The Bar Review

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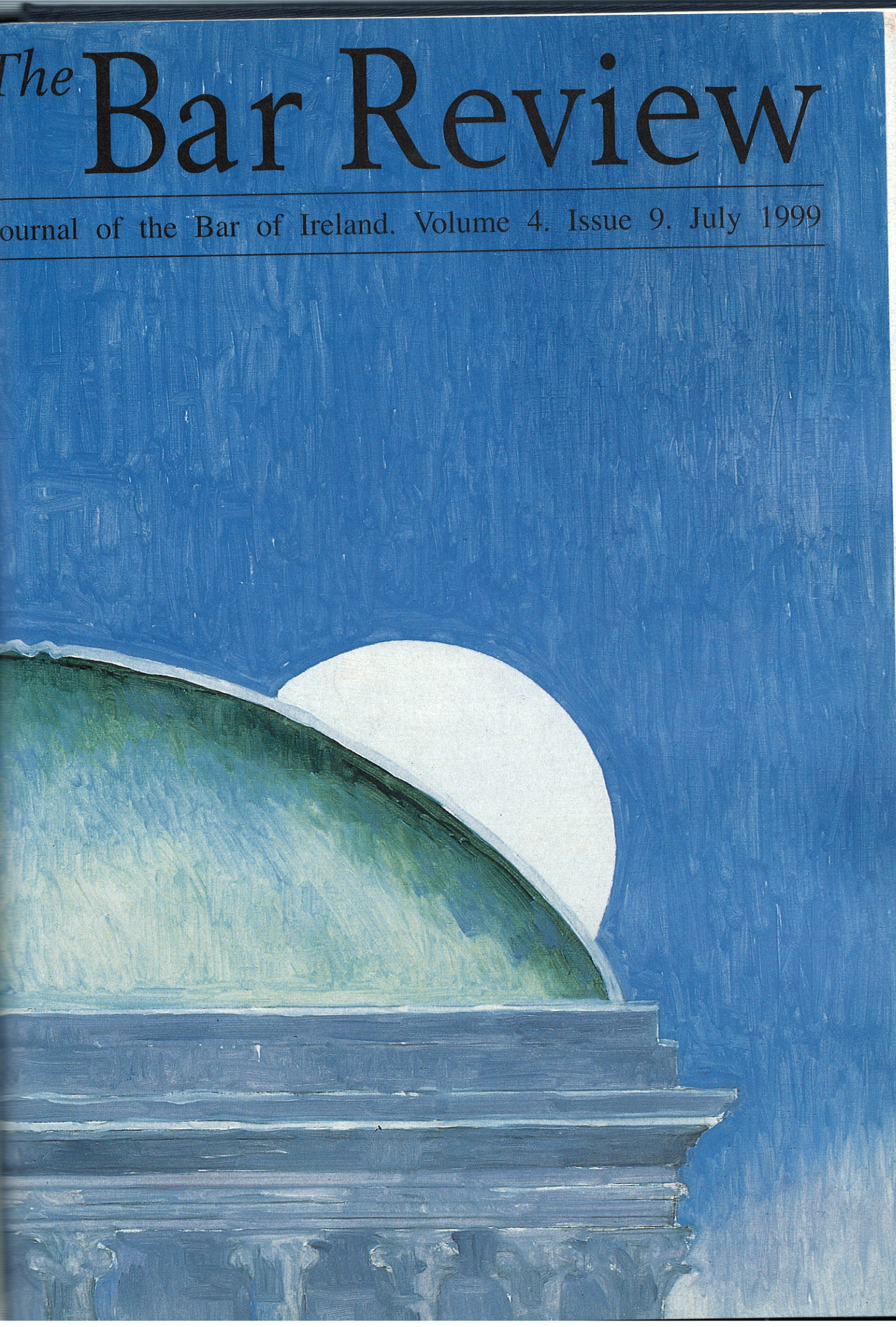

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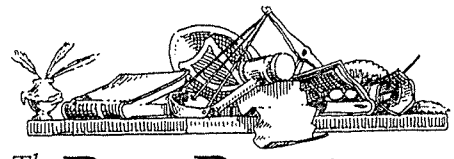

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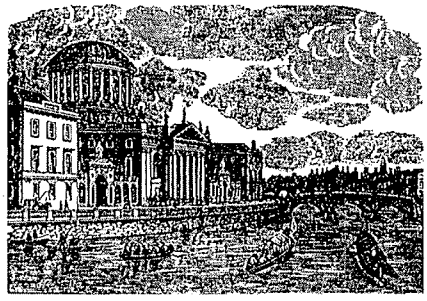

Library Book Returns

In order to improve the book collection, a stock review will be carried out during vacation with a view to buying additional stock. Could library members lease return all library books to the Issue Desk or the Distillery Information Desk by Friday, July 30th, 1999. This will facilitate the stock taking. Thank you for your co-operation.

Bernard Rea, Professional Services Manager.

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Corrections and Clarifications

The article in the June issue of the Bar Review on Eamonn Barnes' reflections on his 24 years as DPP omitted in error to mention that it was extracted from a longer address given by the DPP to the Law Graduates Association in UCG in March of this year.

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New Editor for The Bar Review

Cian Ferriter, Barrister has been appointed Editor of the Bar Review from October 1999. Cian, who has been a member of the Editorial Board since the founding of the Bar Review in 1996, will replace Edel Gormally who has acted as Editor to date.

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Tribunals of Inquiry

The past legal year has been dominated to a large extent by the proceedings of various Tribunals of Inquiry. That these tribunals are a commonplace feature of our political and legal system is now an accepted reality. This should not preclude, indeed it should place an even greater emphasis on, the need for ongoing analysis and constructive comment on the workings of these bodies from the lawyer's perspective. Accordingly, the Bar Council organised towards the end of the legal year a highly successful conference to consider the nature of inquiries from a domestic and international perspective. Some of the papers given at that conference are reproduced in this issue of the Bar Review for reader's records and reference.

The two main themes regarding domestic tribunals of inquiry have emerged as being the costs of such inquiries to be borne by the public purse and the erosion of individual rights of privacy and confidentiality that are an increasing aspect of public tribunals. It is in the general public interest, and more particularly in the interests of lawyers who are core players in any such inquiry, to ensure that any changes which would enhance the operation of such tribunals and lead to a cheaper and more efficient disposal of business along with ensuring added protection to persons involved, should be encouraged. That a comprehensive review of necessory changes to the operation of tribunals should be perhaps considered by the Law Reform Commission has been raised before and perhaps would merit from consideration once the current tribunals have ceased their deliberations and made their reports.

In the interim, certain issues present themselves for consideration. The requirement for procedural devices to assist in reducing public hearings and for a comprehensive set of procedural rules governing all aspects of the operation of tribunals deserves attention. The resultant certainty would enhance the effective operation of tribunals and would importantly also serve to reduce the delays which have occurred as a result of litigation arising out of the operation of tribunals to date.

As regards the threat to privacy which arises from the operation of tribunals, the fact that most tribunals, while they do hold a private inquiry prior to proceeding with a public one, are not in fact obliged to do so and are also not required to be satisfied that there is a *prima facie* case before an allegation is made public means that there is no legal protection, other than the good judgment of the tribunal, against the risk of having baseless allegations made against a citizen with the resultant distress and injury to reputation. While the right to cross-examination and other procedural rights are important protections in the ultimate vindication of one's good name, in reality any vindication which may occur to one's reputation in the final report in the tribunal cannot be commensurate with the damage already caused, given the inevitable delay involved between allegation and vindication.

The apparent power to hear hearsay evidence, even if ultimately it might be inappropriate for the tribunal to base its findings on such evidence, is also potentially corrosive of an individual's right to privacy and vindication of one's good name.

Statutory amendments to the legislative framework of tribunals to address some of these issues would merit consideration in any comprehensive review of the operation of tribunals generally.

Too often, tribunals are dominated in the media and public's mind with issues of costs and with allegations of wrongdoing by high-profile individuals. Other considerations of privacy and the need for incisive analysis of prodedural issues are overlooked. In particular, the importance of matters of privacy in these matters should not be coloured by the knowledge that such tribunals have been very effective in unearthing wrongdoing and that many persons who claim such privacy rights may themselves have been guilty of wrongdoing. While the rooting out of wrongdoing is undoubtedly an essential part of democracy, it is equally an essential part of democracy that the fundamental rights of all citizens are protected, notwithstanding public demand for results and a lack of public sympathy for people invoking such rights.

Tribunals and the Erosion of the Right to Privacy

PAUL GALLAGHER, SC

In this paper I propose to consider the right of privacy in the context of a particular type of Tribunal, namely a Tribunal of Inquiry governed by the Tribunals of Inquiry (Evidence) Act 1921 as amended. The 1921 Act was expressed to be *"an Act to make provision with respect to the taking of evidence before and the procedure and powers of certain Tribunals of Inquiry"*. The 1921 Act did not provide for the establishment of a Tribunal of Inquiry but rather governed its procedures and determined its powers. The establishment of a Tribunal of Inquiry, as the Supreme Court pointed out in *Haughey & Ors. -v.- Mr. Justice Moriarty & Ors*[1] *("Haughey No. 2")* is made pursuant to the inherent jurisdiction of the Houses of the Oireachtas to resolve that it is expedient that a Tribunal be established to enquire into what they consider to be urgent matters of public importance.

A Tribunal so set up has very significant inquisitorial powers that were described by Lord Justice Salmon in the Report of the Royal Commission of Tribunals of Inquiry 1966 in the United Kingdom ("the Salmon Report") in the following terms. This description was quoted with approval by the Supreme Court in the *Haughey No. 2:*

> *"The exceptional inquisitorial powers conferred upon a Tribunal of Inquiry under the Act of 1921 necessarily exposed the ordinary citizen to the risk of having aspects of his private life uncovered which would otherwise remain private, and to the risk of baseless allegations made against him. This may cause distress and injury to reputation. For these reasons, we are strongly of the opinion that the inquisitorial machinery set up under the Act of 1921 should never be used for matters of local or minor public importance, but always be confined to matters of vital public importance concerning which there is something in the nature of a nation-wide crisis of confidence. In such cases we consider that no other method of investigation would be adequate."*

In any consideration of the effect of Tribunal of Inquiry on the right to privacy, it is well to bear in mind this judicial recognition of the exceptional inquisitorial powers which a Tribunal has and the inevitable exposure of the ordinary citizen to the risk of having aspects of his private life uncovered and having baseless allegations made against him which might injure his reputation.

The Supreme Court in *Haughey No. 2* also accepted the Salmon Report's recognition of the important role of Tribunals of Inquiry in restoring public confidence. The Salmon Report emphasised the importance of this role in the following terms:

> *"The inquisitorial procedure is alien to the concept of justice generally accepted in the United Kingdom. There are, however, exceptional cases in which such procedures must be used to preserve the purity and integrity of our public life without which a successful democracy is impossible. It is essential that on the very rare occasions when crises of public confidence occur, the evil, if it exists, shall be exposed so that it may be rooted out; or if it does not exist, the public shall be satisfied that in reality there is no substance in the prevalent rumours and suspicions by which they have been disturbed. We are satisfied that this would be difficult if not impossible without public investigation by an inquisitorial tribunal possessing the powers conferred by the Act of 1921."*

The Supreme Court's acceptance that the considerations identified above are also applicable in this jurisdiction and its recognition of the exceptional inquisitorial powers enjoyed by Tribunals of Inquiry are particularly relevant to a discussion of the right to privacy and a consideration of the extent of encroachment on that right by Tribunals of Inquiry. Any analysis of the extent of that encroachment necessarily involves an examination of the extent of the right to privacy under our system of law or at least under our system of constitutional law.

The notion of a right to privacy is potentially a broad one into which different senses of privacy are conflated. Sometimes privacy is territorial: people have a right to privacy in the territorial sense when they are entitled to do as they wish in a certain specified space – inside their home for example. Sometimes privacy is a matter of confidentiality: we say that people may keep their political convictions private, meaning that they need not disclose how they have voted. Sometimes, however, privacy means something different from either of these senses: it means sovereignty over personal decisions. The issues raised in *McGee -v.- Attorney General*[2], relating to the use of contraception within marriage and *Norris -v.- Attorney General*[3] relating to the legality of homosexual acts are aspects of the latter type of privacy. Privacy can also relate to the protection of one's reputation. It is really privacy in the sense of confidentiality and reputation that is of concern in the present context. Though a right to privacy need not necessarily derive from the Constitution, it seems appropriate to consider in the main the constitutional aspects of that right. If the relevant rights of privacy have a constitutional basis and are subject to erosion, then that erosion is not

mitigated by identifying other non-constitutional sources of those rights.

Unlike some constitutions, the Irish Constitution does not explicitly recognise any right to privacy. It could be said that the notion of a constitutional right to privacy derives from the Supreme Court decision in *In Re Haughey*[4] *("Haughey No. 1")*. In that case the Supreme Court recognised the constitutional right to protect one's good name and the concomitant right to ensure that investigation procedures protected that right.

The concept of a right to privacy derives from the decision of the Supreme Court in *McGee -v.- Attorney General.* Budd J. described the right in the following expansive terms:

> *"Whilst the "personal rights" are not described specifically, it is scarcely to be doubted in our society that the right to privacy is universally recognised and accepted with possibly the rarest of exceptions, and that the matter of marital relationships must rank as one of the most important of matters in the realm of privacy."*

The concept of a right of privacy was developed in subsequent cases. In *Murphy -v.- PMPA Insurance Company Limited*[5], Doyle J. recognised an unspecified natural right, akin to a right of privacy, in relation to the obligation of insurers to preserve the confidentiality of information furnished to them by the insured.

In *Norris -v.- Attorney General* the majority of the Supreme Court held that the State's interest in the general moral well-being of the community enabled it to regulate the field of private morality. However, Henchy J. in a dissenting judgment reaffirmed the extent and importance of a right to privacy in the following terms:

> *"A right of privacy inheres in each citizen by virtue of his human personality, and that such right is constitutionally guaranteed as one of the unspecified personal rights comprehended by Article 40.3."*

He went on to say that a right of privacy is:

> *"A complex of rights, varying in nature, purpose and range, each necessarily a facet of the citizen's core of individuality within the constitutional order.*[6] *..... There are many other aspects of the right of privacy, some yet to be given judicial recognition. It is unnecessary for the purpose of this case to explore them. It is sufficient to say that they would all appear to fall within a secluded area of activity or non-activity which may be claimed as necessary for the expression of an individual personality, for purposes not always necessarily moral or commendable, but meriting recognition in circumstances which do not endanger consideration such as state security, public order or morality, or other essential components of the common good."*

The concept of a constitutional right to privacy was developed further in *Kennedy -v.- Ireland*[7] in which the plaintiffs complained of unjustifiable tapping of their telephones by the State and sought damages for this breach of the right to privacy. The plaintiffs succeeded and Hamilton P. (as he then was) held:

> *"The right to privacy is not an issue, the issue is the extent of that right or the extent of the right "to be let alone". Though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, or by the requirements of the common good, and it is subject to the requirements of public order and morality. ..... The nature of the right of privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely a sovereign, independent and democratic society. The dignity and freedom of an individual in a democratic society cannot be ensured if his communications of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with. I emphasise the words "deliberately, consciously and unjustifiably", because an individual must accept the risk of accidental interference with his communications and the fact that in certain circumstances the exigencies of the common good may require and justify such intrusion and interference. No such circumstances exist in this case."*

In *Kane -v.- Governor of Mountjoy Prison*[8] the Supreme Court again accepted the existence of a general constitutional right of privacy while rejecting a claim by the applicant that his constitutional rights had been unlawfully interfered with by police surveillance of his movements. No precise definition was given of the qualifications which circumscribed the right.

The extent of the qualifications to the constitutional right of privacy became more apparent in subsequent cases, many of which dealt with investigations or aspects of the administration of justice. In *Desmond -v.- Glackin (No. 2)*[9] the Court had to consider an aspect of the Companies Act investigation into the controversial purchase of property by Telecom Eireann in Ballsbridge. One of the issues in that case was the use of information obtained by the Inspector indirectly through the Central Bank. It was alleged that the use of such information breached the duty of confidentiality imposed by the Constitution. O'Hanlon J. felt that in the particular circumstances the protection afforded by the common law and by the Constitution were probably co-extensive. He said what had occurred was the disclosure of such information by the Minister for Finance to another Minister of Government and the further disclosure of the information by him to an inspector appointed by him for the purpose of carrying out statutory functions under the Act of 1990 – the investiga-

tion of the affairs of two named companies as a matter of public interest. The information was given in the belief that it had a material bearing on the matters which were the subject of the inspector's investigation, and was actually sought by the inspector before the necessary steps were taken to make it available to him. O'Hanlon J. concluded in terms that were to find an echo in more recent cases as follows:

"There appears to me to be clear public interest in having all the information needed by the Inspector for the purposes of his investigation made available. I do not detect the existence of any significant public interest of equal or near-equal weight in denying access by the inspector to this source of information. The knowledge on the part of persons involved in transactions requiring them to make disclosure to the Central Bank under the Exchange Control Acts 1954 – 1962, that particulars of such transactions may, in unusual and exceptional circumstances be made available to an inspector appointed under the Act of 1990 and may – if he finds the information relevant to the subject-matter of his investigation – be made public at some stage, may be upsetting for the persons concerned but it cannot (without illegality) diminish in any way the free flow of information to the Central Bank under the Exchange Control Acts."

O'Hanlon J. also held that the making available of such information did not breach any duty of confidentiality arising under the provision of the Central Bank Acts 1942-1989 or the Official Secrets Act 1963.

In *M -v.- Drury*[10] the plaintiff sought to restrain the defendant from publishing or communicating to any person any matter or fact pertaining to her family life. The second, fourth and sixth defendants had published articles which supported the eleventh defendant's (the plaintiff's husband) opinion that his marriage had broken down by reason of an alleged adulterous relationship between his wife, the plaintiff, and a Roman Catholic priest, and his intention to bring proceedings against the Roman Catholic Church seeking compensation for the breakdown of the marriage. Restraint was sought on the basis that what was involved was a proposed disclosure of matters relating to the intimate family relationship of husband and wife and that such disclosure should not be permitted having regard to the judgment in *McGee -v.- Attorney General.* O'Hanlon J. refused to restrain the publication and rejected such claim in the following terms:

"There are extreme cases where the right to privacy (which is recognised as one of the personal rights, though unspecified, guaranteed protection by the Constitution .....) may demand the intervention of the Courts. An example might be the circumstances illustrated in Argyle -v.- Argyle [1967] Ch. 302 where confidential communications between husband and wife during their married life together were protected against disclosure. Generally speaking, however, it seems desirable that it should be left to the legislature, and not to the Courts to "stake out exceptions to freedom of speech" (in the words of Lord Denning).

In the present case the Court is asked to intervene to restrain the publication of material, the truth of which has not as yet been disputed, in order to save from the distress that such publication is sure to cause, the children of the marriage who are all minors. This would represent a new departure in our law, for which, in my opinion, no precedent has been shown, and for which I can find no basis in the Irish Constitution, having regard in particular to the strongly expressed guarantees in favour of freedom of expression in that document."

The issue of privacy arose again in *Roe -v.- Blood Transfusion Service Board*[11] this time in the context of the administration of justice. Article 34(1) of the Constitution provides that justice shall be administered in Courts established by law and that it shall be administered in public. The Plaintiff had contracted the Hepatitis C virus as a result of being treated with infected blood products and claimed damages for personal injuries. She wished to sue in an assumed name. Laffoy J., following the earlier decision of Mr. Justice Hamilton in *The Claimant -v.- The Board of St. James' Hospital*[12] (which dealt with a similar application by a number of haemophiliacs who alleged that they had been affected by the HIV virus as a result of infected blood products) refused the application. She said that where the true identity of a plaintiff in a civil action was known to the parties to the action and to the Court but was concealed from the public, members of the general public could not see for themselves that justice was being done. As a result the Court had no jurisdiction to allow the plaintiff to prosecute the proceedings under an assumed name as this would be in contravention of Article 34, Section 1. Laffoy J. also had regard, in arriving at that conclusion, to the decision of the Supreme Court in *RE R Limited*[13] which dealt with the entitlement to hold proceedings brought under Section 205 of the Companies Act 1963 in camera. In that case Walsh J. had said:

"The issue before this Court touches a fundamental principle of the administration of justice in a democratic state, namely the administration of justice in public. Article 34 of the Constitution provides that justice shall be administered in Courts established by law and shall be administered in public save in such special and limited cases as may be prescribed by law, the actual presence of the public is never necessary but the administration of justice in public does require that the doors of the Courts must be open so that members of the general public may come and see for themselves that justice is done. It is in no way necessary that the members of the public to whom the Courts are open should themselves have any particular interest in the cases or that they should have had any business in the Court. Justice is administered in public on behalf of all of the inhabitants of the State."

The decision in *In Re: R Limited* and the later decision in *Irish Press PLC -v.- Ingersoll Irish Publications Limited*[14] are of a special significance in emphasising the limitations on the right to privacy in the context of the administration of justice, even where the Court is given a discretion to hear proceedings in private. Section 205(7) of the Companies Act 1963 grants such a discretion to the Court in the following terms:

"If, in the opinion of the Court, the hearing of proceedings under this section would involve the disclosure of information the publication of

which would be seriously prejudicial to the legitimate interests of the company, the Court may order that the hearing of the proceedings or any part thereof shall be in camera.."

In *In Re: R Limited* Mr. Justice Walsh held that the section could not be invoked

"simply to conceal from the public evidence of wrongful activities on the part of the company, or any member of the company, or employees of the company, or anybody dealing with the company or the good name of any such persons or anybody else. ..... In seeking to avail of the protection apparently afforded by the subsection, the parties seeking it must be able to satisfy the Court that not only would the disclosure of information be seriously prejudicial to the legitimate interests of the company but it must also be shown that a public hearing of the whole or of the part of the proceedings which it has sought to have heard other than in a public court, would fall short of the doing of justice."

More recently the Supreme Court considered the right to privacy in *Haughey No. 2*. The Supreme Court recognised the potential which a Tribunal of Inquiry had for intrusion into the citizen's private life and also recognised the constitutional right to privacy. The Court said:

"There is no doubt but the terms of reference of the Tribunal of Inquiry and the exceptional inquisitorial powers conferred upon such a Tribunal under the 1921 Act (as amended) necessarily exposed the plaintiffs/appellants and other citizens to the risk of having aspects of their private life uncovered which would otherwise remain private, and the risk of having baseless allegations made against them. This may cause distress and injury to their reputations.

There is no doubt but that the plaintiffs/appellants enjoy a constitutional right to privacy. What is in dispute in this case is the extent of such right to privacy and in particular whether it extends to the right to confidentiality in respect of banking transactions and whether the exigencies of the common good outweigh in the circumstances of this case, such a right to privacy. .....

The right to privacy is not in issue: the issue is the extent of that right and whether that right extends to the confidentiality of a person's banking transactions.

For the purposes of this case, and not so holding, the Court is prepared to accept that the constitutional right to privacy extends to the privacy and confidentiality of a citizen's banking records and transactions. This is a right which is recognised at common law."

