

# The Bar Review

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- Case Law on Restricted Directors
- The Rules on Cross-Examination
- Pre-1986 Divorce

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# The BarReview

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# News

## Continuing Professional Development.

Inga Ryan

Continuing Professional Development Manager



The demand and popularity of Bar Council CPD events has taken off and the momentum continues to increase rapidly. Often, attendance at events has exceeded capacity and their popularity shows no sign of abating. As a result, we have scheduled a busy CPD agenda for the rest of the year. The Southwestern and the Southeastern circuits have arranged conferences locally that were very successful and we will happily work with other circuit practitioners to assist them in arranging regional events.

We plan to explore the below areas of law over the Easter and Trinity sittings. Topics may change and details of dates, venue and speakers and topic will be posted to all members' pigeon holes on the CPD section of [www.lawlibrary.ie](http://www.lawlibrary.ie) and to Bar Council noticeboards.

Seminars will deal with the subjects of Intellectual Property, Arbitration, the Interpretation Act, recent developments in Landlord & Tenant law, Section 150 Disqualification Applications and there will be a repeat seminar on Personal Injuries and the Civil Liabilities and Courts Act 2004. Bar CPD conferences in the pipeline will focus on recent developments in Tort law and another on Defamation. The Western circuit will hold a conference in July.

Generally bookings are taken for attendance at conferences only; places at seminars are usually allocated on a first come, first served basis on the day.

Keep in mind that you should attain 10 cpd points, details on how to get these and on the self certification process can be found on the CPD section of [www.lawlibrary.ie](http://www.lawlibrary.ie)

## Book Launch



*Pictured at the launch of her new book, Environmental and Land Use Law, is Professor Yvonne Scannell with The Hon. Mr Justice Nicholas Kearns who officially launched the book.*

## Retirement Party



*A reception was held in the Distillery Building in February to mark the retirement of crier Pat McDonald after 50 years of service to the Law Library. Pictured at the reception with Pat are his wife Patty and Hugh Mohan SC, Chairman of the Bar Council*

## Award



*Thomson Round Hall author Geoffrey Shannon was awarded the MRCS Canon Handy Award 2006 for his contribution to Irish Family Law. Geoffrey Shannon is the author of Child Law and the editor of the Irish Journal of Family Law and Family Law Practitioner, all published by Thomson Round Hall*

# Putting the case against the rule in *Browne v Dunn*

Hugh Kennedy BL

## The Rule in *Browne v Dunn*

The duty to cross-examine or to put one's case (in cross-examination), is also known as the Rule in *Browne v Dunn*<sup>1</sup>. Put briefly, it requires a cross-examining party to "put to" a witness the substance of evidence offered or to be offered by the cross-examining party, or the substance of a planned submission to the court, when such evidence or submission will contradict that witness's testimony, so that the witness may have an opportunity to respond to the contradiction. I will refer simply to the "Rule" throughout the rest of this article.

Both the rationales and origins of the Rule are suspect and open to criticism, yet the Rule appears to be followed unquestioningly in Irish courts and in other common law countries. The consequences of a breach of the Rule can be severe, and are frequently of more significance in a trial than any of the actual evidence that may be available to the court.

Although the Rule has its place in trial procedure, the choice of whether to put the case in cross-examination should be a tactical one for professional counsel, and should not be a duty imposed by a Rule. Counsel would then run the risk of having unchallenged witness evidence believed by the court, but would benefit from regaining control of the cross-examination process and from the opportunity to use court time efficiently and to best effect.

## Some rationales for the Rule

### (i) Fundamental fairness

It is axiomatic that fair play and fair dealing must be observed in the running of trials. Many say that the Rule is justified under this heading, as a means of ensuring that witnesses receive fair treatment, are not ambushed by contradictory evidence from the other party after they have given their testimony, and that they have every opportunity to give their evidence and to respond directly to any challenges that the other party intends to put to their evidence. Thus, the Rule can be rationalised as coming under the fair procedures principles laid down in cases such as *In Re Haughey*<sup>2</sup>.

### (ii) Practical considerations:

Another rationale for the Rule is that it expedites the hearing of evidence and the efficient running of trials, as well as saving on costs and witness expenses. If advocates are strictly required to put their case while cross-examining witnesses the first time round, without the safety

net of being able to recall witnesses later if needed, then the trial of actions runs much more smoothly, without repetition or confusion. It is a waste of time and money to allow the recall of witnesses, perhaps multiple times, to remedy the failure of counsel to put the case properly to the witness in cross-examination the first time, goes the logic.

Furthermore, strict adherence to the Rule avoids the situation where, if a party is allowed to recall a witness after they breached the Rule, that witness might be unavailable and/or unwilling to give evidence a second or even subsequent time. And why should the party not in breach of the Rule be put to the effort and expense of relocating and resummoning "their" witness, in ease of the party who breached the Rule?

### (iii) Customary practice

The Rule would appear to be a long-standing practice in Ireland, as it is in most of the other common law jurisdictions. As indicated by Roberts<sup>3</sup>, the Rule has become ingrained in Australia<sup>4</sup>; in Canada the Rule is followed<sup>5</sup>; similarly in New Zealand, the Rule there has been described as "sacred"<sup>6</sup>. However, curiously the Rule has no place in American law or practice and is unknown there<sup>7</sup>, although many American writers discuss at length the tactical decision of how far to press the witness in cross-examination, or indeed the wisdom or otherwise of asking any questions at all.<sup>8</sup>

The Irish legal system is built on custom and precedent, on what went before. Given that the Rule is exercised in Irish court rooms nearly every day of the year, it could be said that the Rule is simply part of the legal landscape and practice of Ireland, and as such has achieved an unassailable position as being just the way things are, like the weather.

How then did the Rule come to be a central part of the way trials are conducted in Ireland, as well as in other countries?

## Origin of the Rule

The House of Lords' decision in the case of *Browne v. Dunn*<sup>9</sup> would appear to be the first reported judgment in any jurisdiction that pronounces a duty to put one's case in cross-examination. As such, it is useful to consider the genesis of the Rule, coming as it did in a civil case only recorded in an obscure reporting service.

Although it might be harsh to say that the Law Lords in *Browne* fashioned the Rule simply out of thin air (and there is no sign in the language of the judgment itself that they believed they were stating anything new), nonetheless commentators<sup>10</sup> have pointed out that no legal textbook before *Browne* even mentions the Rule. Indeed, such

1 As it is commonly known in New Zealand, Australia and Canada. *Browne v Dunn* (1893) 6 R. 67

2 *In Re Haughey* (1971) IR 217

3 Evidence: Proof and Practice, (1998), Lawbook Co: Sydney, at p. 355; the Rule has received its own abbreviation in Australia, the "put:age" rule.

4 Although it has been reformed somewhat in Australia by s. 46 of the 1995 Uniform Evidence Acts of the Commonwealth and New South Wales - see footnote 28.

5 Williston and Rolls, *The Conduct of an Action* (1982) Butterworths: Toronto.

6 See, for example, Mahoney, "Putting the Case Against the Duty to Put the Case" (2004)

NZ Law Review 313.

7 Federal Rules of Evidence, December 31, 2004 edition, which are silent on any such duty.

8 See, for example, Fisher, *Evidence* (2002), Foundation Press; and Waltz and Park, *Evidence - Cases and Materials* (2005) Foundation Press.

9 See footnote 1 supra.

10 Mahoney, *ibid*; and Renaud, "The Rule in *Browne v. Dunn*: Should It Be Undone?" 1 *Across Borders Int'l L. J.* 2 (2003) [www.across-borders.com](http://www.across-borders.com)

textbooks instead deal with parties' right to cross-examine, but not their duty. It seems fair to say that the Rule commenced with *Browne*.

In *Browne*, which was an appeal in a civil action for libel, Lord Herschell LC made the following pronouncement, supported by two other Law Lords, who each gave their own judgments:

"My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth. . . . All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."<sup>11</sup>

To highlight the very severe consequences of the Rule so created, the House of Lords in *Browne* concluded that counsel's failure to attack witnesses during cross-examination meant that he should not have been permitted even to *argue* to the jury that the witnesses had testified falsely.

However the three separate judgments in *Browne* may have ended up at the same conclusion, each of the three Law Lords in the case employed different rationales to arrive at the Rule.

Lord Herschell LC<sup>12</sup> asks whether the witness not cross-examined is thus "unworthy of credit"; but Lord Halsbury<sup>13</sup> worries about the "accuracy of facts"; Lord Herschell LC<sup>14</sup> thought it best practice that "the circumstances" indicating that the witness was not worthy of credit be put to the witness; but Lord Morris<sup>15</sup> says it is not necessary to "take him through the story he had told"; and then there is the frequently-cited caveat of Lord Morris,<sup>16</sup> warning against any "hard-and-fast rule" requiring cross-examination, especially when the witness tells an "incredible and romancing story" during his examination-in-chief.

Beyond the somewhat confusing and muddled dicta contained in the *Browne* judgment itself, Mahoney<sup>17</sup> describes how even more than the three Law Lords in that case, the most influential role in the genesis of the Rule was played by Blake Odgers KC, counsel for the unsuccessful appellant in *Browne* (that is, the party who had not sufficiently cross-examined), and author of a leading textbook at the time on practice and procedure<sup>18</sup>. Mahoney explains that the first two editions of Odgers's work, published in 1892 and 1894 (the latter being the year after *Browne* was reported) make no mention whatsoever of any such Rule. However, Odgers dutifully began setting out the Rule as laid down by the Law Lords in later editions of his book published after *Browne*.

Shortly after this (at times taking express guidance from Odgers's texts), other texts and judgments began to give unquestioning allegiance to the duty to cross-examine – a situation that has continued, with few exceptions, to the present day<sup>19</sup>.

In England and Wales, the Rule has been made part of the very fabric of practice before the courts, by being enshrined in the Code of Conduct of the Bar Council of England and Wales.<sup>20</sup> However, the course of the introduction of the Rule into this jurisdiction has not been so clear-cut and subject to analysis as it has been in other jurisdictions.

## The history of the Rule in Ireland

The history of the Rule in Ireland is somewhat murky and uncertain. After the ruling in *Browne* in 1893, the Rule was binding authority on the courts of Ireland, the House of Lords being the ultimate court of appeal for Ireland then too.

However, in the only Irish case I can find in the entire Irish Reports<sup>21</sup> to date that mentions *Browne v Dunn*, the case of *Flanagan v. Fahy*<sup>22</sup>, the judgment of Ronan LJ serves to reverse utterly the Rule in *Browne*, finding that there is no duty to put one's case in cross-examination whatsoever, but rather the opposite:

"[t]he entire evidence of Ryan [a witness] was impeached as being an absolute fabrication and invention. If there was no cross-examination, he would have had no opportunity of explaining and showing that it was not. The practice here [in Ireland] on the part of skillful counsel has been not to ask any questions which would give the witness an opportunity of explaining, or of stating facts or giving reasons in support of his evidence, unless counsel supposed he could obtain an answer favourable to his case."<sup>23</sup>

Thus, Ronan LJ stated his belief, apparently widely-held among the practitioners in the Irish courts at the time<sup>24</sup> that competent counsel guards vigilantly against the possibility of providing a witness with an opportunity of explaining away an inconsistency or discrepancy in his testimony that will later be challenged when counsel puts his own case in evidence<sup>25</sup>.

Because of the complete lack of any reported Irish decisions dealing with the Rule or referring in any way to *Browne* since 1918, at least one foreign legal commentator<sup>26</sup> on the Rule has understandably, if not entirely accurately, stated that the Rule (sensibly!) has no place in Ireland<sup>27</sup>.

The sole reported authority of the *Flanagan* case notwithstanding, the practice in the Irish courts has been that the Rule is applied strictly. The tactical choice for counsel as to whether to cross-examine or not, and the extent of such cross-examination if any, has been taken away by the Irish courts from the place where it rightfully resides, with the advocate, on arguably dubious and faulty reasoning and precedent.

This emasculation of counsel's choice when it comes to the cross-examination of a witness, decried as unprofessional foolishness in *Flanagan*, also creates other difficulties and problems, which further undermine the various rationales put forward for the Rule.

11 At p. 70-71.

12 At p. 70.

13 At p. 77.

14 At p. 70.

15 At p. 79.

16 At p. 79.

17 *Ibid*, at p. 321.

18 Odgers, *The Principles of Pleadings in Civil Actions* (1892).

19 See for example, McGrath, *Evidence*, (2004) Thomson Round Hall, Dublin, p. 90-91.

20 Part VII – s. 708 – Conduct of Work by Practising Barristers.

21 From extensive keyword searches on the Justis electronic database of the Irish Reports.

22 (1918) 2 I.R. 361

23 At p. 388-389.11 At p. 70-71.

24 At p. 388

25 As to how the Irish court could purport to hold directly against the precedent set by the House of Lords in *Browne*, Ronan LJ stated (at p.389): "I say nothing as to how far *Browne v. Dunn* governs the Irish Courts."

26 Renaud, *ibid*, at p. 9: "Furthermore, the Irish courts do not appear to apply the Rule to criminal proceedings ..."

27 Likewise, in *Phipsan on Evidence* (14th ed, 1990), the authors state (at para 12-13): "As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness . . . If he asks no questions he will in England, though not perhaps in Ireland, generally be taken to accept the witness's account and he will not be allowed to attack it in his closing speech, nor will he be allowed in that speech to put forward explanations where he has failed to cross-examine relevant witnesses on the point." (Emphasis added).

## Problems and difficulties with the Rule

### (i) A trap

The Rule is rationalised as preventing the unfair ambush of witnesses by a party. But instead, in practice it operates as an ambush mechanism against inexperienced lawyers: operating where opposing advocates are simply making something out of nothing rather than being forced to rely on the strengths of their own case, or the weakness of the other side's case. Counsel are continually being caught out by the Rule. In most situations, nothing is to be gained by complying with the letter of the Rule and offering the witness the opportunity to give the predictable responses to a series of suggestions that he or she is a perjurer. Opposing counsel is, therefore, much happier to make a hullabaloo on the sole basis that a "rule" has been broken. Indeed, at times, the Rule plays a more important role in the fact-finding process than does the actual evidence that has been offered to the court.

### (ii) The supposed need to be fair to witnesses

It may actually be quite unfair to a witness to be met in cross-examination by a sudden, unexpected attack on what they said earlier in examination-in-chief, and to be immediately expected to respond in a clear and coherent manner. In such a case, it may be fairer to recall the witness whose evidence is contradicted without prior cross-examination, thus affording the recalled witness some opportunity to formulate a response before facing the challenge.<sup>28</sup>

Furthermore, although the need for fundamental fairness when dealing with an *accused* is obviously central to any trial, just how far must a court go in assuring fairness for a *witness*? It can hardly be stated as a general proposition that being fair to witnesses is a central tenet of adversarial litigation. Instead, litigation treats witnesses' feelings and entitlements as subservient to the fact-finding system, and ultimately to the administration of justice. Even where statute governs the cross-examination of a witness, the aim is never to be fair to witnesses. For example, with cross-examination on a witness's prior inconsistent statement<sup>29</sup>, the explicit aim is to allow cross-examination on and proof of the witness's prior inconsistent statement, a very uncomfortable position indeed for a witness to find himself in, and one that the witness may not consider in any way fair.

I would submit that the methods and techniques of advocacy should not be blindly and unquestioningly sacrificed on this altar of the supposed need to be fair to witnesses. A better rationale in this context may be that it is important to put one's case in cross-examination so as to enable the judge to assess that witness's response to the other case orally, by reference to their demeanour<sup>30</sup>.

### (iii) Too rigid and automatic in its operation

In essence, the consequence of a breach of the Rule is that testimony not challenged and cross-examined upon must be accepted by the court. Thus, the Rule is extremely strict, barring absolutely the subsequent putting of the case of the party adjudged to be in breach of the Rule, no matter what the individual circumstances, merits or justice of a given case might actually be, nor the possible reasons why there was no formal challenge through cross-examination.

### (iv) Waste of time and expense

One rationale for the Rule, as noted above, is that it operates to expedite trials and save on costs. However, the Rule can also generate waste of court time and costs itself, particularly when counsel are required to safeguard themselves from running foul of the Rule by overextensive, exhaustive cross-examination, tediously putting every single detail and item upon which the witness will or might be contradicted on subsequently.

### (v) Uncertain scope and range

The Rule has variously been described as applying only in civil trials<sup>31</sup>; as applying in criminal trials<sup>32</sup>; or as not applying to lay magistrates or to summary trials<sup>33</sup>. Well, which is it, and why? One will search long and fruitlessly in the caselaw and textbooks for answers as to the scope and range of the Rule in various types of litigation. Further uncertainties also exist as to the application of the Rule:

Does the Rule arise only when counsel later submits that the witness is lying, or is it enough that the suggestion is made that the witness, although telling the truth, is simply mistaken? Is it sufficient to ask some general questions in cross-examination to comply with the Rule, or must the questioning go further and put to the witness every detail of his or her evidence that will be challenged?

What is to happen with a vulnerable witness, where one party decides not to be too rough in cross-examination, or to forego cross-examination altogether, but is then potentially vulnerable themselves to being accused by the other party of breaching the Rule, and barred from putting their own case subsequently?

### (vi) Specific difficulties in criminal context

If the Rule does apply in criminal trials, and it would appear that it does in Ireland<sup>34</sup>, no general duty requiring the defence to disclose evidence before the prosecution has completed its case in chief is recognised by the Irish courts. Nevertheless, how else can the operation of the Rule in a criminal trial context be characterised, but as requiring such disclosure? Whatever may be the required amount of detail to be put by the cross-examiner, the effect of the Rule if enforced by the court is an obligation to give advance notice of defence evidence and intended submissions on behalf of the accused.

When considered in the criminal context, it also becomes apparent that the Rule touches on the accused's right to silence, a central part of which is the accused's right to remain silent at trial. Surely the accused is, or should be, entitled to remain silent as to the nature of his or her defence until after the prosecution has introduced all the evidence they intend to rely on in outlining the case to be met, and not be forced by the Rule to show its hand prematurely?

The position in Scotland in relation to the operation of the Rule in criminal trials may be somewhat different, as appears from the case of *McPherson v Copeland*<sup>35</sup>, where the court stated:

"Ordinarily there is no burden on the accused and he is entitled to sit back and leave the Crown to it. Of course, if he sits back too far and too long, he may come to grief but that is his own affair. He can leave

28 This is a reform that has been implemented in Australia, in s. 46 of the 1995 Uniform Evidence Acts of the Commonwealth and New South Wales.

29 Criminal Procedure Act 1865, s. 4.

30 *EPI Environmental Technologies Inc and another v. Symphony Plastic Technologies plc and another* [Practice Note] [2005] 1 WLR 3456.

31 *Verney v. The Queen* [1993] 67 O.A.C. 279, 288; 1993 Ont. C. A. LEXIS 324.

32 *R v Fenlon* (1980) 71 Cr App R 307; *MWJ v The Queen* [2005] HCA 74.

33 *O'Connell v. Adams* 1973 Crim LR. 113, as cited in McGrath, *ibid*.

34 See, for example Walsh, *Criminal Procedure* (2002), Thomson Round Hall: Dublin, p. 903 and Charleton et al, *Criminal Law* (1999), Butterworths: Dublin, p. 186.

35 [1961] Scots Law Times 373

the Crown evidence severely alone in the hope that it does not reach the standard of reasonable certainty or he can intervene at points where he is hopeful of raising a reasonable doubt. It follows that the procurator for the accused can be as selective as he chooses in the cross-examination."<sup>36</sup>

I would submit that such a sensible approach would be a wise one for the Irish criminal courts to follow.

### *(vii) Potential to induce a breach of privilege*

Reliance on the Rule by an aggrieved party at trial may result in a breach of the solicitor-client privilege of the other party, in the following scenario:

The accused is pressed in cross-examination to explain why his counsel did not put to a prosecution witness some detail about the case that is now being testified to by the accused. What is being suggested by such questioning is that the accused has just made up the detail in the witness box. This is to suggest that the only possible explanation of defence counsel's earlier failure to comply with the Rule, with the duty to cross-examine, is the lack of any instructions from the accused mentioning the detail now in question. All this may be quite confusing for the accused, who is suddenly called upon to explain his or her lawyer's handling of an earlier cross-examination. It is also improper, because the thrust of the prosecution's questioning depends on what the accused did or did not say to his counsel in preparing for the trial, a privileged matter.

