an exception to the general rule that the rules in force must be strictly observed; hence, it must be interpreted and applied restrictively.
2. Force majeure is not a general principle of law, but can be regarded, in exceptional cases, as an embodiment of the principle of proportionality, in the strict conditions laid down by the Court's decisions.
3. The proof required of traders who rely on force majeure must be incontrovertible.

In practice this concept has not provided much relief to traders who found that through no fault of their own, obligations under EC regulations were not fulfilled as a result of exceptional and unforeseen events. A number of the rulings of the European Court serve to illustrate this point:-

1. *Firma Milch-, Fett- und Eierkontor GmbH v. Bundesanstalt fur landwirtschaftliche Marktordnug*[5] held:-

   > "Where the purchaser of the butter from storage referred to in regulation 1308/68 of the Commission of 28 August, 1968, resells it to a third party for export in accordance with that regulation, the fact that it is impossible to export the butter because it has been diverted from its proper destination by the criminal acts of a duly authorised agent of that third party to the detriment of the latter, does not constitute a case of force majeure within the meaning of the first sub-paragraph of Article 4(3) of the said regulation."

2. *Anthony McNicholl Ltd & Others v. Minister for Agriculture*[6] held:

   > "The failure of a purchaser of beef held in intervention storage and intended for exportation to fulfil his obligation to export it, as a result of fraud or negligence or combination of fraud and negligence on the part of an independent courier to whom the transport of the goods was sub-contracted, does not constitute a case of force majeure within the meaning of Article 11 of Commission regulation EEC No 1687/76 of 30 June, 1976 laying down common detailed rules

for verifying the use and/or destination of products from intervention."

3. *Organisationen Danske Slagterier agissant pour Jydske Andelsslagteriers Konservesfabrik AmbA (Jaka) v. Landbrugsministeriet*[7] held:

"Articles 36 and 37 of Commission regulation 3183/80 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products must be interpreted as meaning that there is no force majeure where supplies of raw materials to an undertaking which has obtained an advance fixing certificate are halted owing to a lawful strike in other undertakings...."

4. *An Bord Bainne Co-operative Ltd & Compagnie Interagra SA v. Intervention Board for Agricultural Produce*[8] held:-

"The amendment of the legislation of a non-member country governing the quality of imported products in consequence of which it is impossible to carry out an export to that non-member country, planned by a trader and entailing commitments on his part such as the lodging of a security under the rules on tenders in regulation 765/86, laying down detailed rules for the sale of butter from intervention stock for export to certain destinations, must be regarded as a circumstance outside the control of the trader concerned. However in the case of exports to a state trading country, such an occurrence cannot be regarded as abnormal and unforeseeable. On the contrary it constitutes usual commercial risk in commercial transactions with an organisation of such country which is directly subject to the public authority of that state. Traders who engage in such transactions run the risk that the legislation governing the import of products sold to that state trading organisation will subsequently be altered by sovereign act of the state in question, even after a very long period of stability. A prudent trader, who cannot be unaware of that risk and who is at liberty to choose his trading partners, must take appropriate precautions, either by inserting a suitable clause in the contract or by taking out specific insurance. If that is not possible and he still enters the contract, he accepts that risk and must bear the consequences"

5. *Belgian State v. Boterlux SPRL*[9] held:-

"Even if fraudulent re-importation into the Community may be a circumstance beyond the control of the exporter, it nonetheless represents an ordinary commercial risk and cannot be regarded as being enforceable in the contractual relations entered into on the occasion of an export qualifying for refund. The conditions for there to be a case of force majeure, as constructed in the sphere of the agriculture regulations, are therefore not met."

"The exporter's good faith and the fact that he did not take part in the fraud cannot be taken into account either because the exporter can ensure, by contractual measures, that purchasers do not fraudulently divert the goods from their destination. It is for the exporter to take the appropriate precautions either by including the requisite clauses in the contract in question or by effecting specific insurance."

The effect of the above mentioned cases has been threefold:-

1. Traders who get into difficulties complying with the letter of EC regulations are very reluctant to seek relief from the public authorities on the basis of the principle of force majeure.

2. National administrations are most reluctant to grant force majeure to specific traders without written approval by the European Commission, notwithstanding the fact that it is the national authorities who have responsibility for determining the existence or otherwise of force majeure in specific cases, for fear of having the relevant expenditure disallowed under the Community's clearance of accounts procedure.

3. The European Commission refrains from approving the application of force majeure on a case by case basis. Without acknowledging the existence of force majeure the Commission tends to resolve difficulties of traders, in very exceptional cases, by adopting regulations to deal with the specific problems in question. This obviates the need to resort to the concept of force majeure.

Consequences of Force Majeure

Even where force majeure has been accepted, the European Commission only relieves the trader of the discretionary element* involved in the bank securities provided to guarantee the fulfilment of obligations under the regulations. In all cases actual expenditure under the European Agricultural Guarantee and Guidance Fund (FEOGA) have to be repaid. In two notable cases, which involved the exportation of beef from Ireland to the Middle East, while force majeure was accepted by the authorities, the exporters in question were required to refund the export subsidies granted on the product in question:-

1. *The Queen v. Intervention Board for Agricultural Produce, ex-parte Tara Meat Packers Ltd.*[10] The Court held in the case of exportation of beef by Tara Meats Ltd to Egypt that the regulations 'do not entitle a trader to a differentiated refund for exports of beef to a non-member country in a case where the goods exported were destroyed as a result of force majeure after leaving the customs territory of the Community and prior to importation in the unaltered state into the non-member country of destination.'