The doubt as to the extent of the constitutional right to privacy is not surprising insofar as that right is one of the unspecified rights in the Constitution and therefore the Constitution does not explicitly define its context. What is perhaps of more concern is the implicit doubt expressed by the Supreme Court that that right extended to the privacy and confidentiality of a citizen's banking records and transactions. If the constitutional right to privacy does not extend to those documents and transactions, that means that the constitutional right to privacy, outside perhaps the area of personal morality, is significantly restricted. It also means that the protection of that right in the context of Tribunals or other legislative interventions is very seriously weakened.

It had of course already been held by the Supreme Court earlier in 1998 in *National Irish Bank Limited & Anor. -v.- Radio Teleís Éireann*[15] that there existed at common law a duty and right of confidentiality between banker and customer and that there was a public interest in the maintenance of such confidentiality for the benefit of society at large. The Supreme Court also went on to hold that there was a public interest in defeating wrongdoing and where the publication of confidential information might be of assistance in defeating wrongdoing, the public interest in such publication might outweigh the public interest in the maintenance of confidentiality. Obviously, however, the extent of the protection which the right enjoys could be very significantly affected by whether it is a constitutional or just a common law right.

It is clear from the above decisions that the extent of the constitutional right to privacy is uncertain. If it does not self-evidently extend to the privacy and confidentiality of a citizen's banking records and transactions, there must be serious concern as to the extent of the constitutional protection actually enjoyed. The nature and substance of the right to privacy is fundamentally dependent on its extent. There is no right to privacy independent of its components. If the constitutional right to privacy is uncertain, the potential for intrusion on that right by the legislature and by Tribunals of Inquiry is very much greater. Uncertainty as to the nature of the right means that if the right is to be vindicated, it is much more likely that it will be necessary to have recourse to the Courts to do so. The lack of a clear definition of the right to privacy militates against its vindication in a non-Court context because the very lack of clarity allows scope for dispute as to its nature and extent. This is quite apart from any issue as to whether such a right must be qualified in a particular case by other exigencies such as those of the common good.

This lack of definition of the right of privacy is all the more serious in the context of Tribunals of Inquiry. This is so for two reasons. These Tribunals by virtue of the nature of the subject matter into which they are enquiring will almost certainly have the potential, as was recognised by the Supreme Court in *Haughey No. 2*, to expose citizens to the risk of having aspects of their private life uncovered which would otherwise remain private and to the risk of having baseless allegations made against them. Secondly, the body charged with carrying out a successful investigation is the same body which decides in the first instance whether or not particular information should be exposed to public scrutiny and whether or not allegations should be made public (which might ultimately be baseless).

The concern in the latter regard is heightened by the Supreme Court decision in *Redmond -v.- Flood*[16] in which the Supreme Court made it clear that a Tribunal can proceed to a public inquiry even where there is not a *prima facie* or strong case against a particular citizen. The Court held[17]:

"An inquiry under the Tribunals of Inquiry (Evidence) Act 1921 is a public inquiry. The Court in the passage quoted accepted that it is proper for a Tribunal to hold preliminary investigations in private. This would enable the Tribunal, inter alia, to check on the substance of the allegations and in this way would protect

the citizens against having groundless allegations made against them in public. But the Court was not suggesting that the Tribunal should proceed to a public inquiry only if there was a prima facie case or a strong case against a particular citizen. It was suggesting that the allegation should be substantial in the sense that it warranted a public inquiry. The Tribunal is not obliged to hold a private inquiry before proceeding with its public inquiry. The allegations made against the applicant in this case could be false. At this stage we simply do not know. But they are grounded on a sworn affidavit. In these circumstances it appears to this Court that the Tribunal was entitled to decide that they were of sufficient substance to warrant investigation at a public inquiry. Indeed it would have been surprising if the Tribunal had decided otherwise."

The fact is that most of the Tribunals do hold a private inquiry before proceeding with the public inquiry. The statement that they are not obliged to do so and that the Tribunal is not required to be satisfied that there is a *prima facie* case before an allegation is made public means that in reality there is no legal protection (other than the good judgment of the Tribunal) against the risk of having baseless allegations made against the citizen with the resultant distress and injury to reputations.

The potential for injury to reputations by the making of baseless allegations was also recognised by the Supreme Court in the context of a different Tribunal, in *Barry -v.- Medical Council*[18]. There the Supreme Court had to consider disciplinary enquiries by the Medical Council against a doctor. The statutory scheme under which these enquiries were carried out was of course quite different from the statutory scheme for a Tribunal of Inquiry and the Court held that the scheme gave to the Fitness to Practice Committee a discretion as to whether or not its hearing should be in private. The Court also referred to the statutory provision which provided that the findings of the Fitness to Practice Committee and the decision of the Medical Council in any report made to it by the Committee should not be made public without the consent of the doctor who had been the subject of the inquiry unless such doctor had been found guilty of professional misconduct or unfit to engage in the practice of medicine. Mr. Justice Barrington said:

"Clearly the purpose of this provision is to protect the reputation of practitioners who have not been found guilty of professional misconduct or unfit to engage in the practice of medicine."

I believe that this recognition of the serious danger that can be done to one's reputation as a result of the making of baseless allegations is not reflected in the protection accorded by the Courts to people who are either the subject matter of Tribunals of Inquiry or who were witnesses at such Tribunals. The rights of cross-examination and other procedural rights recognised in *Haughey No. 1* do not adequately protect one's reputation against the making of such baseless allegations. They are of course important protections in the ultimate vindication of one's good name. If however, as has been recognised, that the making of baseless allegations can cause distress and injury to reputations (irrespective of whether those allegations are ultimately upheld), it follows that those procedural rights will not redress the injury suffered by the citizen in such circumstances. As a matter of common sense and practice we are all aware that by the time one's good name is vindicated in the ultimate report of the Tribunal, very significant damage can already have been done to that good name by reason of the lapse in time between the making of the allegation and the ultimate vindication. In most cases the lapse in time will be months, and in many cases years. The ultimate report in those circumstances may be ineffective in dislodging people's recollection of the allegations, particularly where the ultimate vindication of the good name is only part of the detail in a lengthy report. Such detail may never be given the publicity which the original allegations were given. In any event, if what is disclosed in public is confidential information, the ultimate report provides no redress for that intrusion into the citizen's right of privacy.

There is another feature of Tribunals which can significantly affect the right to privacy. This is the apparent power of a Tribunal to at least hear hearsay evidence, even if ultimately it might be inappropriate for the Tribunal to base any of its findings thereon. In *Goodman International -v.- Mr. Justice Hamilton*[19] Hederman J. said:

"The applicants challenge four procedural rulings which have already been made by the Sole Member of the Tribunal, seeking an Order prohibiting the continuance of the Tribunal otherwise than according to the following claimed procedural rulings:

(a) that the only evidence admissible is evidence admissible in a Court of law;

(b) that certain evidence should be heard in private;

(c) that statements of evidence should be prepared and furnished to the interested party;

(d) that the Tribunal having collected the allegations into which it will enquire has made a constitutionally invalid section of the matters into which it will enquire.

With regard to the first there was a fear that there might be an overuse of hearsay evidence. This is because, undoubtedly, in the material furnished to the solicitors for the applicants there was included much hearsay, but the Tribunal will doubtless adopt the same approach as the Tribunal of Inquiry into dealings in Great Southern Railways Stock (PRL 6792; [1943])..... While it sifted through rumour and hearsay it relied only on admissible evidence for its findings.
In the course of this inquiry it may be necessary for the Tribunal to relax the rules of evidence in regard to some particular party – including the applicants. It would be very unwise for this Court to attempt to fetter the discretion which the Tribunal undoubtedly possesses to regulate its own procedure. Similarly, in regard to whether any evidence should be taken in private – that would be a matter for the Tribunal to rule on as the occasion requires. .....".

The acceptance that the Tribunal can rule on its own procedure and can admit hearsay evidence obviously expands very greatly the potential for the making of baseless allegations. Furthermore.

because those allegations may be made on a hearsay basis, the ability to challenge them by cross-examination may well be significantly limited.

However, the real undermining of the right to privacy comes, in my view, from the very basis on which Tribunals can be established. As mentioned already, the Supreme Court has held that the Houses of the Oireachtas have an inherent jurisdiction to establish enquiries into matters of urgent public importance. The Supreme Court recognised in *Haughey No. 2* that the powers of both Houses of the Oireachtas in this regard are not absolute. The resolutions of both Houses however enjoy the same presumption of constitutional validity as has been applied by the Court to statutes enacted by the Oireachtas. That fact and the fact that the Courts must recognise the legislature's discretion in identifying what are matters of public importance, means in reality that the possibility of successfully reviewing a resolution of the Houses of the Oireachtas to establish an inquiry are very limited. All the Inquiries established by the Houses of the Oireachtas to date were certainly validly established. It is these validly established Tribunals that have such potential to interfere with rights of privacy.

One is reminded of the Catch-22 phenomenon derived from the famous book of that name. Yossairn, the hero of that book, was constantly trying to get excused from flying bombing missions for the US Airforce in Italy during the Second World War. One could be excused from flying such missions if one were mad but if anyone asked to be excused from the bombing missions, there was an irrebuttable presumption that one was not mad because only mad people would want to fly those missions in the first place.

The Catch-22 with Tribunals of Inquiry is that if they can only be set up to enquire into matters of urgent public importance, then by definition the essential purpose of the Tribunal involves the element of public interest in defeating wrongdoing or enquiring into important matters of national or public interest that have been held on so many occasions to be sufficient to outweigh the right of privacy and more particularly the right of confidentiality. The Supreme Court in *Haughey No. 2* said[20]:

> *"The exigencies of the common good require that matters considered by both Houses of the Oireachtas to be of urgent public importance be inquired into, particularly when such inquiries are necessary to preserve the purity and integrity of our public life without which a successful democracy is impossible.*
> *In this case both Houses of the Oireachtas deemed it expedient that a Tribunal of Inquiry be established to enquire into the matters set forth in the resolutions.*
> *The effect of such resolutions is undoubtedly to encroach upon the fundamental rights of the plaintiffs/appellants in the name of the common good.*
> *The encroachments on such rights is justified in this particular case by the exigencies of the common good.*
> *Such encroachment must however be only to the extent necessary for the proper conduct of the inquiry.*
> *Both Houses of the Oireachtas are entitled to assume that the Tribunal will conduct its investigation in accordance with the principles of constitutional justice and fair procedures and will only interfere with the constitutional rights of the appellants when, and only to the extent that, it is necessary for the proper conduct of the inquiry."*

With respect however, the conduct of the investigation in accordance with the principles of constitutional justice and fair procedures does not solve the privacy problem identified above. Those procedures may help one to ultimately vindicate one's good name but it does not protect one from the *"distress and injury to reputations"* caused as a result of the making of baseless allegations. The Supreme Court has already held that a Tribunal is the master of its own procedure and can enquire into allegations even where the *prima facie* validity of those allegations has not been established. It follows therefore that there is in reality little protection for one's reputation in the face of baseless allegations.

This encroachment is made even more serious by the terms of the 1921 Act itself. Section 2(a) provides:

> *"A Tribunal to which this Act is so applied as aforesaid –*
> *(a) shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the Tribunal unless in the opinion of the Tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given."*

This statutory provision gives to the Tribunal a discretion, which is undoubtedly difficult to judicially review, with regard to hearings in private. Even this discretion is very seriously qualified and the circumstances in which it would be appropriate for the Tribunal (apart from the preliminary private investigation) to hear evidence in private are very limited and the test which an applicant must satisfy before a Tribunal could direct evidence to be heard in private is clearly a very difficult one.

Against this legislative and judicial background, those rights of privacy which in Mr. Justice Henchy's words are inherent in each citizen by virtue of his human personality and which comprise a complex of rights which are a facet of the citizen's core of individuality, are needlessly and unnecessarily threatened.

As mentioned already, the Supreme Court has recognised in *Haughey No. 2* that the encroachment on the constitutional right to privacy must be *"only to the extent necessary for the proper conduct of the inquiry"*. If that is so, there does not appear to be any reason in principle why greater protections (than presently exist) could not be accorded to the right of privacy while yet protecting the fundamental purpose and efficacy of Tribunals of Inquiry.

The Supreme Court has determined in *Goodman International -v.- Mr. Justice Hamilton*[21] that a Tribunal of Inquiry does not involve the administration of justice. The constitutional requirement therefore to have the proceedings heard in public imposed by Article 34, Section 1, in respect of Court proceedings does not apply. Similarly the constitutional limitations on the right to privacy recognised by the High Court in *Roe -v.- Blood Transfusion Service Board* and other cases in the context of Court proceedings is not a consideration for Tribunals. Neither is there any overriding reason (in the case of a Tribunal) why a statutory discretion or mandate to hear certain aspects of Tribunal evidence in private should be construed in a limited or qualified way as there is in the context of a similar discretion in relation to Court proceedings. This

means there is nothing to prevent the legislature introducing legislation which would specifically entitle Tribunals to hear certain aspects of the evidence in private and which would not impose on those wishing a private hearing such a difficult threshold (as is imposed by Section 21(2) of the 1921 Act). Furthermore, a legislative requirement that the Tribunal be satisfied that there is a *prima facie* basis for allegations (or at least a serious basis for the allegations) before they are aired in public would be constitutionally permissible and would not materially diminish the effectiveness of Tribunals given their very substantial inquisitorial powers.

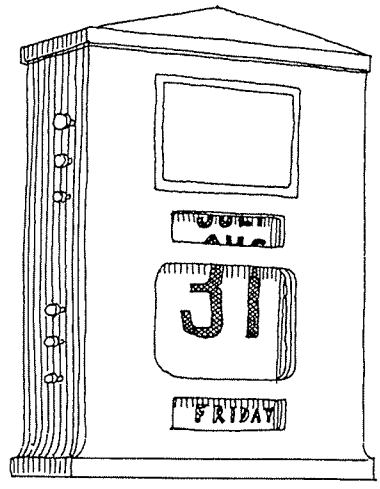
It is equally open to the Courts to review the constitutionality of Section 21(2) of the 1921 Act to see whether the obligation which it imposes on a Tribunal to hear evidence in public does go further than is necessary in the encroachment of the rights to privacy.

One's approach to the desirability of the protection of privacy in these matters should not be coloured by the knowledge that these Tribunals have been effective in unearthing wrongdoing or that many people who claim such privacy rights may themselves have been guilty of wrongdoing. In the history of the State some of the most important constitutional rights have been established and vindicated in cases where the plaintiffs seeking to establish those rights have been wholly unmeritorious. While the rooting out of wrongdoing is undoubtedly an essential part of democracy, it is equally an essential part of that democracy that the fundamental rights of a citizen are protected, notwithstanding public demand for results and a lack of public sympathy for the people invoking those constitutional rights. Fundamental rights are designed, at least in part, to provide protection against the emotions of the majority and against high running feelings of antagonism amongst the public.

While the European Convention on Human Rights is not part of the law of this State, it is now part of the law of the European Union and therefore indirectly forms part of the fundamental right protection which the citizens of Ireland enjoy in those areas within the competence of the European Union. The right to privacy is recognised by Article 8 of the European Convention which provides:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."



In Resolution 428 (1970) of the Consultative (Parliamentary) Assembly of the Council of Europe, which contains the Declaration concerning the Mass Media and Human Rights, this right has been defined as follows:

"The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially."

These rights are of course, even under the European Convention, subject to qualifications. In any ordered society rights of privacy must be subject to qualification. The real test for society is ensuring that those restrictions on the right to privacy go no further than is necessary for the achievement of the other proper objectives of a democratic society. The twin objectives of rooting out wrongdoing and respect of the right to privacy are not incompatible.

The importance and justification of the recognition of a right to privacy was expressed so eloquently by Brandeis J. in *Olmstead -v.- United States*[22] in the following terms:

"The makers of our Constitution ..... recognised the significance of a man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilised men."

It may ultimately be too high a price to pay to lose such a right. It is certainly too high a price to pay where the protection of that right is not inconsistent with the objectives or efficacy of Tribunals of Inquiry. ●

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1 unreported, Supreme Court, 28th July 1998].
2 [1934] I.R. 284.
3 1984] I.R. 36
4 [1970] I.R. 217.
5 [1978] ILRM 25.
6 He gave examples such as the secret ballot and the marital privacy recognised in the McGee case.
7 [1987] I.R. 587.
8 [1988] I.R. 757.
9 [1993] 3 I.R. 67.
10 [1994] 2 I.R. 8.
11 [1996] 3 I.R. 67.
12 [Unreported High Court, Hamilton P.. 10th May 1989]
13 [1989] I.R. 126.
14 [993] ILRM 747.
15 [1998] 2 I.R. 479.
16 [1999] 1 ILRM 241.
17 At Page 256.
18 [1998] 3 I.R. 368.
19 [1992] 2 I.R. 542 at 603.
20 At Page 124.
21 [1992] 2 I.R. 542.
22 277 U.S. 438 at 478.

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* Paper originally delivered to the Bar Council Conference on Tribunals of Inquiry in July 1999.

The Proceeds of Crime Act, 1996: A Review of the Past 12 Months

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1. Introduction

It will soon be three years since the Proceeds of Crime Act 1996 was enacted in response to the murder of journalist Veronica Guerin. In that time the Act has survived two major constitutional challenges in the High Court and the operation of its provisions has begun to be fleshed out by an increasing number of judgments on procedural matters. In the past year a CAB list has appeared regularly in the legal diary and proceedings under the Act have changed from being an exotic area of law practised by only a handful of barristers to a more ordinary part of the court's day to day business. In addition, the Criminal Assets Bureau has widened its attention from freezing orders and focused more on tax assessments and social welfare applications. Several judgments have been successfully obtained in these areas and a large variety of property including boats, cars, pubs and houses has been seized. The purpose of this article is to review some of the important cases that have been decided in the past twelve months.

2.1 Constitutional Challenge

2.1 Introduction

In *M v M*[1] O'Higgins J upheld the constitutionality of the Proceeds of Crime Act 1996 after a 29 day hearing in the High Court. The constitutionality of the Act had previously been upheld by McGuinness J in *Gilligan v Criminal Assets Bureau*[2], but the Supreme Court gave the applicants in *M v M* leave to argue the issue all over again. It must be a matter of concern that the Supreme Court overrode the doctrine of *res judicata* and thereby created a precedent whereby an Act can now potentially be exhaustively challenged on two occasions in the High Court. And if two occasions, why not three or four, so long as the applicants can continue to come up with some reason why they are unhappy with the previous judgments. Surely finality is as important in constitutional litigation as in any other area of law. The Constitution itself recognises this in Article 34.3.3 which provides that a Bill upheld by the Supreme Court after being referred to it by the President under Article 26 can never be challenged again.

The background to *M v M* involved an application for an interlocutory freezing order under s 3 of the 1996 Act prohibiting the four respondents from disposing or otherwise dealing with a sum of £300,000. An interim order freezing the money had already been obtained by the CAB under s 2 of the Act. The judgment of O'Higgins J. is wide ranging in its scope and makes important declarations of principle on matters such as constitutional rights, statutory interpretation, the separation of powers, the presumption of constitutionality, international law, the law of evidence and the rules of pleading and service. The judgment will therefore be of interest to all practitioners and not just those who are directly involved in CAB litigation.

2.2 The Act

Before examining the judgment it is helpful to briefly consider the structure of the Proceeds of Crime Act 1996. Under s 2 an interim order can be obtained on an *ex-parte* basis freezing the proceeds of crime. The value of the property must be at least £10,000. This order lasts for 21 days at which stage an interlocutory order may be sought under s 3. After seven years a final disposal order may be sought under s 4. Section 6 permits the respondent to apply to have the order varied to discharge his reasonable living and other necessary expenses. Section 7 permits the appointment of a receiver, and section 8 provides for the admissibility in evidence of the belief of a member of the Garda Síochána not below the rank of Chief Superintendent. Section 9 permits the court at any time during proceedings under ss 2 or 3 or while an interim or interlocutory order is in force to direct the respondent to file an affidavit specifying the property he is in possession or control of or his income and sources of income over a period not exceeding the previous ten years. Finally, sections 10 to 14 deal with matters such as the registration of interim orders and the situation where a respondent is bankrupt.

2.3 Pleading and Service

In *M v M* the respondents successfully contended that the plenary summons served on them was defective since it merely sought interlocutory relief under s 3 and contained no claim for substantive relief under s 4 of the Act. They relied on *Caudron v Air Zaire*[3] for the proposition that injunctive relief can only be obtained in the context of an application for substantive relief. O'Higgins J agreed that the substantive relief claimed under s 4 should have been included in the indorsement of claim. However the respondents had failed to apply by way of notice to have the applicant's claim struck out and, in any event, the defect in pleading was of a technical nature and could not have conceivably prejudiced the respondents. The Court therefore used its discretion to permit the summons to be amended.

The third respondent further claimed that as he was resident in the Isle of Man he should not have been served with the plenary summons but only with notice of it as required by Order 11, Rule 8 of the Rules of the Superior Courts. O'Higgins J agreed but held that the unconditional appearance on behalf of that party cured any defect in the summons.

2.4 Possession and control

The respondents argued that since a receiver had already been appointed over the money they were no longer in 'possession or control' of it and so could not be made the subject of a s 3 freezing order. O'Higgins J looked to the scheme of the Proceeds of Crime Act and concluded that if the appointment of a receiver prevented the making of an order under s 3 it would defeat the whole purpose of the Act. In addition, there was internal evidence in

the Act which favoured this conclusion. For example, s 7 envisages the appointment of a receiver between the interim order under s 2 and the interlocutory order under s 3. It was inconceivable that the Act, while permitting the appointment of a receiver between the interim and the interlocutory order, would nevertheless bring about the destruction of the statutory provisions by preventing the interlocutory order being made if the receiver were appointed.

It is submitted that this conclusion is correct. The purpose of the 1996 Act had already been identified by Moriarty J in *M v D*[4] in the following terms:

> "it seems to me that I am clearly entitled to take notice of the international phenomenon, far from peculiar to Ireland, that significant numbers of persons who engage as principals in lucrative professional crime, particularly that referable to the illicit supply of controlled drugs, are alert and effectively able to insulate themselves against the risk of successful criminal prosecution through deployment of intermediaries, and that the Act is designed to enable the lower probative requirements of civil law to be utilised in appropriate cases, not to achieve penal sanctions, but to effectively deprive such persons of such illicit financial fruits of their labours as can be shown to be the proceeds of crime."[5]

This purpose would have been totally frustrated had the respondents' been successful in their argument.

2.5 Extraterritoriality

Approximately £180,000 of the money being held had been brought back from a bank account in London by a Detective Garda. The circumstances in which this was done were of crucial importance. The receiver had advised the relevant respondent that a s 2 order had been made in respect of the money and requested him to sign an authority directly to the London bank to give the Detective Garda a bank draft for that amount which was made payable to the receiver. The respondent complied with that request and the receiver dispatched the Detective Garda to London to collect the funds on his behalf.