The operation of the Rule in such fashion may also attach the not-inconsiderable stigma to counsel that they are somehow being professionally negligent – possibly lowering them, unnecessarily, in the eyes of their clients, colleagues and the court.

### *(viii) Where a witness is a fantasist*

The Rule doesn't take into account the situation where it may be abundantly clear that a witness is completely and utterly disbelieved by a party, which party thus declines to cross-examine the witness either in part or at all.

In *Browne* itself, Lord Morris, though stating that he went along with the judgment of the Lord Chancellor, contributed his own gloss to the Rule:

"I can quite understand a case in which a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box....I therefore wish it to be understood that I would not concur in ruling that it was necessary, in order to impeach a witness's credit, that you should take him through the story which he had told, giving him notice by the questions that you impeached his credit."<sup>37</sup>

Clearly, it should not follow that because evidence is uncontradicted, it is true (although this is a consequence of the Rule). The evidence may be so improbable in the light of all the evidence that it cannot be accepted by any sane person. Indeed, where evidence falls in the above category of improbability without the witness having been cross-examined, I would submit that the party who chose not to cross-examine should gain added favour in the eyes of the court, for having the good sense not to have wasted the court's time in unnecessary questioning.

Only one illustration is required to show whether the lack of challenge is appropriate or not depends entirely on the nature of the testimony in question. Bowie Kuhn, a prominent New York based lawyer and Princeton alumnus, and the former Commissioner of Major League Baseball, recalls the following anecdote:

When accused of having caused a hotel room fire by careless smoking in bed, a "big league" player responded: "That bed was on fire when I got into it!"<sup>38</sup>

Surely no cross-examination was required here!

### *(ix) Pre-trial disclosure precludes allegations of ambush by aggrieved parties*

Neither does the Rule countenance the increasingly common situation where the requirement of pre-trial disclosure by the parties means that an ambush through breach of the Rule is not possible: each party knows the other party's case already.

### *(x) Denial of a vital tactical choice*

Finally, I would submit that the Rule operates in opposition to the best techniques of advocacy. All such techniques, such as controlling the witness by asking only questions designed to elicit agreement with the propositions suggested by the cross-examiner; not asking the witness for open-ended explanations; and avoiding any questions if there is likely to be no gain from giving the witness a further opportunity to testify, are thrown into disarray by a duty to give the witness the chance to respond to the crucial aspects of the cross-examiner's case that contradict the witness's evidence.

The Rule forces counsel to pass control to the witness of what might otherwise have been the most carefully constructed cross-examination. Indeed, I believe that this tension between the best practices of advocacy and the operation of the Rule accounts for much of the uncertainty surrounding the scope of the Rule.

Clearly, there are times when it is the tactics of advocacy themselves that dictate the absolute need to cross-examine the witness: the court is unlikely to disbelieve an otherwise-credible witness when there is no evidence in the case that casts any suspicion on the witness's testimony. In such circumstances, a searching cross-examination may provide the only hope for establishing a foundation upon which to base counsel's submission that the witness's version of events should be rejected. Nevertheless, even the most obvious tactical pressure to cross-examine should not be transmogrified into a duty to do so.

## How to reform and/or abolish the rule

What are the possible remedies for breaching the Rule and not putting one's case in cross-examination? The existing remedies, in declining order of severity, are:

- i) A prohibition on the party in breach of the Rule from even arguing that the witness not cross-examined should not be believed or that the witness's testimony is false (as occurred in *Browne* itself).<sup>39</sup>

36 In *R v Birks* (1990) 19 NSWLR 677, 688 (CA) Gleeson CJ said that "there are some obvious difficulties concerning the operation of the rule in criminal trials". Gleeson CJ cited McPherson for the proposition that the Rule has no application in criminal trials in Scotland.

37 At p. 79.

38 Kuhn and Appell, *Hardball: The Education of a Baseball Commissioner* (1997), Bison

Books, as quoted in Renaud, *ibid*.

39 *EPI Environmental Technologies Inc and another v. Symphony Plastic Technologies plc and another* (Practice Note) [2005] 1 WLR 3456, per Peter Smith J: "A failure to put a point should usually disentitle the point to be taken against a witness in a closing speech."

- ii) A prohibition on the party in breach of the Rule from putting their own case, insofar as it contradicts the evidence of any witnesses not cross-examined previously. This appears to be the most common remedy in the Irish courts and elsewhere today.
- iii) Where a party breaches the Rule by not cross-examining one witness, that party might be prohibited from subsequently cross-examining another witness on the same issue<sup>40</sup>.

Other possible, less severe and I would submit, more rational remedies to a breach of the Rule include:

- iv) The court discounts or the jury is instructed that it may discount the case of the party in breach of the Rule, which was not put in cross-examination to the witnesses for the other party. With such a remedy, the weight to be attached to the party's case is reduced; and/or alternatively, unchallenged/uncontradicted witness testimony may have credibility weight added to it. For example, the judge might give an instruction that it may be inferred that the unchallenged witness's evidence on cross-examination would have been adverse to the side that did not adhere to the Rule.
- v) The recall of unchallenged witnesses is permitted by:
  - The judge, so that he can put the case to the witness himself, if he feels the need to do so, or
  - The party aggrieved and perhaps prejudiced by the breach of the Rule, so they can now put the case of the other (breaching) party to the witness, or
  - The party in breach of the Rule, so that they can now put their case to the witness, prior to the determination of the court<sup>41</sup>, or
  - Either party, prior to the impeachment of that witness's evidence by the other party putting its case.

Each of these scenarios may necessitate reconsideration of the traditional finality in Irish courts of the prosecution having "closed its case", whereby it is exceptional indeed for the prosecution to be permitted to call or recall witnesses after stating that its case is closed.

- vi) If it is possible to do so, the party aggrieved by an alleged breach of the Rule is required to object to the breach immediately following the allegedly faulty cross-examination, so that the breach may be remedied by the party in breach while that witness remains in the witness box. An aggrieved party may be in a position to object due to knowledge of the other party's case, from pre-trial disclosure for example. The issue of the breach of the Rule could be raised in the absence of the jury, if any.
- vii) Best remedy for breach of the Rule

Finally, I suggest that the best option is to allow the remedy for a supposed breach of the Rule to come during the determination of the court at the end of trial. At this stage, a party not having put its case in cross-examination would run the tactical risk that unchallenged witnesses might be believed by the court due to the lack of cross-

examination. Whenever counsel has limited the extent of a cross-examination, the court should ask itself whether any conceivable benefit could have been obtained by further cross-examination, such benefit involving something more than the witness simply either reaffirming what was just said in examination in chief or attempting to explain away a falsehood, and whether what occurred actually resulted from a breach of a professional duty by counsel rather than from an understandable tactical choice. Surely this would be remedy enough, in fact the fairest remedy in all the circumstances?

## Conclusion

Both the rationales and origins of the Rule are suspect and open to criticism, yet the Rule is followed unquestioningly in Irish courts and textbooks. The consequences for a party in breach of the Rule can be severe, and are frequently of more significance than any of the actual evidence that may be available to the court.

Although the Rule has its place in trial procedure, the choice of whether to put the case in cross-examination should be a tactical one for professional counsel, and should not be a duty imposed by a Rule. Counsel would then run the risk of having unchallenged testimony believed by the court, but could benefit from regaining control of the cross-examination process and from using court time efficiently.

There is a full range of possible directions for reform of the operation of the Rule, as evidenced by the Australian attempt to abrogate the rule<sup>42</sup> and the New Zealand Law Commission's proposal to codify the current position in that country<sup>43</sup>.

Entrenched as the Rule seems to have become in Ireland, it is hoped that this article will at least stimulate thought and debate on the rationale for, and application of, the Rule. Such an approach will free us from the shackles imposed by the House of Lords over 100 years ago. ●

40 As occurred in *McPherson v Copeland* [1961] Scots Law Times 373, for example.

41 It is possible to ask the court for permission to recall a witness for cross-examination: *R v Wilson* (1977) Crim LR 553. The judge will usually allow this if the cross-examination would be proper, and there will not be unnecessary delay or injustice. In *Wilson*, the defendant was recalled to be cross-examined on his previous convictions.

42 See footnotes 4 and 25.

43 New Zealand Law Commission, Report 55, Volume 2: Evidence Code and Commentary, pp. 216-217.

# Commission v Council. EU Legislation and the Irish Constitution

Elaine Fahey BL

The recent decision of the Court of Justice in *Commission v. Council*<sup>1</sup> is arguably one of the most controversial of the Court composed since 2003. The decision follows a number of far-reaching decisions of the Court over the summer months of 2005, subjecting Member States to rigorous penalties and extending liability and core doctrines in a multitude of areas.<sup>2</sup> It is suggested herein that *Commission v. Council* arguably may have the combined force of the existing constitutional tenets of EU law, namely, *Van Gend en Loos*,<sup>3</sup> *Van Duyn*,<sup>4</sup> *Costa*<sup>5</sup> and *Marshall*<sup>6</sup> together.

However, from an Irish perspective, it is possible to suggest that its relevance may in fact lie in the realm of the *Cityview Press Co. Ltd. v. An Chomhairle Oiliuna*<sup>7</sup> "principles and policies" doctrine pursuant to Article 15.2.1 of the Constitution,<sup>8</sup> concerning the powers of the Oireachtas to validly delegate power contained in secondary legislation pursuant to a parent Act. Ostensibly, the decision in *Commission v. Council* could in fact pose to be a constitutional quagmire for many an Irish Court in future times.

The test in *Cityview* remains to this day the definitive one as to the validity of delegated subordinate legislation pursuant to a parent statute. The Supreme Court held that:

"In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to "principles and policies" which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits -- if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body -- there is no unauthorised delegation of legislative power."<sup>9</sup>

The rigorous application by the Supreme Court of the "principles and policies" test to secondary legislation, in particular in the last 2 decades, has been the subject of intense criticism in this jurisdiction because of the Court's restrictive tendencies towards the desire of the Oireachtas to be efficient and flexible.<sup>10</sup> However, the relevance of the decision in *Commission v. Council* in this jurisdiction may also lie as to the "necessitated clause" pursuant to Article 29.4.10 of the Constitution,<sup>11</sup> whereby acts done or measures adopted pursuant to the State's membership of the European Communities are immunised from review if necessitated by membership thereof by virtue of the constitutional relationship between Article 15.2.1 and 29.4.10.<sup>12</sup> This relationship has involved extensive deference to the State in challenges to delegated legislation under Article 15.2.1 implementing European legislation where Article 29.4.10 arises for review. The effect of the interaction of the two clauses has been that delegated legislation implementing European obligations has been upheld at all cost with the Supreme Court evading analysis of the "necessitated" clause.

*Commission v. Council* concerned an application on the part of the Commission to annul a Council Framework decision (2003/80/JHA of 27th January, 2003) on the protection of the environment through the criminal law under the rubric of Justice and Home Affairs, employing Article 34 EU, whereby the Council, acting unanimously, can adopt a framework decision binding upon Member States. The Framework decision was adopted primarily because of the concern of the Union at the rise in environmental offences and their increasingly cross-border effects between States. Article 2 of the Framework decision provided, *inter alia*, that:

"[e]ach Member State shall take the necessary measures to establish as criminal offences under its domestic law..."

The Commission objected to the appropriateness of the legal basis for

1 Case C-176/03 *Commission v. Council* [2005] ECR 0000.  
 2 See, for a selection, Case C-304/02 *Commission v. France* [2005] ECR 0000 (imposing a large periodic penalty payment and a lump sum fine for a serious and persistent failure to comply with Community law); Case C-147/03 *Commission v. Austria* [2005] ECR 0000 (striking down legislation on admission to Austrian Universities); Case 17/03 *Vereniging voor Energie, Milieu en Water e.a. v. Directeur van de Dienst uitvoering en toezicht energie* [2005] ECR 0000 (holding that the grant of preferential access to the cross-border electricity transmission network to an undertaking that was previously a monopoly amounted to discrimination and Case C-438/02 *Criminal Proceedings Against Krister Hanner* [2005] ECR 0000 (striking down a Swedish monopoly on retail sales of medicinal preparations).  
 3 Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, the foundational basis for "direct effect" in the jurisprudence of the Court.  
 4 Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337. *Van Duyn* extended the doctrine in *Van Gend en Loos* to the provisions of directives.  
 5 Case 6/64 *Costa v. ENEL* [1964] ECR 585. *Costa* is authority for the Court of Justice's enunciation of the supremacy of Community law in case of conflict with national law where appropriate conditions are met.

6 Case 152/84 *Marshall v. Southampton Health Authority* [1986] ECR 723. In *Marshall*, the Court gave a particularly broad reading of the concept of the State, that in turn affected the doctrine of State Liability. Under the latter, the State may be liable to an individual in damages for a breach of their Community rights through acts or omissions on the part of the State under certain conditions. Together, seen cumulatively, these cases establish aspects of the constitutional foundations of the EU, whereby the Court of Justice thus set out the principles of direct effect, supremacy and state liability: see *Craig & De Burca EU Law: Cases, Texts & Materials* (Oxford, 3rd ed., 2003) Ch. 5-7.  
 7 [1980] IR 381.  
 8 As to Article 15.2.1 generally see, Hogan & Morgan eds. *Kelly: The Irish Constitution op.cit.*, 4.2.09 et seq; Gwynn Morgan *The Separation of Powers in the Irish Constitution* (Roundhall, 1997) p. 235 et seq; *Casey Constitutional Law in Ireland* (3rd ed., Roundhall, 2000) p. 233 et seq.  
 9 At p. 399.  
 10 In Ireland, we have adopted the "nondelegation" model, despite its rejection in the US, where it derives its genesis from. See the discussion *infra*. While a full consideration of the caselaw relating to Article 15.2.1 is outside of the scope of this article, as to the operation of the doctrine see the earlier decisions of *Cooke v. Walsh* [1984] IR 710 and *McDaid v. Sheehy* [1991] 1 IR 1, where the Supreme Court

went to great lengths to uphold legislation through the presumption of constitutionality in particular and contrast with the more robust application of the test in the more recent decisions of *Laurentiu v. Minister for Justice* [1999] 4 IR 26 and *Leontjova v. Director of Public Prosecutions* [2004] 1 IR 591. On a count by the author, it would appear in the last twenty years that the Supreme Court has upheld in 16 cases delegated legislation but has invalidated 11 instances of delegated legislation, a particularly high rate of attrition indeed.  
 11 Article 29.4.10 of the Constitution provides that: "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State".  
 12 As to the judicial interpretation of this clause and its uneasy relationship with Article 15.2.1, see Hogan & Whyte eds. *Kelly: The Irish Constitution* (4th ed., Lexis-Nexis, 2003) at para. 5.3.62 et seq. The caselaw in this regard is not without major difficulties: see Doherty "Land, Milk and Freedom - Implementing Community law in Ireland" (2004) 11 IJEL 141.

the decision. It contended that Article 175 (1) EC should have been used, whereby the co-decision procedure involving the Commission and the Parliament and also consultation of the Economic and Social Committee and the Committee of the Regions would have been employed, instead of the unanimous decision from the Council under Article 34 EU. Whilst not contending that the Community legislature had general competence in the field of criminal law, it argued that the legislature was competent to prescribe criminal penalties in order to make legislation more effective. The Parliament submitted that the Council had confused the Community's power to adopt the proposed directive and the power to adopt the framework decision in its entirety and had thus adopted the incorrect legal base.

That the decision was to be a controversial one is reflected in the unanimous opposition of 11 Member States, including Ireland, who argued that the Community did not have the power to require the Member States to impose criminal penalties pursuant to Article 34 EU. Whilst acting contrary to a collective body of Member State opposition is not altogether unusual for the Court of Justice, it might reasonably be said to occur more often in recent times where major fiscal consequences would ensue to the Member States and less so in a "constitutional" type area.

The Court held that the Council had adopted the proper legal base under Article 34. More radically, from the point of view of the Member States, was its decision that the Council could impose criminal penalties to enforce the Treaty even when the Treaty did not specifically provide for such penalties. As a starting point, the Court noted that Article 47 EU provided that nothing in the Treaty on the European Union was to affect the EC Treaty. It was "common ground" to the court that the environment constituted one of the essential objectives of the Community. Whilst as a general rule, criminal law or procedure did not fall within Community competence, it held that this did not prevent the Community legislature from taking necessary measures to ensure that it lays down rules that are fully effective. The spheres of separation of competence were not called into question in this conclusion, given that it was not possible to infer from Articles 135 EC, whereby pursuant to the co-decision procedure (involving both the Commission and the Parliament) the Council may strengthen customs co-operation or 280(4) EC, whereby pursuant to the co-decision procedure, the Council may take measures against fraud, that any harmonisation of criminal law must be ruled out to ensure the effectiveness of Community law.

The judgment is unquestionably most remarkable in its employment of the "*l'effet utile*" or "useful effect" style of reasoning that previously resulted inter alia, in the "direct effect" doctrine, wherein the Court attaches all-importance to EU law being effective notwithstanding the far-reaching constitutional ramifications of the its actions.<sup>13</sup> Most

extraordinarily, it is an honest and punchy decision specifying lucidly its legal ramifications, i.e. that effectiveness of Community law must prevail at all times. Clearly, in many areas of EC and EU law, the same genre of reasoning may be readily employed. Where will it lead? A gradual creep of criminal penalties in all areas of Community and Union law is clearly an option, as is any form of effective harmonisation that will ensure "*l'effet utile*" or the effectiveness of Community Law at all costs. *Commission v. Council* is also an unusual decision in view of the constitutional scenario envisaged in the Protocol on Subsidiarity contained in the yet to be ratified Draft Treaty establishing a Constitution for Europe,<sup>14</sup> involving extensive consultation with national parliaments designed to respect national sovereignty and ensure extensive input from regional parliaments in the newly proposed legislative process. The decision is all the more difficult to comprehend in view of the new approach to the delimitation of competences in the Draft Constitutional Treaty, where precise categories of competence are established.<sup>15</sup>

Unsurprisingly the reaction to the decision has been diverse and colourful—the London *Times* edition banner heading the day after the decision of the Court was entitled "Europe wins the power to jail British Citizens",<sup>16</sup> whilst the Commission President Jose Manuel Barroso is quoted in the same paper as having stated that the "judgement breaks new ground. It strengthens democracy and efficiency in the EU".<sup>17</sup>

A link with domestic constitutional matters may not be apparent but this decision may have a major impact on the "principles and policies" doctrine of the Irish superior courts pursuant to Article 15.2.1 of the Constitution. The link between this doctrine and the "necessitated" clause under Article 29.4.10 appears to have the effect that acts done or measures adopted pursuant to the State's membership of the European Communities are immunised from review if necessitated by membership thereof. However, if the Commission is empowered now, generally speaking, to initiate legislation with penalties outside the scope of the Treaty and thus impacting on Member State competence, the sovereign rights and powers of States to legislate domestically have clearly been affected.

Thus in principle, the "principles and policies" doctrine has been radically affected, whether as to the implementation of directives or regulations. The basic question remains now as to how the decision affects Article 15.2.1: what principles or policies can an Irish Court locate in European legislation, in its search to see whether a Minister has delegated powers in excess of the principles or policies, if the Court of Justice will validate principles or policies in directives or regulations, that are not specifically prescribed in the Treaty. A legitimacy crisis is surely inevitable here, resulting from a clash of legal orders. The issues raised here are all the more thorny in light of the rather strict approach taken on the part of

13 As to which, see *Craig & De Burca EU Law: Cases, Texts and Materials* (3rd ed., OUP, 2003) pp. 202 et seq. See also De Witte "*Direct Effect, Supremacy and the Nature of the Legal order*" in Craig & De Burca eds., *The Evolution of EU Law* (OUP, 1999).

14 [2003] OJ C169/1.