2. *Anglo Irish Beef Processors International v. Minister for Agriculture, Food and Forestry.*[11] Anglo Irish Beef Processors were prevented from exporting beef to Iraq due to the introduction of a UN embargo on trade with that country following the Gulf War. The Court held:

"Article 33(5) of Commission regulation 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products, as amended by Commission regulation 354/90 of 9 February, 1990, is to be interpreted as meaning that where, owing to force majeure, goods do not reach their intended country of destination but are exported to other non-member countries which qualify

> for a lower export refund or none at all, the security forfeited is to be equal to the difference between the amount of the refund paid in advance and that of the refund actually due.'

The practical lesson from such cases is that a prudent trader, notwithstanding the excessive cost, is inclined to insure all of the bank securities put in place guaranteeing the fulfilment of obligations under EC regulations.

General Principles of Community Law

The general principle of legitimate expectations and proportionality have not tended to afford operators much relief from the strictures of EC regulations. In relation to legitimate expectations, it is normally considered that such expectations can not arise since the obligations to be fulfilled, giving rise to the payment of EC aid, are specified in the regulations. Proportionality arguments intended to reduce penalties are also generally rejected on the basis that any penalties which are imposed are commensurate with the objective of the legislation.

The principle of proportionality was defined in *Internationale Hanldels Gesellschaft v.. Einfuhr - Und Vorratsstelle*[12] as follows:-

> 'citizens may only have imposed on them, for the purposes of the public interest, obligations which are strictly necessary for those purposes to be attained.'

In *EDF and Man v. Intervention Board*[13] it was held that where the objective of a deposit was to ensure that sugar was exported, it was a breach of the principle of proportionality to require the forfeiture of the whole deposit when the exporter was late by some hours in applying for the export licence.

The agricultural regulations now tend to distinguish between primary and secondary obligations and provide in most cases for a variation in penalties for breach of the latter obligations.

The leading case on proportionality is, of course, *Bela-Muhle v. Grows Farm*[14] usually referred to the 'Skimmed Milk Powder case'.

The principal of legitimate expectations has been used successfully to challenge the validity of regulations as in *Mulder v. Minister Van Landbouw En Visserij*[15] but very rarely to mitigate the rigorous application of regulations on traders. In *Delacre v. Commission*[16] the court held that 'traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained.'

The issue of the good faith of a trader has never on its own been sufficient to relieve that trader of his/her obligations under the EC regulations, although it is an essential ingredient if a trader is to be relieved of penalties arising from non-fulfilment of the regulations as illustrated in *Gebruder Gausepohl v. Hauptzollamt Hamburg-Jonas.*[17]

In the case of *Belgium State v. Boterlux SPRL*[18] the court held that 'the exporter's good faith and the fact that he did not take part in the fraud cannot be taken into account either because the exporter can ensure by contractual measures that purchasers do not fraudulently divert the goods from their destination.'

Other principles such as equality of treatment and non-discrimination and legal certainty tend to have little relevance to the strict application of EC regulations in respect of traders' obligations.

An involuntary mistake or human error is a concept which the European Commission is prepared, at times, to entertain in order to relieve a trader of his strict obligations under EC regulations. The Commission will examine if the trader was acting in good faith, exercised all due diligence expected of a prudent trader and if there were exceptional circumstances which gave rise to confusion in the mind of the trader which accounted for the non-compliance with the rules. The concept of excusable error was pleaded in *Bayer AG v. EC Commission*[19] without success.

Recent Case Law of European Court

The judgment of the European Court in *Landbrugministeriet v. Steff-Houlberg Export I/S and Nowaco A/S*[20] throws new light on many of the concepts and principles referred to above and provides some comfort to traders who may be faced with the imposition of financial penalties through bank security forfeiture or the repayment of subsidies, arising from events of an unforseen and exceptional nature and of which they may be totally blameless or even unaware.

The facts may be summarised as follows: In 1989, the Ministry of Agriculture in Denmark was informed that, according to tests carried out in the Middle East, beef products originating in Denmark and sold to the Middle East contained pork. Danish customs authorities carried out inspections at Slagtergarden's manufacturing premises where the product was produced. The investigations revealed that the composition of the products manufactured by Slagtergarden differed considerably from that indicated to the purchasers, the traders/-defendants in the case, and to the authorities. Some of the meat qualifying for an export refund had been replaced by other ingredients not qualifying for refunds. Thus the beef content of the product in respect of which the exporter undertakings had applied for and received export refunds was in fact only 28% rather than the required 60%. The Ministry consequently sought to recover the refunds. At the same time, criminal proceedings were brought against the manager of Slagtergarden.

The exporter undertakings contested the Ministry's claim for repayment on the grounds that they could not be held liable for the 'reprehensible conduct' of the manufacturer, Slagtergarden. As trading undertakings' they had no contact with the goods and therefore had no opportunity to check them. The checks were always carried out exclusively by the competent authorities. Serious inadequacies were detected in the monitoring system operated by the Ministry and the Customs Authorities. By judgments of 29 June, 1992 the Eastern Regional Court in Denmark upheld the exporter undertakings contentions and thus held that under national law they could not be required to repay the sums received. It acknowledged that the exporter undertakings had acted in good faith, that the irregular payment of the refunds resulted from special circumstances of an exceptional nature and that, on the basis of the evidence adduced in the course of the proceedings concerning the organisation of the authority's monitoring system and the manner in which it operated in practice, it was most appropriate for the authority which paid the refunds to bear the attendant risks.