The respondents' argued that the Proceeds of Crime Act did not apply to this money as the legislature had not expressly made the Act extra-territorial in effect. They pointed out that similar legislation in New Zealand, Australia and the UK, as well as the Irish Criminal Justice Act 1994, all specifically referred to the extra-territorial application of their provisions. By contrast, the 1996 Act was silent as to its extra-territoriality. In addition they relied on the judgment of Lord Denning in *Attorney General of New Zealand v Ortiz*[6]. In that case the New Zealand Government had attempted to stop the auction in England of a Maori carving that had been illegally exported from New Zealand in breach of the Historic Articles Act 1962. In a dictum Lord Denning held that if the New Zealand Act provided for automatic forfeiture as soon as an article was exported, it was unenforceable in England on the basis that it infringed the rule of international law which says that no country can legislate so as to affect the rights of property when that property is situated beyond the limits of its own territory. This dictum was relied on by the respondents for the proposition that if the 1996 Act were to have extra-territorial application it would be an infringement of international law.

O'Higgins J held that the power of the court to appoint a receiver over assets situated abroad was well-established without explicit statutory provision. There was nothing in the Proceeds of Crime Act to suggest that receivers appointed under it were intended by the legislature to have less power than other receivers. Nor was there anything in the Act that required the reading down of the words so as to imply that the Act only applied to assets in the jurisdiction. The appointment of a receiver over property abroad did not infringe any principle of international law. The widespread application of similar legislation in other countries to property "wherever situate" was indicative of this. Here the receiver had been appointed by an Irish court. The assets were the property of an Irish citizen. The request or demand of the receiver was made in Ireland of an Irish citizen who had control over assets which had been transferred to him in Ireland. In these circumstances O'Higgins J held that there was sufficient connection with Ireland for the court to exercise jurisdiction without offending against the sovereignty of any country. The injunction operated *in personam* only and therefore did not offend international comity by infringing the exclusive jurisdiction of a court in another country.

2.6 The Reveiver

A receiver had been appointed over the respondents' assets on behalf of the CAB. The respondents complained that it was impermissible to make an interim order and a receivership order simultaneously and also impermissible to make a receivership order on an *ex-parte* basis. O'Higgins J found as a matter of fact that the interim order had been made before the receivership order. In any event, he could see nothing to prohibit both applications being sought at the same time. In addition, the equitable remedy of appointing a receiver had always been available on an *ex-parte* basis and so the absence of an express provision in the Proceeds of Crime Act for the appointment of a receiver on an *ex-parte* basis did not mean that this could not be done.

2.7 The presumption of constitutionality

One of the most novel and interesting arguments raised by the respondents was that because of the hurried circumstances in which the Proceeds of Crime Act was passed the presumption of constitutionality that attached to it should be less strong than in other cases. The Bill had been passed after the killing of journalist Veronica Guerin and there was considerable high feeling prevalent at the time of its passing. O'Higgins J rejected the respondents' contention and in an important declaration of principle stated that the presumption of constitutionality arises from the respect that the courts owe to the Legislature and not on the quality or otherwise of the proceedings in the Oireachtas.

2.8 Ersatz civil law?

The respondents contended that the Proceeds of Crime Act is ersatz civil law. They suggested that in reality it was a criminal law which did not afford the protections normally existing in the criminal law such as the presumption of innocence and the standard of proof required. O'Higgins J concluded that proceedings under the Proceeds of Crime Act were civil in nature for the following reasons:

i) The Act does not seek to make anyone amenable for a criminal offence.
ii) It is not necessary for the operation of an order under the Act that the respondent be guilty of a crime, nor is it even necessary that their conduct be morally reprehensible. It is quite conceivable that an order could be made against a guiltless person who is in possession of goods which are the proceeds of crime.
iii) It is not sought under the Act to bring the person who committed the crime to justice in respect of any such crime.
iv) The fact that, in proving the circumstances which justify forfeiture under

the Act, it is necessary to establish that a crime was in fact committed did not per se make the proceedings criminal in nature.

v) Proceedings under the Act are *in rem* and not *in personam.*

vi) No person is on trial under the Act.

vii) No question of *mens rea* or fraud necessarily arises under the Act.

viii) No question of imprisonment arises under the Act. Nor does any question of pecuniary penalty directly arise under the Act. What occurs is forfeiture of the proceeds of crime.

ix) The decision of the Supreme Court in *Attorney General v Southern Industrial Trust* was binding on the court There it was held that the seizure of an illegally exported car from an innocent hire-purchase company was a civil proceeding and was constitutional.

O'Higgins J was satisfied that the Proceeds of Crime Act did not create a money-laundering type offence. He accepted that there was a public dimension to the Act but held that the sanction of forfeiture was a matter of fiscal reparation rather than being punitive in nature. As a person does not have any title to the proceeds of crime no punishment could be said to accrue if such proceeds were forfeited.

The decision of O'Higgins J is in line with previous Irish cases on this point, but the Proceeds of Crime Act probably marks the high water-point of non-criminal matters. The same arguments that the respondents were making on this issue had previously been raised and rejected in the *Gilligan* case and the only difference in that case and the judgment of O'Higgins J is that the respondents in *M v M* cited a more extensive survey of ECHR case-law to back up their contention that the Act was criminal in nature. However, O'Higgins J was unable to discern any conflict between the case-law of the ECHR and the decision in the leading Irish case on the identification of criminal proceedings, namely *Melling v O'Mathghamhna.*[8]

2.9 Right to private property

It was claimed that if the 1996 Act were to permit the forfeiture of property owned by entirely innocent parties it would be invalid as an impermissible invasion of private property. O'Higgins J rejected this contention and followed *Attorney General v Southern Industrial Trust*[9], where the Supreme Court had held the confiscation of the property of an entirely innocent party to be constitutional.

2.10 Delay

A claim by the respondents that they had been prejudiced by a delay of over a year between the making of the interim order and the hearing of the interlocutory application was rejected on the ground that the responsibility for much of the delay lay with the respondents themselves. The respondents further claimed that the fact that such a delay could occur under the Act made it unconstitutional. They drew the court's attention to the fact that similar legislation in Australia and New Zealand expressly requires expedition. O'Higgins J was unable to understand how, even if there had been a delay, that could of itself make the Act unconstitutional unless the Act itself required such delay or prevented a person alleging prejudice through delay. The Act did no such thing. In fact, an application by the respondents to have the proceedings struck out on the grounds of delay had previously been rejected and this rejection had not been appealed against. O'Higgins J also rejected a claim that there should be built-in time limits in the Act as these could cause injustice in certain circumstances.

The respondents drew the court's attention to the fact that a final disposal order could not be made under s 4(1) of the Act until a period of at least seven years had passed since the interlocutory order was made. They complained that the fact that they would have to wait seven years to get a hearing of the substantive case constituted an excessive delay. The difficulty in getting witnesses seven years down the line could prejudice them considerably. O'Higgins J held that this argument was based on a misconception of how the Act worked. The structure provided for a disposal order under s 4 did not contemplate a rehearing of the material on which a s 3 interlocutory order was made. A hearing under s 4 was not intended to be akin to the usual form of trial of the substantive issues in a civil action. In fact the seven-year period was provided in ease of the respondents and gave them seven years in which to demonstrate that the assets frozen were not the proceeds of crime or that it would otherwise be unjust to continue the s 3 order.

2.11 Res judicata

O'Higgins J held that the principle of *res judicata* would not prevent the respondents from re-applying to have the interlocutory order varied or discharged under s 3(3) of the Act. There was nothing to preclude applications being made from time to time depending on a change in circumstances or additional information coming to light. It is submitted that this interpretation is correct and is in line with the limited applicability of *res judicata* to bail and maintenance applications.

2.12 Hearsay evidence

The respondents objected to the use of hearsay evidence by the CAB in the interlocutory application as it was not an ordinary kind of interlocutory hearing in that there was no requirement for an undertaking in damages and the substantive case would not be heard for seven years. O'Higgins J held that the rule against hearsay was a rule of evidence only and not a constitutional requirement. It could be modified by statute and the admission of such evidence was not *per se* unfair. In addition, the weight to be attached to such evidence was a matter for the court which was obliged to examine it carefully and which could require the attendance of the person identified as the source of the deponent's hearsay evidence in an appropriate case.

2.13 The standard of proof

O'Higgins J held that the standard of proof required under the Act was the balance of probabilities and rejected the respondent's claim that it was the standard required to obtain an interlocutory injunction, namely a statable case. If a disposal order could be obtained by virtue of an order obtained on a lower standard of proof than on the balance of probabilities that could be a fundamentally unfair procedure and hence unconstitutional. Therefore the constitutional interpretation of the Act had to be adopted and that was the balance of probabilities.

2.14 Onus of proof

The respondents challenged the provisions of the Act (ss 3 & 4) which contained provisions for the changing of the onus of proof from the applicant to the respondent. Effectively, this argument fell once O'Higgins J determined that proceedings under the Act were civil rather than criminal. The use of shifting burdens of proof in criminal law has been repeatedly upheld by the High and Supreme Court[10]. If such a procedure is permissible under the exacting standards of criminal law, then it must certainly be allowed in civil law. There was nothing unfair or contrary to any concept of equality of arms in the *onus* shifting in a civil action on the attaining of certain proofs. It was quite reasonable in the context where it appears to a court that the goods are the

proceeds of crime that the person in possession be asked to account for the property.

2.15 Evidence of belief

Section 8 of the Act makes admissible evidence of belief. If a member or authorised officer of the CAB states that he or she believes that the respondent is in possession of the proceeds of crime or property acquired with the proceeds of crime, then if the court is satisfied that there are reasonable grounds for such belief, it shall be evidence of the matters stated therein.

The respondents contended that because the belief is based on hearsay the court should not be satisfied that there are reasonable grounds for it. O'Higgins J held that it was illogical to conclude that it was *per se* unreasonable to accept such information.

The respondents further complained that such evidence of belief was unconstitutional if the evidence was that of the plaintiff himself. In rejecting this claim, O'Higgins J noted that the plaintiff (who was the head of the CAB) had no personal interest in the outcome of the case. He was not acting for himself and was only the plaintiff because under the legislation he was entitled to bring the proceedings. Evidence of belief was not decisive of the proceedings and did not even alter the onus of proof. Rather, it was simply admissible as a part of the evidence.

2.16 Statement of claim and discovery

In the interlocutory proceedings the respondent had been denied a statement of claim and also refused discovery. They claimed that this was constitutionally unfair. O'Higgins J held that there was no constitutional requirement for either a statement of claim or a notice of particulars or for discovery. What there was, was a requirement that a person knows reasonably the case that is being made against him and which he has to answer. Here, the respondents were aware not only of the nature of the claim but of a great part of the evidence as well. In those circumstances there had been no infringement of any constitutional rights. Interestingly O'Higgins J suggested that the procedures to be adopted under the Proceeds of Crime Act have not yet been fully settled and that it might be that some procedure other than a plenary summons would be more appropriate.

O'Higgins J also rejected a contention that proceedings under the Act must be in relation to an identifiable crime. It is submitted that this is correct. The background to the passing of the Act was that certain criminal 'godfathers' could not be linked to identifiable crimes and if this were to be made a requirement under the Act its purpose would be defeated.

2.17 Is the Act over-broad?

It was submitted that the Proceeds of Crime Act is over-broad in that it is impermissibly wide and indiscriminate. O'Higgins J accepted that the definition section of the Act was indeed broad and that the range of property coming within the ambit of s 3 was likewise very extensive. However he found it difficult to see how an Act with the object of the Proceeds of Crime Act could in any way be effective without a broad definition. The objects of the Act were legitimate and laudable. In any event, the court was precluded from granting an interlocutory injunction under s 3 if it was satisfied that there would be 'a serious risk of injustice.' O'Higgins J also held that the respondents lacked *locus standi* to claim that the Act was over-broad in that it failed to protect the rights of a *bona fide* purchaser for value without notice, as none of them claimed to be such a person.

2.18 Is the Act unconstitutionally vague?

It was submitted that the Act was excessively vague in terms of the property to which it refers and the degree of guilt necessary and also that the 'risk of injustice' saver was similarly too vague. O'Higgins J held that the terms of the property targeted in the Act, while very broad, were not vague and, in any event, the respondent would in any given case be quite aware of what they are. Nor could it be said that the Act was unconstitutionally vague in terms of guilt, as the Act did not necessarily require any degree of guilt. In fact, one of the distinguishing features of the Act was that it drew a distinction between the possession of an asset and criminality.

2.19 Equality of arms

O'Higgins J rejected a claim that the provisions for hearsay and opinion evidence combined with the lack of a statement of claim, discovery or particulars constituted any inequality of arms between the parties. It was open to the respondents to challenge any evidence given in an interlocutory application and in most, if not all, such cases the respondent would be in a unique position to account for property in his possession or control.

2.20 Unwarranted interference with judicial functions?

It was contended that a number of provisions in the Act constituted an unwarranted interference with the judicial function. The respondents made the following contentions in this regard:

i) Under s 2(5) of the Act an interim order expires after 21 days unless interlocutory relief is applied for. The Court cannot discharge the interim motion on its own motion and this is an invasion into the judicial domain.
ii) The seven-year interval between an interlocutory order and a disposal order is an invasion into the judicial domain.
iii) The limiting of opinion evidence to the applicant and not to the respondent is an unwarranted interference with the judicial power to receive evidence.

O'Higgins J rejected all of these contentions and noted that no authority had been cited to substantiate them. The seven-year interval was no more an invasion into the judicial domain than the Statute of Limitations. There was no principle in law or justice that required evidence of belief admissible on behalf of one party to be counter-balanced by a similar provision for the opposing party.

2.21 Executive function?

The respondents claimed that the Act was unconstitutional in that it required the court to carry out intrinsically executive functions similar to the appropriation of land. The colourful prospect of a High Court judge directing traffic with his tipstaff on O'Connell Bridge pursuant to a theoretical Road Traffic Act containing legislation to that effect was used to illustrate this proposition. In the view of O'Higgins J the functions given to the court under the Proceeds of Crime Act essentially constituted the administration of justice. The granting of injunctions, the appointing of receivers, the granting of tracing remedies and the determination of ownership of property were all clearly matters in which the courts had traditionally been engaged and could not be classified as essentially executive or administrative functions.

2.22 The use of material obtained in other proceedings

Objection was taken to the use by the CAB in Proceeds of Crime proceedings of certain evidence obtained under s 63 of the Criminal Justice Act 1994 in garda investigations. However, O'Higgins J

could see no good reason why information obtained by the Gardaí in a criminal investigation should not be used in Proceeds of Crime proceedings which also had a public dimension to them.

2.23 Is the Act retrospective?

The respondents submitted that on a proper interpretation of the Act it applied to offences prior to the date of coming into force of the Act. However O'Higgins J held that the Act was prospective, not retrospective. The action which it focussed on was the possession or control of the proceeds of crime. It was only possession or control after the commencement date of the Act (4 August 1996) to which the Act attached consequences. It did not affect the possession or control of anything prior to the coming into force of the Act. While the Act looked at events prior to its commencement date, it could not be said to have a retrospective application.

2.24 The outcome

On the facts of the case O'Higgins J was satisfied that the respondents were in possession or control of £300,000 and that that property constituted directly or indirectly the proceeds of crime or was acquired in whole or in part with or in connection with property that directly or indirectly constituted the proceeds of crime. They had attempted to explain the origins of the money by submitting documentation relating to alleged business transactions. Part of their case relied on signed letters from third parties. However the CAB had introduced into evidence reconstituted unsigned copies of the same letters which they had found in the shredder of one of the respondents. O'Higgins J concluded that this respondent had been engaged in a premeditated, calculated, sophisticated and outrageous attempt to mislead the court.

3 Tax

One of the major shifts of emphasis in the past year has been towards tax collection. Judgments have mainly been obtained against drug dealers but in one case an assessment was raised against a brothel operator. The following examples illustrate how the CAB has utilised its revenue powers in the past twelve months.

In July 1998 a High Court judgment for £103,350 was obtained against George Mitchell for unpaid VAT and interest.[11] The defendant was serving a sentence of imprisonment in Holland and was alleged to be involved in the Irish drugs trade. The assessment was between 1992 and 1993 and related to a Dublin licensed premises, the Spinning Wheel in Mary Street, in which it was alleged Mr Mitchell had an interest. Laffoy J put a four week stay on the order to permit Mr Mitchell an opportunity to appeal against the assessment. In November 1998 the stay was lifted and Laffoy J granted leave to the CAB to register a judgment mortgage against what was believed to be Mr Mitchell's home.[12]

In October 1998 a High Court judgment for £242,799 was obtained against Patrick Holland who was serving a 12 year jail sentence on drugs charges.[13] The judgment followed a tax assessment by the Revenue authorities for the years 1994 to 1996 plus interest. In an affidavit Mr Holland had described himself as an unemployed printer.

In February 1999 judgment in respect of a tax assessment of £1.75 million was granted by the High Court relating to the earnings of Thomas McDonnell since 1998.[14] Officers from CAB estimated that Mr McDonnell was making £5000 a week with an average of 12 prostitutes a day working for him. Gardai had identified four premises in Dublin run by Mr McDonnell.

In *CAB v Gerard Hutch*[15] Morris J granted leave to enter final judgment against the defendant for almost £2 million and interest. The claim was in respect of income tax alleged to be due by the defendant from 1988 to 1997. Lawyers for the CAB had told the court that there was evidence that Mr Hutch was the owner of property not in his name and had never explained where he got the means to purchase it. The CAB was also investigating the whereabouts of over £4 million suspected to be the proceeds of criminal activities by Mr Hutch. The gardai were investigating the robbery of £1.7 million from an armoured van at Marino in 1997 and the robbery of £3 million from a security depot in Clonshaugh in 1996. The defendant argued that the matter should have been sent to plenary hearing. He claimed that s 966(5)(a) of the Taxes Consolidation Act 1997 vested in the Inspector of Taxes the judicial function of making a determination of the tax due by a tax payer, since the certificate of this officer is to be taken as proof of the amount of tax due. Morris J held that this argument had already been rejected by the Supreme Court in *Dieghan v Hearne*[16]. In that case, which was concerned with s 184 of the Income Tax Act 1967, Murphy J had held that the purpose of the Inspector of Taxes was to compute the amount of tax to be paid having regard to the information provided by the taxpayer. His function was purely administrative and the fact that the taxpayer was precluded from disputing an assessment arose by virtue of something akin to statutory estoppel resulting from the inaction of the taxpayer.

The defendant also claimed that the CAB was estopped from pursuing its claim because he had availed of a tax amnesty under the Waiver of Certain Tax, Interest and Penalties Act 1993. Morris J held that if Mr Hutch was relying on the tax amnesty it was incumbent on him to produce the relevant certificate and this he had failed to do.

The defendant also attempted to claim that there was a issue to be argued as to which section of the Tax Code was the appropriate one for him to appeal his assessment under, but Morris J disposed of this point on the ground that he had failed to rely on any of the available mechanisms for appeal.

The defendant's final claim was that s 955(2)(a) of the Taxes Consolidation Act 1997 provided him with a partial defence in that it provided that where a person provided a return no assessment could be made on him after the end of a period of six years commencing at the end of the chargeable period in which the return is delivered. Morris J ruled that this subsection had to be read in the light of s 294 of the Taxes Consolidation Act 1997 which provides that an inspector may make an additional assessment where chargeable properties or income have been omitted from the first assessment or where a chargeable person has not delivered a full and proper statement.

In June 1999 the defendant lost a Supreme Court application for a stay on the High Court order.[17]

4 Social Welfare

Information gathered in investigations by the CAB has also been used to cut-off social welfare allowances. A good example is the case of Martin Hyland heard before Judge Dunne in the Circuit Civil Court on May 11 1999 in which she upheld the decision of a Social Welfare Deciding Officer to cut off unemployment assistance to Mr Hyland.[18] An article in the Sunday World had alleged that Mr Hyland was involved in drug dealing. This article had come to the attention to the Department of Social, Community and Family Affairs and an investigation was directed to be carried out by the CAB. This investigation led to a recommendation that his unemployment

assistance be terminated. Judge Dunne upheld this decision and stated that Mr Hyland's evidence as to his place of residence had been evasive, inconsistent and, at times, contradictory.

5 Legal Aid

One of the issues that has recently led to some debate is the extent to which legal aid should be available to defendants to actions brought by the CAB. On the one hand the defendants may argue that as all their assets are frozen under an *ex-parte* order they should automatically be granted a legal aid order without further investigation. Even if all their assets are not frozen, they may be reluctant to get into the witness box or swear a statement of means as this will leave them open to an unwelcome cross-examination by counsel for the CAB. On the other hand it can be argued that such defendants are in no different position to any other defendant and must give sworn evidence as to their means before being granted legal aid. It is not in the public interest that a person should be permitted to defend themselves out of the public purse if they have in fact other undisclosed assets.

To date decisions have come down in favour of the latter approach. A good example is the case of Gerard Hutch whose application for legal aid to challenge a £1.9 million tax assessment was rejected by both Kelly J. McGuinness J had previously held that an application brought for legal aid by Mr Hutch or any other citizen always involved a court adjudication as to an applicant's means. She said that it was not a matter of looking into Mr Hutch's Communion money but looking into his assets. Subsequently, Kelly J held that the evidence given by Mr Hutch's solicitor was insufficient as to her client's means and that it was for Mr Hutch himself to give evidence of his assets.[19] A notable feature of the case was that Mr Hutch had neither appeared to give evidence nor sworn an affidavit to support his application. Evidence from the CAB that he had assets in Ireland and offshore had not been challenged.

An ad-hoc scheme has now been put in place by the Department of Justice for the payment of legal aid when it is granted in CAB cases.

6 CAB and the Tribunal

In early 1999 the Flood Tribunal required Mr Gorge Redmond to make discovery on oath of all documents in his possession relevant to the subject matter of the Tribunal's inquiry. Mr Redmond claimed that he was unable to comply with this order because the documents in question had been seized by the CAB. Mr Redmond had been arrested by CAB officers at Dublin airport and documents were subsequently seized in a search of his house. The Tribunal ordered the CAB to furnish copies of all documents seized from Mr Redmond. CAB claimed privilege over the documents on the grounds that it was material obtained for the detection of crime and to furnish it would prejudice both the investigations and the fair trial of any persons who might be prosecuted as a result of those investigations. CAB further claimed that the issue of privilege was a matter for the courts and not for the tribunal to determine. It was this latter point that McCracken J was asked to rule upon in *Murphy v Flood*.[20] He noted that both the Tribunal and the CAB had been established by the Oireachtas to carry out investigations in the public interest. Unfortunately the Oireachtas had failed to legislate for the priorities of those bodies to information. He concluded that it was for the Tribunal to determine the issue of privilege and held that since the Tribunal was neither a litigant nor adjudicating on a dispute *inter partes* it could not be said to be acting as a judge in its own cause:

> "If the Tribunal could not rule on matters of evidence, and this is really a matter of evidence, as they arise in the course of the Tribunal's hearings, it would make the work of the Tribunal almost impossible. If the applicant is correct, then any person appearing before the Tribunal who is dissatisfied with a ruling on evidence could come to the High Court and claim that the Tribunal was acting as a judge in its own cause in making that ruling, and have it set aside. There could be endless delays and enormous public expense in what the Oireachtas has determined to be a matter of urgent public interest. This could not possibly have been intended by the Oireachtas when the Tribunal was set up. The only basis upon which a Tribunal of this nature can operate is that it may make rulings as they arise, and that is the reason why the specific powers were given to the Tribunal both under Section 1 of the 1921 Act and Section 4 of the 1971 Act."