15 See Part I, Title 1, Arts- 11, 12, 13 and 16 thereof in particular, setting out the principles of conferral of competence, exclusive, shared and supporting categories of competence. See Berman "Competences of the Union" in Tridimas & Nebbia eds. *European Union Law for the Twenty-First Century: Rethinking the New Legal Order Vol. 1* (Hart, 2004). There are many critics to the new system of categorisation of

competences who suggest that the role of national parliaments envisaged in the reformed legislative process is preferable to a systematic categorisation of competences: see Weatherill "*Better Competence Monitoring*" (2005)30 ELR 2.

16 14th September, 2005.

17 *Ibid.*

the Supreme Court over the last twenty years as to the powers on the part of the Oireachtas to delegate legislation, contrary to the approach adopted in the US,<sup>18</sup> Australia,<sup>19</sup> New Zealand<sup>20</sup> and Italy<sup>21</sup> to name but a few other examples, with an extraordinary rate of attrition of invalidated legislation developing.<sup>22</sup>

Say, for example, as is the present case, the legal base in the EC Treaty does not provide for the use of criminal penalties in the implementation of environmental legislation but the Commission provides for such penalties to be prescribed in legislation and the legislation is eventually approved by all of the requisite Community institutions following the *Commission v. Council* decision. Is it not the case that an Irish court might have tremendous difficulty ascertaining the legitimacy of the principles and policies of the European primary legislation (albeit in principle legitimised at European level by *Commission v. Council*) in the event of a challenge to their implementation via domestic secondary legislation prescribing criminal penalties? Is the clash of legal orders not more apparent than ever here and the very legitimacy of European legal supremacy called into question?<sup>23</sup>

The importance of the difficulties presented by *Commission v. Council* is magnified surely by the recent decision of the Supreme Court in *McCauley Chemists (Blackpool) Ltd. v. Pharmaceutical Society of Ireland*<sup>24</sup>. *McCauley* concerned a challenge pursuant to Article 15.2.1 of the Constitution, to the statutory instrument implementing Council Directive No. 85/433/EEC as to the mutual recognition of pharmacist qualifications to facilitate the effective right of establishment across the European Union. The Council Directive had been implemented by way of the European Communities (Recognition of Qualifications in Pharmacy) Regulations, 1991,<sup>25</sup> introducing a new s. 2(3A) into the original Pharmacy Act, 1962. The Supreme Court on appeal chose to make a preliminary reference to the Court of Justice pursuant to Article 234 EC in order to resolve its analysis of the "principles and policies" doctrine and the "necessitated clause" pursuant to Article 29.4.10 of the Constitution, in construing provisions of the European Communities (Recognition of Qualifications in Pharmacy) Regulations, 1991.

What is extraordinary, then, about *McCauley* is the fact that the Court of Justice is now involved in the construction of both domestic legislative and constitutional texts outside of its remit ostensibly, given that a Article 234 EC reference is strictly speaking not a forum for domestic constitutional issues to be addressed, those being central to the *McCauley* case.

Yet does the precedent set by the Supreme Court in *McCauley Chemists (Blackpool) Ltd. v. Pharmaceutical Society of Ireland* and the decision of the Court of Justice in *Commission v. Council* not entail that a dutiful and diligent Court is obliged perpetually to make a preliminary reference to the Court of Justice in order to seek a construction of the "principles and policies" contained in a directive or regulation for implementation in a Member State, where the legal basis of legislation at European level is open to some doubt? Might not the criticism be made that the burden of this contact could become overwhelming for the Luxembourg Court, already swamped by the mass of preliminary references from the existing and newer accession States?

Thus on many levels, it is apparent that the *Commission v. Council* decision is most worrisome in that it poses difficulties for the Irish Courts from a domestic constitutional perspective seeking to construe the "principles and policies" doctrine in the context of EU law, already fraught with difficulty after the *McCauley* precedent. From a European constitutional perspective, the draft Constitutional Treaty attempted to define unequivocally the spheres of competence between State and Union, with which *Commission v. Council* sits uneasily. The Court of Justice has frequently had its more controversial decisions in Grand Chambers downplayed or indeed distinguished by subsequent decisions of smaller chambers of a more conservative judicial species.<sup>26</sup> This may ultimately occur in respect of *Commission v. Council*. However, the decision of the Court of Justice in *Commission v. Council* demonstrates that unless the Draft Constitutional Treaty is duly ratified, wherein the competence of the Institutions and States is set out with remarkable clarity and without ambiguity, the problem of a creeping encroachment of competence could become a large and live one. ●

18 See Tribe *American Constitutional Law Vol. 1* (3rd ed., New York, The Foundation Press, 2000) §5-19. See *Maher v. Minister for Agriculture and Food* [2001] 2 IR 139 where the US approach was rejected. Cf. the discussion of *Maher in Doherty "Land, Milk and Freedom- Implementing Community law in Ireland"* (2004) 11 IJEL 141 and Hogan & Whyte *Kelly: The Irish Constitution* (4th ed., Lexis-Nexis, 2003) 5.3.71 et seq.

19 The High Court of Australia rejected the nondelegation rule as far back as the 1930's: see *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

20 As to New Zealand, the Regulations Review Committee specifically monitors and scrutinises delegated legislation. See the report of the latter: *Inquiry into Instruments Deemed to be Regulations: An Examination of Delegated Legislation* (AJHR, 1999, I.16R)

21 Article 76 of the Italian Constitution of 1946 expressly provides for delegation of legislation under certain conditions.

22 See *supra* fn. 10.

23 As to supremacy of EC law, see Case 6/64 *Costa v. ENEL* [1964] ECR 585.

24 High Court, McCracken J., 31st July, 2002. The decision of McCracken J was appealed to the Supreme Court and an order for a preliminary reference to the Court of Justice was made on 11th May, 2005. .

25 SI. 330 of 1991.

26 A good example of this is the infamous *Carpenter* decision: C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279. *Carpenter* is a particularly important decision for its extension of a right of residence to a non-national spouse of an EU citizen by virtue of Article 18 EC (establishing European citizenship rights) and fundamental rights principles *simpliciter*. See the refinement of *Carpenter* in Case C-200/02 *Chen v. Secretary of State for the Home Department* [2004] 3 CMLR 48, where the Court evidently rows back on its precedent set in *Carpenter* and see the analysis of Carlier "*Annotation of Chen*" (2005) 42 CMLR 1121.

# Recognition of a pre-1986 Divorce. Domicile v Residency

Jack Hickey BL

## Introduction

The rules governing the recognition of a foreign divorce obtained prior to 1986 have been the subject of some confusion in this jurisdiction. This article reviews the authorities in this area, particularly the two divergent opinions expressed in the High Court cases, *McG v. W* [2000] 1 IR 96 and *M.E.C. v. J.A.C* [2001] 2 IR 399. This article concludes that the *M.E.C.* judgment now appears to be the more correct statement of law applying to pre-1986 divorces.

Since the Supreme Court decision in *W v. W* [1993] 2 IR 476, it has been the law in Ireland that for the Courts to recognise a foreign divorce obtained prior to 1986, it must be shown that one of the parties to the marriage was domiciled in the jurisdiction where the divorce was obtained. However, in *McG v. W*, Mc Guinness J. held that the previous requirement of domicile could be satisfied by mere residence. She extended recognition to a decree of divorce granted in a jurisdiction in which one of the spouses had been resident, but not domiciled prior to the divorce. However, it is now seriously in doubt whether residence as opposed to domicile is a ground for the recognition of a pre-1986 divorce in Irish law.

## The *W v. W* decision

Prior to the enactment of the Domicile and Recognition of Foreign Divorces Act, 1986 the rules applicable to the recognition of foreign divorce referred to *the dependent domicile of the wife*. The 1986 Act abolished that rule but only regarding the recognition of any divorce passed after October 2nd 1986. Briefly, the 1986 Act provides for the recognition of divorces granted in the country where either spouse is domiciled.

In *W v. W*, the plaintiff was born in Ireland to Irish parents and went to work in England in 1957. She returned to Ireland for a brief period before she married in England in 1966. Her first husband was English. The marriage broke down in 1969 and the plaintiff lived in Australia for two years before returning to Ireland in 1971. In 1972, she met the defendant and accordingly petitioned for a divorce in England, which was granted in October 1972. She married the defendant in Ireland in 1973 and had four children with him. Their relationship broke down and she applied to the Circuit Family Court for a decree of judicial separation in 1991. However counsel for the respondent argued that she was not entitled to a judicial separation as she was not legally married to the defendant on the grounds that she was not domiciled in England when the 1972 divorce was obtained.

The Circuit Court Judge declared the 1973 marriage to be valid and granted a decree of judicial separation and ancillary reliefs. The defendant appealed to the High Court and O'Hanlon J. stated a case to the Supreme Court.

In the Supreme Court, counsel for the plaintiff argued that the plaintiff had acquired a domicile of choice in England, despite returning to Ireland in 1971 and that therefore her English divorce was valid in Irish law. In the alternative, the common law rule of the dependent domicile of a married woman was not unconstitutional and should be upheld. In the alternative, if the Court was to uphold the decision of Barr J. in *C.M. v. T.M.* 1991 I.L.R.M 268 (holding that the rule that a wife's domicile was dependent on the domicile of her husband was unconstitutional), then the decision should not be applied *retrospectively*. Otherwise an unjust and inequitable situation would arise where the plaintiff had entered a perfectly legal marriage according to the state of the law of 1973 and who had conducted her life on that basis for 18 years would find in 1991 that she had never been legally married to the defendant, the father of her four children.

The Supreme Court declared the rule of dependent domicile to be unconstitutional and held that a pre-1986 Act divorce would be recognised once either of the parties was domiciled in the state granting the divorce. This had the effect of declaring the 1972 divorce valid as the first husband and respondent in that case had an English domicile. In effect, the Supreme Court equalised the common law rules applying to the pre-1986 situation with those of the Domicile and Recognition of Foreign Divorces, 1986

Egan J. stated at page 494:

'In the absence of statutory regulation of it before the 2nd October 1986, there must be for the period before that time, of regulation by common law'.

Blayney J. held at page 505

'In my opinion, such recognition would be consistent with what the present policy of the Courts should be. The Court may not leave out (section 5) of the Domicile and Recognition of Foreign Divorces Act, 1986...While this provision applies only to divorces granted after the statute came into force on the 2nd October 1986, it seems to me that it would be wholly consistent with the statute that this Court, as a matter of public policy, should independently modify the judge-made rule in order to do justice to the Plaintiff.

## The ratio of *Mc G v. W*

In *Mc G v. W* [2000] I R 96, the petitioner Mr Mc G married the notice party, Miss C in Dublin in 1967 and both parties were domiciled and resident in Ireland at the time. They had two children and the marriage broke down in the late 1970's and both parties formed new relationships. In August 1984, Mr. Mc G petitioned for a divorce in England based on the jurisdiction of the English Court on either English domicile or the residence of more than one year in England of his wife, the notice party. A decree absolute was granted in February 1985 and the notice party remarried. The petitioner married the respondent, Ms.W, in London in 1987. However, in 1998, he issued nullity proceedings which came before the Master of the High Court. The Master refused to hear the proceedings, having concluded that the 1985 divorce was not valid in Irish law and that the petitioner was still legally married to the notice party. He decided that both parties had committed bigamy and referred the matter to the D.P.P. and a number of parties, including the petitioner and Ms C were interviewed by the Gardai concerning a possible prosecution for bigamy.

In the High Court no case was made that either party had acquired an English domicile. McGuinness J. observed that the English internal jurisdictional rules are the same as the jurisdiction requirement used here in respect of divorces under Section 39 of the Family Law (Divorce) Act, 1996, in that to apply for a divorce in Ireland, one must be ordinarily resident in Ireland for one year before the application, or one must be domiciled here. She held that this demonstrated a clear public policy that the modern matrimonial jurisdiction of the State was not limited to a party's domicile. She also felt the doctrine of comity of courts supported an extension of the rules as would the policy of the courts to avoid 'limping marriages. These reasons she felt justified an extension of the common law rule to recognise a divorce granted on the basis of ordinary residence in England for one year.

Mc Guinness J. held;

"It would seem to me both logical and reasonable that the Irish common law recognition rule should similarly be extended to cover cases under the statute law. The Irish Courts claim entitlement not alone to dissolve marriages but also to annul them and to make far reaching declarations as to marital status. The well known policy of comity of the Courts alone would support such an extension of recognition. While accepting the reason and logic of extending the common law rules in this way, the court must also consider the difficulty that may arise because the Act of 1986 provides only for the recognition of divorces granted in the country where either spouse is domiciled. If, therefore, this Court extends the common law rule of recognition to reflect the jurisdiction set out in the Acts of 1995 and 1996, is it usurping the function of the Oireachtas to enact an amendment to the Act of 1986? "

She cited the decision of Blayney J. in *W v.W* and held:-

"Nor, I think, does it prevent the Court from developing the rules of recognition in reliance on the decision of the Supreme Court in *W v.W* that common law rules are judge-made law and may be modified depending on the current policy of the Court."

Mc Guinness J. then examined the Section 5(1) Domicile and Recognition of Foreign Divorces Act, 1986:-

"While this provision applies only to divorces granted after the statute came into force on the 2nd October 1986, it seems to me that it would be wholly consistent with the statute that this Court, as a matter of public policy, should independently modify the judge-made rule in order to do justice to the plaintiff. It seems to me that in considering in the instant case 'what the present policy of the Court should be' I 'may not leave out of account' the provisions of the 1986 Act, which is the current major statutory provision in regard to Divorce. It does not seem to me that it would in reality be inconsistent with the Act of 1986 that this court 'as a matter of public policy should independently modify the judge made rule in order to do justice' to the three parties in this case." (page 106)

Therefore, Mc Guinness J declared the English divorce of 1984 to be capable of recognition in Irish Law on the grounds that the Mr. McG was resident in England for more than one year prior to the application for a divorce. This decision obviously dispensed with any possible prosecution for bigamy.

The Attorney General did not learn of the Mc Guinness decision until after it was delivered. The Attorney General then sought to be joined to the proceedings and this application was refused by McGuinness J. in June 1999, five months after she delivered her judgment. The Attorney General appealed to the Supreme Court (*McG v. W. No. 2* 2000 4 I.R. 1) but the Supreme Court held that since the judgment and order had been given and there was no appeal, there were no proceedings in being to which the Attorney General could be joined.

The decision of Mc Guinness J. in *McG* was approved by Morris P. in *D.T v. F.L* (2002 ILRM 152) when he said:

'.....in her judgment she changed the common law rules as to entitlement to recognition, holding that in the instant case the divorce based on residence in England entitled the divorce to recognition in this jurisdiction. With that judgment I am in respectful agreement' (page 159)

However Morris P. was dealing with a post 1986 divorce and held that he was bound by the rules set out in Section 5 of the Domicile and Recognition of Foreign Divorces Act, 1986. Therefore his comments on the *Mc G* case were obiter.

## The Procedure since *Mc G.v. W*

Where a person seeks a declaration as to the validity of a foreign divorce under Section 29(1)(d) of the Family Law Act, 1999, the Court has power under Section 29(4) of that Act to request if the Attorney General wishes to be made a party to the proceedings. The Attorney General will routinely seek to be joined as a notice party and argues through counsel that the *McG* case is wrong in law. As a result, the *McG* authority has not been followed in a number of cases and most importantly another High Court decision (*M.E.C v. J.A.C* [2001] 2 IR 399).

*Continued on page 61*

# Legal

## The BarReview

*Journal of the Bar of Ireland, Volume 11, Issue 2, April 2006*

# Update

A directory of legislation, articles and acquisitions received in the Law Library from the February 8th 2006 up to the 16th March 2006.

Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

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### ADMINISTRATIVE LAW

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#### Library Acquisitions

All-Party Oireachtas Committee on the Constitution  
Tenth progress report: The family  
Dublin: Stationery Office, 2006  
M31.C5

Cane, Peter  
Administrative law  
4th ed  
Oxford: Oxford University Press, 2004  
M300

#### Statutory Instruments

Comptroller and auditor general (amendment) act 1993 (section 14) order 2006  
SI 14/2006

Health and children (delegation of ministerial functions) order, 2003  
SI 474/2003

Marine (delegation of ministerial functions) order 2006  
SI 82/2006

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### AGRICULTURE

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#### Statutory Instrument

Employment regulation order (agricultural workers joint labour committee), 2006  
SI 24/2006

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### ARBITRATION

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#### Library Acquisitions

Hill, Jonathan  
International commercial disputes in English courts  
3rd ed  
Oxford: Hart Publishing, 2005  
N256

Joseph, David  
Jurisdiction and arbitration agreements and their enforcement

London: Sweet & Maxwell, 2005  
N398

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Cambridge: Cambridge University Press, 2005  
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#### Statutory Instrument

Rules of the superior courts (arbitration) 2006  
SI 109/2006

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### AVIATION

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#### Statutory Instrument

Aer Lingus act 2004 (commencement of certain provisions) order 2005  
SI 645/2005

Irish Aviation Authority (operations) order, 2006  
SI 61/2006

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### BANKING

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#### Library Acquisition

Hedley, Steve  
The law of electronic commerce and the Internet in the UK and Ireland  
London: Cavendish Publishing Limited, 2006  
N347.4

#### Statutory Instruments

Asset covered securities act, 2001 (approval of transfers between Allied Irish Banks, plc. and AIB Mortgage Bank) order 2006  
SI 60/2006

Dormant accounts (amendment) act 2005 (establishment day) order 2006  
SI 922/2005

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### BROADCASTING

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#### Licence

Radio licence - Character of applicant - Concern over applicant's involvement in illegal broadcasting - Bias - Whether respondent had prejudged applicant - *Spin Communications Ltd v Independent Radio and*

*Television Commission* [2001] 4 IR 411 followed - *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 considered - Radio and Television Act 1988 (No 20), s 6 - *Certiorari* refused (2005/267JR - O'Sullivan J - 1/11/2005) [2005] IEHC 355  
*Scrollside Ltd t/a Zed FM v Broadcasting Commission of Ireland*

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### CHARITIES

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#### Library Acquisition

Law Reform Commission  
Consultation paper on legal structures for charities  
Dublin: Law Reform Commission, 2005  
L160.C5

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### CHILDREN

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#### Statutory Instrument

Health and children (delegation of ministerial functions) order, 2003  
SI 474/2003

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### COMMERCIAL LAW

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#### Article

Carey, Gearoid  
Can part payment constitute full satisfaction?  
2006 CLP 3

#### Library Acquisition

Casey, Denise  
Law Society of Ireland  
Business law  
3rd ed  
Oxford: Oxford University Press, 2005  
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### COMPANY LAW

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#### Directors

Restriction - Insolvent liquidation - Whether directors acted responsibly - Whether directors took real steps to inform themselves of affairs of company - Company Law Enforcement Act 2001 (No 28), s 56; Companies Act 1990 (No 33), s 150 -

Restriction order granted - (2001/293COS - Finlay Geoghegan J - 21/12/2004) [2004] IEHC 412  
*O'Ferral v Coughlan*

#### Directors

Restriction - Parties - Application by Director of Corporate Enforcement to be joined as notice party to proceedings - Court's inherent discretion to join parties - Whether party other than those set out in s.152 (4) can be joined - Whether necessary to join Director of Corporate Enforcement - Issues which court will consider in determining application for declaration of restriction to be lifted - Companies Act 1990 (No. 33) - Director of Corporate Enforcement joined to proceedings - (2004/48Cos - Finlay Geoghegan J - 14/10/2005) [2005] IEHC 340  
*In Re CMC (Ireland) Ltd; Carolan v Fennell*

#### Directors

Restriction - Test - Duties of director where company being wound up - Whether court should be concerned only with 12 month period prior to liquidation or entire tenure of director - Whether commercial misjudgement sufficient to warrant restricting director - Application granted (2005/5Cos - Clarke J - 4/11/2005) [2005] IEHC 341  
*In Re Swanpool Ltd; McLaughlin v Lannen*

#### Injunction

Interlocutory - Balance of convenience - Whether serious question to be tried as to whether petitioner excluded from company's affairs - Whether damages adequate remedy - Oppression of member - Removal of director - Equivalent to partnership - McGilligan v O'Grady [1999] 1 ILRM 303, *In re Murph's Restaurants Ltd* [1979] ILRM 141 and *Campus Oil Ltd v Minister for Industry and Energy* (No 2) [1983] IR 88 followed - Companies Act 1963 (No 33), s205 - Injunction refused (2005/251COS - Clarke J - 29/7/2005) [2005] IEHC 302  
*In re Avoca Capital Holdings*