The Ministry appealed that decision and the matter was referred to the European Court, in which specific refer-

ence was made to the principles laid down by the Court in joined cases, *Deutsche & Milchkontor and others*[21] (hereinafter referred to as Deutsche & Milchkontor).

1. The Requirement of Good Faith as a Condition for Protection of Legitimate Expectations

The Court reiterated the legal position regarding member states' obligations in safeguarding the Community's financial interests. The court stated 'it should be recalled that it is for the member states by virtue of Article 5 of the EC Treaty, to ensure that Community regulations, particularly those concerning the common agricultural policy, are implemented within their territory, likewise, it follows from Article 8(1) of regulation EEC 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy that member states must take the measures necessary to recover sums lost as a result of irregularities or negligence.'

On the question of good faith, the Commission argued that the court has already established a system of strict liability and referred to the judgment in *Plange*[22].

The Court held that in the present case, in contrast to *Plange,*[23] 'there is no community provision governing the recovery of refunds paid on the basis of documents subsequently shown to be inaccurate. Regulation 2945/94, upon which the Commission relied in support of its argument, does not apply ratione temporis to the refunds in question. Accordingly, if an exporter draws up and submits a declaration with a view to obtaining export refunds, the mere fact of having prepared that document cannot deprive him of the right to plead his good faith, when the declaration is based exclusively on information which was provided by the other party to a contract and the accuracy of which he was unable to establish.'

The Court noted that the exporters pointed out that the only practical means for them to have detected the fraudulent composition of the meat supplied by the manufacturer would have been to supervise production. Such supervision of the other partys' performance of its contractual obligations would not, however, have been practical, in view of the technical difficulty involved and the fact that such a procedure, which is very expensive, is not common practice in the sector concerned. The Court concluded on this point that 'if that were the case, such supervision would be onerous and technically difficult to carry out and the obligation would thus be disproportionate to the object pursued. In those circumstances, therefore, Community law cannot make the exporter's right to plead his good faith as regards the conformity of the goods with the description given by him in the declaration submitted in order to obtain an export refund, conditional on him supervising the manufacturing process or checking the raw materials used by his third party supplier, in order to verify the quality of those goods, unless there are specific reasons to doubt that the content of the declaration is accurate or special circumstances, such as abnormally low prices or the size of the exporter undertakings profit margin.'

2. Fault on the part of a Third Party

The Court noted that the Danish Ministry of Agriculture and the Commission claimed that, in accordance with the judgment in *Boterlux,*[24] fraudulent behaviour by a third party should be considered to be an ordinary commercial risk for the recipient of the aid and repayment cannot therefore be excluded.

The judgment states that 'the court considered in *Boterlux*, at paragraph 35, that in the context of an application for export refunds governed by Community Law, fraudulent behaviour by a third party does not amount to force majeure but constitutes an ordinary commercial risk. Although, in contrast to the present case, that judgment was not given in the context of repayment governed by national law, it is nonetheless the case that when a balance must be struck between the interests of the community and those of the trader, the national court must take into account the fact that fault on the part of the third party with whom the recipient of the aid has entered into a contract concerns more closely the sphere of the recipient of the aid than that of the community.'

3. Negligence on the part of the National Authorities

The Court held 'it is for the national court to determine the controls necessary for this purpose, having regard to the circumstances of the case and the technical methods available at the time for the product in question and therefore the existence and degree of negligence, if any. If the circumstances referred to by the national court are established, there is no apparent reason why the conduct of the national authority should not be treated as negligence which may exclude repayment. Likewise, the identification of negligent conduct on the part of the national authorities by a Community body such as the Court of Auditors is a specific indication in that respect.'

4. Grounds of Equity

The national court asked whether the lapse of five to ten years since the payment of the aid and the fact that any repayment would be particularly onerous for the recipients could be taken into account.

The Court stated that 'Community law does not prevent the national legislator from having regard, in excluding the recovery of aids unduly paid, to such considerations as the passing of a time limit.

'In this case it follows from the explanations given by the national court that, under Danish law, the national authorities have a discretion to refuse or to grant recovery of aid unduly paid, having regard to the period of time which has elapsed since the refunds were paid. Community law does not preclude that ground of equity from being taken into account provided, however, that it satisfies the condition set out in Deutsche Milchkontor.'

The court concluded therefore that 'Community law does not in principle preclude a national rule from allowing non-recovery of Community aid unduly paid, regard being had to criteria such as negligence on the part of the national authorities and the fact that a considerable period of time has elapsed since the payment of the aid in question, on condition that the good faith of the recipient is established and provided that the same conditions apply as for the recovery of purely national payments and that the interests of the Community are fully taken into account.'

It is worth noting that the Court in its conclusion in this judgment overruled the Opinion of the Advocate General issued on 29 April, 1997 who had held that the good faith of the trader and the negligence of the administration could not be taken into account in relieving the trader of his obligations.