McCracken J remitted the question of privilege back to the Tribunal and instructed it to hear further argument from the CAB on the issue. The case was appealed to the Supreme Court and on the 22nd July, 1999 Hamilton, C.J., upheld the decision of the High Court.

7 Conclusion

There now exist two exhaustive High Court judgements upholding the constitutionality of the Proceeds of Crime Act. It has been comprehensively judged against the standards of Irish case-law, foreign case-law and the ECHR and been found to adequately meet those standards. In such circumstances the chances of the considered judgments of McGuinness and O'Higgins JJ being overturned by the Supreme Court must be regarded as being slim. It is likely that litigation in the next twelve months will concentrate on establishing the procedures for the day to day operation of the Act. It will take a few more years before every aspect of the Act has been judicially teased out. In particular, the first applications for disposal orders under s 4 will not occur until the year 2003 at the earliest. The use by the CAB of its powers in tax and social welfare matters has proved to be particularly successful and many more of these applications can be expected in the near future. The fear of some people that the passing of the Proceeds of Crime Act was too rushed have proved misplaced and the CAB list has become just another part of the weaponry in the State's armoury against those who seek to make their living by inflicting their criminal acts on the rest of society. ●

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1 Unreported, High Court, 4 June 1999
2 [1998] 3 IR 185
3 [1985] IR 716
4 [1998] 3 IR 175
5 [1998] 3 IR 175 at 178
6 [1984] 1 AC 1
7 (1960) 94 ILTR 161
8 [1962] IR 1
9 (1960) 94 ILTR 161
10 See e.g. O'Leary v Attorney General [1993] 1 IR 102
11 Irish Times, 18 July 1998
12 Irish Times, 11 November 1998
13 Irish Times, 21 October 1998
14 Irish Times , 3 February 1999
15 High Court, 14 May 1999
16 [1986] IR 603
17 Irish Times 12 June 1999
18 Irish Times, 12 May 1999
19 Irish Times 14 April 1999
20 High Court, 1 July 1999

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A directory of legislation, articles and written judgments received in the Law Library from 14th June 1999 to 23rd July 1999.
Judgment Information compiled by the Legal Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative Law

O'Donohoe v. O'Baroid
High Court: **McCracken J.**
23/04/1999

Injunction; declaration; G.A.A. rules on transfer of players; interpretation of rules; transfer sought from junior club to other gaelic games clubs; refusal by county committee to approve transfer; transfer would breach rules; whether an agreement between the clubs governed the rules; whether the rules affected constitutional right to association; whether bound by the rules of the G.A.A.; whether letter of complaint should have been read out at meeting
Held: Relief refused

Cross River Ferries Limited v. Port of Cork Company
High Court: **O'Sullivan J.**
06/05/1999

Declaration; fair procedures; constitutional justice; management of port; delegated power to impose charges on vessels operating ferry service; whether the charges were invalid; whether applicants should have been consulted and given notice in relation to charges; whether *audi alteram partem* principle applies to the making of delegated legislation
Held: Application dismissed

Bankruptcy

Mehigan v. Duignan
High Court: **Laffoy J.**
22/03/1999

Bankruptcy petition; act of bankruptcy; orders of *fieri facias*; return of no goods; address on orders of *fieri facias* alleged to be incorrect; county registrar failed to carry out a search at address following receipt of a letter stating that the applicant had no belongings at that address; respondent claimed that returns were irregular and fell short of satisfying the Court that an act of bankruptcy had been committed; whether applicant had satisfied the requirements of s.11(1), Bankruptcy Act, 1988; whether wrong address was endorsed on orders of *fieri facias*; whether there had been a *bona fide* attempt at execution of the order of *fieri facias*; ss.7(1)(f) and 11(1), Bankruptcy Act, 1988; Ord. 42, R.16, Rules of the Superior Courts
Held: Respondent adjudicated bankrupt

Children

Article

Child protection: conflicting legal and medical perspectives
Buckley, Helen
5 (1999) ITR 18

Commercial Law

Article

Contracts negotiated away from business premises and the 1997 distance selling directive
McMahon, Laurence
1999 ILTR 139

Company Law

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Reck, Paul
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O'Hanlon, Niall
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Ryan, Jim
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Travers, Noel J
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Constitutional

Redmond v. Flood
Supreme Court: **Hamilton C.J.***, O'Flaherty J., Denham J., Barrington J., Murphy J.
(*Judgment of the Court delivered by Hamilton C.J.)
06/01/99

Tribunal of Inquiry; public hearings; terms of reference; right to privacy; fair procedures; constitutional justice; challenge in respect of investigation of allegations against the applicant by Tribunal of Inquiry into Certain

Planning Matters; whether the Tribunal had misinterpreted its Terms of Reference; whether the Terms of Reference were *ultra vires* the Tribunals of Inquiry (Evidence) Acts, 1921-1998 in that they were too broad to constitute definite matters of urgent public importance; whether right to privacy would be infringed by public hearing of allegations; whether fair procedures required that proceedings of the Tribunal be conducted in private; whether Tribunal was required to hold private inquiry before proceeding to a public inquiry; whether *prima facie* case was required before proceeding to a public inquiry; whether fair procedures required that applicant should see the evidence against him prior to the public inquiry; Tribunals of Inquiry (Evidence) Acts, 1921-1998
Held: There was no arguable case that the Tribunal had misinterpreted its terms of reference; there was no arguable case that the Terms of Reference were *ultra vires* the Tribunals of Inquiry (Evidence) Acts, 1921-1998; the Tribunal was not obliged to hold a private inquiry before proceeding with its public inquiry; appeal dismissed

O'Shiel v. The Minister for Education
High Court: **Laffoy J.**
16/04/99

Education; duty of the State to provide free primary education; teacher qualifications; Irish language; Department of Education refused to recognise a Steiner School as a primary school and refused the school State funding; whether the constitutional obligation of the State to provide free primary education is subject to parental freedom of choice in relation to the type of primary education; whether the criteria under the Rules for National Schools for recognition of a primary school – in relation to teacher qualifications and the place of the Irish language in the curriculum – infringed the plaintiffs' constitutional rights; Arts. 8 and 42, Constitution; Rules for National Schools under the Department of Education, 1965
Held: The State must take account of the parental freedom of choice guaranteed by Art. 42 of the Constitution; the criteria for recognition of primary schools did not infringe the plaintiffs' constitutional rights; relief refused

Lavery v. The Member in Charge, Carrickmacross Garda Station
Supreme Court: Hamilton C.J., **O'Flaherty J.,** Barrington J., Keane J., Murphy J.
23/02/1999

Appeal from successful *habeas corpus* application; respondent was arrested on suspicion of being a member of an unlawful organisation; no notes were taken at early interviews and solicitor was refused access to notes taken at later interviews; whether detention of respondent was unlawful; whether refusal to allow solicitor of respondent access to documentation rendered detention unlawful; ss.2 and 5, Offences against the State (Amendment) Act, 1998; Art. 40.4, Constitution
Held: Detention was lawful; order of the High Court reversed

Consumer Law

Article

The powers and functions of the European ombudsman
Somers, Jim
12 (1999) ITR 259

Contract

Article

Contracts negotiated away from business premises and the 1997 distance selling directive
McMahon, Laurence
1999 ILTR 139

Conveyancing

Article

Recent developments in conveyancing practice
Sweetman, Patrick
1999 IPELJ 28

Copyright, Patents & Designs

Articles

Can you patent a business method?
Kelleher, D
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"Owning" life: new frontiers in patent law, genetics and biotechnology?
Sheikh, Asim
5 (1999) MLJI

Criminal Law

O'Connor v. D.P.P.
High Court: **McGuinness J.**
04/03/1999

Judicial review; delay; alleged child sexual abuse; prohibition; injunction; right of an accused to a trial with reasonable expedition; applicant was charged with indecent assault of a minor; whether there was delay in bringing the applicant to trial; grounds upon which the court is entitled to prohibit a prosecution; whether the applicant had suffered specific prejudice; whether the applicant would obtain a fair trial; whether basic unfairness could be avoided by proper rulings and directions by the trial judge during the course of the trial
Held: Relief granted; specific prejudice suffered by the applicant; in the circumstances, unfairness of the trial could not be avoided by rulings and directions of the trial judge

D.P.P. v. District Judge Finn
High **Court: Barr J.**
07/05/1999

Procedure; judicial review; charges preferred by applicant alleging breach of s.8(b), Official Secrets Act, 1963; informations refused by respondent; whether the offence was one which could be tried summarily; whether offence was committed in a manner prejudicial to the safety or preservation of the State; whether order made by respondent was made without jurisdiction; ss.8(b) and 13, Official Secrets Act, 1963
Held: Order made by respondent was a nullity; charge should be tried summarily

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Customs & Excise

Article

Customs and excise duties explained: a case study approach
Herbert, Louis
12 (1999) ITR 305

Damages

F.W. v. British Broadcasting Corporation
High Court: **Barr J.**
25/03/1999

Assessment of damages; aggravated damages; personal injury; negligence; expert witness; breach of undertaking; broadcast about sexual abuse of plaintiff by former swimming coach; identity of plaintiff disclosed during broadcast despite undertakings that his anonymity would be preserved; whether gross negligence or gross misconduct of an expert witness; whether conduct of expert witness entitled the plaintiff to aggravated damages; whether professional misconduct in issuing a warning; whether conduct of the trial was unfair
Held: Plaintiff awarded general damages of £75,000 and aggravated damages of £15,000

Article

Quantum leap general damages in the 1990s
Pierse, Robert
1999 (May) GILSI 20

Defamation

Article

All the news that's fit to print?
O'Halloran, Barry
1999 (May) GILSI 16

Defence Forces

Kerwick v. Minister for Defence
High Court: **O'Donovan J.**
19/03/1999

Army deafness; Green Book; tinnitus; loss of hearing; time-limit; plaintiff was exposed to noise of gunfire without hearing protection while serving in army; whether claim was time-barred; whether plaintiff was precluded from maintaining a claim in respect of tinnitus by virtue of Green Book which requires documented evidence of having attended a primary care physician; whether damages should be awarded for loss of hearing on the basis of the Green Book; whether there was good reason for departing from Green Book; Statute of Limitations Act, 1957; Statute of Limitations (Amendment) Act, 1991; Civil Liability (Assessment of Hearing Injury) Act, 1998
Held: damages awarded for loss of hearing; damages were not assessed on the basis of Green Book

Permanent Defence Force Other Ranks Representative Association v. Minister for Defence
High Court: **Geoghegan J.**
04/05/1999

Quasi-industrial dispute; subsistence allowance; interpretation of Regulations: soldiers on an operation; absent on duty from their station; whether soldiers were rationed; whether entitled to subsistence allowance under the Regulations; whether automatically entitled to subsistence allowance if complied with conditions; whether entitled to subsistence allowance and rations; Paragraph 68 of the Defence Force Regulations, s.3
Held: Paragraph 68 is a rate fixing and procedural regulation; subsistence cannot be claimed where food and accommodation is provided; action dismissed

Employment

Articles

Asbestos-related disease claims
Hill, Niall
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O'Brien, Ken
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Environmental Law

Maher v. An Bord Pleanála
High Court: **Kelly J.**
07/05/1999

Environmental; interpretation of statutory instrument; judicial review; application for order of *certiorari* to quash decision of respondent whereby notice party was granted planning permission for pig unit; spreading of pig slurry in vulnerable area; habitat for fresh water pearl mussel; spawning ground for brook lampreys; whether the proposed development exceeded the thresholds set for developments of that class in par. 1(e) of Part II of the First Schedule to the E.C. (Environmental Impact Assessment) Regulations, 1989; whether submission of environmental impact statement was mandatory; interpretation of thresholds; whether the term "sow" included progeny; whether a sow's progeny are encompassed within the pig units assigned to a sow under the Regulations; whether court should apply literal or purposive interpretation; E.C. Directive 85/337/EEC; E.C. (Environmental Impact Assessment) Regulations 1989
Held: Respondent had misinterpreted the threshold requirement in par. 1(e) of Part II of the First Schedule to the 1989 Regulations; environmental impact statement was required for the proposed development; order of *certiorari* granted

Articles

Can EIA deliver sustainable development?
Fry, John
1999 IPELJ 17

Causes of action where damage has been suffered as a result of the improper treatment and disposal of sewage
Fitzsimons, Jarlath
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The powers and functions of the European ombudsman
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Supreme Court: Hamilton C.J., Denham J., Barrington J., **Keane J., Barron J.*** (*dissenting)
19/02/1999

Child abduction; wrongful removal; rights of unmarried father under the Hague Convention on the Civil Aspects of International Child Abduction; defendant removed child from U.S.; petitioner sought return of child; parent's marriage not recognised under U.S. law; whether petitioner was entitled to invoke the Hague Convention; whether removal of child was wrongful within the meaning of Art. 3 of the Convention; whether removal of child was in breach of rights of custody attributed to the defendant or any other institution or body under the law of the State of New York; whether Hague Convention recognises inchoate rights of custody not attributed by the law of requesting State to the party asserting them or to the court itself but regarded by court of requested state as being capable of protection under the Convention; Child Abduction and Enforcement of Custody Orders Act, 1991; Arts. 1, 3 and 5, Hague Convention on the Civil Aspects of International Child Abduction
Held: Appeal allowed; removal of child was not in breach of rights of custody attributed to the defendant or any other institution or body under the law of the State of New York

Article

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Child abduction; wrongful removal; rights of unmarried father under the Hague Convention on the Civil Aspects of International Child Abduction; defendant removed child from U.S.; petitioner sought return of child; parent's marriage not recognised under U.S. law; whether petitioner was entitled to invoke the Hague Convention; whether removal of child was wrongful within the meaning of Art. 3 of the Convention; whether removal of child was in breach of rights of custody attributed to the defendant or any other institution or body under the law of the State of New York; whether Hague Convention recognises inchoate rights of custody not attributed by the law of requesting State to the party asserting them or to the court itself but regarded by court of requested state as being capable of protection under the Convention; Child Abduction and Enforcement of Custody Orders Act, 1991; Arts. 1, 3 and 5, Hague Convention on the Civil Aspects of International Child Abduction
Held: Appeal allowed; removal of child was not in breach of rights of custody attributed to the defendant or any other institution or body under the law of the State of New York

Article

Procedural exclusivity in the judicial review of transportation planning
Bradley, Conleth
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Articles

Law Society's new complaints procedures
Shaw, John
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Last rights death, dying and the law in Ireland
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Negligence

Stakelum v. Bank of Ireland
High Court: **O'Donovan J.**
27/04/99

Personal injury; assessment of liability; contributory negligence; plaintiff used unsuitable ladder at work and suffered personal injury; whether the plaintiff's duties required him to use a ladder; whether the defendants were obliged to ensure the ladder was suitable for the purpose; whether the plaintiff was guilty of contributory negligence
Held: The parties were equally at fault; damages were awarded

Fox v. O'Carroll
High Court: **O'Sullivan J.**
29/04/1999

Professional negligence; solicitor; reliance upon counsel's advice; plaintiff had purchased land; signature of one of the vendors was forged; signature had been attested by vendors' solicitors; transfer delayed as a result of forgery; plaintiff sought advice from defendant as to whether he could sue vendors' solicitors for damages in respect of losses caused by delay; defendant advised by counsel on two occasions that plaintiff had no cause of action against vendors' solicitors; plaintiff subsequently advised that he did have a case against vendors' solicitors; claim

was statute-barred; whether defendant was negligent in failing to sue vendors' solicitors within the limitation period; whether plaintiff had instructed defendant to initiate proceedings against vendors' solicitors notwithstanding counsel's advice that plaintiff had no case against said solicitors; whether defendant was negligent in accepting Counsel's advice in all the circumstances of the case; whether case against vendors' solicitors was glaringly obvious
Held: Claim dismissed

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Hill, Niall
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An analysis of the medical basis for assessing hearing loss in army deafness compensation cases
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Fry, John
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Fitzsimons, Jarlath
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Farrell, Emily
1999 IPELJ 22

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Bradley, Conleth
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Practice & Procdure

Irish Equine Foundation Limited v. Robinson
High Court: **Geoghegan J.**
04/05/99

Preliminary issue; plea that action was statute-barred; commencement of limitation period; plaintiff sought damages for faulty design of roof; damage occurred 4 years after construction of building; whether action founded in negligence was statute-barred; whether damage had to be manifest or discoverable in order to commence the limitation period; whether damage was manifest from date of construction or from date of damage; Statute of Limitations, 1957
Held: damage was manifest from the date of construction of the building; claim was statute-barred

Corbett v. D.P.P.
High Court: **O'Sullivan J.**
13/04/99

Discovery; privilege; legal professional privilege; public policy privilege; High Court had granted an order of discovery in respect of certain documents held by the respondent; whether the documents were covered by legal professional privilege and/or public policy privilege; whether public policy privilege had been competently raised; whether there was an abuse of process
Held: An Order directing production of specified documents and portions thereof was granted

Johnston v. Church of Scientology Mission of Dublin Limited
High Court: **Geoghegan J.**
30/04/99

Discovery; further and better discovery; sacerdotal privilege; contractual obligation of confidentiality; defendants claimed sacerdotal privilege in respect of counselling notes arising from "spiritual practices" of scientology; whether these sessions were analogous to confessions in the Roman Catholic Church; whether the public interest in the preservation of such confidentiality outweighed the normal public interest in favour of disclosure of evidence; whether the plaintiff was bound by written contract to preserve confidentiality
Held: Defendants could not rely on the analogy of the seal of confession; a private contract *inter partes* could not oust the jurisdiction of the Court to order discovery of documents referred to therein; an Order of Discovery was granted

Ted Castle McCormack & Company Ltd. v. McCrystal
High Court: **Morris P.**
15/03/1999

Application to enter final judgment; defence of *non est factum*; contract of guarantee; defendant signed guarantee in the belief that he was signing a loyalty agreement; additional claim for money due in respect of goods sold and delivered; whether defendant should be given leave to defend; whether there was a radical difference between what was signed and what the defendant believed he signed; whether the mistake was as to the general character of the document as opposed to its legal effect; whether there was a "lack of negligence" on the part of the defendant; whether defendant had established that there was a fair and reasonable probability that he had a real or *bona fide* defence
Held: Defendant was entitled to defend: application to enter final judgment refused

D.P.P. v. Galvin
High Court: **Geoghegan J**
30/04/1999

Case stated; jurisdiction; statutory interpretation; appeal by way of case stated from an acquittal by direction in the trial of a charge under the Road Traffic Act, 1961, as amended; application to have case stated made by or under the direction of the D.P.P.; Judge who tried the case in the District Court was a Judge of the Circuit Court when he signed the case stated; whether

Judge acted *ultra vires* in stating a case; ss.2 and 6, Summary Jurisdiction Act, 1857; s.51, Courts (Supplemental Provisions) Act, 1961
Held: Relief refused; court had no jurisdiction to grant relief

Lord v. Master Flynn
High Court: **Geoghegan J.**
14/05/1999

Judicial review; practice direction; inspection of taxed bills; plaintiff challenged validity of direction issued by respondent prohibiting the inspection of taxed bills of costs without the prior consent of the relevant party to the action in respect of which the bill arises; whether cost accountants' practice of inspecting taxed bills of costs was a consequence of a right vested in them or a consequence of a concession or implied permission by the Taxing Master; whether practice direction issued by Taxing Master is lawful; s.27, Courts and Court Officers Act, 1995
Held: Relief refused; costs accountants have no legal or constitutional right to browse through taxed bills

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Some aspects of probate practice and procedure
Pilkington, Teresa
1999 (1) P & P 41

The case law method of legal instruction: from Harvard to Yale
Friel, Raymond J
1999 ILTR153

The judge's discretion to state a case
Dignam, Conor
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Stay or strike out? unsustainable actions, and frivolous or vexatious pleadings
Marray, Eamon
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Res judicata and double jeopardy
Dublin Butterworths 1999
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Property

Griffin v. Bleithin
High Court: **Quirke J.**
12/03/1999

Adverse possession; Statute of Limitations; title to lands; weekly tenancy; appeal against order of Circuit Court; defendant had remained in possession of certain lands after service of a notice to quit; whether the defendant had adverse possession to the lands; whether the title of the plaintiff to the lands was statute-barred; whether acts by the defendant were done with sufficient animus possidendi; ss.13, 18, 24 and 58, Statute of Limitations, 1957
Held: Appeal dismissed
Article

Recent developments in conveyancing practice
Sweetman, Patrick
1999 IPELJ 28

Road Traffic

Madigan v. Judge Devally
Supreme Court: Hamilton C.J., Barrington J., **Lynch J.**
28/01/99

Judicial review; offence of driving a mechanically propelled vehicle with excess alcohol in blood; challenge to validity of arrest and subsequent procedures in garda station; whether misquoting of the relevant road traffic legislation invalidated the arrest of the applicant and the subsequent procedures he underwent; whether misquotation caused any disadvantage or injustice to the applicant; s.49, Road Traffic Act, 1961; ss.5 and 13, Road Traffic Act, 1978; ss.4 and 13, Road Traffic Act, 1994
Held: No disadvantage arose by virtue of the misquotation; appeal allowed and judicial review proceedings dismissed

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London Sweet and Maxwell 1998
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Shipping

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Williams, Harvey
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Law Society's new complaints procedures
Shaw, John
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Taxation

Criminal Assets Bureau v. Hutch
The High Court: **Morris P.**
14/05/1999

Income tax; application for leave to enter final judgment against defendant in respect of a claim for arrears of income tax; defendant challenged the constitutionality of s.966(5)(a), Taxes Consolidation Act, 1997; defendant claimed that he had the benefit of the amnesty under the Waiver of Certain Tax, Interest and Penalties Act, 1993; defendant sought to rely on s.955(2)(a), 1997 Act; whether defendant had established any real or *bona fide* defence to be tried by the Court; whether determination of amount of tax due by a taxpayer under s.966(5)(a), 1997 Act was a judicial function; whether defendant had established a defence pursuant to the 1993 Act; whether defendant was protected by s.955(2)(a), 1997 Act; s.6, Waiver of Certain Tax, Interest and Penalties Act, 1993; s.8, Criminal Assets Bureau Act, 1996; ss.924, 933, 955(2)(a) and 966(5)(a), Taxes Consolidation Act, 1997
Held: Defendant had not established any real or *bona fide* defence to be tried by the Court; judgment for the plaintiff in the amount of the claim

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Carr, Frank
12 (1999) ITR 222

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Redmond, Mark
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Travers, Noel J
1999 CLP 159

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Cormack, Alan
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Reference for a preliminary ruling from the Cour d'Appel, Douai (Social chamber) – Social policy – Protection of employees in the event of the insolvency of their employer – Council Directive 80/987/EEC – Article 4 – Direct effect – National ceiling for the guarantee of payment imposed but not communicated to the Commission

C-320/95 Alvite v Instituto Nacional de Empleo
Judgment delivered: 25/2/1999
Article 51 of the EC Treaty – Article 67 of Regulation (EEC) No 1408/71 – Unemployment allowance for claimants of more than 52 years of age