#### Insolvency

Winding up - Crossclaim - Company having genuine and serious counterclaim in excess of petition debt - *Bona fide* claim for debt - Whether company able to litigate counterclaim - Whether winding up petition should be dismissed - *In re WMG (Toughening) Ltd* [2003] 1 IR 389 followed - *In re Bayoil SA* [1991] 1 WLR 147 approved - Companies Act 1963 (No 33), s 214 - Winding up petition dismissed - (2005/147COS - Clarke J - 3/8/2005) [2005] IEHC 301  
*In re Emerald Portable Buildings Systems Ltd*

#### Article

#### Mongan, Dearbhla

The new approach to directors' compliance statements  
2006 (Jan) ITR 63

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Report on corporate killing  
Dublin: Law Reform Commission, 2005  
L160.C5

#### Statutory Instruments

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SI 56/2006

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SI 57/2006

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#### Library Acquisition

Fine, Frank L  
EC competition law on technology licensing  
London: Sweet & Maxwell, 2006  
W110.7

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## CONFLICT OF LAWS

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#### Jurisdiction

Matrimonial proceedings - Judicial separation - Seat of marriage - Forum - Locus standi - Court first seised - Whether Irish court has jurisdiction to hear matrimonial proceedings - Whether court can proceed with matrimonial proceedings when matrimonial proceedings in being in respect of same parties in another Member State - Council Regulation (EC) 1347/2000 - Council Regulation 2201/2003 - Constitution of Ireland 1937, Articles 29.4.5°, 29.4.6°, 29.4.10° and 41.3.2° - Jurisdiction refused (2002/13M - O'Higgins J - 3/6/2005) [2005] IEHC 335  
*R (YN) v N (M)*

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## CONSTITUTIONAL LAW

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#### Detention

*Habeas corpus* - European arrest warrant - Error in committal warrant - Whether order bad on its face - Whether error could be corrected by slip rule - Whether fundamental rights breached - Whether detention unlawful - Application of *McLaughlin* [1970] IR 197 and *The State (McDonagh) v Frawley* [1978] IR 131 considered - European Arrest Warrant Act 2003 (No 45), ss 16, 13 and 14 - Constitution of Ireland 1937, Article 40.4.2° - Relief refused (2005/732SS - Peart j - 7/6/2005) [2005] IEHC 195  
*McArdle v Governor of Cloverhill*

#### Education

Children- Special needs - Mandatory orders - Separation of powers - Whether proposals for education and care of autistic child

appropriate - Whether applicant entitled to placement of his choice - *O'Donoghue v Minister for Health* [1996] 2 IR 20; *O'Shiel v Minister for Education* [1999] 2 IR 321 and *Sinnott v Minister for Education* [2001] 2 IR 545 followed - Education Act 1998 (No 51), s 7(1)(a) - Education for Persons with Special Educational Needs Act 2004 (No 30), s 2 - Constitution of Ireland 1937, Article 42.4 - Application dismissed; respondent's proposals accepted (2003/971JR - MacMenamin J - 15/6/2005) [2005] IEHC 296  
*O'Carolan (a minor) v Minister for Education and Science*

#### Family rights

Non national - Personal rights - Whether non national married to Irish citizen automatically entitled to reside in State - Whether length of time married couple resided together as family unit legitimate consideration when reviewing deportation order - Whether precarious immigration status of party to marriage relevant consideration - *Abdulaziz v UK* (1985) 7 EHRR 471; *Gül v Switzerland* (1996) EHRR 93; R (*Mahmood*) v *Home Secretary* [2001] 1 WLR 840 considered - Constitution of Ireland 1937, Articles 40.1, 40.3.1, 41 and 42 - European Convention of Human Rights 1950, Article 8 - Applicants' appeal dismissed (78/2005 - SC - 20/6/2005) [2005] IESC 42  
*C (T) v Minister for Justice*

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All-party Oireachtas Committee on the Constitution: Tenth progress report: The family  
Dublin: Stationery Office, 2006  
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## CONTRACT

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#### Breach of contract

Building contract - Damages - Extra works - Claim for works done - Counter claim - Damages awarded (2005/214CA - Herbert J - 14/10/2005) [2005] IEHC 319  
*Ryan t/a James Ryan and Sons v McManus*

#### Terms

Standard form - Community pharmacy contractor agreement - Agreement between Minister and representative pharmacist body - Validity - Whether new contract terms could be imposed by health boards upon individual pharmacies - Failure of health boards to consult pharmacists - Whether health boards acted *ultra vires* - Whether agreement amounted to quasi-regulation - Whether regulation made without consent of minister - Whether certain terms of agreement *ultra vires* - Whether requirement for supervising pharmacist with three years experience contrary to terms of Act - *Association of General Practitioners Lt. v*

*Minister for Health* [1995] 1 IR 382 followed; *McCord v ESB* [1980] ILRM 153 - distinguished - Pharmacy Act 1962 (No 14), s 2 - Health Act 1970 (No1), s 59 (1) and (4)- Claim and appeal dismissed (316 Et 317/2004 - SC - 6/7/2005) [2005] IESC 44  
*Collooney Pharmacy Ltd v North Western Health Board*

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Carey, Gearoid  
Can part payment constitute full satisfaction?  
2006 CLP 3

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London: Sweet & Maxwell, 2005  
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Commentary on the UN convention on the international sale of goods (CISG)  
2nd ed  
Oxford: Oxford University Press, 2005  
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### COSTS

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Legal Costs Working Group  
Report of the legal costs working group  
Dublin: Stationery Office, 2005  
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### CRIMINAL LAW

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#### Appeal

Miscarriage of justice - New fact - Handling of defence at trial - Counsel briefed night before trial - Complaint that no formal advice on proofs prepared - Not proper ground of appeal - Application under Criminal Procedure Act 1993, s 2 - No newly discovered fact established - No evidence that defence of trial conducted badly - Application struck out (01/2002 - CCA - 11/4/2005) [2005] IECCA 34  
*People (DPP) v Murray*

#### Criminal trial

Trial judge's charge to jury - Whether conviction of a lesser offence was warranted - Absence of requisition at trial - Admissibility of answers to garda interrogation - Circumstances of interrogation - Applicant in hospital - Whether fit to be questioned - Leave to appeal against conviction refused (39/2003 - CCA - 27/1/2005) [2005] IECCA 2  
*People (DPP) v Bishop*

#### Delay

Sexual offences - Right to fair trial - Right to expeditious trial - Lapse of time in

complaining to gardai - Whether applicant prejudiced - Whether delay attributable to applicant's conduct - Constitution of Ireland 1937, Article 38.1 - *P O'C v Director of Public Prosecutions* [2000] 3 IR 87 applied - Order of prohibition granted (2002/268JR - O'Leary J - 10/12/2004) [2004] IEHC 417  
*G (P) v Director of Public Prosecutions*

#### Sentence

Murder - Fifteen year old at time of commission of offence - Discretion on question of sentence - Sentenced to life imprisonment - Sentence subject to review in 2014 - Both accused and DPP submitted custodial sentence for specified number of years in principle more appropriate - Trial judge did not err in principle in imposing life sentence subject to review - Application refused (198/2004 - CCA - 27/5/2005) [2005] IECCA 75  
*People (DPP) v DG*

#### Article

McHugh, Damian  
Location, location, location  
2006 (Jan/Feb) GLSI 32

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Corre, Neil  
Bail in criminal proceedings  
3rd ed  
Oxford: Oxford University Press, 2004  
M580.6

O'Donnell, Ian  
Crime and punishment in Ireland, 1922 to 2003: a statistical sourcebook  
Dublin: Institute of Public Administration, 2005  
M500.C5

Ormerod, David  
Smith & Hogan criminal law  
11th ed  
Oxford: Oxford University Press, 2005  
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#### Statutory Instruments

Criminal justice act 1994 (section 37(1))  
order 2005  
SI 289/2005

Criminal justice act 1994 (section 46(1))  
order 2006  
SI 66/2006

Criminal justice act 1994 (section 47(1))  
order 2006  
SI 67/2006

Criminal justice act 1994 (section 55(1))  
order 2006  
SI 68/2006

District court (criminal justice act, 1994 section 38) rules 2006  
SI 47/2006

Misuse of drugs (amendment) regulations, 2006  
SI 53/2006

Misuse of drugs act 1977 (controlled drugs) (declaration) order 2006  
SI 55/2006

Misuse of drugs (exemption) (amendment) order 2006  
SI 54/2006

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### DAMAGES

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#### Aggravated damages

Tort - Negligence - Circumstances in which court can award aggravated damages - Conduct of defence - *Conway v Irish National Teachers Organisation* [1991] 2 IR 305 applied; *Philp v Ryan* [2004] IESC 105, [2004] 4 IR 241 followed; *Swaine v Commissioners of Public Works* [2003] 1 IR 521 considered - Damages awarded (2002/2704P - O'Sullivan J - 22/4/2005) [2005] IEHC 140  
*Daly v Mulhern*

#### Defamation

General damages - Aggravated and exemplary damages - Proof of damage - Jurisdiction of appellate court to review award of damages - Award of general damages upheld but appeal allowed against award of exemplary damages (75/2004 - SC - 12/4/2005) [2005] IESC 20  
*Crofter Properties Ltd v Genport Ltd*

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### DEFAMATION

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#### Damages

Publication - Damage - Requirement of specific identification - Requirement of proof of actual damage - Damage to reputation of company - Publication to limited class of persons - Award of general damages upheld but appeal allowed against award of exemplary damages (75/2004 - SC - 12/4/2005) [2005] IESC 20  
*Crofter Properties Ltd v Genport Ltd*

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### EDUCATION

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#### Library Acquisition

Binchy, William  
Litigation against schools: implications for school management  
Dublin: First Law, 2006  
N33.3.T2.C5

#### Statutory Instrument

Education act 1998 (publication of inspection reports on schools and centres for education) regulations 2006  
SI 49/2006

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### ELECTIONS

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**Statutory Instrument**

Electoral (amendment) act 2001  
(commencement) order 2006  
SI 26/2006

**ELECTRICITY**

**Statutory Instrument**

Electricity regulation act 1999 (market arrangements for electricity) (revocation) regulations 2006  
SI 78/2006

**EMPLOYMENT**

**Disciplinary procedures**

Fairness of procedures - Whether breach of natural and constitutional justice - Details of complaint - Availability of material witnesses - Relationship breakdown - Whether entitled to salary and return to work - *Martin v National Building Society* [2001] 1 IR 288; *O'Donnell v Chief State Solicitor* [2003] ELR 268 and *Bryan v Finglas Child and Adolescent Centre* (Unrep, Kelly J, 10/5/2004) considered - Employment contract - Implied terms - Custom and practice - Availability of alternative work - Whether breach of contract - Whether malice - Type of damages - *Bliss v Southeast Thames Regional Health Authority* [1987] 1 ICR 700 followed; *Addis v Gramophone Company Ltd* [1909] AC 488; *Jarvis v Swan Tours Ltd* [1973] QB 233 and *Cox v Philips Industries Ltd* [1976] WLR 638 considered - Declarations granted but injunction refused (2004/1876P - Clarke J - 4/8/2005) [2005] IEHC 278  
*Carroll v Bus Átha Cliath*

**Termination**

Interlocutory injunction - Breach of contract of employment - Plaintiff made out fair case to be tried - Terms of contract - Whether alteration in plaintiff's duties sufficient to render it breach of contract of employment - Whether damages adequate remedy - Principles where interlocutory injunctions sought in employment cases - Courts reluctant to perpetuate relationship based on mutual trust which no longer exists - *Reynolds v Malocco* [1999] 2 IR 203 and *Garraghy v Bord na gCon* [2003] ELR 274 considered - Injunction sought restraining appointment of person to new post pending determination of action - Damages not considered adequate - Plaintiff's case in loss of job satisfaction rather than financial loss - Balance of convenience considered - Injunction granted precluding defendant from appointing person to new post save on terms that preserved plaintiff's contractual entitlements (2005/548P - Clarke J - 11/4/2005) [2005] IEHC 107  
*Evans v IRFB Services (Ireland) Ltd*

**Termination**

Transfer of undertakings - Amalgamation of two posts for harbour masters - Obligation to

retain plaintiff on terms not less favourable than previously - Whether consent of Minister necessary to dismiss plaintiff - Whether plaintiff validly removed from office - Harbours Act 1996 (No 11), ss 5, 7, 39, 43(4)(c); Harbours (Amendment) Act 2000 (No 21), ss 1 - *Cox v Electricity Supply Board* [1943] IR 94 followed; *Woodar Ltd v Wimpey Ltd* [1980] 1 WLR 277 distinguished - Appeal allowed; declaration granted that plaintiff still employed by defendant (4 Et 8/2004 - Supreme Court - 17/12/2004) [2004] IESC 107  
*Histon v Shannon Foynes Port Co*

**Article**

Walsh, Barry  
The tax treatment of severance payments 2006 (Jan) ITR 55

**Statutory Instruments**

Adoptive leave act 2005 (commencement) order 2006  
SI 16/2006

Adoptive leave act 1995 (extension of periods of leave) order 2006  
SI 52/2006

Employment regulation order (agricultural workers joint labour committee), 2006  
SI 24/2006

Employment regulation order (contract cleaning (city and county of Dublin) joint labour committee), 2006  
SI 72/2006

Employment regulation order (contract cleaning (excluding the city and county of Dublin) joint labour committee), 2006  
SI 73/2006

Industrial relations act 1990 (code of practice on access to part-time working) (declaration) order 2006  
SI 8/2006

Occupational pension schemes (revaluation) regulations, 2006  
SI 70/2006

**EUROPEAN LAW**

**Library Acquisitions**

Bovis, Christopher  
EC public procurement: case law and regulation  
Oxford: Oxford University Press, 2006  
W109.6

Fine, Frank L  
EC competition law on technology licensing  
London: Sweet & Maxwell, 2006  
W110.7

Voyez, John

VAT in Europe  
4th ed  
London: LexisNexis UK, 2004  
W103.4

**EVIDENCE**

**Additional evidence**

New or additional evidence on appeal - Accused convicted of murder - Deceased person had taken considerable quantity of ecstasy tablets - Pathologist evidence - New evidence that deceased may have died of ecstasy poisoning - Expert evidence given at trial by pathologists - Principles applicable - Exceptional circumstances - Where evidence not known at time of trial - Evidence must be credible by reference to other evidence at trial - Application to hear additional evidence refused (63/2003 - CCA - 18/2/2005) [2005] IECCA 4  
*People (DPP) v Willoughby*

**Admissibility**

Interview of accused with gardai - Admissibility - *Voir dire* before trial judge - Advice of solicitor about how to exercise right to silence - No comment answers - Answers that he could not remember, if he could he would answer - Evidence admitted in respect of answers not using these *formulae* - Answers given voluntarily under caution - Trial judge correct in ruling them admissible - Admission of evidence did not give rise to injustice or fundamental unfairness - Application for leave to appeal refused - (156/2002 - CCA - 12/5/2005) [2005] IECCA 72  
*People (DPP) v O'Callaghan*

**Admissibility**

Statement of accused - Admissibility - Accused denied making statement - No video recording - Statement taken by single garda - *People (DPP) v Connolly* [2003] 2 IR 1 considered - Statement made voluntarily while not under arrest - Privacy rights - No requirement to video record statement - Trial judge did not err in admitting statement - Ground of appeal failed (134/2003 - CCA - 31/1/2005) [2005] IECCA 3  
*People (DPP) v Christo*

**Evidence**

CCTV evidence disposed of by garda - Proper and desirable for garda to retain tape - Evidence given at trial that tape did not contain evidence bearing on issue of guilt or innocence - Accused's solicitor did not seek to examine tape - *People (DPP) v Braddish* [2001] 3 IR 127 considered - Ground of appeal failed (134/2003 - CCA - 31/1/2005) [2005] IECCA 3  
*People (DPP) v Christo*

**Hearsay**

Hearsay - Documents found during search of car - No search warrant - Consent of owner - Owner did not give evidence at trial - Whether evidence ought to have been ruled out as hearsay - *Cullen v. Clarke* [1963] I.R.

368 considered - Leave to appeal against conviction refused (39/2003 - CCA - 27/1/2005) [2005] IECCA 2  
*People (DPP) v Bishop*

#### Identification

Identification - *Test in Reg v Turnbull* [1977] 1 QB 224 applied - Injured party observed assailant in good light and for some time - Injured party and accused gave evidence - Holding of visual identification parade in this case not required - *People (DPP) v O'Reilly* [1990] 2 IR 415 distinguished - Ground of appeal failed (134/2003 - CCA - 31/1/2005) [2005] IECCA 3  
*People (DPP) v Christo*

#### Identification

Identification - Warning in relation to dangers of identification evidence - Cross-racial identification - Trial judge's charge to jury - *The People (AG) v Casey (No 2)* [1963] IR 33 applied - Trial judge's charge did not raise issue of inter racial recognition - Verdict unsatisfactory by reason of inadequate warning - Appeal allowed on this ground conviction quashed no retrial ordered (134/2003 - CCAI - 31/1/2005) [2005] IECCA 3  
*People (DPP) v Christo*

#### Article

Healy, John  
An examination of the proposed reform of the rules governing criminal procedure and evidence  
2005 (Autumn) ILR 2

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## EXTRADITION

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#### Delay

Lapse of time - Exceptional circumstances - Whether lapse of time exceptional - Whether other exceptional circumstances - Period of incarceration - Whether period of incarceration discounted from lapse of time - Whether period of incarceration reason for delay - Whether unjust, oppressive or invidious to deliver up - No delay on part of requesting authorities - Whether relevant factor that the requesting authority blameless - Whether consideration of unfairness from point of view of plaintiff only - *Martin v Conroy* [2002] 1 ILRM 461; *Kelly v Minister for Justice* (Unrep, Kearns J, 23/7/2004) and *Coleman v O'Toole* [2003] 4 IR 222 considered.