Conclusion

In this case, as in many other cases which concern community expenditure, a distinction was drawn between the relationship between the national authorities and the Community authorities concerning proper accounting of EC expenditure on the one hand and the relationship between the national authority and the trader on the other hand which is mainly concerned with the fulfilment of essentially contractual obligations. Should the Danish trading companies succeed in the Danish court from being relieved of their obligations to repay the export refunds in question the Commission may seek recovery of the said sums from the Danish Government and thereby protect the financial interests of the Community.

Finally, this judgment gives some comfort to traders who find themselves in difficulties adhering to the strict requirements of the EC regulations by giving greater recognition to good faith, undue delay and negligence of national authorities, as factors which may justify non-recovery of EC funds or non-forfeiture of securities. By giving explicit recognition to the notion of negligence of the national administration, a greater onus is placed on national authorities to ensure that proper and adequate supervision is carried out of transactions which attract EC funding. ●

1 Case C-366/95, judgment of Court of Justice of 12 May 1998, unreported
2 Case C-11/70, [1970] ECR I-1125
3 Ibid. at P 1137
4 88/C-259/07
5 Case C-42/79 [1979] ECR 3703
6 Case C-296/86 [1988] ECR 1-491
7 Case C-388/89 [1991] ECR 1-2315
8 Case C-124/92 [1993] ECR 1-5061
9 Case C-347/93 [1994] ECR 1-3933
* EC Export subsidies paid in advance of exportation must be secured by a Bank Security of 120% the value of the subsidy. 'The purpose of that supplement (20%) is to prevent traders from unduly benefiting from interest free credit'. *Hauptzollamt Hamburg-Jonas v. Plange Kraftfutterwerke GmBh & Co.* Case C-288/85 [1987] ECR 1-611.
10 Case C-321/91 [1993] ECR 1-2811
11 Case C-299/94 [1996] ECR 1-1925
12 Case C-11/70 [1972] ECR 1-1125
13 Case C-181/84 [1985] ECR 2889
14 Case C-114/76 [1987] ECR 1211
15 Case C-120/86 [1988] ECR 2321
16 Case C-350/88 [1990] ECR 1-395
17 Case C-101/88 [1990] ECR 1-0023
18 Case C-347/93 [1994] ECR 1-3933
19 Case C-195/91 [1994] ECR 1-5619
20 Case C-366/95, judgment of Court of Justice of 12 May 1988, unreported
21 Joined cases C-205/82 to C- 215/82 [1983] ECR 2633
22 Case C-288/85 [1987] ECR 611
23 Ibid
24 Case C-347/9 [1994] ECR 1-3933

Another Year, Another Acronym

GREG KENNEDY, I.T. Executive & CIAN FERRITER, Special Projects Manager

This past year has been a watershed year for the computerisation of legal practice. Commercial acceptance of the Internet, the rise in PC specifications, the proliferation of legal databases on CD-ROM and, from the Bar's perspective, the expansion of the Law Library network into the new Distillery Centre and the introduction of computer training, have all combined to result in the computer becoming an essential part of any practitioner's set-up.

This article reviews some of the principal developments of interest during the year and casts an eye on how developments in the coming year will likely impact on practitioners.

The Internet

There is little doubt now as to the centrality of the Internet to global and local commerce. It is already widely used by legal practitioners for e-mail. It is in the area of online legal materials that its real force will be felt. Previous *Online* articles have catalogued the legal materials currently available on the Internet (in the vast majority of cases for free) and its potential for new forms of legal information (and legal advice) services.

The coming year will see continuing growth in this area. The Internet will not become truly indispensable to practitioners until Irish legislation and judgments are available on it. The next twelve months should reveal how close that actuality is.

Legal Databases

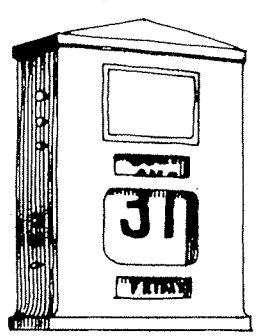
The publication of the official English Law Reports on CD-ROM during the year meant that, along with the All England Reports on CD-ROM, all the core English case law from 1865 is now available electronically. Many specialist titles are also available. The Irish Reports from 1919 and all the statutes in force from 1922 should be available on CD-ROM during the course of the next legal year. While the point has been made in previous *Online* articles, it cannot be stressed too often: when the Irish materials become available electronically, every member of the Law Library will need (and want) to know how to use them.

Computers and Software

The specifications for PCs have had a meteoric rise this year. The Pentium II 400Mhz processor is the standard now as opposed to the Pentium I 200Mhz at this time last year.

This highlights the perennial difficulty of deciding whether to hold out for the latest specification to be released or to buy now and be done with it. It is important to bear in mind that the specifications of computers are being pushed higher and higher because of the number of sales into the home market. Of course the major application in the home is not the All England Reports or Microsoft Word. It is an application more power hungry than all the legal applications rolled into one i.e. video games.

Thus, it should be born in mind the current specification of most Pentium I or II based computers will more than



cope with any demands a legal practice will put on it - lawyers trade largely in text and text is the least memory-hungry aspect of any of the much-touted 'multimedia' uses.