C-181/96 Wilkens v Landwirtschaftskammer Hanover
Judgment delivered: 28/1/1999
Additional milk levy – Special reference quantity – Non-marketing and con
version undertaking – Obligations – Failure to fulfil – Withdrawal of the conversion premium – Retroactive annulment of a quota allocation

C-262/96 Surul v Bundesanstalt fur Arbeit
Judgment delivered: 4/5/1999
EEC-Turkey Association Agreement – Decision of the Association Council – Social Security – Principle of non-discrimination on grounds of nationality – Direct effect – Turkish national authorised to reside in a Member State – Entitlement to family
allowances under the same conditions as nationals of that State

C-412/96 Kainuun Liikenne Oy and Oy Pohjolan Liikenne Ab v Oulun Laaninhallitus
Judgment delivered: 17/9/1998
Reference for a preliminary ruling from the Korkein Hallinto-oikeus – Transport – Public service obligations – Application for termination of part of a service obligation

C-87/97 Consorzio per la Tutela del Formaggio Gorgonzola v Kaserei Champignon Hofmeister GmbH
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Articles 30 and 36 of the EC Treaty – Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs

C-108 & 109/97 Windsurfing Chiemsee Produktions-und Vertriebs GmbH (WSC) v Boots-und Segelzubehor Walter Huber and Franz Attenberger
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C-112/97 Commission of the European Communities v Italian Republic
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Failure by a member state to fulfil its obligations – Directive 90/396/EEC – Heaters – Installation in living areas

C-125/97 AGR Regeling v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid
Judgment delivered: 14/7/1998
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C-172/97 Commission of the European Communities v SIVU du plan d'eau de la Vallee du Lot & Hydro-Realisations SARL
Judgment delivered: 10/6/1999
Arbitration clause – Non-performance of a contract

C-337/97 CPM Meeusen v Hoofddirectie van de Informatie Beheer Groep
Judgment delivered: 8/6/1999
Regulation (EEC) No 1612/68 – Free movement of persons – Concept of 'worker' – Freedom of establishment – Study finance – Discrimination on the ground of nationality – Residence requirement

C-338/97 Pelzl v Steiermarkische Landesregierung
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Article 33 of Sixth Directive 77/388/EEC – Turnover taxes – Contributions
to tourism associations and to a tourism development fund

C-350/97 Monsees v Unabhangiger Verwaltungssenat fur Karnten & Bundesminister fur Wissenschaft und Verkehr
Judgment delivered: 11/5/1999
Articles 30, 34 and 36 of the EC Treaty (now, after amendment, Articles 28, 29 and 30 EC) – Free movement of goods – Prohibition of quantitative restrictions and measures having equivalent effect – Derogations – Protection of health and life of
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Special premium for beef producers – Obligation to keep cattle on the applicant's holding for a minimum period – Transfer of the holding during th
at period by way of anticipated succession inter vivos – Effect on entitlement to the premium

C-430/97 Johannes v Johannes
Judgment delivered: 10/6/1999
Officials – Pension rights – Apportionment of pension rights in divorce proceedings
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C-31/98 Peter Luksch v Hauptzollamt Weiden
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26/1999
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Abbreviations

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

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The Implied Undertaking on Discovery

DAVID O'NEILL, Barrister

The "implied undertaking" in relation to discovery received further consideration within this jurisdiction in the recent *ex tempore* decision of Kelly J. in *Hoechst Marion Roussel v. Farchepro Ltd*[1]. The judgment confirmed the application of the implied undertaking in Ireland, and recognized that a party receiving discovery might be released from the bonds of the undertaking by leave of the court. However, many of the more difficult issues that have confronted courts in other jurisdictions remain to be decided by Irish courts.

1. Nature of the Undertaking

The implied undertaking is an obligation imposed on any person obtaining discovery not, without prior leave of the court, or the consent of the party making discovery, to use the discovered documents for any purpose ulterior or collateral to the proceedings in which discovery was ordered. In *Ambiorix Ltd v. Minister for the Environment (No. 1)*[2] Finlay C.J. said:

> "As a matter of general principle...a party obtaining the production of documents by discovery in an action is prohibited by law from making any use of any description of such documents or the information contained in them otherwise than for the purpose of the action. To go outside that prohibition is to commit contempt of court."

And in *Greencore Group plc v. Murphy*, Keane J. stated:

> "[A] solicitor for one party to litigation, who in the course of discovery in that litigation obtains possession of copies of documents belonging to the other party to the litigation, impliedly undertakes to the Court that he will not use them, or any information derived from them, for a collateral or ulterior purpose, without the leave of the Court or the consent of the party providing such discovery."

A "collateral or ulterior purpose" includes, in this context "some purpose different from that which was the only reason why, under a procedure designed to achieve justice in civil actions, [the party obtaining discovery] was accorded the advantage, which [he] would not otherwise have had, of having in [his] possession copies of other people's documents"[4]. The use of documents for publication in the press, or for the initiation of separate proceedings would be common examples of collateral or ulterior purposes[5]. The undertaking is owed to the Court[6], and binds both the party obtaining discovery[7], and his legal advisers[8], as well as certain other persons (for example, expert witnesses) connected with the litigation that come into possession of the information[9]. The undertaking may be enforced by injunction[10], by proceedings for contempt[11], or by staying or striking out proceedings commenced in breach of the undertaking[12].

The system of civil procedure adopted in most of the common law world since the merger of common law and equity is often described as being an adversarial system, but this is not quite accurate, and its description as a "party-prosecution" system would be fairer[13]. Discovery was an adaptation of the inquisitorial system of the canon law[14], and it has no real parallel in the modern civilian systems[15], although most of these provide some limited procedure for the production of evidence in advance of trial. Discovery being an inquisitorial procedure[16], and in this jurisdiction, perhaps also an expression of the reconciliation of the constitutional right of privacy[17] with the right of access to the courts, the undertaking is regarded as a necessary corollary of obtaining compulsory process for the examination of another person's private affairs[18]. It is regarded as a valuable incentive to parties to provide full and frank discovery by securing them against further use of the matter discovered[19].

Nevertheless, the precise scope of the undertaking has brought it into controversy in recent years. Is it the document itself that may not be used without permission, or the information itself? What constitutes an ulterior purpose? What is the effect of publication of the document on the undertaking? When will leave for further use be granted?

2. Hoechst Marion Roussel v. Farchepro Ltd

It was this last issue that was centrally at issue in the *Hoechst* case. The plaintiff sought leave to use some documents disclosed by one of the defendants before the Irish court in two other sets of proceedings, one before the Spanish courts and the other before the Swiss courts. It is unclear in response to quite what type of order the disclosure had been made, but it would appear from page 7 of the judgment that it was in the nature of an *Anton Piller* order. The defendant in question contended that the courts of Ireland had no jurisdiction to release the plaintiff from its undertaking. Kelly J. rejected this contention. He firstly dismissed an argument that such a contention could be supported from the terms of the above statement from Finlay C.J.'s decision in *Ambiorix*. He also rejected the relevance of a comment of O'Flaherty J.'s in *Megaleasing (U.K.) Ltd v. Barrett*[20], where in the context of an action for discovery, that Judge had said that such an action, which is employed to obtain from a third person the identi-

ty of an intended defendant, could not be used as a means of obtaining evidence against the third person with a view to suing him. Such English authority as existed on the point, of which Kelly J. cited *Crest Homes Ltd v. Marks*[21], indicated that leave to use the documents could be granted. Such leave had already been granted by McCracken J. in the case before him, and a similar order had been made in a case called *Yske Bank, Gibraltar, Ltd v. Henning* in July, 1995. Furthermore, the learned Judge held that an absolute bar on using the discovery material in other proceedings would unduly fetter the court in its constitutional obligation to administer justice.

The court next considered whether the same principles applied to disclosure pursuant to *Mareva* or *Anton Piller* orders or in actions for discovery. Kelly J. remarked that it might have been contended that different principles applied, but noted that the defendant's counsel had been content to have the documents dealt with as if they had been disclosed pursuant to a normal discovery order. The judge thought, in the light of the decision of the English Chancery Division in *Jade Engineering Coventry Ltd v. Antiference Windows Systems Ltd*[22], that the concession was wise, because in that case Jacob J. had observed that *Anton Piller* orders were often brought against one supplier of infringing products so that other infringers could be traced and sued. The Judge cited *Crest Homes* again, to the effect that whether the undertaking would be released would depend on the facts of the case, but that it would not be released except in special circumstances, and where no injustice would result to the party who made the discovery. However, he added that in his view, all the circumstances would have to be looked at, and he referred in particular to the circumstances of the original disclosure, the nature and strength of the evidence, the type of wrongdoing alleged, the respective interests of the parties, and any public interest there might be.

In the case before him, there were special circumstances in that the actions in Spain and Switzerland in which it was sought to use the documents arose out of alleged infringements of the same patent that was the subject of proceedings before the Irish courts. The Judge refused to grant leave for the use of documents in the Swiss proceedings on the ground that he was not satisfied that their confidentiality would be adequately protected in those proceedings, and also because there did not appear to be any particular urgency about disclosure for the purpose of those proceedings. He did, however, permit the plaintiff to re-apply at the end of the Irish trial, and noted that his decision might have been different had it not been expected that the Irish proceedings would be disposed of promptly. On the other hand, he granted leave for the plaintiff to use documents disclosed in Ireland in the Spanish proceedings. The proceedings in that jurisdiction were at a stage where the documents would have to be adduced, rendering the application more urgent than in the Swiss case. The Spanish judge would consider whether the documents were relevant or admissible, and if he decided that they were not, the plaintiffs had undertaken to return them. Also, if the documents were admitted in Spain, they were to be examined by court experts and not in open court, so the risk to the defendant's interest in the confidentiality of the documents was minimized.

3. Is leave required in such circumstances?

There are a number of interesting aspects to this decision, and to the terms of the judgment. To start with a preliminary issue: Was leave of the court necessary at all in the circumstances of the case? It was undoubtedly safer to obtain leave. But *Anton Piller* orders and actions for discovery raise peculiar questions with regard to leave. The implied undertaking undoubtedly applies to information disclosed pursuant to the discovery provisions of an *Anton Piller* order[23]. Indeed, a party who commences fresh proceedings against the same defendant based on the fruit of such an order has been held to require leave to do so[24]. Nevertheless, such orders are frequently made with a view to tracing other persons involved in infringement of the plaintiff's rights, and where the order is sought specifically with that end in mind, there is English authority to the effect that no leave is required[25], even for the commencement of proceedings in another jurisdiction[26]. That a court should have such power would seem to be justified by Article 24 of the Brussels Convention[27], as implemented by s. 11 of the *Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988*[28], which allows an Irish court to order provisional or protective measures in aid of proceedings in another Convention State[29].

4. Should leave be granted for use in foreign proceedings?

The next question was the central issue in the *Hoechst* case: When should a party be freed from the undertaking in order to use discovery documents in other proceedings? Here there may be a difference in principle between *Anton Piller* orders and ordinary discovery. Since an *Anton Piller* order is a provisional or protective measure within the meaning of Article 24 of the Brussels Convention, and since the Irish courts must apply the same criteria in granting relief in aid of proceedings in another country adhering to the Brussels Convention as it would in aid of Irish proceedings, its discretion to refuse leave in aid of proceedings within the E.U. may be limited.

With regard to ordinary discovery in the course of proceedings, different considerations may apply. A factor that has been referred to in England in the past is the unavailability of discovery in many civil law systems[30]. Admittedly, in the case in question, the principal objection of the English court was that, since there was no compulsory disclosure before the tribunal in question, all the documents that were disclosed were open to public inspection. In *Hoechst* the learned Judge specifically referred to the preservation of confidentiality in the Spanish proceedings as a reason for granting leave. However, it might be argued that a party to proceedings in a system that does not allow for discovery should not be allowed to obtain the benefit of discovery by reason of his co-incidentally having a cause of action in a jurisdiction that does allow it. If the opponents in the proceedings within and outside the jurisdiction are not the same, the opponent outside the jurisdiction may be put at a disadvantage in the foreign proceedings, since the party seeking leave will have had the benefit of discovery from a third person that is not available to that opponent.

This question is likely to be of much more consequence in the future. From 26 April, 1999, the *Rules of the Supreme Court* and *County Court Rules* were repealed in England, and unified

Civil Procedure Rules came into force in England and Wales for the High Court and County Court. (These new Rules are not in force in Northern Ireland.) Among the reforms introduced was an attenuated procedure for discovery, now renamed disclosure[31]. At the moment, a party in both parts of Ireland must disclose all relevant documents that may (not must) assist the case of the party seeking discovery against him or against any other party to the proceedings[32], whether by advancing the case of the party seeking discovery or damaging the opponent's, or which may lead to a train of enquiry that could have either of those effects[33]. A party was traditionally entitled to object to the production of documents that related to his own case only, did not support the case of the applicant for discovery, and did not damage his own case[34], but whether or not this objection is obsolete[35], the existence of such documents would have to be disclosed in the Republic[36]. In England, the obligation to disclose documents that are not in themselves relevant, but which might lead to a relevant train of enquiry, has been effectively abolished[37]. Standard disclosure is to consist of disclosure of documents that support or adversely affect the case of some party other than the party making disclosure, or on which the party making disclosure relies, or the disclosure of which is prescribed in specific types of case by practice direction[38]. Admittedly, the virtually free admissibility of hearsay in England[39] broadens the scope of standard disclosure, and many documents, such, for example, as medical records, would be relevant themselves in England, whereas they might more appropriately be described as "train of enquiry" documents in the Republic. Another method by which disclosure has been limited is that the party providing it is only obliged to carry out a reasonable search for documents[40], and must aver in a disclosure statement (which might be described as a quasi-affidavit, since, although not sworn, it imports a criminal sanction for falsehood), what search he has carried out[41]. In all actions worth less than £Stg15,000 but more than £Stg5,000[42], this will generally be the limit of disclosure[43]. In actions worth more than that, the court will have power to order what is described as "specific disclosure"[44]. Whether the specific documents or classes of documents of which the court has power to order disclosure is broader than the scope of standard disclosure is unclear: Lord Woolf's initial report would seem to support that view[45], but it may be that the power is intended to act more in the nature of an order for further and better discovery, especially when the court is dissatisfied with the extent of the search carried out by the party making disclosure.

The effect of these reforms is to place the scope of disclosure in England somewhere between the scope of discovery in Ireland and the limited methods of disclosure available in continental Europe. There may well be a temptation, therefore, for parties to initiate litigation in the Irish courts with a view to availing of the broader discovery granted here for the purpose of English litigation. The House of Lords has held that a party to English litigation may avail of the still wider scope of discovery in the United States to obtain discovery for use in English proceedings[46]. The Irish courts may wish to think long and hard before adopting a course which may lead to their becoming an auxiliary arm to foreign litigation.

5. Uniformity of Irish and English law regarding the Undertaking

A more fundamental question, however, arises from a *dictum* uttered by Kelly J. earlier in the case, where he said at page 2 of his judgment that "Insofar as the obligation not to use the material disclosed on discovery is concerned, I am satisfied that the law in this jurisdiction and the law in England and Wales is the same." Later, at page 6, and with reference to the release of the undertaking, he said "In my view, the law on this state has marched alongside with the law on the same topic in England and Wales." These *dicta* presuppose two points, neither of which is self-evident. The first is that the existence of an implied undertaking is by no means a necessary corollary of the provision of a discovery facility in a country's rules of civil procedure. Secondly, it presupposes that the law of England and Wales has remained static since the controversial decision in *Home Office v. Harman*[47] cited by the learned Judge.

(a) Existence of the undertaking in Irish law.

First, with regard to the existence of an implied undertaking. That such an undertaking was a condition of obtaining discovery does not seem to have been recognized before the mid-19th century in England. At that time, a party who wanted to protect his documents from further use appears to have been bound to obtain an express undertaking to that effect from his opponent[48], and the exaction of such an undertaking would not necessarily be decreed[49]. There are some cases from the latter half of the last century which indicate the development of the modern doctrine[50], and a principle to that effect is stated by Bray in his seminal work of 1885[51]. A definitive case on the matter does not, however, appear, until the decision in *Alterskye v. Scott*[52] in 1948. Most, if not all, of the Commonwealth jurisdictions have adopted the principle that documents disclosed on discovery cannot be used without the consent of the discovering party or leave of the court for a purpose ulterior or collateral to the litigation in which the discovery was given[53]. However, because of the First Amendment guarantee of freedom of speech, there is no blanket undertaking in the United States[54], and a party to litigation there must obtain what is described in the Federal Rules as a "protective order" enjoining the party that received discovery from making further use of the discovered documents[55]. The constitutionality of even this provision has been questioned, but it has been upheld by the Federal Supreme Court[56]. The constitutional provisions protecting freedom of speech in Ireland are rather more limited, and it is probable that in reconciling that freedom with the unenumerated right of litigants to privacy, an Irish court would uphold the implied undertaking. Nevertheless, in the absence of such a reconciliation, it is submitted with respect that the assumption that Irish and English law are in step is not one that should have been made by an Irish court.

On the whole, this author believes that since discovery is a greater invasion of privacy than is allowed by many systems of civil procedure, and since it is granted at a stage of proceedings where the allegations pleaded by the party seeking it may be very tenuous, the undertaking is constitutionally justified when balanced against an abstract right of free speech asserted in respect of

documents that would otherwise have remained private. Nevertheless, the scope of the undertaking as applied in certain cases in England does give rise to concern. The most significant debate has taken place with regard to the dissemination of documents that, having been discovered, have been read out in open court. But two other important issues are the public policy regarding exposure to civil proceedings, and whether the undertaking protects the documents themselves or the information in them.

(b) Exposure to civil proceedings.

The first question involves consideration of the implied undertaking in context. A party may not obtain discovery either with a view to supporting a cause of action not pleaded, or a cause he has pleaded without reasonable grounds for believing that it is sustainable[57]. However, there seems no reason why a party who obtains information from discovered documents should not use that information to amend his pleadings to include another cause of action, or join another party[58]. Furthermore, the better view is that a party may obtain discovery specifically for the purpose of joining another party to the proceedings[59], the decisions expressing a contrary opinion[60] in other than newspaper libel cases[61] being, it appears to this author, a superstition. Finally, whether there was ever a privilege at common law against providing discovery that might expose the party to civil proceedings, since the *Witnesses Act, 1806*[62], no such privilege has existed. In this context, the implied undertaking does have curious effects. If it is possible to join an additional defendant identified by means of discovery in the same proceedings no leave is required, but were the plaintiff to wish to commence a separate action he would require the court's permission. And while a party cannot object to giving discovery on the ground that it might expose him to another action, the party seeking to bring that action must obtain permission to do so, a permission which some English courts have said will be sparingly granted.

(c) Documents or information.

The second issue referred to may be illustrated on the following manner. One of the objectives of the implied undertaking is said to be to encourage honest discovery by protecting the party making discovery from collateral actions. So, for example, suppose a dismissed employee brings an action against his former employer for false imprisonment. The action fails, but a document created within the business at the time of the dismissal contains an allegation against the employee. It is clear, leaving aside the question of documents read in open court, that the employee could not bring a libel action and rely on the document in evidence unless he had leave of the court[63]. But suppose he brought the action for slander, and suppose some other employees or former employees were willing to testify that allegations similar to those in the document were uttered about him. Could the employer have the action struck out on the ground that the employee would never have found out about the allegations but for the discovery made in the first action? From the Irish *dicta* quoted at the beginning of this article, it appears that an Irish court would answer the question "Yes", and would follow the decision of the English Chancery Division in *Sybron Corporation v. Barclays Bank plc*[64]. Nevertheless, it might well be argued that this approach defies enforcement, operates capriciously, and places an undue fetter on a litigant's right of access to the courts. Many actions may arise from the use of such information, but it will only be in those few where such use is evident that the plaintiff will find himself in difficulty. Nevertheless, the undertaking is capable of acting as a deterrent to a party who believes that he may be entitled to bring subsequent proceedings arising from the same or similar subject matter to an existing action, in that although he would have no difficulty in bringing the subsequent proceedings, if he had obtained discovery in the existing action he could be accused of relying on the information thereby acquired for initiating the subsequent proceedings.

6. Documents read or referred to in open court

As indicated above, the most controversial aspect of the implied undertaking has been its application to documents the contents of which have been read in open court. Any person who attends a public hearing of a court may take notes of the proceedings, including notes of the contents of a document read in evidence. In *Home Office v. Harman*[65] the respondent had been the legal adviser of the British National Council for Civil Liberties. She was also the solicitor of Williams, a prisoner who had been placed in a special "control unit", and who was suing the Home Office on the basis that this form of detention was illegal. The Home Office was ordered to produce six confidential documents, and Ms Harman selected the relevant passages for her purposes, which were read out in open court by counsel during the trial. Some days after the hearing, she permitted a journalist who had been in court for part of the hearing to have access to the documents produced in the litigation by the Home Office, including the documents extracts from which had been read out in court. She was proceeded against for contempt and convicted. By a three-two majority, the House of Lords upheld the conviction. Lord Diplock held that the purpose of the public administration of justice was to place the judges under public scrutiny rather than to facilitate public discussion of the matters at issue. He rejected an argument that because any excerpts from the documents read out in court would form part of the transcript the party obtaining discovery or his solicitor should be able to publicize those excerpts, saying that the transcript was difficult and expensive to obtain, so publication in that manner would be limited and unusual. Similarly, Templeman L.J. in the Court of Appeal[66] had observed that since the party seeking discovery had obtained a special privilege in seeing his opponent's confidential documents, therefore he was under a special duty not to disseminate their contents even though they had been read out in public, and could to that extent be used by any other person[67]. Lord Keith agreed that the risk of a document's receiving publicity by being read out in open court was largely theoretical, especially when compared with the publicity it might be given by the party freely publishing its contents". Lord Roskill observed that it would be capricious to make an exception from the undertaking for documents read in open court because it would often be a matter of chance what documents were read out. Lords Diplock, Keith and Roskill all expressed concern about parties deliberately reading documents into the record with a view to their publication after the proceedings determined.

Lords Scarman and Simon entered a vigorous dissent with regard to the

application of the implied undertaking to documents read out in open court, saying that the undertaking should only apply to those documents if the court made a special order to that effect. They believed that part of the purpose of the public administration of justice was to enable matters before the courts to be discussed, and that to extend the undertaking further would unduly interfere with freedom of expression[69], and might well contravene Article 10 of the European Convention on Human Rights, which states that "[e]veryone has the right to freedom of expression", and "to receive and impart information and ideas without interference from public authority". They believed that the risk of deterring parties from frank discovery was overstated in that parties already knew that discovered documents might be read in evidence. On that point they expressed a preference that parties should be encouraged to read documents in open court rather than allow the judge to read them privately.