Extradition Act 1965 (No 17), ss 47 and 50(2)(bbb) - Plaintiff released (2004/242Sp - Peart J - 12/7/2005) [2005] IEHC 246  
*O'Keefe v O'Toole*

#### Warrant

European arrest warrant - Error in committal warrant - Whether order bad on its face - Habeas corpus - Whether error could be corrected by slip rule - Whether fundamental rights breached - Whether detention unlawful - *Re McLoughlin* [1970] IR 197 and *The State (McDonagh) v Frawley* [1978] IR 131

considered - European Arrest Warrant Act 2003 (No 45), ss 16, 13 and 14 - Constitution of Ireland 1937, Article 40.4.2° - *Habeas corpus refused* (732SS/2005 - Peart J - 7/6/2005) [2005] IEHC 195  
*McArdle v Governor of Cloverhill Prison*

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## FAMILY LAW

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#### Divorce

Ancillary relief - Proper provision - Maintenance - Lump sum payment - Pension adjustment order - Succession rights - Parties married in 1974 and separated in 1992 - Two adopted children - Judicial separation proceedings compromised at hearing - Whether applicant entitled to further financial provision at time of divorce - Circumstances surrounding earlier settlement - Whether any change in circumstances since 1992 - Whether applicant dissipated settlement monies - Disparity of income - Bulk of assets generated by respondent since separation - Judicial Separation and Family Law Reform Act 1989 (No 6), s 2(1)(f) - Family Law (Divorce) Act 1996 (No 33), ss 5, 17, 20 - Constitution of Ireland 1937, Article 41.3.20.iii - *DT v CT (Divorce: Ample resources)* [2002] 3 IR 334 applied; *MK v JK* (otherwise SK) (No 2) [2003] 1 IR 326 distinguished - Divorce granted: maintenance increased; application for a lump sum payment refused (2001/43M - O'Higgins J - 2/3/2005) [2005] IEHC 326  
*P (M) v P (A)*

#### Article

O'Brien, Jennifer  
Blind justice  
2006 (Jan/Feb) GLSI 28

#### Library Acquisition

All-Party Oireachtas Committee on the Constitution  
All-party Oireachtas Committee on the Constitution: Tenth progress report: The family  
Dublin: Stationery Office, 2006  
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#### Statutory Instruments

Bass (restriction on sale) order 2005  
SI 298/2005

Herring (fisheries management and conservation) (revocation) regulations 2005  
SI 564/2005

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SI 562/2005

Mackerel (fisheries management and conservation) (no. 3) regulations 2005

SI 638/2005

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SI 563/2005

Mackerel (fisheries management and conservation) (revocation) (no. 2) regulations 2005  
SI 602/2005

Marine (delegation of ministerial functions) order 2006  
SI 82/2006

Norway lobster (fisheries management and conservation) (no. 2) regulations 2005  
SI 361/2005

Sea fisheries (weighing procedures for herring, mackerel and horse mackerel) regulations 2005  
REG 1954/2003, REG 1415/2004  
SI 513/2005

Sea fisheries (weighing procedures for herring, mackerel and horse mackerel) (no. 2) regulations 2005  
REG 2287/2003  
SI 557/2005

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REG 1300/2005  
SI 640/2005

Whiting (fisheries management and conservation) (no. 5) (revocation) regulations 2005  
SI 554/2005

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## HEALTH

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#### Statutory Instrument

Health and children (delegation of ministerial functions) order, 2003  
SI 474/2003

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## HUMAN RIGHTS

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#### Library Acquisition

Ovey, Clare  
Jacobs and White: the European convention on human rights  
4th ed  
Oxford: Oxford University Press, 2006  
White, Robin C A  
C200

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## IMMIGRATION

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#### Asylum

Judicial review - Credibility of applicant -

Whether assessment of credibility of applicant matter for court on judicial review - Application refused - (2004/644JR - O'Neill J - 7/10/2005) [200] IEHC 345  
*N (L) v Refugee Appeals Tribunal*

#### Asylum

Right to liberty -- Forged identity papers - Possession - Applicant detained on grounds of being in possession of forged documents - Identity papers previously confiscated by gardai - Whether any entitlement to detain applicant - *The People (Director of Public Prosecutions) v Foley* [1995] 1 IR 267 distinguished - Constitution of Ireland 1937, Article 40.4.2<sup>o</sup> - Refugee Act 1996 (No 17), ss 9(8)(f), 9(10) - *Habeas corpus* granted (2004/2073SS - Peart J - 24/12/2004) [2004] IEHC 392  
*S (V) v Governor of Cloverhill Prison*

#### Deportation

Judicial review - Leave - Extension of time - Deportation order made - Fair procedures - Research carried out by RAT member after hearing - Fourteen day time limit - Not absolute limitation period but confers discretion on court - Claims not advised of possibility of applying to High Court for judicial review of refusal of refugee status - Claims not advised of mistakes in member's decision - No clear oversight by lawyers previously acting - No good or sufficient reason for extending period under s 5(2) - Application for leave refused (2003/888JR - Gilligan J - 18/3/2005) [2005] IEHC 78  
*B (Y) v Minister for Justice, Equality and Law Reform*

#### Deportation

Judicial review - Leave - Whether Minister obliged to consider question of torture in determining application to remain in country - Whether Minister obliged to consider country of origin information favourable to applicant's claim - Whether Minister can have regard to decision of Refugee Appeal Tribunal - Whether deportation order should include final destination - Leave refused - (2005/57JR - O'Neill J - 13/10/2005) [2005] IEHC 338  
*A (F) v Minister for Justice Equality and Law Reform*

#### Deportation

Judicial review - New evidence - Supplemental affidavit - Whether new facts disclosed - Application for leave refused (2005/72JR - Murphy J - 7/10/2005) [2005] IEHC 308  
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#### Deportation

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*Irish Shell Ltd v JH McLoughlin (Balbriggan) Ltd*

#### Interlocutory

Trade marks - Likelihood of confusion - Adequacy of damages - Balance of convenience - Interference with property right - Whether potential loss quantifiable - Plaintiff owning trade mark for "Metro" - Whether use by defendant should be restrained - *Smithkline v Antigen Pharmaceuticals Ltd* [1999] 2 ILMR 190 and *B & S Ltd v Irish Autotrader Ltd* [1995] 2 IR 142 followed - Trade Mark Act 1996 (No 6), s 14(2) - Injunction granted (2005/3177P - Clarke J - 7/10/2005) [2005] IEHC 309  
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#### Discovery

Director of Public Prosecutions - Decision to institute prosecution - Disclosure - Juvenile liaison scheme - Disparate decisions to prosecute - Whether Director has to disclose reasons for prosecuting - Equality before law - Whether possibility of proper and valid decisions on prosecution by Director - Whether fishing exercise - *Eivston v DPP* [2002] 3 IR 260; *State (McCormack) v Curran* [1987] ILMR 225; *H v DPP* [1994] 2 ILMR 285; *Brennan v Windle* [2003] 3 IR 494; *Hanrahan v Merck Sharp and Dolme* [1988] ILMR 629; *Quinn's Supermarket v Attorney General* [1972] IR 1; *Dillane v Ireland* [1980] ILMR 167 and *State (Keegan) v Stardust Victims Compensation Tribunal* [1986] IR 642 considered - Discovery refused (290/2004 - SC - 2/11/2005) [2005] IESC 75  
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#### Leave

Appeal - Standard for granting leave by Supreme Court - Standard on inter partes application for leave in Supreme Court - Delay - Whether standard of arguable case applied - *G v DPP* [1994] 1 IR 374 applied and *Gorman v Minister for the Environment* [2001] 1 IR 306 considered - Whether application made promptly - Whether issue of delay in applying for leave treated by Supreme Court as appeal or de novo - *Dekra Éireann Teo v Minister for the Environment* [2003] 2 IR 270 followed; *The State (Cussen) v Brennan* [1981] IR 181 distinguished - Rules of the Superior Courts 1986 (SI 15/1986), O 58, r 13 - Leave granted (448/2004 - SC 12/5/2005) [2005] IESC 32  
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### Duty of care

Immunity from suit - *Misfeasance* - Statutory tribunal - Damages - Judicial immunity - Entitlement of applicants to damages - Whether respondent liable to applicants in damages for manner of performance of statutory function - Whether duty of care owed to applicants when making decision - Whether claim for damages for negligence can be made against Rent Tribunal arising out of its determination - *Arenson v Arenson* [1977] AC 405 and *Sirros v Moore* [1975] QB 118 followed - Respondent's appeal allowed (290/2003 - SC - 21/10/2005) [2005] IESC 66  
*Beatty v Rent Tribunal*

### Medical negligence

Liability - Standard of care - Causation - Personal injuries - Injuries suffered by mother during birth - Whether inherent defects in standard practice - Whether negligent supervision - Whether injury occurred within area of risk created by defendant - *Dunne (an infant) v National Maternity Hospital* [1989] IR 91; *McGhee v National Coal Board* [1973] 1 WLR 1; *Best v Wellcome Foundation Ltd* [1993] 3 IR 421 and *Lindsay v Mid Western Health Board* [1993] 2 IR 147 followed - Damages of €55,500 awarded (1997/4340P - Abbott J - 2/7/2004) [2004] IEHC 427  
*Kelly v Lenihan*

### Personal injury

Liability - Balance of probability - Burden of proof - Claim dismissed - (2001/5295P - Peart J - 9/11/2005) [2005] IEHC 357  
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### Change of use

Intensification of use - Caravan park - Increase in number of caravans on site - Whether material change of use - *Dublin Co Co v Carthy Building Co Ltd* [1987] IR 255 followed - Application refused; no change in use (2004/177CA - Finnegan P - 29/7/2005) [2005] IEHC 320  
*Wexford County Council v Hanley*

### Injunction

Unauthorised development - Boundary of planning application site - Planning conditions - Burden of proof in establishing planning permission invalid - Whether court can restrict user of development if development proved to be unauthorised - Whether application for an order under s. 160 must fail where planning permission remains unrevoked - Planning and Development Act 2000 (No. 30) - Application refused (2005/54MCA - Murphy J - 1/11/2005) [2005] IEHC 351  
*P.M. Cantwell Ltd v McCarthy*

### Injunction

Discretionary remedy - Planning permission - Condition - Housing development - Condition that road be "commissioned" - Whether road must be operational - Whether applicant motivated by mala fides - Whether injunction would cause undue hardship to respondent and employees - *Readymix (Eire) v Dublin County Council* (Unrep., SC, 30/7/1974) followed - Planning and Development Act

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*Altara Developments Ltd v Ventola Ltd*

#### Judicial review

Costs – Planning application – Planning register – Planning application returned as invalid – Subsequent planning application – Whether planning authority must ensure accuracy of facilities made available to public – Respondent ordered to pay costs of applicant and notice party – (2005/368JR – Murphy J – 1/11/2005) [2005] IEHC 352  
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#### Compromise of action

Agreement and compromise sought to be set aside by plaintiff – Plaintiff to institute fresh proceedings seeking substantially same relief – Grounds of duress – Duress can encompass economic duress – Application by defendant to have fresh proceedings struck out as abuse of process – *Carroll v Law Society* (Unrep, HC, Kelly J, 2/5/2001) distinguished – Possibility that compromise would be set aside – Inappropriate to strike out proceedings – Defendant’s application refused (2004/791P – Finnegan P – 18/3/2005) [2005] IEHC 74  
*O’Sullivan v Weisz*

#### Costs

Court’s discretion in making order as to costs – Whether burden on party making application for costs to show that order for costs should not follow event – Whether respondents estopped from making application for costs in circumstances early hearing date on costs issue not sought – Whether length of time between judgment and application for costs amounted to abuse of process – Order for costs made (2001/154JR – Herbert J – 4/11/2005) [2005] IEHC 350  
*Phelan v Minister for Justice, Equality and Law Reform*

#### Discovery

Divorce – Further and better discovery – Relevance – Necessity – Separation agreement seeking clean break – Order refused (2003/41M – Master Honohan –

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#### Discovery

Judicial review – Application for leave – Whether documents necessary for resolution of issues arising at leave hearing – Whether documents already available to applicant – Whether challenge to transposition of directive matter of pure law – *Commission v Ireland* [1999] 1 ECR 5901 and *Carlow Kilkenny Radio Ltd v Broadcasting Commission* [2003] 3 IR 528 followed; *KA v Minister for Justice* [2003] 2 IR 73 distinguished – Planning and Development Act 2000 (No 30), s 146(3) – Application refused (2005/291JR – Clarke J – 3/8/2005) [2005] IEHC 303  
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#### Discovery

Judicial review – Basis for granting discovery in judicial review proceedings – Necessity for documents – Ability to prove events without discovery – Order for discovery refused (2004/451JR – Master Honohan – 20/10/2005) [2005] IEHC 336  
*Price v Governor of Mountjoy Prison*

#### Discovery

Particulars – Amendment of pleadings – Whether discovery necessary – Party seeking discovery already in possession of documents – Whether still entitled to discovery to know case being made by respondent – Whether defendant entitled to fuller particulars of plaintiff’s claim – Whether sufficient to state that matter within knowledge of defendant – Whether amendments necessary to allow court determine real questions of controversy – Whether reason for amendment necessary – *Mahon v Celbridge Spinning Co Ltd* [1967] IR 1; *McCarthy v O’Flynn* [1979] IR 127; *Taylor v Clonmel Healthcare Ltd* [2004] 1 IR 169 and *Croke v Waterford Crystal Ltd* [2004] IESC 97, [2005] 1 ILRM 321 followed – Rules of the Superior Courts 1986 (SI 15/1986), O 31 r 12 – Discovery ordered; replies to request for particulars ordered; amendment allowed (2003/9018P – Clarke J – 20/10/2005) [2005] IEHC 329  
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#### Dismissal of proceedings

Inherent jurisdiction – Separate corporate personality – Whether shareholder entitled to sue in respect of wrong done to company – Whether claim bound to fail – Whether plaintiff suffered separate and distinct loss – Rules of the Superior Courts 1986 (SI 15/1986), O 19 r 28 – *Foss v Harbottle* (1843) 2 Hare 461; *Prudential Assurance v Newman Industries* (No 2) [1982] Ch 204; *O’Neill v Ryan* [1993] ILRM 557; and *Johnson v Gore Wood & Co* [2002] 2 AC 1 followed – Proceedings dismissed (322/2003 – Supreme Court – 17/12/2004) [2004] IESC 108  
*Madden v Anglo Irish Bank Corp plc*

#### Dismissal of proceedings

Inherent jurisdiction – Whether proceedings bound to fail – Challenge to refusal to grant legal aid – Plaintiff wishing to appeal High

Court order from 1990 – Whether plaintiff had constitutional entitlement to legal aid – Proceedings dismissed (2003/7829P – Dunne J – 15/12/2004) [2004] IEHC 428  
*Keena v Brady*

#### Jurisdiction

Personal injuries – Personal Injury Assessment Board – Motor Insurers’ Bureau of Ireland – Road traffic accident – Accident caused by uninsured driver – Whether proceedings could be issued against Bureau without reference to PIAB – Whether action against Bureau falls within definition of civil action – Whether regard can be had to consequences in construing statute if statute ambiguous – Personal Injury Assessment Board Act 2003 (No 20), s. 4 (2005/1057P – Finnegan P – 26/7/2005) [2005] IEHC 266  
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#### Summary judgment

Leave to defend – Guarantee and indemnity – Whether defendant had shown fair or reasonable probability of having real and bona fide defence – Allegations of misrepresentation – Companies Act 1963 (No 33), s 60 – *First National Commercial Bank plc v Anglin* [1996] 1 IR 75 applied – Judgment entered (323/2003 – Supreme Court – 17/12/2004) [2004] IESC 109  
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Disciplinary procedure – Misconduct – Proposal to remove – Statutory committee – Whether proposal to remove necessary before committee could be established under s 24 of the Health Act 1970 – Suspension – Whether suspension without pay punitive in its effect – Fair procedures – Whether obliged to consider all representations prior to ordering

suspension without pay - Whether allegation of specific misconduct or unfitness necessary before suspension without pay valid - Health (Removal of Officers and Servants) Regulations 1971 (SI 110/1971), reg 4 - Health Act 1970 (No 1), ss 22, 23 and 24 - *Certiorari* granted (286 & 291/2004 - SC - 9/6/2005) [2005] IEHC 39  
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### Judgment mortgage

Execution of judgment debt - Order granting liberty to conduct examination of defendant - Application by defendant to set aside order - Affidavit of registration sworn by plaintiff - Entire judgment registered as mortgage against defendant's estate in subject property - Order made ex parte - Low threshold - Full disclosure must be made on ex parte application - Ground to object if made before acceding to examination before the Master - No objection taken to examination until cross-examination began - Rules of the Superior Courts 1986 (SI 15/1986), O 42, r 36 - Application refused (2001/7654P - Murphy J - 18/3/2005) [2005] IEHC 91  
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### Contract

Breach - Remedy - Specific performance - Discretionary remedy - Uncertainty - Whether boundary of land sufficiently certain - Defendant serving completion notice - Whether completion notice valid - Whether special conditions breached - Whether defendant entitled to terminate contract and forfeit deposit - *O'Brien v Kearney* [1995] 2 ILRM 232 followed - Damages awarded in lieu of specific performance; damages to be assessed (2003/13120P - Finlay Geoghegan J - 7/7/2005) [2005] IEHC 314  
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### Contract

Damages - Assessment - Loss of bargain - Contract for the sale of land - Damages awarded in lieu of specific performance - Increase in value between wrongful repudiation and judgment - Evidence of valuers - €80,000 awarded (2003/13 120P - Finlay Geoghegan J - 7/10/2005)[2005] IEHC 315  
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### Enforcement

Jurisdiction - *Certiorari* - Criminal Assets Bureau - Whether Bureau officer can enforce revenue judgment not connected to proceeds of crime - Attachment of debts - Whether Revenue can attach debts due to taxpayer which he is obliged to pay to another - Proceeds of Crime Act 1996 (No 30), ss 4, 5, 8 and 10 - Taxes Consolidation Act 1997 (No 39), ss 962 and 1002 - Claim dismissed (2001/805JR - Finnegan P - 10/10/2005) [2005] IEHC 318  
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### Income tax

Assessment - Appeal - Whether assessment arbitrary and unreasonable - Requirement to deliver tax returns prior to appealing - *Deighan v Hearne* [1986] IR 603 and Keogh v

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### Trade dispute

Fair procedures - Informal tribunal - Reference of trade dispute to Labour Relations Commission - Right to cross-examine - Whether necessary to hear oral evidence - Whether trade dispute existed - *Kiely v Minister for Social Welfare* [1977] IR 267 and *The State (Casey) v Labour Court* [1984] 3 JISLL 135 followed - Industrial Relations (Amendment) Act 2001 (No 11), ss 2 and 3 - Industrial Relations (Miscellaneous Provisions) Act 2004 (No 4) - Application dismissed (2005/166JR - *Hanna J - 14/10/2005*) [2005] IEHC 330  
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### Tribunal of inquiry

Injunction - Terms of reference - Evidence - Whether arguable case decision of tribunal of inquiry outside terms of reference - Whether arguable case tribunal had sufficient evidence to proceed to full public inquiry - Whether arguable case decision of tribunal irrational - Whether injunction appropriate - *Redmond v Flood* [1999] 3 IR 79 followed - Tribunals of Inquiry (Evidence) Act 1921 (11 & 12 Geo, c 7) - Leave granted (448/2004 - SC 12/5/2005) [2005] IESC 32  
*O'Brien v Mr Justice Moriarty*

### Tribunal of inquiry

Jurisdiction - Evidence - Certiorari - Whether tribunal entitled to examine events occurring after it was established - Whether sufficient evidence to justify investigating applicant in public session - *Haughey v Moriarty* [1999] 3 IR 1 and *O'Keefe v An Bord Pleandála* [1993] 1

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European communities (seed of oil plants and fibre plants) (amendment) regulations 2005 DIR 2002/57, DIR 2002/68, DIR 2003/45, DIR 2004/117 SI 917/2005	[pmb]: Description: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dail or Seanad. Other bills are initiated by the Government.	Enforcement of court orders bill 2004 2nd stage- Dail
European Communities (statistical classification of building and construction activities) regulations 2005 REG 3037/1990, REG 761/1993 SI 774/2005	Aviation bill 2005 changed from Air navigation (Eurocontrol) bill 2005 Committee stage - Dail (Initiated in Seanad)	Enforcement of court orders (no.2) bill 2004 1st stage- Seanad
European communities (vegetable seed) (amendment) regulations 2005 DIR 2004/117 SI 920/2005	Air navigation and transport (indemnities) bill 2005 1st stage- Seanad	Finance bill 2006 Committee-Dail
Sea fisheries (weighing procedures for herring, mackerel and horse mackerel) regulations 2005 REG 1954/2003, REG 1415/2004 SI 513/2005	Broadcasting (amendment) bill 2003 1st stage -Dail	Fines bill 2004 2nd stage- Dail [pmb] Jim O'Keefe
Sea fisheries (weighing procedures for herring, mackerel and horse mackerel) (no. 2) regulations 2005 REG 2287/2003 SI 557/2005	Building control bill 2005 2nd stage - Dail	Fluoride (repeal of enactments) bill 2005 2nd stage - Dail [pmb] John Gormley
Sea fisheries (weighing procedures for herring, mackerel and horse mackerel) (no. 3)	Child trafficking and pornography (amendment) (no.2) bill 2004 2nd stage- Dail [pmb] Jim O'Keefe	Freedom of information (amendment) (no.2) bill 2003 1st stage - Seanad
	Civil partnership bill 2004 2nd stage- Seanad	Freedom of information (amendment) (no.3) bill 2003 2nd stage - Dail
	Climate change targets bill 2nd stage - Dail [pmb] Eamon Ryan and Ciaran Cuffe	Fur farming (prohibition) bill 2004 1st stage- Dail
	Comhairle (amendment) bill 2004 2nd stage - Dail	Good Samaritan bill 2005 2nd stage - Dail [pmb] Billy Timmins
	Competition (amendment) bill 2005 2nd stage - Dail (Initiated in Seanad)	Greyhound industry (doping regulation) bill 2006 2nd stage - Dail
	Consumer rights enforcer bill 2004 1st stage -Dail	Health (amendment) (no.2) bill 2004 1st stage- Dail
	Criminal Justice bill 2004 Committee-Dail	Health (repayment scheme) bill 2006 1st stage- Dail
	Criminal justice (mutual assistance) bill 2005 1st stage - Seanad	Housing (state payments) bill 2004 1st stage- Seanad
		Human reproduction bill 2003