A new CD-ROM style technology has seen its way into the public domain this year. DVD (Digital Versatile Disc) has a capacity four times greater than that of CD-ROM (i.e. one single DVD-ROM could hold the entire AER, WLR, FLR and the Law Reports) and that's just on one side of the disk, a double sided version is waiting in the wings.

DVD also has other applications. DVD-AUDIO will replace standard audio CDs. DVD-VIDEO will replace current video tape technology.

June 26th of this year saw the release of Microsoft Windows 98. Initial experiences with it are quite good especially for those who would use their machine for multi-media and internet access. There is support for a lot more devices (DVD, TV Tuners and a new technology for connecting mice, monitors and other peripherals called the Universal Serial Bus - USB).

Year 2000

Even the most casual reader of the features pages of newspapers in the last year will likely be aware of the 'Year 2000' (or 'Y2K') problem The problem comes from the fact that much software and hardware up until recently only recorded the year as the last two digits e.g. 98 for 1998. When the clocks tick over to 2000 these programs will record 00 as 1900.

While the principal focus has been on businesses with large bespoke systems which need rewriting, the legal practitioner entering the market even now will have to have regard to the problem.

Take note, Windows 95 and Microsoft Office 97 are not Year 2000-compliant so anyone using these systems (which probably includes 90% of legal practitioners) will have to replace the software before the end of 2000, i.e. within the next eighteen months. Windows 98 and the upcoming Microsoft Office 98 will be 2000 compliant.

There are predictions of real supply difficulties towards the end of next year as it dawns on people that there software will no longer function for them, so you have been warned – get your replacement software early!

Computer Training

The big focus for practitioners over the coming year will be on computer training. Computer skills (including familiarity with Windows, basic Word Processing, electronic legal research and Internet usage) are now integral to any legal practice and must be acquired if you are to avoid being left behind. The skills are fairly easily acquired but some investment of time (and money) is essential. Details of Bar Council training courses are available from Adele Murphy at ext. 4621.

Conclusion

One could be forgiven for thinking a year in the computer industry is like dog years; one year is the same as seven years passing by. However, the computer manufacturing industry and the computer market have always been out of step in that very few people ever have the latest equipment that is for sale.
Computing power needs to be balanced against computing needs and the needs of a legal practitioner is rarely for the latest 400Mhz Pentium II.

Despite that, a similar article to this next year could be talking about the 1000Mhz Pentium III with 128Mb RAM, 20Gb HDD, DVD-ROM, USB, 20" FPM, I2O Bus...by then we would have reached a stage of EBA (Enough Bloody Acronyms!) ●

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BANKING & SECURITY LAW IN IRELAND,

***William Johnston,* Butterworths, Hardback £80.00**

This book is an admirable work. Mr Johnston is manifestly in control of his material. His initial academic training was as an economist. The book highlights the importance of an efficient banking system to the development of the economy. Mr Johnston also addresses concisely the historical development of many areas so that the under-lying reasons for the current state of the law are known. He has the skill of making the complicated if not exactly simple, at least readily comprehensible.

As a practising solicitor, Mr Johnston deals comprehensively with topics which a practitioner is likely to encounter. For instance his chronological exposition of the law in relation to a fixed charge on book debts and the various refinements which have developed since the decision of Slade J. in *Siebe Gorman* in 1978 will become an accepted starting point for any person wishing to understand the principles involved. The author gives helpful guidelines as to how to draft various clauses in order to create a fixed charge on book debts. He shrewdly emphasises the difficulties by reminding the reader that the four principal court decisions which need to be considered each reversed the judgment given in the court below.

He further explains the implications of Section 1001 Taxes Consolidated Act, 1997, which may in certain cases make it unwise to take as security a fixed charge on book debts. The practitioner is therefore well prepared to be able to advise fully any particular client as to the advantages and disadvantages of taking a fixed charge on book debts or as to its precise effect if subsequently sought to be enforced.

Similarly the practical importance of the family home as an asset which is available as security for a loan is comprehensively considered. If the family home is to be a security for a loan or a guarantee it is essential to ensure that both spouses have created a valid charge over it if it is going subsequently to be capable of being enforced.

One of the problems which a bank is unlikely to know dealing with a married couple is what are the stresses and strains at work within the marriage. It may well be that the husband exercises

undue influence over the wife in relation to financial matters. By the very nature of the transaction a bank may be put on notice to make enquiries. In dealing with this sensitive area the author rightly considers the exposition of the law by Lord Browne-Wilkinson in *Barclays Bank v. O'Brien* to be clear and therefore quotes it in full.

He further considers the possibility of undue influence being also prevalent between cohabitees. There are increasing numbers of cohabitees and their arrangements are far more diverse and fluid than they were twenty years ago and most are, unlikely to be of the 'until death do us part' variety. However they are, like married couples, users of the services which banks provide.

A bank is faced with difficult decisions in determining whether the customers are in fact cohabitees never mind whether undue influence may be at work. If a bank official thinks the customers are cohabitees it is in most cases inappropriate for him to make enquiries of an intimate nature as to the domestic arrangements. To circumvent the difficulty it would seem the wisest course is not to make such enquiries of the borrowers but for the bank to insist that any person who is not apparently obtaining any obvious financial advantage from the transaction obtain independent legal advice.