Were the implied undertaking only to apply to the documents themselves, and not to the information contained in them, the majority decision, right or wrong, might just have been tolerable, but combined with that principle, the undertaking can be reduced to absurdity. In the *Sybron* case referred to above, Scott J. held that it was immaterial whether the reference in open court to the documents was by counsel or the judge, – the undertaking still applied, and he seems to have thought that it was irrelevant by whatever means the information had come into the public domain. He held that the party obtaining discovery could not even quote the transcript of the action[70]. Therefore, presumably, if a journalist reported the contents of a discovered document in a newspaper, and the party who obtained the discovery read the newspaper report to a friend, the party would be guilty of a technical contempt. With regard to the argument the undertaking encourages frank discovery, a party discovering sensitive documents will be much more worried about their being read out in open court, and their being thereby exposed to press reporting, than his opponent's openly discussing their contents afterwards. It may be that the opponent can make surreptitious use of the information, but in most cases this will not be evident, and the undertaking will not act as a deterrent. The extension of the undertaking to documents read in open court may well be regarded as a nonsensical fetter on the discussion of a case in that it prevents a party and his representatives from doing what every other citizen can do, namely to discuss evidence given in public[71]. The minority judgments in *Harman* would be likely to carry special weight in this jurisdiction because of the constitutional imperative that justice be administered in public except in special circumstances prescribed by law[72].

7. Reform in England and Northern Ireland

Miss Harman herself may have lost the battle, but in a sense she won the war. She brought a petition before the European Commission for Human Rights, alleging that her right of free expression had been infringed. The British Government chose not to contest the matter, but undertook to amend the Rules of Court, which they did by promulgating what was then O. 24 r. 14A in England, and is now O. 24 r. 17 in Northern Ireland. This provides that where a documents is read in open court the implied undertaking ceases to apply to it unless the court has previously made an order to the contrary. The new *Civil Procedure Rules* dispense with the verbosity of an "implied undertaking", and speak simply of a party's being permitted to use discovered documents only for the purposes of the proceedings, except in three instances, one of which is that the documents have been read to or by the court, or referred to, at a public hearing; the others being where the court gives permission, and where the party disclosing the documents and the person who owns them agree to the further use[73]. The court may, on the application of any party, or of the owner of the documents, forbid further use of the documents even if they have been read or referred to in open court[74]. The new Rule also improves on certain drafting difficulties encountered with O. 24 r. 14A[75]. It should be noted that the relaxation of the undertaking in these circumstances has been held not to extend to permitting the documents to be used without leave for the institution of further proceedings[76], although the correctness of this decision has been doubted[77].

8. *Harman* elsewhere in the common law world

The majority decision in *Harman* has not met with favour in other common law jurisdictions. The New South Wales Court of Appeal, in a decision concerning the application of the implied undertaking to interrogatories, refused to follow the House of Lords majority in *Home Office v. Harman*[78], and held that once answers to interrogatories had been tendered or read in open Court, no liability for contempt of Court would attach to their subsequent use[79]. The Ontario Court of Appeal came to the same decision[80]. A dissent in the Divisional Court whose decision was reversed by the Appeal Court went even further, suggesting that not only documents read in open court but any documents that the party receiving discovery could obtain by lawful means, should be excluded from the scope of the implied undertaking. As has been noted, there is no equivalent to the general implied undertaking in the United States.

9. Scope of the undertaking

Before making certain recommendations with regard to the further development of the implied undertaking in this jurisdiction, brief reference will be made to the types of disclosure it applies to. The gist, it has been said in England, of the undertaking is that it applies to any information obtained by compulsory process[81]. Therefore it applies to discovery, since a party is theoretically liable for contempt of court for not complying with an order for discovery[82]. An interesting query might be raised about whether the rule would apply to discovery obtained by notice as in the Republic[83], since there is no compulsion apart from a costs sanction requiring the party from whom voluntary discovery is sought to respond to the notice: however, in Ontario it was held that the implied undertaking did apply[84]. On the same reasoning, it should also apply to an answer to interrogatories[85]. As was conceded in the *Hoechst* case, it would apply to discovery provisions in *Anton Piller* and *Mareva* relief[86], although, as suggested above, it probably does not apply where one of the purposes of the order is to trace the names of other infringers so

that actions may be brought against them[87]. The implied undertaking was also applied to disclosure under Rules of Court in matrimonial cases requiring parties to file an affidavit of means[88], and to production pursuant to an order under the Bankers' Books Evidence Acts or a *subpoena duces tecum*[89]. Its application to actions for discovery is problematic. An action for discovery lies where there is such a relation between a third person and a defined but unidentified defendant that it is just that the third person should come under an obligation to supply the information necessary to identify the defendant[90]. *Ex ratione materiae* it must be possible to use the information acquired by means of the action to commence proceedings against the defendant once he is identified. It has been suggested by O'Flaherty J. in the Supreme Court in *Megaleasing (U.K.) Ltd v. Barrett*[91] that the implied undertaking would prevent the use of information disclosed in the course of the action to sue the third person himself. It is respectfully submitted that this would not be the case once the action was commenced in the *bona fide* belief that the third person and the defendant were not identical[92]. In England, the implied undertaking has been held not to apply to documents disclosed by the prosecution in the course of criminal proceedings[93].

More difficulty applies with other disclosures. The English practice has been to deny the protection of the undertaking to any documents not strictly speaking procured by compulsory process. So, for example, a document exhibited to a replying affidavit in *Mareva* proceedings, however necessary it may be to enable the defendant to free his assets, is not protected[94]. Less straightforward is the instance where some step in the proceedings is conditional on a document's being produced. For example, most jurisdictions now require expert reports to be disclosed as a condition of calling the expert as a witness, at least in certain circumstances[95]. Some jurisdictions, notably England, have gone even further, and have made the calling of any witness conditional on the prior disclosure either of a statement or a summary of his evidence[96]. The English Courts refused to apply the implied undertaking as such to such disclosures, since under the English Rules of Court a party who failed to disclose could only be prevented from calling the witness, and could not be punished for contempt[97]. The English Rules allowed free use of expert reports once exchanged, so they were held to be covered by no protection at all[98]. Witness statements, on the other hand, retained legal professional privilege until the witness was called, and could not be used by the other party even in the same proceedings unless the witness was called[99]. The English Courts therefore regarded the exchange of witness statements as being akin to a "without prejudice" disclosure, and the statements as being protected to the same extent[100]. In this jurisdiction a party can be punished for contempt for not disclosing an expert report where the Rules require such disclosure since he can be ordered to comply with those Rules[101]. The report cannot be put in evidence[102], and if the disclosing party withdraws reliance on the witness legal professional privilege is deemed always to have attached to the report[103]. Therefore, it is submitted that the undertaking applies to such reports, or that they are, at very least, protected in a similar manner to "without prejudice" communications.

10. Conclusions and recommendations

The conclusions and recommendations of this author with regard to the implied undertaking are as follows. With regard to the issue that arose in *Hoechst*, the court may, pursuant to its obligations under Article 24 of the Brussels Convention, have had no jurisdiction to refuse leave merely on the ground that it was sought to use the information in another Convention country. With regard to discovery in the normal course of proceedings, while there is no objection in the interests of justice to allowing a party to use material obtained in foreign proceedings where the party could have obtained the same information in those proceedings, much more careful consideration must be given where the foreign proceedings are conducted under a procedural code that does not allow the same latitude of disclosure as Ireland. Otherwise, the grant of leave may well result in injustice, in that it may give one party to the foreign proceedings an advantage that his opponent in the foreign proceedings cannot obtain.

With regard to the more general principle, the adoption of the implied undertaking probably achieves the correct balance between the right of a party to have access to the courts, and to the observance of fair procedures in the course of the proceedings, on the one hand, and the other party's right of privacy on the other. On a semantic level, it might be better, however, to drop the talk of "implied undertakings" and rather to speak of a duty incumbent on a party obtaining discovery not to use the discovered information without leave of the court. More importantly, it should not be assumed that the law regarding the implied undertaking should be the same in Ireland and England because the administration of justice in England is governed by a different constitutional arrangement, because some of the English conclusions on the matter have not found favour elsewhere in the common law world, and because the position in England has not remained static in the past twenty years.

The best approach, it is submitted, is as follows. Whether or not the information is read out or revealed in open court or not, it should be possible to use the information to commence *bona fide* legal proceedings, or as evidence on other proceedings, at least within the jurisdiction, without leave of the court unless the party making discovery has asked that it be made a condition of discovery that the documents not be used for that purpose. However, the court before which it is sought to commence the proceedings or adduce the evidence should have a discretion to strike out the proceedings or exclude the evidence if this use of the information would cause particular injustice to the opponent of the party relying on it. This matter is, of course, not res *integra* in the Republic, since it was part of the *ratio* of *Hoechst* that the plaintiff required leave of the court to use the discovered information for the purpose of the foreign proceedings, Kelly J. describing the undertaking as being "that the documents will not be used nor allowed to be used for any purpose other than the proper conduct of *this* action" [emphasis added]. In *Greencore* Keane J. described the undertaking as being only to use the information in the particular proceedings in which it was obtained.

Where discovered material is read out, or the information contained in it revealed, in open court, the undertaking should cease to apply to that information unless the court otherwise orders. The suggestion of the Canadian judge that the implied undertaking should not

apply to information that could be lawfully acquired by the party who obtained discovery seems to go too far, since there is quite a wide range of information that could be so acquired. Indeed, since the party making discovery may consent to the information being used for an ulterior or collateral purpose, it could be contended that there is no information that could fall outside this exception. However, an exception to the requirement for leave might legitimately be made for information that had genuinely obtained public notoriety. All other use of discovered information should require leave of the court as at present. ●

1 Unreported, Kelly J., 14 January, 1999.
2 [1992] 1 I.R. 277, S.C.
3 [1995] 3 I.R. 520, H.C.
4 *Home Office v. Harman* [1983] 1 A.C. 280, H.L. (Eng.), *per* Lord Diplock.
5 *Distillers Co. (Biochemicals) Ltd v. Times Newspapers Ltd* [1975] Q.B. 613, H.C. (Q.B.) (Eng.), *Riddick v. Thames Board Mills Ltd* [1977] Q.B. 881, C.A. (Eng.), *Home Office v. Harman* [1983] 1 A.C. 280.
6 *Greencore Group plc v. Murphy* [1995] 3 I.R. 520, H.C., *Riddick v. Thames Board Mills Ltd* [1977] Q.B. 881, C.A. (Eng.), *Home Office v. Harman* [1983] 1 A.C. 280, H.L. (Eng.), *Sybron Corpn v. Barclays Bank plc* [1985] Ch. 299, H.C. (Ch.) (Eng.), *Prudential Assurance Co. Ltd v. Fountain Page Ltd* [1991] 1 W.L.R. 756, H.C. (Q.B.) (Eng.).
7 *Sybron Corpn v. Barclays Bank plc* [1985] Ch. 299, H.C. (Ch.) (Eng.).
8 *Greencore Group plc v. Murphy* [1995] 3 I.R. 520, H.C. (R.O.I.), *Home Office v. Harman* [1983] 1 A.C. 280, H.L. (Eng.), *Watkins v. Wright (Electrical) Ltd* [1996] 3 All E.R. 31, H.C. (Ch.) (Eng.).
9 *Distillers Co. (Biochemicals) Ltd v. Times Newspapers Ltd* [1975] Q.B. 613, H.C. (Q.B.) (Eng.), *Davies v. Eli Lilly & Co.* [1987] 1 All E.R. 801, C.A. (Eng.), especially *per* Bingham L.J.
10 *Williams v. Prince of Wales &c. Co.* (1857) 23 Beav. 338, Rolls Ct (Eng.), *Distillers Co. (Biochemicals) Ltd v. Times Newspapers Ltd* [1975] Q.B. 613, H.C. (Q.B.) (Eng.), *Riddick v. Thames Board Mills Ltd* [1977] Q.B. 881, C.A. (Eng.), *Medway v. Doublelock Ltd* [1978] 1 W.L.R. 710, H.C. (Ch.) (Eng.), *Ainsworth v. Hanrahan* (1991) 25 N.S.W.L.R. 155, C.A. (N.S.W.), *Goodman v. Rossi* (1995) 125 D.L.R. (4th) 613, C.A. (Ont.), *Mahon v. Rahn* [1998] Q.B. 424, C.A. (Eng.). Cp. *Prudential Assurance Co. Ltd v. Fountain Page Ltd* [1991] 1 W.L.R. 756, H.C. (Q.B.) (Eng.).
11 *Ambiorix Ltd v. Minister for the Environment (No. 1)* [1992] 1 I.R. 277, S.C., *Greencore Group plc v. Murphy* [1995] 3 I.R. 520, H.C., *Home Office v. Harman* [1983] 1 A.C. 280, H.L. (Eng.), *Sybron Corpn v. Barclays Bank plc* [1985] Ch. 299, H.C. (Ch.) (Eng.), *Goodman v. Rossi* (1995) 125 D.L.R. (4th) 613, C.A. (Ont.), *Miller v. Scorey* [1996] 1 W.L.R. 1122, H.C. (Ch.) (Eng.), *Watkins v. Wright (Electrical) Ltd* [1996] 3 All E.R. 31, H.C. (Ch.) (Eng.), *Mahon v. Rahn* [1998] Q.B. 424, C.A. (Eng.).
The commission of contempt is an objective fact: want of intent on the contemnor's part is a matter of mitigation only: *Miller v. Scorey* [1996] 1 W.L.R. 1122.C. (Ch.) (Eng.), *Watkins v. Wright (Electrical) Ltd* [1996] 3 All E.R. 31, H.C. (Ch.) (Eng.). *Similarly Ainsworth v. Hanrahan* (1991) 25 N.S.W.L.R. 155, C.A. (N.S.W.).
12 *Riddick v. Thames Board Mills Ltd* [1977] Q.B. 881, C.A. (Eng.), *Goodman v. Rossi* (1995) 125 D.L.R. (4th) 613, C.A. (Ont.), *Miller v. Scorey* [1996] 1 W.L.R. 1122, H.C. (Ch.) (Eng.).
13 Cp. Cairns, *An Evaluation of the Function and Practice of Discovery* (1987) 61 A.L.J. 79.
14 Holdsworth, *History of English Law*, Vol. V. London (1924), pp. 81-83, Vol. IX, London (1926), pp. 335, 336.
15 Von Mehren and Gordley, *The Civil Law* System, Boston (1977), p. 152, Cappelletti and Perillo, *Civil Procedure in Italy*, The Hague (1965), p. 184.
16 *Air Canada v. Secretary of State for Trade* (No. 2) [1983] 2 A.C. 394, H.L. (Eng.), *per* Lords Scarman and Templeman, dissenting.
17 *Norris v. A.G.* [1984] I.R. 36, S.C., *per* Henchy and McCarthy JJ., dissenting, *Kennedy and Arnold v. Ireland* [1988] I.L.R.M. 472, H.C.
18 *Greencore Group plc v. Murphy* [1995] 3 I.R. 520, H.C., *Distillers Co. (Biochemicals) Ltd v. Times Newspapers Ltd* [1975] Q.B. 613, H.C. (Q.B.) (Eng.), *Riddick v. Thames Board Mills Ltd* [1977] Q.B. 81, C.A. (Eng.), *Halcon International Inc. v. Shell Transport and Trading Co.* [1979] R.P.C. 97, C.A. (Eng.), *Home Office v. Harman* [1983] 1 A.C. 280, H.L. (Eng.), *Lac Minerals Ltd v. New Cinch Uranium Ltd* (1985) 17 D.L.R. (4th) 745, H.C. (Ont.), *Lac Minerals Ltd v. Vancouver Stock Exchange* (1985) 17 D.L.R. (4th) 687, S.C. (B.C.), *Derby & Co. Ltd v. Weldon, The Times*, 20 October, 1988, H.C. (Ch.) (Eng.), *Prudential Assurance Co. Ltd v. Fountain Page Ltd* [1991] 1 W.L.R. 756, H.C. (Q.B.) (Eng.), *Apple Corps Ltd v. Apple Computer Inc.*[1992] 1 C.M.L.R. 969, H.C. (Ch.) (Eng.), *Goodman v. Rossi* (1995) 125 D.L.R. (4th) 613, C.A. (Ont.), *Miller v. Scorey* [1996] 1 W.L.R. 1122, H.C. (Ch.) (Eng.), *Mahon v. Rahn* [1998] Q.B. 424, C.A. (Eng.).
19 *Riddick v. Thames Board Mills Ltd* [1977] Q.B. 881, C.A. (Eng.), *Medway v. Doublelock Ltd* [1978] 1 W.L.R. 710, H.C. (Ch.) (Eng.), *Halcon International Inc. v. Shell Transport and Trading Co.* [1979] R.P.C. 97, C.A. (Eng.), *Home Office v. Harman* [1983] 1 A.C. 280, H.L (Eng.), *Sybron Corpn v. Barclays Bank plc* [1985] Ch. 299, H.C. (Ch.) (Eng.), *Bibby Bulk Carriers Ltd v. Cansulex Ltd* [1989] Q.B. 155, H.C. (Q.B.) (Eng.), *Dory v. Wolf GmbH* [1990] F.S.R. 266, Patents Ct (Eng.), *Levi Strauss & Co. v. Barclays Trading Corpn* [1993] F.S.R. 179, H.C. (Ch.) (Eng.), *Mahon v. Rahn* [1998] Q.B. 424, C.A. (Eng.).
20 [1993] I.L.R.M. 497, S.C.
21 [1987] 1 A.C. 829, H.L. (Eng.).
22 [1996] F.S.R. 461, H.C. (Ch.) (Eng.). He might also have referred to *Cointyglen plc v. Caraway* [1995] 2 I.R. 108, H.C.
23 *Sony Corpn v. Time Electronics* [1981] 1 W.L.R. 1293, H.C. (Ch.) (Eng.),*Sony Corpn v. Anand* [1981] F.S.R. 398, H.C. (Ch.) (Eng.), *Crest Homes plc v. Marks* [1987] A.C. 829, C.A. and H.L. (Eng.), in the C.A, *Jade Engineering (Coventry) Ltd v. Antiference Window Systems Ltd* [1996] F.S.R. 461, H.C. (Ch.) (Eng.).
24 *Crest Homes plc v. Marks* [1987] A.C. 829, H.L. (Eng.).
25 *Sony Corpn v. Anand* [1981] F.S.R. 398, H.C. (Ch.) (Eng.), *Sybron Corpn v. Barclays Bank plc* [1985] Ch. 299, H.C. (Ch.) (Eng.), *Levi Strauss & Co. v. Barclays Trading Corpn* [1993] F.S.R. 179, H.C. (Ch.) (Eng.).
26 *Sony Corpn v. Anand* [1981] F.S.R. 398, H.C. (Ch.) (Eng.), although the decision of Jacob J. in *Jade Engineering (Coventry) Ltd v. Antiference Window Systems Ltd* [1996] F.S.R. 461, H.C. (Ch.) (Eng.), cited by Kelly J. in the *Hoechst* case, might suggest the contrary.
27 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters done at Brussels, 27 September, 1968.
28 No. 3 of 1988.
29 The Court must grant any protective

measures it might grant in aid of an action within the jurisdiction: *Elwyn (Cottons) Ltd v. Pearle Designs Ltd* [1989] I.R. 9, H.C.

30 *Halcon International Inc. v. Shell Transport and Trading Co.* [1979] R.P.C. 97, C.A. (Eng.).

31 *Civil Procedure Rules*, Part 31.

32 *Kelly v. Colhoun* [1899] 2 I.R. 199, Div. Ct (Ir.), *Spokes v. Grosvenor and West End Railway Terminus Hotel Co. Ltd* [1897] 2 Q.B. 124, C.A. (Eng.), Cory v. Cory [1923] 1 Ch. 90, H.C. (Ch.) and C.A. (Eng.).

33 *Kreglinger and Fernau Ltd v. Irish National Insurance Co.*, Unreported, Supreme Court, 2 July, 1954, *Sterling-Winthrop Group Ltd v. Farbenfabriken Bayer Aktiengesellschaft* [1967] I.R. 97, H.C., *Irish Shell Ltd v. Ryan Ltd*, Unreported, Costello J., 22 April, 1986, H.C., *Golden Vale Co-operative Creameries Ltd v. Barrett*, Unreported, Hamilton P., 6 June, 1986, H.C., *Breathnach v. Ireland (No. 3)* [1993] 2 I.R. 458, H.C., *Woodfab Ltd v. Coillte Teo.*, Unreported, Flood J., 11 August, 1995, H.C., *Murphy v. Donohoe Ltd* [1996] 1 I.R. 123, H.C. and S.C., *per* Johnson J. in the H.C. (citing Halsbury's *Laws of England*, 4th ed., Vol. 13, *Discovery, Inspection and Interrogatories*, para. 38), *Irish Nationwide Building Society v. Charlton*, Unreported, Supreme Court, 5 March, 1997, *Skeffington v. Rooney* [1997] 1 I.R. 22, S.C., *Kennedy v. Law Society of Ireland*, Unreported, *ex tempore*, Supreme Court, 28 November, 1997, *O'Reilly v. Lahart*, Unreported, Supreme Court, 9 November, 1998, *Brooks Thomas Ltd v. Impac Ltd* [1999] 1 I.L.R.M. 171.

34 *Lord Mountnorris v. Lord Dungannon* (1808) 2 Moll. 317, L.C. (Ir.), *Lord Muskerry v. Chinnery* (1833) 1 Ir. Law Rec. (N.S.) 107, Rolls Ct (Ir.), *Frewen v. Incorporated Society* (1854) 3 I.C.L.R. 118, Chambers (Ir.), *Grace v. Hussey* (1854) Ir. Jur. Rep. 243, C.P. (Ir.), *Peyton v. Lambert* (1856) 6 Ir. Ch. Rep. 9, Rolls Ct (Ir.), *Worthington v. Dublin, Wicklow & Wexford Ry Co.* (1888) 22 L.R.(Ir.) 310, Div. Ct (Ir.), *Miller v. Kirwan* [1903] 2 I.R. 118, Div. Ct (Ir.) (a decision on interrogatories, but which approves *Emmerson v. Ind Coope & Co.* and *Morris v. Edwards, post*), *Power v. Freeman* (1908) 42 I.L.T.R. 115, Div. Ct (Ir.), *Bishop v. Bishop* (1909) 43 I.L.T.R. 55, C.A. (Ir.), *Beamish v. Beamish* (1914) 49 I.L.T.R. 64, H.C. (K.B.) (Ir.), *Nolan v. Irish Land Commission* [1981] I.R. 23, H.C. and S.C., *per* Costello J. in the H.C., *Bewicke v. Graham* (1881) 7 Q.B.D. 400, Div. Ct and C.A. (Eng.), *A.G. v. Emerson* (1882) 10 Q.B.D. 191, C.A. (Eng.), *Emmerson v. Ind, Coope & Co.* (1886) 33 Ch. D. 323, C.A. (Eng.), affirmed *sub. nom. Ind, Coope & Co. v. Emmerson* (1887) 12 App. Cas. 300, H.L. (Eng.), *Morris v. Edwards* (1890) 15 App. Cas. 309, H.L. (Eng.), *Re Strachan* [1895] 1 Ch. 439, C.A. (Eng.), *Frankenstein v. Gavin's House-to-House Cycle Cleaning and Insurance Co.* [1897] 2 Q.B. 62, C.A. (Eng.), *Milbank v. Milbank* [1900] 1 Ch. 376, C.A. (Eng.), *Johnson v. Whitaker* (1904) 90 L.T.(N.S.)R. 535, H.C. (Ch.) (Eng.), *Re The Patent of the Stahlwerk Becker Aktiengesellschaft* (1917) 34 R.P.C. 332, H.C. (Ch.) (Eng.), *O'Rourke v. Darbishire* [1920] A.C. 581, H.L. (Eng.), *Chowood Ltd v. Lyall* [1929] 2 Ch. 406, H.C. (Ch.) (Eng.), *Infields Ltd v. Rosen & Son* [1938] 3 All E.R. 591, C.A. (Eng.), *Brookes v. Prescott* [1948] 2 K.B. 133, C.A. (Eng.), Wigmore, *Evidence in Trials at Common Law*, Chadbourn Revision, Little, Brown & Co., Boston, 1976, Vol. 6, § 1846.