2nd stage - Dail [pmb] Mary Upton	2003	1st stage - Seanad
Independent monitoring commission (repeal) bill 2006	1st stage - Dail	Tribunals of inquiry bill 2005
2nd stage - Dail	Planning and development (amendment) bill 2004	1st stage- Dail
International criminal court bill 2003	1st stage - Dail	Twenty-fourth amendment of the Constitution bill 2002
Committee - Dail	Planning and development (amendment) bill 2005	1st stage- Dail
International peace missions bill 2003	Committee - Dail	Twenty-seventh amendment of the constitution bill 2003
2nd stage - Dail [pmb] Gay Mitchell & Dinny McGinley	Planning and development (amendment) (no.2) bill 2004	2nd stage - Dail
Irish nationality and citizenship and ministers and secretaries (amendment) bill 2003	1st stage -Dail	Twenty-seventh amendment of the constitution (No.2) bill 2003
Report - Seanad	Planning and development (amendment) (no.3) bill 2004	1st stage - Dail
Law of the sea (repression of piracy) bill 2001	2nd stage- Dail [pmb] Eamon Gilmore	Twenty-eighth amendment of the constitution bill 2005
2nd stage - Dail (Initiated in Seanad)	Postal (miscellaneous provisions) bill 2001	1st stage- Dail
Local elections bill 2003	1st stage -Dail (order for second stage)	Twenty-eighth amendment of the constitution bill 2006
2nd stage -Dail [pmb] Eamon Gilmore	Prisons bill 2005	2nd stage- Dail
Mercantile marine (avoidance of flags of convenience) bill 2005	Committee - Seanad	Twenty-eighth amendment of the constitution (No.2) bill 2006
2nd stage- Dail [pmb] Thomas P. Broughan	Proceeds of crime (amendment) bill 2003	2nd stage- Dail
Money advice and budgeting service bill 2002	1st stage - Dail	Waste management (amendment) bill 2002
1st stage - Dail	Prohibition of ticket touts bill 2005	2nd stage- Dail
National economic and social development office bill 2002	2nd stage - Dail [pmb] Jimmy Deenihan	Waste management (amendment) bill 2003
2nd stage - Dail	Public service management (recruitment and appointments) bill 2003	2nd stage - Dail [pmb] Arthur Morgan
National sports campus development authority bill 2006	1st stage - Dail	Water services bill 2003
1st stage - Dail	Registration of deeds and title bill 2004	Committee - Dail (Initiated in Seanad)
National transport authority bill 2003	Committee - Dail (initiated in Seanad)	Whistleblowers protection bill 1999
1st stage - Dail	Registration of wills bill 2005	Committee - Dail
Offences against the state acts (1939 to 1998) repeal bill 2004	Committee - Seanad	<b>Abbreviations</b>
1st stage-Dail	Registration of lobbyists bill 2003	BR = Bar Review
Offences against the state (amendment) bill 2006	2nd stage- Dail [pmb] Pat Rabbitte	CIILP = Contemporary Issues in Irish Politics
1st stage- Seanad	Residential tenancies bill 2003	CLP = Commercial Law Practitioner
Official languages (amendment) bill 2005	2nd stage - Dail	DULJ = Dublin University Law Journal
2nd stage -Seanad	Road safety authority bill 2004 changed from Driver testing and standards authority bill 2004	GLSI = Gazette Society of Ireland
Parental leave (amendment) bill 2004	Committee- Dail	ICLJ = Irish Criminal Law Journal
Committee - Dail (Initiated in Seanad)	Sea-fisheries and maritime jurisdiction bill 2005	ICPLJ = Irish Conveyancing & Property Law Journal
Patents (amendment) bill 1999	Committee - Dail	IELJ = Irish Employment Law Journal
Committee - Dail	Sea pollution (miscellaneous provisions) bill 2003	IJEL = Irish Journal of European Law
Petroleum and other minerals development bill 2005	Committee - Dail (Initiated in Seanad)	IJFL = Irish Journal of Family Law
2nd stage - Dail [pmb] Thomas P. Broughan	Social welfare law reform and pensions bill 2006	ILR = Independent Law Review
Planning and development (acquisition of development land) (assessment of compensation) bill 2003	Committee stage - Dail	ILTR = Irish Law Times Reports
1st stage - Dail	Sustainable communities bill 2004	IPELJ = Irish Planning & Environmental Law Journal
Planning and development (strategic infrastructure) bill 2006	1st stage - Dail	ISLR = Irish Student Law Review
1st stage- Seanad	The Royal College of Surgeons in Ireland (Charter Amendment) bill 2002	ITR = Irish Tax Review
Planning and development (amendment) bill	2nd stage - Seanad [p.m.b.]	JCP & P = Journal of Civil Practice and Procedure
Totalisator (amendment) bill 2005		JSIJ = Judicial Studies Institute Journal
		MLJI = Medico Legal Journal of Ireland

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

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## The *M.E.C.* decision

The *Mc G* decision was considered and not followed by Kinlen J. in *M.E.C. v. J.A.C* [2001] 2 IR 399. The applicant sought a declaration under Section 29 of the Family Law Act, 1995 that the English divorce was not entitled to recognition in Ireland. She also sought a decree of divorce and ancillary reliefs. Kinlen J. tried the section 29 declaration as a preliminary issue. The parties married in Sligo in 1968. The respondent obtained a decree of divorce in England in 1980 and the respondent remarried in 1989. Both parties had lived in England prior to the 1968 marriage. After the marriage, they lived in England but the respondent bought land and then a pub in Ireland in the 1970's. The marriage broke up in 1979 and the applicant returned to live in Ireland in 1984. The respondent returned to Ireland in 1994.

The Attorney General was joined as notice party to the proceedings and instructed counsel to argue against the finding of *McG* that the Irish Courts should extend recognition to a decree of divorce granted by the courts in a State where one or both of the spouses had been resident, but not domiciled prior to and at the time of the institution of the divorce proceedings. Counsel for the Attorney General submitted that historically the approach of the Irish courts in regard to the recognition of foreign divorces has been to satisfy themselves that the foreign court had jurisdiction over the spouses in the eyes of Irish law. The Domicile and Recognition of Divorces Act, 1986 abolished dependent domicile and provided that any divorce granted after the 2nd October 1986 in the country where either spouse is domiciled at the date of the institution of the proceedings shall be recognised. The Attorney General submitted that the decision of *Mc Guinness J.* to extend the rules of recognition to a divorce granted where one of the spouses was resident for one year at the time of the institution of the proceedings was wrong in law because, inter alia:-

- 1 *McGuinness J.* (page 105) appeared to take the view that the Courts could modify not only the pre-1986 rules but also the post 1986 rules. Counsel argued that for a judge to seek to modify the statutory rule applicable to foreign divorces granted after the 2nd October 1986 would be contrary to Article 15.2 of the Constitution;
2. that the recognition rules for a post 1986 foreign divorce are to be found exclusively in the 1986 Act and that for a pre-1986 divorce, the recognition rules are to be found in common law and it would be erroneous to have different recognition laws for the pre-1986 situation.

Kinlen J. in refusing to recognise the English Divorce of 1980 on the grounds that neither party was *domiciled* in England held:-

'If the grounds of recognition are retrospectively extended to include the residence of either party, then that will have serious implications for the way in which the State and many of its citizens have ordered their affairs...The Court is aware that there may well be substantial change in the whole law of recognition of foreign divorces in the very

near future...However this court cannot assume the results of referenda or prospective legislation.' (pages 412-413)

## The Current Position

If one seeks to have a pre-1986 divorce recognised on the grounds of residence as distinct from domicile under Section 29 of the Family Law Act, 1995 and the trial judge instructs the County Registrar to ascertain whether the Attorney General wishes to be joined as a Notice Party pursuant to Section 29(4) of the 1995 Act, such request will be accepted and counsel instructed to argue against *Mc G*. Since there is no Supreme Court decision which has considered *McG*, it is a competing authority with *M.E.C.* Because, there are now two incompatible High court authorities in this area, a Circuit Family Court Judge, has declined to follow *McG*.

In *B O'M v. B O'M* (Circuit Family Court Nenagh, July 2005), the parties married in England in 1969 and lived there until 1975, when the wife came back to Ireland and the husband went to America. The wife returned to England in 1978 and applied for a divorce using the one year residency provision. The divorce was granted in 1981. In 2004, she issued a Family Law Civil Bill seeking a declaration that the 1981 divorce was not capable of recognition in Irish law and seeking a decree of divorce and ancillary reliefs. Since counsel for the respondent sought to rely on the *Mc G v. W* decision, Judge Buttimer made a direction that the Attorney General be requested to indicate if he wished to be joined as a Notice Party and the invitation was accepted. The applicant had returned to Ireland in 1983 and the respondent had emigrated to America in 1975 so no case could be made that either party had acquired an English domicile. Therefore the sole question was whether Judge Buttimer would recognise the 1981 divorce on the grounds of residence.

Counsel for the Attorney General referred to the new E.U. regulation on family law, Council Regulation (EC) No: 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, It was submitted that this regulation in no way affected Irish law on the recognition of foreign divorces because article 3 therefore recognised the concept of domicile in the U.K. and Ireland. Using the arguments already made in *M.E.C v. J.A.C.*, he urged the trial judge not to follow *Mc G* on the grounds that there was a more recent and conflicting High Court authority in *M.E.C.*

He argued that there were infirmities in the *Mc G* decision including the fact that a significant factor in the decision was that a contrary view might expose the applicant to a prosecution for bigamy. Also, counsel pointed out that no argument had been made against extending the rules of recognition to include residence in *McG* since all parties appeared to be pushing for the same result. Counsel also made the point that to have a different recognition rule depending on whether the divorce was pre-1986 Act or post the Act was undesirable in the extreme.

Having heard the submissions, Judge Buttimer decided on the preliminary issue of the validity of the 1981 English Divorce not to follow the *McG* decision. She made a finding under section 29 of the Family Law Act, 1995 that since neither party was domiciled in England at the time of the 1981 divorce, it was not capable of recognition in Irish law. The parties subsequently settled all ancillary issues and Judge Buttimer proceeded to grant a divorce to the applicant and a section 18(10) mutual blocking order.

## Conclusion

In light of the foregoing, it appears that the *Mc G v. W* decision is one which turns on its own unique facts. Certainly, given the existence of a competing High Court decision and given the attitude of Judge Buttimer in the *B O'M case*, *McG* can not be seen as a reliable authority establishing residence, as distinct from domicile, as a ground for the recognition of a foreign divorce in Irish law. ●

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## COURTS AND COURT OFFICERS ACTS 1995 – 2002

### JUDICIAL APPOINTMENTS ADVISORY BOARD

#### Appointment of Ordinary Judge of the

#### District Court

Notice is hereby given that applications are invited from practising barristers and solicitors who are eligible for appointment to the Office of Ordinary Judge of the District Court for a vacancy that is due to arise in the District Court.

Those eligible for appointment and who wish to be considered should apply in writing to the Secretary, Judicial Appointments Advisory Board, Phoenix House, 15/24 Phoenix Street North, Smithfield, Dublin 7, for a copy of the relevant application form.

**The closing date for receipt of completed application forms, in relation to this advertisement, is 5p.m. on Thursday 20th April, 2006.**

*It should be noted that The Standards in Public Office Act, 2001 prohibits the Board from recommending a person for judicial office unless the person has furnished to the Board a relevant tax clearance certificate (TC4) that was issued to the person not more than 18 months before the date of a recommendation.*

Applicants may, at the discretion of the Board, be required to attend for interview.

Canvassing is prohibited.

Dated the 30th March 2006.

Brendan Ryan BL

Secretary

Judicial Appointments Advisory Board

# Recent Developments in the Restriction of Directors

Brian Conroy BL

The facility of restricting directors was introduced into Irish law by s.150 of the Companies Act 1990. This provision's stated rationale upon its inception was to combat the "Phoenix syndrome" - whereby directors would use the corporate form to milk the creditors of one company dry, before taking that entity into insolvent liquidation and forming a new company immune from being pursued for the debts of its predecessor. The new mechanism of restriction empowered the High Court to prevent persons whose behaviour in relation to an insolvent company had been found wanting from acting as directors of another company for 5 years unless certain financial conditions were satisfied.

At the outset, it was not clear that s.150 had been successful in achieving its stated aim. Liquidators seemed unwilling to bring restriction applications in the early years following the 1990 Act's entry into force - understandably - given that there was no legal requirement to do so. This difficulty was countered to some extent by a Practice Direction issued by Murphy J. in 1994, which required all court-appointed liquidators of insolvent companies to bring restriction applications. But until 2001, there remained no mechanism to require the initiation of restriction proceedings against directors of companies in voluntary liquidation. Then s.56(2) of the Company Law Enforcement Act 2001 transformed the practice in this area by requiring the liquidators of all insolvent companies to bring restriction proceedings, save in circumstances where they are specifically relieved of this obligation by the Director of Corporate Enforcement [the DCE].

Every year there are approximately 400 new insolvent liquidations in the State. The DCE has shown himself very reluctant indeed to exercise his discretion to relieve directors of their obligation to bring proceedings. The most striking practical effect of the enactment of Section 56(2) - therefore - has been to make the restriction of directors an extremely busy area of High Court practice. More case law on the application of s.150 has been generated in the time since the coming into force of the 2001 Act than in the period between the promulgation of the 1990 and 2001 Acts.

The flood of recent cases has reshaped the law quite dramatically. Most - though not all - of these changes arise from the numerous fine judgments in this area delivered by Finlay Geoghegan J. in the High Court. The first part of this article discusses the recent developments on the core question in a restriction application: whether the respondent director has acted honestly and responsibly. The second part will deal with the several significant procedural issues on s.150 that have been resolved in the case law since the enactment of the 2001 Act.

## The La Moselle Test

Section 150(2)(a) of the 1990 Act provides that a restriction order shall not be made against a respondent where the court is satisfied that he has "acted honestly and responsibly in relation to the conduct of the affairs of the company" - so long as "there is no other reason why it

would be just and equitable" to make a restriction order. The issue for the court in a s.150 application usually boils down, therefore, to whether a director has acted honestly and responsibly. In most cases that come before the courts there is no allegation of dishonesty, and so the issue for consideration becomes the even narrower one of whether the director acted responsibly.

The principal criteria to be applied when considering whether a party has acted responsibly remain those set out in the following seminal *dictum* of Shanley J. in *Re La Moselle Clothing* [1998] 2 ILRM 345 (later approved by the Supreme Court in *Re Squash Ireland* [2001] 3 IR 35):

- "(a) The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts.
- b) The extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility.
- (c) The extent of the directors' responsibility for the insolvency of the company.
- (d) The extent of the directors' responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up thereof.
- (e) The extent to which the director, in his conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards."

There has been only one substantive addition to the above criteria since the coming into force of the 2001 Act. This arises from the judgment of Finlay Geoghegan J. in *Re Tralee Beef and Lamb Ltd.*, High Court, Unreported, 20th July 2004, where the learned judge indicated that a sixth factor - whether the respondent has complied with the duties imposed on by him the common law - must also be taken into account in this regard. Finlay Geoghegan J. described these common law duties therein as: (i) "duties of loyalty based on fiduciary principles", and, (ii) "duties of skill and care developed initially...from the duties in the law of negligence." This new limb of the test may come to be of some significance in practice, given the breadth of a director's obligations at common law. Indeed, in that case and in some later decisions, the actions of respondent directors have been found wanting in the context of the general common law duty of skill and care, rather than against the narrower background of a director's statutory obligations.

## Satisfied by whom?

The judicial position on the onus of proof as regards the issue of honesty and responsibility seems to have evolved considerably, at least in emphasis, since the passing of the 2001 Act. The established approach prior to 2001 was that set out by Murphy J. in *Business Communications v. Baxter*, Unreported, High Court, 21st July 1995, which envisaged that the courts would have no general discretion in relation to a s.150 order. The learned judge drew a sharp distinction between s.150 and the range

of civil and commercial wrongs created by the Companies Acts, with the learned judge stating as follows:

"...the most important feature of the legislation is that it effectively imposes a burden on the directors to establish that the insolvency occurred in circumstances in which no blame attaches to them as a result of either dishonesty or irresponsibility."

In other words, a restriction order does not require a finding of wrongdoing on the part of the director. Unless a director can show that he has acted honestly and responsibly (or, in rare circumstances, that it would be otherwise unjust or inequitable to restrict him), an order will be made.

In *Re SPH Ltd.*, High Court, Unreported, 25th May 2005, Finlay Geoghegan J. adopted the *Business Communications* approach to s.150, stating that "The onus of establishing that he/she acted honestly and responsibly rests on the director." But in *Re USIT World plc*, High Court, Unreported, 10th August 2005, Peart J. took a far broader view of the court's discretion under s.150. He pointed out that the provision only requires the court to be satisfied of the relevant matters – it does not expressly demand that the material which enables it to be so satisfied should come from the respondent. This led the learned judge to the conclusion that a restriction order could be refused even in a case where the respondent director did not contest a s.150 application. This interpretation of the section was invoked in refusing to grant restriction orders against two directors of the respondent company who did not appear or submit affidavits in answer to the application, with Peart J. stating as follows:

"...the Court may well be satisfied on the documentation and information provided to it by the liquidator that even though there are concerns expressed, the director respondent has nevertheless acted honestly and responsibly...The section cannot be fairly interpreted, in the absence of express wording to such effect, as meaning that a presumption of dishonesty and irresponsibility is to be inferred where a director takes no step to participate in the application. Such a presumption could fly in the face of matters glaring from the application itself from which the Court is satisfied as to honesty and responsibility. The task of the court is to be satisfied. The section does not confine the Court as to the source of that satisfaction."

Peart J.'s approach to the court's role in a s.150 application seems to this writer to be excessively generous to the respondent director. The learned judge's remarks go close to creating a general requirement under s.150 for the court to exercise its discretion in relation to the moral culpability of the respondent director's conduct. It is abundantly clear on the basis of the earlier authorities that this should not be the case – a restriction order is designed as a protective measure for the public rather than an indicator of guilt on the part of the restricted director. The issue for the court is whether it is safe for a respondent who has a history of involvement with insolvent companies to continue to act as a director without certain minimum financial safeguards being present. As Murphy J. made clear in the *Business Communications* case, s.150 is not a penal provision. A restriction order – unlike an order disqualifying a director under s.160 of the 1990 Act – does not impose a punishment on the respondent in respect of morally reprehensible conduct.

Read in light of the above, Peart J.'s observation that s.150 cannot be interpreted as creating "a presumption of dishonesty and irresponsibility...where a director takes no step to participate in the application" – though undoubtedly correct – is irrelevant. A court does not have to be persuaded that a director has acted dishonestly or irresponsibly to restrict him. On the contrary, a director must show that he acted honestly and responsibly for a restriction order to be refused. If a director does not bother to contest an application – whether via legal

representation or in person – there may be exceptional circumstances where a court acting of its own motion would seek to put his case for him. But judges should be slow to act in this way in an adversarial system, and it seems odd that Peart J. was willing to do so without identifying any special element on the facts which justified the measure.

The anecdotal evidence of practitioners suggests that in the past restriction orders have been imposed by consent of the parties without the benefit of submissions from either side. Indeed, Head 49 of Part XIII of the draft Companies Consolidation Bill envisages restriction orders being made on consent of the directors in these cases without any involvement from the court. This reflects the position in relation to disqualification proceedings under Britain's Disqualification of Directors Act 1986, as amended, whereby 80% of orders are made on consent of the directors concerned. Hence the prevailing view seems to be that the court should not act of its own motion to look behind the submissions of the parties and consider whether a director ought to be restricted as a matter of justice.