What constitutes independent legal advice and the lender's obligations to ensure that it has actually been obtained are also examined. Again in the maze of fine distinctions Mr Johnston points out the way to what are the appropriate principles and undoubtedly will help many practitioners to advise a bank of the prudent steps to take to ensure that all security is enforceable or as the case may be to advise subsequently a borrower or guarantor that all relevant precautions were not to be taken so as to render the security unenforceable.

The number and type of financial transactions are increasing as are the number and identity of the persons who enter into them; the transactions themselves are also becoming more complex. Any lawyer needs to understand and be at ease with the principles of law relating to banking and security in order to apply those principles to the changing circumstances. This book which is written in clear and concise prose makes the task considerably less onerous.

— John McBratney, SC

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IRELAND'S EVOLVING CONSTITUTION, 1937- 1997: COLLECTED ESSAYS

***Eds. Tim Murphy & Patrick Twomey,* Hart Publishing, £40 Hardback, £20 Paperback**

This is an interesting collection of twenty-four separate essays marking the 60th anniversary of the Constitution. One may say immediately that the quality and thought provoking character of the majority of the essays is such that this collection deserves to be purchased by every lawyer with even a passing interest in Irish constitutional law. It is certainly handsomely produced by a new English publishing house, Hart Publishing.

The essays from the academic legal community are universally of an extremely high quality. Space permits one only to mention contributions from Carty (which re-examines the 1925 report of the Boundary commission in the light of modern constitutional law and international law thinking); Gwynn Morgan (dealing with the implications of judicial activism); Whyte (dealing with the role of religion in the constitutional order); Murphy (analysing the role for unenumerated economic rights in the light of the Report of the Constitution Review Group); Twomey (dealing with the cultural attitudes which underlay the timid judicial response to the case dealing with s.31 of the Broadcasting Act) and Whelan and O'Leary (both essays dealing with the inter-relationship between European Community Law and the Constitution), concluding with Hunt's stimulating essay on the limits of consti-

tutionalism in an Irish context. Many of these essays and the other essays are so interesting and well written that they deserve not a short review, but a long monograph by way of response.

However, the book as a whole had, to my mind, at least two failures which call for critical comment. The first was the overall failure to offer a balanced assessment of the successes as well as the failures of the Constitution. Of course, the criticism is vital and necessary, but too many of the criticisms of the drafters of the Constitution and the judiciary were unbalanced and not sufficiently informed. On the historical side – excellent essays by John A. Murphy and Garret Fitzgerald notwithstanding – too many of the essayists uncritically resorted to conventional wisdom and failed to take account of modern scholarship which highlights the huge influence of what Professor Keogh has elsewhere described as the 'meritocratic administrative elite' who served on the Constitution's drafting committee. Furthermore, the drafting committee has a first class instinct for comparative constitutional law and their working papers demonstrate that Constitutions as diverse as those of Mexico and Estonia were examined in detail; see *'The Constitution Review Committee of 1934'* in O'Muircheartaigh's *Ireland in the Changing Times: Essays to Celebrate T.K. Whitaker's 80 Years,* IPA 1997. Of course, not only is the Constitution replete with US influences, but other provisions appear to have drawn inspiration from continental models; see Kelly, *The Irish Constitution* (Dublin, 1994) at 97-98. To that extent, it is difficult to agree with John A. Murphy's description of the Constitution as an 'inward-looking document', although he is, of course, correct in saying that the Constitution was devised almost exclusively with the people of this State in mind and with little regard for thinking in Northern Ireland, Britain or elsewhere in the then Commonwealth.

Some of the commentary on judicial decision by the non-lawyer essayists is also ill-informed. Take, for example the following comments of Browne on the *Tilson* case [1951] IR 1 in his essay on Church and State;

> 'In that case, the Supreme Court upheld Judge Gavan Duffy's ruling in the High Court that, because of the special position of the Church of Rome in the Constitution, the child in a failed inter-Church marriage ought to be awarded to the mother, contrary to the practice at the time, because she was a Catholic, as against the claims of the child's Protestant father.'

In fact Gavan Duffy P. simply decided that an ante-nuptial agreement as to the religious education of their future children was binding on both spouses, although it is true that (as was occasionally his wont) he uttered some incautious dicta about the status of the Catholic church having regard to Article 44.1.2 (before it was deleted by referendum in 1972). The basis for his decision, however, was that the common law rule of paternal supremacy in such matters was inconsistent with Article 42.1 of the Constitution which clearly envisages that both parents have a joint power and duty in respect of the religious education of their children and that they can bind themselves as to how the power can be exercised in contemplation of marriage. That reasoning was subsequently affirmed by the Supreme Court which also went out of its way to indicate that those provisions of Article 44 to which Gavan Duffy P. had alluded were not to be understood as conferring any privileged position upon members of the Roman Catholic church.

Viewed in this way, *Tilson* was really the first in a long line of cases stretching up to cases such as *W v. W* [1993] 2 IR 476 in which the Supreme Court steadily ruled many of these common law rules (which discriminated against one or other spouse) to be unconstitutional. Of course, one unfortunate consequence of this decision is that the Supreme Court thereby indirectly gave effect to the Catholic Church's Ne Temere decree – a decree which no enlightened religious body ought ever to have espoused. But if a church elects to impose such a requirement upon its members as a matter of religious doctrine, is it not the very essence of religious freedom that it ought to have the right to promulgate this view among its adherents and to refuse to give its blessing to any of its members who fail to comply with the rule?