35 The last Irish case in which the objection was actually upheld was *Beamish v. Beamish* in 1914, although it was referred to in *Nolan v. Irish Land Commission* by Costello J. in the High Court. The last English decision was *Brookes v. Prescott* in 1948. The objection has been abolished in Northern Ireland and England, by *Civil Evidence Act (Northern Ireland), 1971*, 1971 c. 36, s. 12(2), and *Civil Evidence Act, 1968*, 1968 c. 64, s. 16(2), respectively.

36 Privileged documents must be individually listed: *Bula Ltd v. Tara Mines Ltd (No. 4)* [1991] 1 I.R. 217, S.C.

37 Lord Woolfís Interim Report, Ch. 21, paras 17, 22, 23, 34, Final Report, Ch. 12, paras 38 and 41, *Civil Procedure* (the new "White Book"), London (1999), pp. 309 and 312.

38 R. 31.6, C.P.R. (Eng.).

39 *Civil Evidence Act*, 1995, 1995 c. 38, s. 2.

40 R. 31.7(1), C.P.R. (Eng.).

41 Rr. 31.7(3) and 31.10(6), C.P.R. (Eng.).

42 In actions worth less than £Stg5,000 there will normally be no disclosure at all, as in the District Court: R. 27.2(1)(b).

43 Rr. 26.6(5), *Civil Procedure*, pp. 279.

44 R. 31.12, C.P.R. (Eng.).

45 Lord Woolf's Final Report, Ch. 12, paras 39 and 40.

46 *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.* [1987] A.C. 24, H.L. (Eng.).

47 [1983] 1 A.C. 280, H.L. (Eng.).

48 An express undertaking against using the documents for a collateral purpose was imposed by the Court in *Richardson v. Hastings* (1844) 7 Beav. 354, Rolls Ct (Eng.), and *Hopkinson v. Lord Burghley* (1867) L.R. 2 Ch. App. 447, App. in Ch. (Eng.).

49 *Tagg v. South Devon Ry Co.*(1849) 12 Beav. 151, Rolls Ct (Eng.).

50 *Williams v. Prince of Wales &c. Co.*(1857) 23 Beav. 338, Rolls Ct (Eng.). In *Coleman v. West Hartlepool Harbour and Ry Co.* (1861) 5 L.T.(N.S.)R. 266, V.C.'s Ct (Eng.), the defendant applied to have an undertaking imposed on the plaintiff not to make "undue use" of the information by advertisement, publication or any other manner, but Page-Wood V.C. "declined to impose any undertaking against publication by the plt. or his solicitor, over whom the court would have ample jurisdiction if any such attempt were made". Cp. *Reynolds v. Goldee* (1858) 4 K. & J. 88, V.C.'s Ct (Eng.).

51 *The Principles and Practice of Discovery, London* (1885), p. 238.

52 [1948] 1 All E.R. 469, H.C. (Ch.) (Eng.).

53 England: *Alterskye v. Scott* [1948] 1 All E.R. 469, H.C. (Ch.) (Eng.), *Distillers Co. (Biochemicals) Ltd v. Times Newspapers Ltd* [1975] Q.B. 613, H.C. (Q.B.) (Eng.), *Riddick v. Thames Board Mills Ltd* [1977] Q.B. 881, C.A. (Eng.), *Home Office v. Harman* [1983] 1 A.C. 280, H.L. (Eng.), *Crest Homes plc v. Marks* [1987] A.C. 829, H.L. (Eng.), *Miller v. Scorey* [1996] 1 W.L.R. 1122, H.C. (Ch.) (Eng.), *Watkins v. Wright (Electrical) Ltd* [1996] 3 All E.R. 31, H.C. (Ch.) (Eng.), *Mahon v. Rahn* [1998] Q.B. 424, C.A. (Eng.).
Canada: *Lac Minerals Ltd v. Vancouver Stock Exchange* (1985) 17 D.L.R. (4th) 687, S.C. (B.C.), *Lac Minerals Ltd v. New Cinch Uranium Ltd* (1985) 17 D.L.R. (4th) 745, H.C. (Ont.), *Consolidated N.B.S. Inc. v. Price Waterhouse* (1992) 94 D.L.R. (4th) 176, Ont. Ct (Gen. Div.), *Goodman v. Rossi* (1995) 125 D.L.R. (4th) 613, C.A. (Ont.).
Australia: *Ainsworth v. Hanrahan* (1991) 25 N.S.W.L.R. 155, C.A. (N.S.W.).

54 In the United States it was even questioned whether the protective measures permitted by F.R.C.P. 26(c), which permit express undertakings to be required and the making of limited and condi-

tional discovery orders, were not a prohibited prior restraint of free speech under the First Amendment to the U.S. Constitution: C. A. Wright, *The Law of Federal Courts*, 4th ed. (1983), p. 564.

55 F.R.C.P. 26(c).

56 In *Seattle Times Co. v. Rhinehart* (1984) 467 U.S. 20, S.C. (U.S.), the *Seattle Times* had obtained discovery in a libel and breach of privacy action brought by Rhinehart, and expressed its intention of using the information to write further articles about him and his sect. Rhinehart obtained a protective order restricting the newspaper to using the information for the purpose of trial preparation. In sustaining this order, the majority of the United States Supreme Court observed (1) that the newspaper had no right of access to the information other than by discovery for the purposes of the action, which was the creature of statute and therefore might be regulated by statute, (2) discovery and interrogatories were "not public components of a civil trial", (3) discovery was available only for the purposes of the action, and (4) information obtained on discovery was open to abuse which the Court should have power to restrain, and involved potential damage to privacy and reputation. The Court did, however, seem to confine its observations to discovered information not admitted in evidence at a public hearing, and this is borne out by point (2).

57 *Galvin v. Graham-Twomey* [1994] 2 I.L.R.M. 315, H.C., *Philipps v. Philipps* (1879) 40 L.T.(N.S.)R. 815, Div. Ct (Eng.), *Mulley v. Manfold* (1959) 103 C.L.R. 341, H.C. of Aus., *Ballantine & Son Ltd v. Dixon & Son Ltd* [1974] 1 W.L.R. 1125, H.C. (Ch.) (Eng.), *British Leyland Motor Corporation v. Wyatt Interpart Co. Ltd* [1979] F.S.R. 79, H.C. (Ch.) (Eng.), *Air Canada v. Secretary of State for Trade (No. 2)* [1983] 2 A.C. 394, C.A. and H.L. (Eng.), *Evans v. Granada Television Ltd,* Unreported, C.A. (Eng.), 19 February, 1993, *British Aerospace plc v. Green* [1995] I.C.R. 1006, C.A. (Eng.), *per* Millett J.

58 Eagles, *Disclosure of Material obtained on Discovery* (1984) 47 M.L.R. 284. (The implied undertaking has since been specifically held to forbid the bringing of fresh proceedings as an alternative to amendment: *Miller v. Scorey* [1996] 1 W.L.R. 1122, H.C. (Ch.) (Eng.).) The principle of the *Greecore* case seems to be that no leave is required to use discovered documents for the purpose of the proceedings in which the discovery was granted.

59 *Clayton v. Earl of Glengall* (1837) 1 C. & Dix. A.C. 70, Rolls Ct (Ir.), X. v. *Flynn*, Unreported, Costello J., 19 May, 1994, H.C., *Finch v. Finch* (1752) 2 Ves. Sen. 491, L.C. (Eng.), Dixon v. Fraser (1866) L.R. 2 Eq. 497, V.C.'s Ct (Eng.), *Orr v. Diaper* (1876) 4 Ch. D. 92, 25 W.R. 23, H.C. (Ch.) (Eng.), *Hancocks & Co. v. Demeric-Lablache* (1878) 3 C.P.D. 197, H.C. (C.P.) (Eng.), *Union Bank of London v. Manby* (1879) 13 Ch. D. 239, C.A. (Eng.), *per* Jessel M.R., *Eyre v. Rodgers* (1891) 40 W.R. 137, H.C. (Ch.) (Eng.), *Norwich Pharmacal Co. v. Commissioners of Customs and Excise* [1974] A.C. 133, H.L. (Eng.), *British Steel Corpn v. Granada Television Ltd* [1981] A.C. 1096, H.C. (Ch.), C.A. and H.L. (Eng.), *per* Templeman L.J. in the C.A., *Ricci v. Chow* [1987] 1 W.L.R. 1658, C.A. (Eng.). This principle derives from the obligation to join all necessary parties to a suit in equity before it could be tried: it is submitted that the abolition of this requirement was not intended to restrict discovery calculated to identify additional parties whom a party wished to join.

60 *Fitzgerald v. Watson* [1918] 2 I.R. 411, C.A. (Ir.), *McKenna v. Best Travel Ltd* [1995] 1 I.R. 577, H.C., *Saccharin Corporation v. Haines, Ward & Co.* (1898) 15 R.P.C. 344, C.A. (Eng.), *White v. Credit Reform Association & Credit Index Ltd* [1905] 1 K.B. 653, C.A. (Eng.), *Edmondson v. Birch & Co.* [1905] 2 K.B. 523, C.A. (Eng.), *Plymouth Mutual Co-operative & Industrial Society v. Traders' Publishing Association* [1906] 1 K.B. 403, C.A. (Eng.).

61 *Kelly v. Colhoun* [1899] 2 I.R. 199, Div. Ct (Ir.), *Fitzgerald v. Watson* [1918] 2 I.R. 411, C.A. (Ir.), *Hennessy v. Wright* (1886) 24 Q.B.D. 445n, C.A. (Eng.), *Mackenzie v. Steinkoff* (1889) 54 J.P. 327, Div. Ct (Eng.), *Parnell v. Walter* (1890) 24 Q.B.D. 441, Div. Ct (Eng.), *Hope v. Brash* [1897] 2 Q.B. 188, C.A. (Eng.), *Plymouth Mutual Co-operative and Industrial Society v. Traders' Publishing Association* [1906] 1 K.B. 403, C.A. (Eng.), *Adam v. Fisher* (1914) 110 L.T.(N.S.)R. 537, C.A. (Eng.), *Lyle Samuel v. Odhams Ltd* [1920] 1 K.B. 135, C.A. (Eng.). Cp. *Murray v. Northern Whig Ltd* (1911) 46 I.L.T.R. 77, C.A. (Ir.), *per* Holmes L.J.

This principle is known as the "newspaper rule", and in accordance with it a plaintiff in an action for defamation only (*X. v. Flynn,* Unreported, Costello J., 19 May, 1994, H.C., included other causes of action) will not be allowed discovery against a defendant newspaper or broadcasting organization for the purpose of identifying the originator of the libel.

62 46 Geo. 3 c. 37.

63 *Riddick v. Thames Board Mills Ltd* [1977] Q.B. 81, C.A. (Eng.).

64 [1985] Ch. 299, H.C. (Ch.) (Eng.).

65 [1983] 1 A.C. 280, H.L. (Eng.).

66 *Home Office v. Harman* [1981] Q.B. 534, C.A. (Eng.).

67 Cp. Scott J. in *Sybron Corpn v. Barclays Bank plc* [1985] Ch. 299, H.C. (Ch.) (Eng.).

68 This point was regarded as significant by the C.A. in *Bibby Bulk Carriers Ltd v. Cansulex Ltd* [1989] Q.B. 155, H.C. (Q.B.) (Eng.).

69 They pointed out that in the United States, documents disclosed on discovery were a matter of public record. See fn. 54 above.

70 He admitted, however, that there is nothing expressly stated in *Home Office v. Harman* [1983] 1 A.C. 280, H.L. (Eng.), that would require him to so hold. This does not appear to have been Lord Scarman's interpretation of the majority decision in *Harman.*

71 Admittedly, however honest such a party is, any public comment by him will be more informed because he has had access to the documents themselves, and much other information besides that remains subject to the undertaking.

72 *Bunreacht na hÉireann,* Art. 34 s. s. 1.

73 R. 31.22(1), C.P.R. (Eng.).

74 R. 31.22(2) and (3), C.P.R. (Eng.).

75 O. 24 r. 14A of the former English Rules, the present O. 24 r. 17, R.S.C. (N.I.), was interpreted as requiring a prior application prohibiting further use of a document read at a public hearing even though the need for the order might only become apparent after the document was read: *Derby & Co. Ltd v. Weldon, The Times,* 20 October, 1988, H.C. (Ch..) (Eng.).

76 *Mahon v. Rahn* [1998] Q.B. 424, C.A. (Eng.), citing *dubitante, Singh v. Christie, The Times,* 11 November, 1993, H.C. (Q.B.) (Eng.), leave to appeal refused, C.A. (Eng.), Unreported, 20 May, 1994.

77 *Mahon v. Rahn* [1998] Q.B. 424, C.A. (Eng.).

78 [1983] 1 A.C. 280, H.L. (Eng.).

79 *Ainsworth v. Hanrahan* (1991) 25

N.S.W.L.R. 155, C.A. (N.S.W.).

80 *Goodman v. Rossi* (1995) 125 D.L.R. (4th) 613, C.A. (Ont.).

81 *Derby & Co. Ltd v. Weldon, The Times,* 20 October, 1988, H.C. (Ch.) (Eng.), *Prudential Assurance Co. Ltd v. Fountain Page Ltd* [1991] 1 W.L.R. 756, H.C. (Q.B.) (Eng.).

82 O. 31 r. 23, R.S.C.

83 O. 31 r. 12(4), R.S.C.

84 See the judgment of Morden A.C.J.O. in *Goodman v. Rossi* (1995) 125 D.L.R. (4th) 613, C.A. (Ont.). The learned Associate Chief Justice, that the imposition of the undertaking was justified because (1) the obligations imposed by the Rules were identical to those that would arise under a Court order, (2), citing *Prudential Assurance Co. Ltd v. Fountain Page Ltd* [1991] 1 W.L.R. 756, H.C. (Q.B.) (Eng.), the undertaking arose historically as part of the Courtís jurisdiction to order discovery, and it emphasized that the obligation not to use discovered information for a collateral or ulterior purpose was not merely owed to the discovering party, but to the Court, which had control over the obligation, and the power to modify it, and (3) proceeding for contempt might be the only method possible in certain instances for enforcing the obligation, and the possibility of such proceedings was likely to have a deterrent effect on infringers.

85 *Ainsworth v. Hanrahan* (1991) 25 N.S.W.L.R. 155, C.A. (N.S.W.). Also *Rank Film Distributors Ltd v. Video Information Centre* [1982] A.C. 380, H.L. (Eng.), *per* Lord Fraser.
Although the fact that the answer, unlike the production of a document, constitutes a formal admission by the party interrogated, admissible in evidence against him, might militate against this view. In *Lovell v. Lovell* [1970] 1 W.L.R. 1451, C.A. (Eng.), a question asking whether a debt, which had become statute-barred, had not been incurred, was disallowed for fear that it might constitute an acknowledgement of the debt on which fresh proceedings might be brought.

86 *Countyglen plc v. Caraway* [1995] 1 I.L.R.M. 48, H.C., *Sony Corpn v. Time Electronics* [1981] 1 W.L.R. 1293, H.C. (Ch.) (Eng.), *Sony Corpn v. Anand* [1981] F.S.R. 398, H.C. (Ch.) (Eng.), *Crest Homes plc v. Marks* [1987] A.C. 829, C.A. and H.L. (Eng.), in the C.A., *Derby & Co. Ltd v. Weldon, The Times,* 20 October, 1988, H.C. (Ch.) (Eng.), *Jade Engineering (Coventry) Ltd v. Antiference Window Systems Ltd* [1996] F.S.R. 461, H.C. (Ch.) (Eng.).

87 *Sony Corpn v. Anand* [1981] F.S.R. 398, H.C. (Ch.) (Eng.), *Sybron Corpn v. Barclays Bank plc* [1985] Ch. 299, H.C. (Ch.) (Eng.).

88 *Medway v. Doublelock Ltd* [1978] 1 W.L.R. 710, H.C. (Ch.) (Eng.).

89 *Sybron Corpn v. Barclays Bank plc* [1985] Ch. 299, H.C. (Ch.) (Eng.), *Bhimji v. Chatwani* (No. 2) [1992] 1 W.L.R. 1158, H.C. (Ch.) (Eng.).

90 This is the principle stated by Lord Kilbrandon in *Norwich Pharmacal Co. v. Commissioners of Customs and Excise* [1974] A.C. 133, H.L. (Eng.), and in certain United States cases (e.g. *Post v. Toledo, Cincinnati & St Louis Railroad Co.* (1887) 11 N.E. Rep. 540, Sup. Jud. Ct (Mass.), *Brown v. McDonald* (1905) 133 F. 897, U.S. Circ. C.A., 3rd Circuit). The more usual definition suggested by Lord Reid in the same case, that the defendant to an action for discovery must, albeit innocently, have become "mixed-up" in the unidentified wrongdoer's tortious activities, should be avoided, because it leads to some very strained findings of involvement by the defendant, not least in the *Norwich Pharmacal* case itself.

91 [1993] I.L.R.M. 497, S.C.

92 This view seems to have been adopted by Cumming-Bruce L.J. in the English Court of Appeal in *Smith Kine & French Laboratories Ltd v. Global Pharmaceutics Ltd* [1986] R.P.C. 394, C.A. (Eng.).

93 *Mahon v. Rahn* [1998] Q.B. 424, C.A. (Eng.). Cp. *Consolidated N.B.S. Inc. v. Price Waterhouse* (1992) 94 D.L.R. (4th) 176, Ont. Ct (Gen. Div.).

94 *Derby & Co. Ltd v. Weldon, The Times,* 20 October, 1988, H.C. (Ch.) (Eng.).

95 *Courts and Court Officers Act, 1995.* No. 31 of 1995, s. 45, O. 39 rr. 45(1)(e). 46(1), 47, and 48, R.S.C.

96 Rr. 32.4, 32.9, 32.10, C.P.R. (Eng.).

97 *Prudential Assurance Co. Ltd v. Fountain Page Ltd* [1991] 1 W.L.R. 756, H.C. (Q.B.) (Eng.).

98 Ibid. The same now applies to witness statements: R. 32.5(5): but use of these is now restricted by Rule to use in the proceedings unless the court permits further use, the witness consents, or the statement is put in evidence: R. 32.12. C.P.R. (Eng.). A witness statement which, pursuant to r. 32.5(2), C.P.R. (Eng.), stands as the witness's evidence-in-chief is open to public inspection unless the court otherwise orders: R. 32.13, C.P.R. (Eng.).

99 *Prudential Assurance Co. Ltd v. Fountain Page Ltd* [1991] 1 W.L.R. 756, H.C. (Q.B.) (Eng.).

100 Ibid.

101 O. 39 rr. 47 and 48, R.S.C.

102 A Rule providing for such admissibility. O. 39 r. 47 introduced by the *Rules of the Superior Courts (No. 7), 1997,* S.I. No. 348 of 1997, has been revoked and not replaced.

103 O. 39 r. 46(6), R.S.C.

www.lawlibrary.ie/bar council

Legal Portals, Gateways and Search Engines on the Internet.

ADÉLE MURPHY

The internet has become the buzz word of the 1990's and is seen as the one stop shop for all research. While general search engines can be extremely useful for finding that last minute holidayor to find out who wrote The Ancient Mariner they are less than satisfactory when it comes to focused research.

As a result a number of sites have appeared on the Internet that are referred to as portals, metaindexes or gateways. Whatever the label the purpose of the sites is the same. They specialise in a particular area, e.g. law, and provide links to a number of relevant sites, having already trawled the internet. Generally the relevant sites are indexed according to country and / or subject area. A number of sites have also developed specialised search engines that will allow you to search specifically across legal web sites. Undoubtedly if you are looking for legal information the following would be a good starting point.

American

Catalaw

Search options

There are three options for searching for information on a particular topic in Catalaw. The first allows you to search by Topic or Region. The second option is a map that sets out a complete list of the headings in each category. The final option is a Search engine that searches within Catalaw and not across the internet. The result is the most relevant subject heading within Catalaw. A search on negligence provided a number of useful sites and led me to a report that appeared in the National Law Journal (American) on the previous day.

Subject headings

Each subject heading has a number of links that are divided into "Focused sites" and "Usual Suspects". Focused Sites are those with information specifically on a topic. Usual Suspects are those sites that cover a number of topics, i.e. another index! Information is further subdivided into region and then further subdivided by more specific subject matter. Where more than five links appear within a class the link is given a quality rating. There are three quality ratings, 1st Class, 2nd Class and 3rd Class. The rating is based on Scope (comprehensiveness of the index), Detail (description of included resources) and Structure (organisation and presentation of information). While the aim was to provide information in a clear fashion the use of ìFocused sitesî and "Usual Suspects" can be confusing and detract from the site.

Lawrunner

Search Engine

Lawrunner is based on the general AltaVista search engine and supports Boolean and Proximity Searching. The site allows you to narrow your search to a particular jurisdiction via the Lawrunner Global Index. While a number of links are available for each jurisdiction the site is mainly useful for its search engine.

Findlaw

Search Engine

Findlaw has a search engine and a subject index. It also provides links to number of universities, libraries and international organisations. The search engine is similar to lawrunner and allows you to search specifically in a country. The subject index is useful providing links a number of American sites, both government and private.

Australian

Australasian Legal Institute

AustLII was established jointly by the University of New South Wales (UNSW) and the University of Technology, Sydney (UTS). The site provides access to Australian legal material and focuses primarily on legislation and decisions.

Search Engine (Australasian sites)

The AustLII search engine is very easy to use and uses a search language called Sino which supports Boolean and Proximity searching. A more advanced version of the search engine is available and allows you to do a broad search across all AustlII databases or a narrow search by region and tribunal. It is unusual in that it has a search facility that allows you to search for a document title / case name or legislation name thus allowing you to ignore irrelevant material.

Search Engine (Worldwide legal search)

A worldwide legal search is also available although it did not seem to work very well.. A search for champerty and England produced 8 documents. While relevant documents were produced from the Chicago-Kent Law Review and the Law Society of New South Wales several links returned a 404 error message (i.e. document not found) and one link did not seem to be at all relevant.

AustLII also has a list of links of worldwide legal sites. The index divides sites by a number of categories, including countries, courts and case-law.

UK and Ireland

Portal to Legal Resources in the UK and Ireland

Home Page Index

The site is maintained by Delia Venables, a computer consultant for lawyers. The home page has a number

of links including a link to Legal Resources in the UK. As well as providing information on Professional Associations and Legal Publishers, the site offers a list of Free Legal Current Awareness Resources.