## Section 56 and the Obligation to Apply

It is difficult to agree with one of the reasons Peart J. gave to support his finding that a failure to contest should not be held against a director – that it might be attributable to a lack of the means to engage legal representation on the part of a respondent, rather than an absence of arguments in his favour. This ignores the reality that the option of contesting the application in person is always open to a respondent, in which case it is well established that the court should bend over backwards to accommodate him.

However, another reason the learned judge gave for his conclusion does appear to hit the mark. He indicated that the requirement in the 2001 Act for a liquidator to bring a restriction application in every case where he is not relieved of this obligation means that "there will inevitably be cases where the court can be satisfied, even in the absence of justification of conduct by a particular director, that he or she has acted honestly and responsibly." This point is interesting, because it implies that the newly created obligation on a liquidator to apply for a restriction order is causing entirely unmeritorious applications to come before the courts.

Section 56(1) of the 2001 Act requires the liquidator of an insolvent company to provide a report to the DCE within 6 months of his appointment covering certain matters relevant to a restriction application. Section 56(2) then provides that – on pain of criminal liability – a liquidator must bring restriction proceedings against the directors of the company between three and 5 months after the provision of this report, unless the DCE relieves him of his obligation to do so. As indicated in the introduction to this piece, in practice the DCE rarely exercises his discretion to relieve a liquidator of the obligation to apply. A good example of this reluctance to relieve arises from *Re Cooke's Events Company Ltd.*, Unreported, High Court, 29th June 2005, where MacMenamin J. concluded that there was not even a stateable case for restriction against the second named respondent. The learned judge had noted that the liquidator wrote to the DCE setting out the limited nature of the second named respondent's role in relation to the company's affairs, but went on to comment that "despite this additional information having been furnished this did not cause the Director to alter the decision that the liquidator should not be relieved of bringing proceedings against [the second named respondent]."

All of this seems to confirm Peart J.'s suggestion that the statutory obligation to apply leads to entirely baseless s.150 applications coming before the courts. This is undesirable for at least two reasons: (1) it wastes court time, and, (2) it leads to the unnecessary incurring of legal costs. Furthermore, it may lead to judges adopting strained

interpretations of s.150 in order to avoid unmeritorious but unopposed applications succeeding (as Peart J. seemed to do in *USIT World*).

It is submitted that there are two possible solutions to the above problem. Either the DCE should begin to exercise his obligation to relieve liquidators of the obligation to apply more readily, or s.56 should be amended. Should legislative reform be needed, it is submitted that a neat compromise between an absolute obligation to apply and the pre-2001 Act situation where too few applications were brought is available. Section 56 could be amended by permitting a liquidator to include a recommendation against bringing s.150 proceedings in his report. This recommendation would operate to free the liquidator of his obligation to apply for a restriction order. But it would have to be founded on stated reasons, and the DCE would retain a discretion to overrule the liquidator and reactivate the obligation to apply where these reasons were deemed inadequate.

## Different classes of director

Some of the most important recent developments as regards restriction proceedings have involved the application of the *La Moselle* test to different categories of director. The obligation to bring a s.150 application imposed by the 2001 Act has led in some cases to proceedings being taken against directors with little decision-making power or involvement with the running of a company. It has been argued that such persons should not be judged by the same exacting standards as directors who seem more culpable for the problems encountered by a company on a day-to-day basis.

The first special category of director considered is far from uncommon in an Irish business environment that has become increasingly dominated by (predominantly American-owned) multinationals. This is the director of a wholly owned Irish subsidiary of a multinational group.

The respondents in *Re 360Atlantic (Ireland) Ltd*, Unreported, High Court, 21st June 2004, were four directors of a wholly owned Irish-incorporated subsidiary of a Danish company. This Danish company belonged in turn, via a series of other foreign companies that held shares in it, to a Canadian group. The Irish-incorporated company was not managed or controlled separately from the overall group of companies. The respondents were not permitted to make management decisions or to become involved in the financing of the company, simply being required to comply with this country's regulatory requirements in respect of the company.

The respondents argued that they should not be held responsible for the implementation of decisions made at a group level which were not in the trading interests of the Irish-incorporated company – given their lack of capacity to influence group policy. In the following passage from her judgment – whilst indicating that the economic reality of a company's status as a subsidiary should be taken into account – Finlay Geoghegan J. held that there could be no modification of the ultimate requirement that directors must act in the interests of their company:

"...it appears to me that where a group corporate structure exists, such as in the present case, and the issue under s.150 of the Act of 1990 is whether a director of the wholly owned Irish subsidiary company acted responsibly in the sense of discharging the minimum common law duties, he must be able to establish at a minimum that he did inform himself about the affairs of the Irish subsidiary company as distinct from any other company within the group and together with his fellow directors that he did take real steps to consider and take decisions upon at least significant transactions to be entered into or projects undertaken by the Irish subsidiary company. There must be evidence of a real consideration by the directors of whether significant transactions or operations to be undertaken were desirable in the interest of the Irish subsidiary

company or could be said to be for the benefit of the Irish subsidiary company. I readily recognise that in many instances the interests of the Irish subsidiary company may be so intertwined with the affairs of the group as a whole that the answer may be obvious. However, the fact that the answer is obvious does not appear to absolve the directors from at least addressing the question."

In the *Tralee Beef and Lamb* case, the same judge had to consider a corollary of the issue dealt with in *360Atlantic* – whether the court can take into account the actions of a director in his capacity as director of another company in determining whether he acted honestly and responsibly. There one of the respondents – Mr. Coyle – was a director of CFIM, a company which had invested in the insolvent company under a BES Investment scheme. In that context, he had been appointed as a non-executive director of the insolvent company. As a matter of statutory interpretation, Finlay Geoghegan J. rejected the view that the unimpeachable nature of Mr. Coyle's conduct as a director of CFIM could influence the decision as to whether he had acted responsibly as regards the insolvent company, stating that "...the court has no discretion [under s.150] to take into account the performance or position of a respondent as a director of any other Company." Accordingly, the courts are obliged to consider the issue of honesty and responsibility solely in the context of a director's conduct in relation to the insolvent company. In this case, a restriction order was ultimately imposed on the basis of Mr. Coyle's "almost total inactivity" in his role as a director of *Tralee Beef and Lamb Limited*.

## Non-executive directors

In the recent case law, pleas for special treatment have most often been made in relation to non-executive directors. Here the law must deal with a dilemma. On the one hand, all directors, whether executive or non-executive, have duties at common law and under statute, which they must fulfil. On the other, in reality many non-executive directors cannot be expected to have an intimate knowledge of a company's affairs, whether because of their age or lack of expertise or the basis on which they were appointed. Hence the issue is whether the courts can accept a lower standard from non-executive directors than from executive directors in deciding that they have acted responsibly.

In *Tralee Beef and Lamb*, Finlay Geoghegan J. responded to the above question in a nuanced fashion. The learned judge stressed that the duty of a director laid down by Jonathan Parker J. in the English case of *Re Barings (No.5)* [1999] 1 BCLC 433 "to inform himself about [his company's] affairs and to join with his co-directors in supervising and controlling them" applied to executive and non-executive directors alike. She then acknowledged that non-executive directors are not expected to have an intimate knowledge of a company's day-to-day affairs, but noted that they must put themselves in a position to supervise the executive directors in their management of the company's affairs:

"It is a fact of commercial life which the courts should not ignore that persons are appointed as non-executive directors to act alongside executive directors. It is also a matter of common sense that the duties and responsibilities of each may differ. The non-executive directors normally do not participate in the day to day management of a company. The directors collectively delegate the day to day management of the company to *inter alia* the executive directors...such delegation does not absolve the non-executive directors from the duty to acquire information about the affairs of the company and to supervise the discharge of delegated functions. However...the Court should take into account the differing roles of each director."

Finlay Geoghegan J. then indicated that the approach suggested above largely reflects the "possibly lesser test" set by the High Court of

Australia in *Daniels v. Anderson* [1995] 16 ACSR 607 to the effect that "...the responsibilities of directors require that they take reasonable steps to place themselves in a position to guide and monitor the management of the Company."

The above approach provided no succour to the respondent non-executive directors of *Tralee Beef and Lamb Limited* in the instant case, since Finlay Geoghegan found that the three non-executive directors had failed to join together to supervise and control the affairs of the company - not even convening a board meeting during the relevant period. The fact that one of the non-executive directors had no financial expertise and a limited role in the running of the company was irrelevant, because she should have insisted that a board meeting of the Company be held, or at least taken steps to bring the information that she admittedly had about the parlous state of the company's finances to the attention of her two fellow non-executive directors.

However, the modified approach to the duties of non-executive directors adopted by Finlay Geoghegan J. in *Tralee Beef and Lamb* did help prevent the imposition of a restriction order in *Re RMF Limited*, High Court, Unreported, 27th May 2004. There, in the view of Finlay Geoghegan J., the respondent non-executive director - Mr. Cooke - had acted responsibly by keeping himself reasonably abreast of the company's affairs at all times. When he became aware of the company's financial problems, he went above and beyond his role by helping to organise a refinancing arrangement and engaging an independent accountant. The learned judge ruled that he could not be held responsible for the failure of the company to file tax returns in circumstances where this omission had not been brought to his attention - since this was a matter for the executive directors.

The difference between the approach of the courts to the roles of executive and non-executive directors is well illustrated by the attitude of MacMenamin J. to the first and second named respondents, respectively, in the *Cooke's Events Company* case. There the second named respondent was the wife of the first named respondent, who was the managing director of the insolvent company. Taking account of her status as a non-executive director and her lack of experience in the restaurant business, MacMenamin J. found no evidence that she had failed to adequately inform herself of the company's affairs as required under the test adumbrated by Finlay Geoghegan J. in *Tralee Beef and Lamb*. But the Court firmly rejected the argument that the first named respondent was entitled to rely on his employees to fulfil their duties adequately and hence not responsible for the company's failure to keep proper accounts or to file VAT or corporation tax returns. According to MacMenamin J., an executive director (and in particular a managing director) - while entitled to "delegate particular functions to those below him and to trust their competence and integrity" - was not thereby absolved of "the duty to supervise the discharge of such delegated functions."

## Procedural Aspects of s.150

The Company Law Enforcement Act 2001 made express provision for two procedural aspects of s.150 in relation to which the 1990 Act was silent. The new subsections dealing with locus standi and costs - together with their subsequent interpretation by the courts - have resolved the earlier uncertainties as regards these matters. The recent case law has also brought clarity to several other procedural or technical aspects of the s.150 jurisdiction - among them the scope of the s.150 jurisdiction, the principles governing delay in applying for the relief, the power to grant relief from a restriction order, and the extra-territorial application of the provision.

## Locus standi

There were no locus standi provisions in s.150 as originally drafted.

Although it was clear from the outset that a liquidator or a receiver of an insolvent company would have sufficient standing to bring an application to restrict, the capacity of other persons to take restriction proceedings remained a live issue. In *Re Steamline Ltd.*, Unreported, High Court, 24th June 1998, Shanley J. had regard to the purpose of the section in addressing the question of whether an aggrieved creditor of the insolvent company could apply for a restriction order. On the basis that there was no standing requirement in the Act and that the provision should be interpreted broadly so as to protect the public by promoting the remedy of restriction, Shanley J. decided that creditors did have *locus standi* to bring an application.

The new s.150(4A) inserted by the 2001 Act filled the legislative lacuna by expressly granting liquidators, receivers, and the newly created office of the Director of Corporate Enforcement locus standi to bring s.150 proceedings. The question that remained was whether this provision was exhaustive. Considering an application by a creditor to be joined as a party in *Re Document Imaging Systems*, Unreported, High Court, 22nd July 2005, Finlay Geoghegan J. took the view that it was. Accordingly, the position after *Steamline* has been reversed and creditors no longer have locus standi to bring an application under s.150.

Although the point was not specifically raised before her, Finlay Geoghegan J. did go on in *Document Imaging* to consider whether a creditor or some other party lacking locus standi to bring an application might be joined as a notice party to s.150 proceedings in accordance with the provisions of Order 15, rule 13 of the Rules of the Superior Courts. The learned judge appeared sceptical as to whether the court had jurisdiction to make such an order, holding that "even if such a discretion exists...there would have to be exceptional circumstances" for a court to permit such a person to be joined as a notice party. It is difficult to envisage what exceptional circumstances might warrant the exercise of any discretion that might exist, though Finlay Geoghegan J. seemed to suggest that it could operate where the liquidator would be "precluded from, or prejudiced in, making the application" if such a party was not joined. Given that the option of calling on a creditor to swear an affidavit supporting the application remains available in every case, it appears that such circumstances will be very rare indeed in practice.

## Costs

The issue of whether a court has a discretion to vary the usual costs order in the context of a s.150 application has been greatly clarified since the passing of the 2001 Act. That Act inserted a new s.150(4B) into the 1990 Act, which enables a court to award the costs of a successful application and "any costs incurred by the applicant in investigating the matter" against the respondent directors. In one sense, this goes beyond the default position under the Rules of the Superior Courts [RSC], since the courts have no discretion to award the costs of investigating a matter - as distinct from the costs involved in bringing that matter to court - under Order 99, rule 1 RSC. In *Re GMT Engineering*, Unreported, High Court, 30th July 2004, Finlay Geoghegan J. was obliged to consider whether the statutory scheme in relation to this matter also limited her discretion under O.99 by precluding her from awarding the costs of an unsuccessful application against the respondent. The learned judge decided that s.150(4B) did prevent her from awarding costs to the applicant in such circumstances, first because the reference to the costs of the application would have been superfluous unless the provision was intended to limit her discretion, and secondly because the provision had to be read in light of s.160(9B) inserted by the same Act, which clearly limited her discretion in the same way in relation to a disqualification application.

In *Re Tipperary Fresh Foods* [2005] 1 I.R. 551, Finlay Geoghegan J. ruled that subsection (4B) should be interpreted as having retrospective

application, on the basis that the surrounding statutory scheme clearly rebutted the general presumption against retrospectivity existing in respect of applications brought after the date of passing of the 2001 Act. This has the consequence that the costs of an applicant's investigations can be awarded against the respondents in all such cases, even those involving liquidations that commenced prior to that date. It seems implicit in the decision, however, that the costs of the investigation cannot be awarded in respect of proceedings issued before the 2001 Act came into force (if any such are yet to conclude).

Another controversy in relation to the construction of s.150(4B) arose in *Re Mitek Holdings*, High Court, Unreported, 5th May 2005. There the liquidator contended that the term "costs incurred by the applicant in investigating the matter" should be construed so as to apply to the liquidator's own remuneration in the winding up in relation to the investigation of the matters germane to the s.150 application. This submission was rejected by Finlay Geoghegan J., who proceeded on the basis that s.150(4B) created a monetary liability and was thus to be interpreted strictly in favour of the respondent director. Applying this rule of interpretation, the term "costs" means money paid out to a third party, and hence cannot cover remuneration owed to a party to the proceedings on his own account. Accordingly, the courts power to award the costs of investigating a s.150 application does not extend to the liquidator's own remuneration.

## Delay

Another procedural point canvassed with some degree of frequency in the case law relates to inordinate delay in the making of an application for restriction. It is well established that the test to be applied here comes from the Supreme Court decision in *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459: a judge must first consider whether a delay in bringing civil proceedings is inordinate and inexcusable, before going on to decide whether it is in the interests of justice for the application to proceed. In *Re Verit Hotel Ltd.* [2001] 4 I.R. 550, the Supreme Court upheld a decision of O'Donovan J. that a five-year delay from the commencement of liquidation to bringing proceedings should not lead to their being struck out, since no prejudice to the respondents had been shown. This was despite the fact that the Court had already concluded that the liquidator's delay was "inordinate and inexcusable".

Two recent decisions of Finlay Geoghegan J. in the High Court may perhaps show a hardening of judicial attitudes to delay by the liquidator. First, in an *ex tempore* decision in *Re Knocklofty House Hotel Ltd. and Re Eccleshall Ltd.*, Unreported, High Court, 5th April 2005, the learned judge struck out two sets of restriction proceedings in respect of liquidations which had commenced 11 years and 12-and-a-half years before the issue of proceedings, respectively. This decision rested on the delay *simpliciter*, since she found that no actual prejudice to the respondent directors in defending the proceedings had been made out. Then in *Re Supreme Oil Ltd.* [2005] 1 IR 571, the learned judge struck the proceedings out on the basis of a 12-year delay from the commencement of the liquidation to the issue of the motion to restrict, again specifically stating that there was no need for the respondents to demonstrate prejudice in the circumstances.

Delays of the order that existed in the above cases are unlikely to occur in relation to liquidations commenced since the coming into force of the 2001 Act, as s.56(3) of the 2001 Act makes it a criminal offence for a liquidator to fail to apply to court within a 3-5 month period from the delivery of his report to the DCE. But this opens up another argument for a respondent who wishes to prevent a restriction application going ahead. This was the point raised by the respondents in *Re E-host Europe*, High Court, Unreported, 14th July 2003, who suggested that the fact that the time period envisaged under s.56 had expired deprived the

liquidator of standing to bring a restriction application. Finlay Geoghegan J. rejected the argument in relatively short order, stating that "the time limitation...is a regulatory limitation imposed on the liquidator which potentially has for him the consequence of committing the offence specified in s.56(3) but does not bar his entitlement to bring an application under s.150 for a declaration of restriction of the directors."

## The scope of the s.150 jurisdiction

There may be some room for argument on the face of the statute as to the range of persons against whom the s.150 jurisdiction can be invoked. The desire to protect the public underlying s.150 would suggest that persons who have been closely involved with the management of an insolvent company without being formally appointed as directors can be the subject of restriction orders, and the law reflects this policy. Under s.149(5) of the 1990 Act, shadow directors of insolvent companies – i.e. persons who dictate the actions of directors without being directors themselves – are expressly mentioned as possible respondents.

It appears that *de facto* directors (i.e. persons who occupy the position of a director without being so called) can also be restricted, since they are included within the definition of a director under s.2(1) of the Principal Act. This last conclusion is also supported by the decision of O'Neill J. in *Re Lynrowan Enterprises*, Unreported, High Court, 21st July 2002, where the learned judge adopted the three-stage test for identifying a *de facto* director set forth by Timothy Lloyd QC sitting as a deputy High Court judge in *Re Richborough Furniture Ltd* [1996] 1 BCLC 507.

In *Re First Class Toy Traders*, High Court, Unreported, *ex tempore*, 9th July 2004, Finlay Geoghegan J. agreed with O'Neill J. on the principle that a *de facto* director can be restricted, but reconsidered the principles that should be used in determining whether or not a party is a *de facto* director. Taking into account the criticisms that had been voiced in Britain regarding the *Richborough Furniture* approach to this matter, Finlay Geoghegan J. preferred to rely instead on the more flexible criteria set down by Jacob J. in the English High Court in *Secretary of State for Industry and Energy v. Tjolle* [1998] BCC 282, and endorsed by Robert Walker L.J. in the Court of Appeal in *Re Kaytech International plc.* [1999] BCC 390. These principles accord importance to whether the individual against whom the order is sought is "part of the corporate governing structure" and whether he "has assumed the status and functions of a company director so as to make himself responsible...as if he were a *de jure* director". However, as Robert Walker L.J. emphasised in *Kaytech*, the relevant factors to be applied can vary depending on the context and "the crucial issue is whether the individual in question has assumed the status and functions of a company director so as to make himself responsible...as if he were a *de jure* director."

There does appear to have been one "wrong turn" in the law regarding shadow and *de facto* directors in the case law prior to the 2001 Act. In *Re Gasco Ltd.*, Unreported, High Court, 5th February 2001, McCracken J. indicated that one of the respondents who "effectively ran the company on his own" for a certain period after the two appointed directors had left could be restricted because he was a shadow director. However, the better view may be that this respondent – a Mr. Rooney – was a *de facto* director, since under s.27(1) of the Companies Act 1990, a shadow director is "a person in accordance with whose directions or instructions the directors of a company are accustomed to act", rather than a person who actually manages a company himself. This conclusion is reinforced by the fact that Mr. Rooney's actions seem to place him within the test for a *de facto* director approved by Finlay Geoghegan J. in *First Class Toy Traders*.