The second disappointing feature was that few of the essays looked forward to the evolution of constitutional law. How realistic were the proposals for reform emanating from the Constitution Review Group? (In fairness, however, it should be noted that many essayists – perhaps correctly – take the Review Group (of which the reviewer was a member) to task for its conservative attitude to the recognition of socio-economic rights). Given the interim reports of the All-Party Oireachtas Committee on the Constitution, is it likely that we will witness substantial constitutional change in the near future? Should the European Convention of Human Rights be made part of our domestic law and if so, how might this be done? Most fundamentally, how do the level of the protections currently contained in the constitution compare with the protections offered by the Convention? How prepared is the electorate willing to support constitutional change in response to on-going political developments in Northern Ireland? In this regard, Brendan Ryan's essay on *Information, Justice and Power* was a refreshing and balanced appraisal of Irish constitutionalism and I am inclined to agree with him when he says that 'any new Constitution drawn up by the present generation of politicians would be more illiberal than that which we currently have and would tilt the balance of power more decisively in favour of the State and against the citizen.' It may also be that, as Adrian Hunt suggests, the Constitution Review Group's largely positive affirmation of the Constitution was a 'self-satisfied' one. But just because a series of tribunals have subsequently uncovered grave political improprieties, it does not follow – as he claims - that these events have made 'a mockery of this analysis', anymore than the same could be said of the US Constitution, despite its one-time acceptance of slavery and prohibition, the activities of the 'Four Horsemen', McCarthyism and Watergate.

I fear that I have digressed and have been too critical. But let that be its own tribute to a very fine and thought-provoking collection of essays.

— Gerard Hogan, SC

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IRISH COMPANY LAW FOR BUSINESS
***by Henry Ellis,* Jordan Publishing Ltd, 1998**

The English novelist Samuel Butler commenting on book reviews said 'Books should be tried by a Judge and Jury as though they were crimes.'

Should Professor Henry Ellis opt for trial by a jury of his peers, there would be a distinguished collection of authors sitting in the jury box. In the huge upsurge in Irish legal publications during recent years, there have been approximately half a dozen general texts dealing with principles of company law in Ireland. And if this were not enough there have been numerous case-books, annotated statutes and slimmer volumes on specific areas such as insolvency and corporate rescue (this reviewer has already pleaded guilty to such a charge in another court).

The challenge which Professor Ellis faces is thus formidable. He tells us in the preface that the book 'attempts to present company law in a visible private enterprise context and a reader-friendly manner by adopting a new 'business relationship' approach to the subject.' While this may appear at first glance to be somewhat opaque, he goes on to explain that 'the text focuses on the individual contractual relationships which arise from the formation, management and use of companies. This novel approach should facilitate a greater understanding of the complexities of company law, particularly amongst those involved in carrying out day to day transactions on behalf of or with companies.' Even the title of the book constitutes a similar declaration of intent, for while Irish Company Law *for* Business (emphasis added) does not explicitly exclude other interested parties, it is clear that the target audience for this audience is primarily persons directly involved in the day to day running of companies. The author does not shrink from the citation of case law (nor would one expect him to do so, given his distinguished academic record) but the tone of the text is at times somewhat more relaxed than might be found in more academically orientated texts. A share is described as being 'in legal parlance, a 'chose in action', i.e. a certain form of right or interest which cannot be possessed in a physical sense'. The author explains patiently many complex concepts in such simple terms on a frequent basis; no doubt his ability as a university lecturer in this regard will be appreciated by those new to company law. Chapters 10, 12 and 13 give a detailed account of how a company's capital is raised and protected, as well as the various types of capital which make up a company's capital base. These matters are dealt with here in substantially more detail than in other texts on Irish company law.

While the book is undoubtedly accurate in its exposition of the general principles of various aspects of Irish company law, a number of recent decisions of relevance seem to have been omitted. Whether this is to simplify the explanation of these principles for the lay reader or some other reason is unclear.

It would have been interesting to have had an analysis of the various High Court decisions arising out of the appointment of an Inspector under Section 12 of the Companies Act, 1990 to Countyglen Plc, which have been reported in the Irish Reports since 1995. In addition, it is somewhat surprising to see no reference of any sort whatsoever to the decision of the Supreme Court in *Irish Press Plc and Ors v. Ingersoll Irish Publications Ltd* [1995] IR 175, which is of considerable significance to oppressed minority shareholders seeking relief under Section 205 of the 1963 Act.

In addition, a text aimed directly at directors and other officers of companies should surely explore in detail the decision of the High Court dealing with the power of the High Court to restrict directors of insolvent companies from acting as directors in the future where those directors have not behaved honestly and responsibly in relation to the affairs of such companies, pursuant to the provisions of Section 150 of the Companies Act, 1990. Yet, regrettably both *Business Communications Ltd v. Baxter and Anor.* and *Costello Doors* (both reported in *1995 Irish Commercial Law Cases* at pages 11 and 52 respectively) are omitted.

The cut off date for the publication of the book to too late to consider the judgment of Shanley J in *La Moselle Clothing Ltd (In Liquidation)* (High Court unreported 11th May, 1998), which further explores and develops this jurisdiction; the law is stated as it was at the 1st July, 1997.