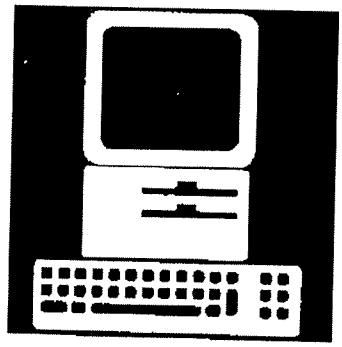
Current Awareness Resources
The Free Legal Current Awareness Resources sites is quite useful and provides a link to The Times which has its Law Reports available in full and to the The Law Society Gazette which provides current news and information, including its own law reports. It also provides a link to a The Daily Law Notes, a new service from The Incorporated Council of Law Reporting which provides summarised reports of cases heard at the House of Lords and Privy Council, the Court of Appeal – Criminal and Civil Divisions, the Chancery Division, the Queen's Bench Division, the Family Division and the Court of Justice of the European Communities

Legal Sites and Resources in Ireland
The link to the Legal Sites and Resources in Ireland is by no means comparable to the links available to UK resources. However that is due to the shortage of Irish legal sites rather than the any shortcoming of the venables site. Amongst the Irish sites that are listed are the Irish Government site and Irish current awareness sites such as the Law Society and William Fry.

Subject Headings
The Portal also contains a list of subject headings from Arbitration to Trading Standards. When you chose a subject heading a number of subsequent links are available and each link is clearly explained so you can assess its usefulness without going to the site.

Canada

Bora Laskin Law Library
The Bora Laskin Law Library is run by the University of Toronto Faculty of Law and is an extremely useful starting point for Canadian Resources. The



search engine is not that significant as it merely searches within the Library Catalogue.

Index
The index to other legal sites is well designed. It is divided into Primary Sources of Law, Secondary Sources of Law, Sources of Law by Organisation and Law Related Internet Resources by Subject. The Primary Sources of Law provides links to court decisions worldwide including those of the Supreme Court of Canada and the New Zealand Court of Appeal. The Secondary Sources of Law includes links to Legal Newspapers and Reference Material. Links are provided to Law Reform Commissions worldwide under the Sources of Law by Organisation while the Law Related Internet Resources by Subject has a comprehensive subject list. Not only does it provide a number of its own links, it also provides a links to other portals such as Hieros Gamos, Findlaw and Catalaw. The only drawback of this site is that some of the links appear to have been last visited in December 1998.

Global

Hieros Gamos
Hieros Gamos advertises itself as the comprehensive Legal and Government Portal. The site is sponsored by a number of Law Firms that call themselves Lex Mundi.

Search Engine
The search engine is easy to use and looks well. However a search on copyright brought back information that was out of date (Information on trademarks in Ireland from 1991) and in some instances there was nothing behind the link.

Index
There is a large amount of useful information on the Hieros Gamos site including the Doing Business guides on a number of jurisdictions. The World Reports are a set of reports published by Lex Mundi and are also available on the site. It is one of the few sites to provide an index to Legal Forms and provides links to discussion groups on diverse topics. However the homepage is not clearly laid out and the information would have been better organised by subject.

Conclusion
Without a doubt portals are extremely useful sites. They prevent you from reinventing the wheel and theoretically present you with the most relevant current information on a topic. However some portals are more useful than others, the Australasian Institute and Bora Laskin Library are probably the best sites in terms of ease of use. The ideal would be co-ordination between the above sites to develop a 'super portal' which would be the ultimate site for legal research. This would ensure that the quality and currency of the available information would be closely monitored. However that remains a distant aim.

Use Sites:
http://www.lastminute.com/lmn/default.asp
http://www.sangfroid.com/rime/
http://www.catalaw.com/
http://www.lawrunner.com/
http://www.findlaw.com
http://www.austlii.edu.au/
http://www.austlii.edu.au/do/form.pl
http://www.austlii.edu.au/World/Worldsearch.html
http://www.venables.co.uk/legal/welcome.htm
http://www.lawreports.co.uk/
http://www.irlgov.ie
http://www.law-lib.utoronto.ca/
http://www.hg.org/

Inquiries: The Rights of Individuals, Privacy and Confidentiality, Reform of The Law of Tribunals

RORY BRADY, SC

1. General

1.1 As we approach the end of this century it is interesting to reflect upon the abundance of investigative agencies that are part of the checks and balances of our political system. Whether the existence of a variety of such agencies is demonstrative of a society that is in need of a greater protection from itself is a philosophical rather than a legal matter. That is a debate for another day. However, as members of the legal profession, we must look at economies that can be achieved through the proper and efficient use of one or more of these agencies.

1.2 It is, I believe, helpful to outline at this stage the principal forms of investigation and inquiry in our system of government.

(a) The Garda Síochána.
(b) The Revenue Commissioners.
(c) The Central Bank.
(d) The Public Offices Commission exercising powers under the Electoral Act 1997, as amended.
(e) Inspectors appointed pursuant to the Merchant Shipping Acts.
(f) Inspectors appointed either by a Minister for the Court pursuant to the Companies Act 1963-1998.
(g) Tribunals established pursuant to resolutions of the Oireachtas and enjoying the statutory powers conferred on them by the Tribunals of Inquiry (Evidence) Acts 1921-1998.

1.3 It is the latter form of inquiry that has been the subject of extensive political and media comment. This commentary has included observations on the costs attendant upon the legal representation at such tribunals, the delays encountered in processing the work of tribunals and the inevitable concomitant of court applications in the form of judicial review. While recognising that there is scope for reform of tribunals we should not ignore their actual success. In the case of the inquiry into the BTSB the tribunal established facts which were not readily available to the Expert Group appointed by the Government to investigate contamination of blood. This success was, in part a function of the public dimension attaching to the workings of the tribunal and in addition its legal ability to seek discovery and to expose witnesses to the rigours of cross examination. The McCracken Tribunal was successful in establishing critical factual data that was additional to that unearthed by the Buncannon Report. The two tribunals currently sitting in Dublin castle may, in due course, also establish facts that shed new and dramatic light on the events of the past. These tribunals should – in terms of their success – be judged on their results and after they have reported to the Oireachtas.

1.4 There are two recurring themes of public comment associated with tribunals. First, the costs associated with setting up and running a tribunal with its panoply of legal representatives. Secondly, the erosion of individual rights of privacy and confidentiality that are a natural by product of public tribunals. What I propose to do is to outline a series of changes that will, in my opinion, enhance the operation of tribunals so as to ensure the cheaper and more efficient disposal of business and that will give added protection to persons appearing before tribunals. Indeed, in due course, the Dail should consider the reform of the law of tribunals to the Law Reform Commission. This referral should take place after the current tribunals have reported to the Oireachtas. That will enable the Law Reform Commission to deal with the issue of law reform in an atmosphere that is not politically charged.

2. Legal Costs

2.1 A full blown judicial inquiry is an expensive creature. The procedures adopted by such inquiries are informed by our constitutional jurisprudence and by established common law rights and privileges. Thus, parties likely to appear before such tribunals will inevitably seek the protection of a legal team. Those whose reputations are likely to be affected – through the public deliberation of tribunals – are entitled to legal representation. Thus, it is easy to see how the costs associated with the public judicial tribunals escalate. This, I believe, is in part a function of the public nature of inquiry. This publicity link to legal representation then raises the prospect that a private form of investigation may be more cost effective. In this context it is interesting to note that the costs of the inspections into Bula (presided over by Lyndon McCann B.L.) and into County Glen Plc (presided over by Frank Clarke S.C.) are a fraction of the costs so far incurred in respect of the Flood and Moriarty tribunals. It is with this in mind, therefore, that I recommend that the legislature consider establishing a statutory inspectorate to investigate matters of fact and that recourse to a full blown judicial inquiry occur only where the Inspectorate can not resolve disputed fact.

2.2 In order to ensure that we have a cost effective fact finding process new rules of procedures should be adopted. Thus, by way of illustration, tribunals should be empowered to serve Notices to Admit Fact and Notices to Admit Documents on all parties appearing before such tribunals. Where a recalcitrant party refuses to admit any such facts – and such refusal is unreasonable – there should be cost implications. While the Tribunals of Inquiry (Evidence) Act 1998 empowers the member of the tribunal to impose certain costs sanctions – for lack of co-operation – that power is too vague and uncertain. While the principle behind the Act is commendable I believe that we need to put flesh on the bone. That should take

the form of adoption of the procedures set out herein combined with the sanction of a costs order in the event of an unreasonable failure to admit facts. This procedural devise would substantially reduce the necessity for public hearings. Nonetheless, the public element of disclosure of such facts would be met by the Oireachtas publishing the tribunal report setting forth all of its findings of fact. In this way public disclosure is not being sacrificed on the altar of financial efficiency.

2.3 Notwithstanding recent changes to tribunals law there are still serious lacunae. While there is a power to order discovery from a party the actual form of the affidavit of discovery is not prescribed in any Act. Furthermore, there are no procedural rules for the operation of tribunals that are equivalent to the Rules of the Superior Courts 1986. Accordingly a party appearing before a tribunal must look at the existing statutory code, common law rights and privileges and constitutional guarantees. The interaction of these various rights and privileges and their occasional conflict with a tribunal's powers of investigation are a source of legal uncertainty and confusion. Hence the necessity for recourse to the courts.

2.4 I believe that it is now time for the legislature to prescribe a set of rules of procedure for tribunals. These can deal with issues such as the period of notification of requests for discovery, the services of Notice to Admit Facts and Documents, the form and content of Affidavits of Discovery and the right to representation before tribunals. In addition to promulgating an exhaustive set of rules – to remove any uncertainty and reduce the scope for litigation – a further "belt and braces" approach is required. It would be self defeating to have these tribunals' procedural rules the subject of constitutional challenges, from time to time, during the course of such inquiries. It is for this reason that I believe that any set of rules promulgated as part of a reform package for tribunals should be considered by the Council of State and the President of Ireland as an appropriate matter to refer to the Supreme Court for Constitutional adjudication. This would be an adjudication carried out under Article 26 of our Constitution. Once the Supreme Court has pronounced on the constitutional validity of such procedural rules they are immune from any subsequent constitutional challenge. The element of certainty therefore introduced would, in my view, significantly enhance the operation of tribunals. It would also reduce the scope for litigation that can cause as an inevitable consequence, delay in the workings of tribunals.

3. Publicity and Privacy

3.1 It can not be a pleasant experience for any person to be subject to examination – in a public forum – of his or her past conduct. One only has to look at the television to see the notoriety that attaches to the most ordinary of witnesses before our tribunals. While that is an unavoidable element of the public nature of such tribunals we must not ignore the potential for harm to one's reputation. Indeed I believe it is the duty of the legislature to vindicate the citizen's right to his or her good name. In this era of political transparency and of exclusives in our newspapers we must be particularly mindful of protecting the citizen's reputation. If the legislature have set up a tribunal with its attendant publicity it should take steps to minimise the risk of damage to reputation. It is with this in mind that I make the following proposal.

3.2 The giving of evidence in a judicial inquiry carries with it a risk of mistaken reporting. While that risk also applies to court litigation it is important to note that in court proceedings the parties choose to be in court and are there because of some legal dispute. A party appearing before a tribunal – whose conduct is being investigated – does not have his consent sought to the establishment of these tribunals. There is, therefore a sound basis for having a special remedy for curing the effects of incorrect reporting of factual matters canvassed before a tribunal. Such errors can damage one's reputation. The blaze of publicity will leave an indelible impression on the mind of the public that can destroy one's reputation. The headline may be short-lived but the damage may be everlasting. In order to minimise the impact of any published mistake in the media (written or oral) I would suggest that the member of a tribunal be empowered to require the media to correct any published error of fact. This would require the media to publish or broadcast a correction prescribed by the member in a manner that is commensurate with the degree of publication of the erroneously stated fact. As a response to creating such a power the media (who comply with such an order) should benefit thereby in the context of our libel laws.

3.3 I propose that the Defamation Act 1961 be amended. These amendments should take the following form:

(a) An amendment to Section 17 of the Defamation Act 1961 so as to provide that the publication of the ordered correction shall be admissible in evidence in mitigation of damages in any action for defamation.

(b) Section 8 of the Defamation Act 1961 should be amended so as to provide that the High Court shall not give permission for a criminal prosecution to be commenced against any journalist where an allegation of a criminal libel consists of the publication of a fact or series of facts that have been corrected pursuant to an order of a member of the tribunal.

3.4 Finally, in this media conscious world those with deep pockets have greater access to media consultants. While the use of such media consultants is undoubtedly a legitimate way of protecting one's reputation it is necessary to look at who should bear the costs of this. There is, in my view, an anomaly in the law of taxation of retaining a media consultant. I take the view that such an item of expenditure should not be recoverable from the exchequer. This is particularly so in light of the suggestions set forth in the preceding paragraph that one would hope would have the potential to improve the protections for every person appearing before the tribunals.

4. Conclusion

4.1 Notwithstanding that tribunals have been in existence for many decades we are still on a learning curve. Given the obsession with investigating the past I think we owe it to the ourselves to do so in a more structured and orderly way.

4.2 The suggestions set out in this paper are, I believe, matters worthy of being referred to the Law Reform Commission. In addition I am sure there are many other areas which could benefit from a thorough analysis of the ever growing corpus of the law of tribunals.

* Paper originally delivered to the Bar Council Conference on Tribunals of Inquiry in July 1999. ●

Inquiries: The Rights of Individuals, Privacy and Confidentiality, Representing The Public Interest

SARA MOORHEAD, Barrister

The concept of counsel representing the public interest at a Tribunal of Inquiry is a matter of recent origin in Irish Law.

At one of the earlier Tribunals, the Public Interest and the State Interest were represented by the Attorney General. The Tribunal is now provided with Solicitor and Counsel to the Tribunal. It is their duty:- "to enable the Tribunal to undertake investigation, to have investigations carried out on its behalf, to obtain Statements from witnesses, to arrange the attendance of witnesses in due order, to prepare and serve all documents and statements of witnesses on all 'interested parties', to present the evidence and examine the witnesses". *(Administrative Law in Ireland Third Edition at page 298).*

Gerard Hogan and David Gwynn Morgan's excellent book Administrative Law in Ireland discusses the development of representations at Tribunals of Inquiry. They note that the Tribunal Team has replaced the Attorney General as the inquisitor. The reason for that is given in the Whiddy Island Report, which was the first Tribunal of Inquiry not to use the Attorney General and it states as follows:-

> *"The Tribunal is not a Court of Law hearing evidence adduced by opposing parties. Its function is to conduct an inquiry . In the present instance, it would be very difficult for it adequately to carry out its Statutory functions if it had not been able to consider, with some Solicitor and Counsel, what evidence should be obtained and direct what steps should be taken in the search for the cause of the disaster.*
> *A further reason for adopting this procedure arose from the fact that the role of the public authorities could come under the scrutiny of the Tribunal and it was obviously not desirable that the Attorney General who would represent the Government Departments involved and the Garda Authorities – should at the same time be responsible for the presentation of evidence to the Tribunal."*

This situation prevailed in a number of Tribunals of Inquiry up to the time of the Beef Tribunal. The Beef Tribunal was the first case in which controversy over representation took place and I propose to deal with the background to that in a little detail. At the beginning, four of the parties were granted full representation, which meant an entitlement to be at the Tribunal on each day. These sets of persons were the Tribunal itself, the Attorney General and all State Authorities, Goodman International and its subsidiary companies, Mr. Larry Goodman and the politicians who made the principal allegations were also given full representation. Various other bodies were given limited representation.

Early on in the Beef Tribunal, the United Farmers' Association contested the notion of representation and exposed for the first time the difficulties that a Tribunal Team encounters at a Tribunal in adequately representing the Public Interest.

Section 2 Paragraph B of the Tribunals of Enquiry (Evidence) Act 1921 provides as follows:-

> *"A Tribunal Act to which this Act is so applied as aforesaid –*
> *(b) shall have power to authorise the representation before them to any person appearing to them to be interested to be represented by counsel or solicitor or otherwise, or to refuse to allow such representation"*

Members of the United Farmers' Association were granted limited representation. This was defined as the right to be present when their witnesses gave evidence, and have the right to examine their witnesses and to participate in the Tribunal at that time.

The Plaintiffs sought an Injunction requiring the Defendants to grant them full representation at the proceedings of the Tribunal, when it was dealing with matters which the Plaintiffs deposed were particularly relevant to them.

In the alternative, they sought full representation to the proceedings of the Tribunal where there was any purported refutation by or on behalf of any other parties of the evidence given by the Plaintiff's witnesses. Ms. Justice Denham heard this matter and the case is reported as *Boyhan & others -v- The Tribunal of Inquiry into the Beef Processing Industry* [1993] 1IR at page 211.

The submissions made by the Plaintiffs in the proceedings although ultimately unsuccessful are interesting to analyse. It was submitted that even if the Attorney General was adequately representing the Public Interest, but even if he was so doing, the farmers were entitled to be represented for their special interest.

The Tribunal's team submitted to Ms. Justice Denham that effectively the United Farmers Association were coming into Court, seeking full representation on the basis that they would then represent the Public Interest.

At page 214 of the Judgement it is stated as follows:-

> *"He (Mr. McGonigal S. C.) submitted that it is the function and duty of the Attorney General to represent the Public Interest. That the determination of legal representation is a matter for the chairman of the Tribunal and that the application for legal representation for the U.F.A. (United Farmers Association) was considered by the chairman of the Tribunal."*

Ms. Justice Denham agreeing with submissions of the Tribunal team, indicated that she was satisfied with the Chairman of the Beef Tribunal's position that the Attorney General was the person to represent the public interest and that the U.F.A. had no interest over and above the interest of any other member of the public.

She was of the view that Counsel for the Tribunal represented the Public Interest. She was also of the view that the Attorney General was represented and that while he represented the State Authorities, he also represented any State Authority from which the Tribunal might require assistance.

It is to be noted in Hogan and Morgan's book previously cited, that they are of the view that there appears to be some confusion in the *Boyhan* case as to whether the Counsel for the Tribunal or the Attorney General represents the Public Interest and also whether the Attorney General represents the Public Interest or the State Authority. On the basis that either of these bodies represented the Public Interest, the Plaintiff was refused full representation.

As will be seen from that Judgement in 1993, what exactly the Public Interest was and how it should be represented, had become increasingly more difficult to define. It was inevitable and indeed it happened throughout the currency of the Beef Tribunal, that the conflict between the various organs of the State and the Public Interest became more apparent.

At the Beef Tribunal, Counsel for the Tribunal were there to present and set out the facts on which they wished to rely and the evidence. The State Team were there to represent the State Interest. It soon became apparent that the State Interest conflicted in many areas. Various examples of conflict existed, conflicts between civil servants and politicians in the giving of evidence; conflicts of the version of events being given by the two partners in government at the time, Fianna Fail and the Progressive Democrats, and perhaps most importantly, conflicts in relation to Cabinet confidentiality. It is perhaps wise with hindsight to look back and wonder what role counsel for the Public Interest could have played arguing against Cabinet confidentiality.

As a sequel to the *Boyhan* case, Fintan O' Toole in his book "Meanwhile back at the Ranch", notes that after the Denham decision, questions were asked once again about the role of the Department of Agriculture and the Attorney General.

At page 276 he states:-

"Counsel for the United Farmers' Association objected at one point that, in his view, the Attorney General's legal team was dealing with evidence so as 'to represent the Department's interest, which is not necessarily the role of the public interest'. Mr. Justice Hamilton replied that this was not the case since 'Ms. Justice Denham in the High Court has held that the Attorney General is representing the public interest.' Counsel for the Attorney General then objected that it was the tribunal legal team and not his own which was representing the public interest.'

Mr. Justice Hamilton then intervened again: 'No, they are not. We have to have regard to the public interest but you are not going to put the job of representing the public interest on counsel for the tribunal, or on the tribunal itself. You represent the public interest'. The Attorney-General's counsel, however, adamantly refused to accept this, saying 'No, the tribunal is acting on behalf of the public interest'.

In the face of this refusal of the Attorney General to accept the role representing the public interest, Mr. Justice Hamilton subsequently ruled that, while the Attorney General had a role as 'protector of the public interest', he had asked counsel for the tribunal to 'have particular regard to the public interest."

In the light of the Boyhan decision, the Attorney General was making it clear that it was his position to instruct the State Authorities only. He was presumably to instruct the tribunal team as both had retained state solicitors reporting back to the Attorney-General's office and it therefore became quite apparent that nobody had a public interest brief. It also became apparent in the Beef Tribunal that there was a necessity for a public interest brief as opposed to representing the State or indeed the tribunal.

As previously indicated, this became most apparent in the challenge to Cabinet confidentiality. This case was originally heard in the High Court by Mr. Justice O' Hanlon and it is noteworthy that in the light of all the confusion regarding the role of the Attorney-General and who represented the public interest, Justice O' Hanlon was prepared to find against Cabinet confidentiality.

In the *Attorney-General -v- Hamilton* [1993] 2IR 250 he took the view that upon a proper balance between the public interest of confidentiality as asserted by the Attorney General on the one hand and the public interest in obtaining full disclosure in the Tribunal of Inquiry and the rights of the individual as guaranteed by the Constitution on the other hand, and moreover having regard to the absence of any express words providing for such confidentiality in the Constitution, the public interest did not require the upholding of such a claim of absolute confidentiality.

The matter was appealed to the Supreme Court which held by three to two that the Attorney General was correct and Cabinet confidentiality was preserved.

In his dissenting Judgement Mr. Justice McCarthy was firmly of the view that if absolute confidentiality was not expressed in the Constitution, then it did not exist.

In many ways I find his argument to be an argument in favour of the public interest. While I make no criticism of the parties involved in making the arguments before the Supreme Court at that time, I do feel that the absence of counsel purely for the public interest represented a grave defect in the case. As Fintan O' Toole points out later in his book, Mr. Justice Hamilton made it clear that the success of the Attorney General's action meant that he was precluded from enquiring into and reporting on the factors which would have influenced the Government in reaching its decisions on Iraq.

It is now generally accepted that all parties learned from the Beef Tribunal that the old view that the Attorney General could represent the public interest, or even older view that the Tribunal could represent the public interest, can no longer prevail having regard to the complexities of the public interest in the various State bodies requiring investigation.

This was accepted in the next Tribunal of Inquiry which was the Tribunal of Inquiry into Hepatitis C which was chaired by Mr. Justice Thomas A. Finlay. For the first time, Counsel on behalf of the public interest was appointed and in the Dail debates a discussion arose as to what role the public interest team would have. The Minister for Health, Mr. Michael Noonan indicated that although the team would be appointed by the Attorney General, having regard to the Chief State Solicitor's role in the controversy leading up to the creation of the Tribunal, a private sector solicitor would be appointed to back up the public interest legal team. He went no further in his view as to the role of the public interest team in such Tribunal.

Back during the days of the Beef Tribunal, politicians, for it is they who create the tribunals, did not see the need for public interest. However, they have appointed such counsel but have gone very little further in defining what the role of such counsel should be. Neither counsel nor solicitor act on their own instructions but upon the instructions of their Client. It is not up to counsel or solicitor to define the public interest according to their beliefs. To do so would be a dangerous and unacceptable role for any counsel to take.

Counsel for the public interest should operate within clearly defined guidelines of what constitutes the public interest.

While the authorities in recent years have embraced the concept of public interest representation, they have not advanced it much further, and it appears time to so do and define the role of the public interest in a relevant and meaningful way. •

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