One might also have thought that the timely reminder of the solemnity which attaches to the passing of resolutions by directors and the formality required before resolutions can be said to be validly passed contained in the judgment of Kelly J in *Aston Colour Print Ltd* (High Court unreported 21st February 1997; now noted in *Irish Commercial Law Practitioner*, December 1997 at page 280) would merely be of assistance to those responsible for convening meetings of directors at which resolutions of significance to the company are to be passed, yet this decision is also omitted.

The table of statutes is laid out in a confusing fashion; the various Companies Acts are set out in chronological order between 1862 and 1963 but there is then a jump forward to the Companies Act of 1990 which is then followed by the various earlier acts of 1977, 1982, 1983 up to 1986 as well as the earlier act of 1990 which introduced the concept of examinership.

Aside from the quibbles above, the book is undoubtedly comprehensive in its scope. Its practical information on the day to day management and running of companies is sure to be of considerable assistance to company secretaries and directors. Whether there is a need for a text book aimed specifically at this market is more difficult to answer.

Certainly it is invidious to ask a legal practitioner whether he would be happy to see potential clients buying a text of this sort rather than seeking professional legal advice; a turkey is unlikely to vote in favour of Christmas.

But it is likely that this text will turn up at AGMs and EGMs all over the country, tucked under the arms of determined shareholders and directors (and perhaps also in the briefcases of some of their legal advisors). Any person so armed will have a substantial amount of information on company law laid out in a simple and direct method available to them. You have been warned.

— John O'Donnell, Barrister

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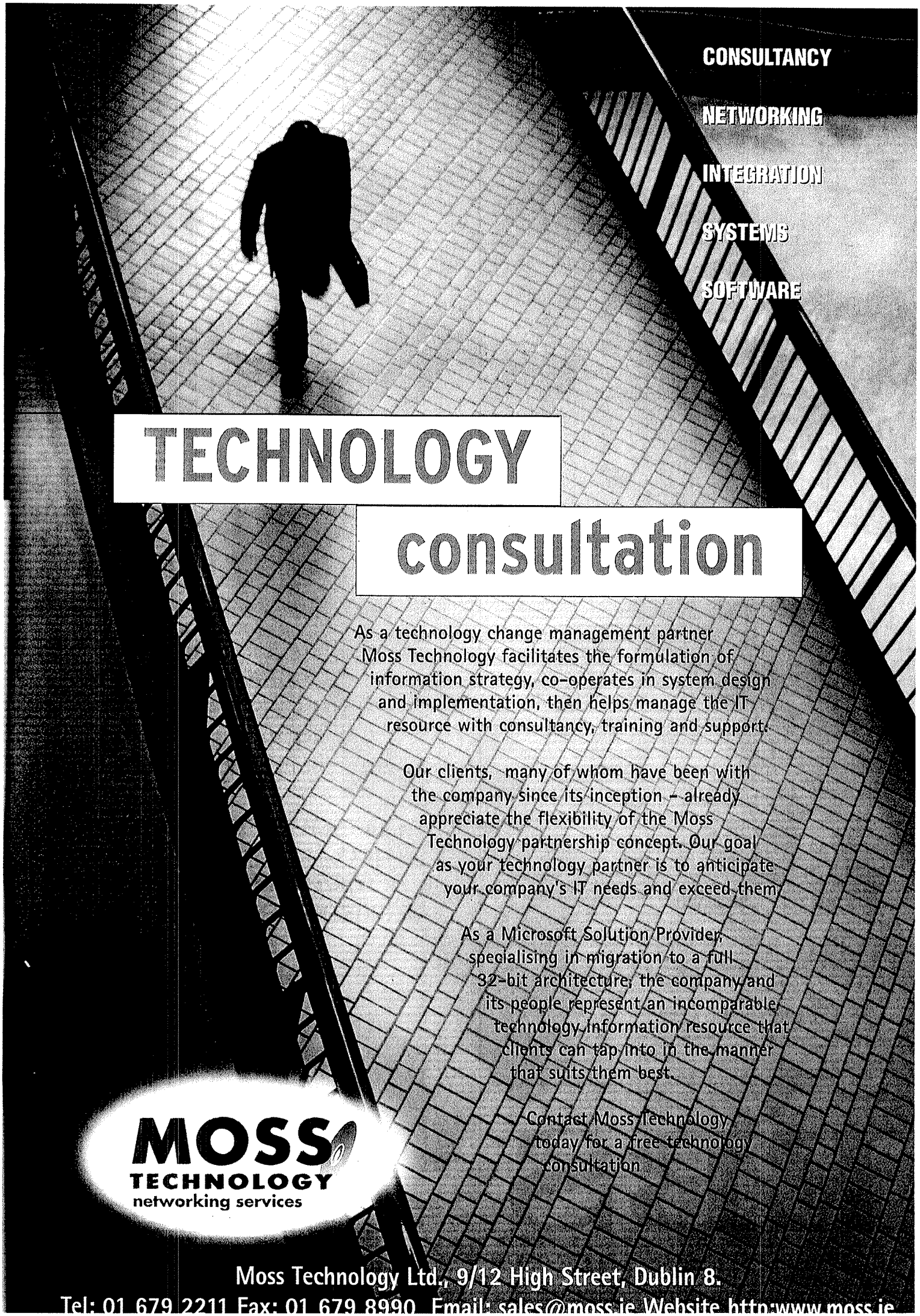
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