The distinction between shadow and *de facto* directors may be of some importance to liquidators, since the obligation under s.56(2) of the 2001

Act to apply to court for a restriction order relates only to the "directors of the company", and makes no reference to shadow directors. Finlay Geoghegan J. expressly reserved her position on this issue in *Re USIT Group*, High Court, Unreported, 30th July 2003, but the better view must be that the absence of a specific reference to shadow directors means that the obligation to apply cannot extend to them. Hence a liquidator is obliged on pain of criminal penalty to bring proceedings against a *de facto* director of an insolvent company, but no such obligation exists in respect of a shadow director. Although there is no genuine likelihood that a liquidator will be subject to criminal proceedings in a case where he fails to bring restriction proceedings on the basis of an honest error as to whether a particular person constitutes a shadow or a *de facto* director, certainly a liquidator's legal representatives should bear the distinction in mind when deciding against whom to draft proceedings on his behalf.

## Section 152

Section 152 of the 1990 Act allows the High Court on application of the restricted person to grant relief from the restriction order on such terms as it thinks fit, if it thinks it just and equitable to so. This discretionary jurisdiction may be seen as a *quid pro quo* for the rigid and inflexible nature of the criteria laid down in s.150 itself. The case law demonstrates that judges are almost unfettered in relation to the basis on which they exercise this jurisdiction.

Granting full relief from a restriction order in the pre-2001 Act case of *Robinson v. Forrest* [1999] 1 IR 426, Laffoy J. took account of the severe impact of the order on the applicant's capacity to earn a livelihood, as well as of the praiseworthy nature of his actions after the winding up had commenced. It is quite clear that neither of these issues can be considered by the court in the context of the initial s.150 application. As much was acknowledged by Finlay Geoghegan J. in the *360Atlantic* case, where she refused to take account of the prejudice to the respondents in their continuing commercial life at the s.150 stage, stating that "the only discretion in the Court is where an application is subsequently made under s.152."

The purpose and scope of the s.152 jurisdiction has most recently been considered by Finlay Geoghegan J. in *Re CMC Ltd*, High Court, Unreported, 1st November 2005, where the learned judge described the section as conferring "a very wide discretion" upon the Court. She stressed that it was "in no sense an appeal from the decision making the order of restriction", adding that the court was not limited to the facts put before it at the initial hearing. As well as the matters taken into account by Laffoy J. in *Robinson*, Finlay Geoghegan J. ruled that the restricted person's actions as a director of another company could be considered, unlike the situation in relation to a s.150 application set forth by the same judge in the *Tralee Beef and Lamb* case.

The CMC case also departs from the case law on s.150 applications by laying down a flexible approach to the joining of parties in an application under s.152. Section 152(2) requires the applicant under

s.152 to give notice to the liquidator of the application. Here the liquidator had indicated that he did not intend to participate in the application. The Director of Corporate Enforcement applied to be joined as a notice party in order to set forth his position in relation to the application. Finlay Geoghegan J. agreed to join the DCE in accordance with the procedure laid down in Order 15, rule 13 RSC, despite the absence of any reference to him in s.152(4), which provides a list of persons from whom the Court can hear evidence on a s.152 application. The Court took the view that the broad and discretionary nature of the provision justified it in joining a party with the capacity to make relevant submissions on the issues involved, particularly in circumstances where the application would otherwise proceed unopposed. Given that liquidators are unlikely to wish to expose the funds available to creditors by engaging legal representation to contest s.152 applications, it seems likely that in the future, the DCE will seek to be joined in s.152 applications on a fairly regular basis.

## Extra-territorial application

One final procedural point that had not arisen prior to the passing of the 2001 Act relates to the extra-territorial application of the s.150 jurisdiction. In *Re Euroking Ltd.*, High Court, Unreported, 5th June 2003, Finlay Geoghegan J. had to consider whether s.150 could be invoked in respect of directors resident outside the State. She decided that, as a matter of statutory interpretation, the presumption that statutory provisions do not apply to non-residents was clearly displaced in relation to s.150. This conclusion was reached primarily on the basis that it would be absurd to suggest that a provision enacted in order to protect the public from rogue directors could "leave dishonest or irresponsible non-resident directors unrestricted freedom to be directors of any Irish companies in the future."

As regards the related issue of whether the Court could give leave under O.11 RSC for s.150 proceedings to be served on directors outside of the jurisdiction, Finlay Geoghegan J. held that the Court had an inherent jurisdiction to permit service out of the jurisdiction in these cases, although no jurisdiction lay to do so under Order 11. As regards the manner of such service, it was indicated that service by registered post to an address where the liquidator believes the respondent to be residing or to be carrying on business should be sufficient in the ordinary course of events.

## Conclusion

Recent judgments have brought a great degree of clarity to the procedural issues affecting a s.150 application. Any certainties that may remain relate to delay and to the scope of the obligation to apply contained in s.56(2) of the 2001 Act. Future case law is likely to provide more detailed guidance as to the period of delay that will suffice to entitle the respondent to have a restriction application struck out, without providing evidence of prejudice. It would also be useful to receive a definite indication as to whether the obligation to apply covers shadow directors. ●

# Hathaway and the rights of refugees under international law

Michael Lynn BL

Fifty five years ago, on 1st January, 1951, the United Nations High Commissioner for Refugees began operating out of three rooms at the Palais des Nations, in Geneva, Switzerland. The world was still recovering from the devastation of World War Two. The Holocaust had shocked the international community to its core. The six years of conflict had left millions of people displaced across Europe. Two years after the cessation of the war, one and a half million Poles, Hungarians, Bulgarians, Romanians, Yugoslavs, Soviet nationals and Jews remained outside their country of origin and resistant to repatriation.<sup>1</sup> Between 1947 and 1951, more than one million Europeans were relocated to the Americas, Israel, South Africa, and Oceania. The degree of suffering and the need for post-war resettlement led the international community to seek a common approach, and on 28th July, 1951, the Convention Relating to the Status of Refugees ('the Geneva Convention') was adopted.<sup>2</sup> Ireland became a party to the Convention in 1956.<sup>3</sup>

Since that time, a large body of jurisprudence and academic commentary has developed on the Geneva Convention definition of a refugee, and the criteria that a person must satisfy in order to gain recognition as a refugee. However, very little has been written on the rights to which a person is entitled once he or she is so recognised, and it is this issue, wide in ambit, which Professor James Hathaway addresses in his new book "The Rights of Refugees under International Law".

Professor Hathaway is, of course, well-known as one of the world's leading academics in the field of refugee law. His book, "The Law of Refugee Status",<sup>4</sup> is a seminal study of the legal definition of a refugee, and is regularly relied upon by courts here and abroad.<sup>5</sup> It is cited in many decisions of the Refugee Appeals Tribunal.<sup>6</sup> Professor Hathaway has worked tirelessly to promote and develop the study of refugee law worldwide. He heads an extensive resource centre at the University of Michigan which is accessible on the internet and is indispensable to

practitioners.<sup>7</sup> He lectures widely around the world. Recently he was the main speaker at a conference entitled "Future Developments in Refugee Law", in Galway<sup>8</sup>, during which he outlined several themes that are expanded upon in "The Rights of Refugees Under International Law", as well as clarifying his understanding of the concept of "persecution".<sup>9</sup>

The motive behind the publication of his latest book is disquieting. Professor Hathaway states that the previous absence of any major work on the rights of refugees was largely because most developed states had admitted recognised refugees as long-term or permanent residents, thus respecting most Refugee Convention rights, and usually more. Because refugee rights were not at risk, there was little perceived need to elaborate their meaning. However, this refugee-friendly approach is in decline. Professor Hathaway writes: "In recent years, governments throughout the industrialized world have begun to question the logic of routinely assimilating refugees, and have therefore sought to limit their access to a variety of rights. Most commonly, questions are now raised about whether refugees should be allowed to enjoy freedom of movement, to work, to access public welfare programs, or to be reunited with family members. In a minority of states, doubts have been expressed about the propriety of exempting refugees from compliance with visa and other immigration rules, and even about whether there is really a duty to admit refugees at all. There is also a marked contrast in the authority of states to repatriate refugees to their countries of origin, or otherwise divest themselves of even such duties of protection as are initially recognised. This movement towards a less robust form of refugee protection mirrors the traditional approach in much of the less developed world. For reasons born of both pragmatism and principle, poorer countries - which host the overwhelming majority of the world's refugees (as of 31st December, 2003, just under 80 per cent of the world's refugees were protected in Africa, the Middle East and Asia) - have rarely contested the eligibility for refugee status of those arriving

1 *Post War. A History of Europe since 1945*, Tony Judt, Heinemann, 2005, page 31.

2 The 1951 Convention contained a temporal limitation (it applied to situations arising out of "events occurring before before 1st January, 1951") and an optional geographical limitation, but these were disposed of by the New York Protocol of 1967.

3 Ireland became a member of the United Nations in 1956 and in that year acceded to the 1951 Convention. It acceded to the 1967 Protocol in 1969.

4 LexisNexis Butterworths, 1991.

5 See for example the High Court decisions in *Gioshville v Minister for Justice, Equality and Law Reform*, 31st January, 2003, *A (R) v Minister for Justice, Equality and Law Reform*, 26th May, 2004, and *Gjyrevci v Minister for Justice, Equality and Law Reform*, 4th November, 2004. The work has also been influential in the highest courts in other jurisdictions.

6 Whilst the Refugee Appeals Tribunal does not publish its decisions, practitioners working in the area are collectively aware that a section on the law pertaining to refugee status is re-produced verbatim in many decisions of the Tribunal, which includes reference to Professor Hathaway's work. The Tribunal has said it will commence publication of decisions of legal importance early this year.

7 The contemporary jurisprudence of leading asylum states on the scope of Convention refugee status is collected at the University of Michigan's Refugee Caselaw Site, [www.refugeecaselaw.org](http://www.refugeecaselaw.org).

8 Organised jointly by the Irish Centre for Human Rights, National University of Galway, and the Human Rights Centre, Law Faculty, Queens University, Belfast.

9 Of particular interest to practitioners was Professor Hathaway's comment on the phrase in his book "The Law of Refugee Status", which is widely relied upon by the Refugee Appeals Tribunal in its determinations, in which he stated (at pp104-5): "... persecution may be defined as the sustained and systemic violation of basic human rights demonstrative of a failure of state protection". This passage was written in the course of a discussion of the duty of state protection. At the conference, Professor Hathaway emphasised that the phrase "sustained and systemic" applied to the risk faced by a person, and not to the actual perpetration of persecutory acts. A person need not have suffered any persecution in order to be a refugee. Nor need they fear sustained persecution. One possible act of persecution, depending on its seriousness, may suffice to bring a person within the refugee definition.

at their borders (in some instances, particularly in Africa, the commitment to a more expansive understanding of refugee status has been formalized in regional treaty or other standards). Yet this conceptual generosity has not always been matched by efforts to treat the refugees admitted in line with duties set by the Refugee Convention."<sup>10</sup>

Professor Hathaway sets as the goal of the book an examination of the source of vital, internationally agreed human rights for refugees, and he works on the premise that refugees are entitled to claim the benefit of a deliberate and coherent system of rights.<sup>11</sup> It is an ambitious goal and the result is an extensive work that will surely be of great assistance to practitioners and of substantial influence in courts worldwide. It is 1,184 pages long, with copious and detailed footnotes. It not only sets out the rights protected by the Refugee Convention but records the differing application of the refugee rights regime in countries around the globe, with reference to judgments from many jurisdictions.

In respect of law and practice in our own jurisdiction, two areas of analysis in the book are of particular interest:

- (a) the obligations flowing from Article 31 of the Refugee Convention; and
- (b) the principle of family reunification.

## Article 31

Article 31 of the Refugee Convention is entitled "Refugees unlawfully in the country of refuge", and provides:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1 [ie for reasons of race, religion, nationality, membership of a particular social group or political opinion], enter or are present in their territory without authorisation, provide they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

The provision that Contracting States shall not impose penalties for unauthorised entry, provided that a refugee presents himself or herself without delay to the authorities and shows good cause for his or her illegal entry, gives rise to the issue of whether a criminal prosecution should be brought against a refugee claimant who enters the State with false documents.<sup>12</sup> The issue came before the High Court in 2004 in the

case of *Sofinetti v Judge David Anderson* and others<sup>13</sup>. The applicant was a Romanian national who attempted to pass through immigration control at Dublin airport on a false Irish passport. She was stopped and refused leave to enter because she was travelling on a fraudulent document. The captain of the aircraft on which she had arrived refused to return her to the country from where she had travelled. She was then charged with using a false instrument, contrary to section 26 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, and with possessing stolen property, contrary to section 18 of the Criminal Justice (Theft and Fraud Offence) Act, 2001. In the High Court action, the applicant sought to prohibit her prosecution on the ground that it was contrary to Article 31 of the Refugee Convention. O'Higgins J refused to grant her the reliefs sought. He held that Article 31 of the Convention was not incorporated into Irish law, nor did it give rise to a legitimate expectation that it could oust the duty of the Director of Public Prosecutions to commence a prosecution where he deemed it appropriate to do so.

The practice continues in our jurisdiction of charging certain asylum claimants with the offence of using a fraudulent instrument and/or possession of stolen property. The accused are brought before the District Court soon after arrival in the State and often spend time in custody on remand. Professor Hathaway provides a lengthy analysis of the application of Article 31, and refers to legal decisions from a number of different countries. He concludes that Article 31 does not require state parties formally to incorporate an exemption for refugees from general immigration penalties, nor does it impose a duty to refrain from launching a prosecution against refugees for breach of immigration laws.<sup>14</sup> But, whilst it is lawful for a government to charge an asylum-seeker with an immigration offence, and even to commence a prosecution, Professor Hathaway is of the view that no conviction should be entered until and unless a determination is made that the individual is not in fact a Convention refugee. He states: "The practice in New Zealand of allowing prosecutions against asylum-seekers for reliance on false travel documents to proceed pending completion of the usual refugee status verification procedures is not therefore a breach of Article 31, so long as a verdict is not rendered pending results of the refugee inquiry."<sup>15</sup> It may be that this view of Article 31 is not inconsistent with O'Higgins J's decision in *Sofinetti* in that it does not challenge the right to bring a prosecution, although it does advocate the postponement of any hearing pending the outcome of the refugee application process. Professor Hathaway's view may be of considerable assistance to practitioners who represent asylum seekers in the District Court and whose best interests might be served by securing an adjournment pending the outcome of their refugee claim.

Ireland's compliance with Article 31 is specifically referred to by Professor Hathaway in respect of two other matters. Article 31(2) states that a limitation on the freedom of movement of a refugee claimant may not be imposed without a valid justification of the kind contemplated in

10 pp 3-4.

11 p4.

12 Note the passage from Simon Brown LJ in *R v Uxbridge Magistrates ex parte Adimi* [1999] 4 All ER 520 in which he notes: "The combined effect of visa requirements and carrier's liability has made it well high impossible for refugees to travel to countries of refuge without false documents ..."

13 The decision was handed down in 2004 but is undated. The case reference is 2002/546JR.

14 Professor Hathaway refers to *R v Uxbridge Magistrates ex parte Adimi* [1999] 4 All ER 520, and to the drafting history of the Convention.

15 At page 407 of the book, it states that in considering the circumstances of an Iranian

refugee claimant who was charged with possession of a fraudulent French passport, the New Zealand High Court observed "[i]f it is, indeed, the case that he is found to be a true refugee then the probabilities are that the charge will be withdrawn. In any event, his claim to refugee status may well result in a reasonable excuse defence being successful if the case proceeds to trial": *AHK v Police* [2002] NZAR 531 (NZ HC, 11th December, 2001) at para 12. The French Conseil d'Etat has held that immigration penalties may only be applied to an asylum-seeker if and when his request for recognition of refugee status is denied: *AJDA 1977.515, Revue de droit administrative 1977.481* (Fr CE, 22nd May, 1977).

the paragraph. This means that no refugee-specific limitation on freedom of movement may be more than strictly provisional. Any such limitation must come to an end once reasons which make it necessary no longer exist – for example, when the preliminary assessment of identity and circumstances of entry is completed. Any other or continuing constraints must be generally applicable to non-citizens in the host country, and must not be imposed on account of irregular entry or presence. Professor Hathaway concludes: "... when asylum-seekers are required to live on an ongoing basis in a reception centre or hostel, as may be the case, for example, in Denmark, Germany, and Ireland, Article 31(2) is contravened." This, too, may have particular relevance to cases coming before practitioners at present. A number of fathers of Irish citizen children have returned from their countries of origin in order to reunite with their children and wives and to apply for residency. In order to enter the State, they applied for refugee status. They have been required to reside in particular hostel accommodation, such that they are forced to live apart from their children and spouses. Whether this requirement is consistent with Article 31 is questionable.

Professor Hathaway also considers the legality of imposing penalties against carriers, and the issue of whether a person or organisation that assists an asylum-seeker to enter another State can derive protection under Article 31. He makes specific reference to our Immigration Act, 2003, and notes that when the legislation was before the Oireachtas, the Office of the United Nations High Commissioner for Refugees was critical of it because it contained no defence to liability based on the principle of asylum.<sup>16</sup> He expresses the view that the legislation is not in breach of Article 31 but approves the European Union's aspirational stance, in EU Council Directive 2001/51/EC, that carriers should be exempt from prosecution where the person they have transported applies for asylum (Ireland has opted out of this directive).<sup>17</sup> Professor Hathaway concludes: "despite the risk that policies such as ... Ireland's refusal to exempt carriers transporting refugees from sanctions will have a chilling effect on the willingness of airlines and others to allow refugees to travel, such penalties cannot be said to breach Article 31", and he states "the recent move of the European Union to promote a policy of not pursuing carrier sanctions when the person transported makes a claim to refugee protection is, like the Canadian practice, more clearly in keeping with the goals of Article 31".<sup>18</sup>

## Family reunification

Many refugees are forced to flee their country of origin either on their own or with only some of their immediate family and it is vital to them that their family can later be reunited with them in their country of refuge. There are few legal impediments to family reunification in most less developed asylum states.<sup>19</sup> Perhaps ironically, it is in developed countries that prolonged delays often occur due to complex procedures.<sup>20</sup> In Ireland, the authorities aim to process applications for family reunification speedily, but cases have arisen where long delays

have occurred. Professor Hathaway conducts a detailed analysis of various international human rights instruments and the principle of respect for family unity. He argues that there is a duty on States to act reasonably towards securing family reunification and states: "... any delay in allowing refugees to access family reunification facilities must be based on rational, substantive considerations rather than simply on the basis of the formal status assigned to them. For example, assuming the existence of discretion to take account of the special psychological or other circumstances of the persons concerned, the [UN] Human Rights Committee's understandings would likely sanction an incremental approach under which a refugee (whatever his or her formal status) would be entitled to be reunited with a spouse and children after one year in the asylum state, and with other dependent family members after two years there. Under such a model, states would have ample time to avoid the reunification of families where the primary claim to protection is clearly unfounded, or where the need for protection is really short-lived."<sup>21</sup> This raises the very important issue of whether a refugee claimant may be able to assert a right to family reunification in the State where the processing of the claimant's case has been delayed for a long period of time through no fault of the claimant.

The issue of delay in processing family reunification claims is an extremely important one to a declared refugee. The consequences of undue delay can be appalling. In Australia, a Pakistani man recognized as a refugee in 1996 had still not received permission as of 2001 to be reunited with his wife and three daughters, one of whom suffered from cerebral palsy. His level of desperation was such that he set himself alight outside Parliament in protest at the Australian government's delays.<sup>22</sup> Throughout the book, there are numerous references to Australia's appalling record of human rights violations against non-nationals, a matter that was recently recounted at a conference in Dublin by the Australian advocate, Julian Burnside QC.<sup>23</sup> The detailed survey of practice and policy towards refugees in countries all over the world is another hugely impressive feature of the book, and one which may help practitioners who are representing refugee claimants here whose cases are being undermined by the contention that they could have claimed asylum in another country. Such a proposition may be questionable. For example, the assumption that ethnic Russians can seek refuge in Russia from a country such as Uzbekistan may be misconceived. It can be difficult, if not impossible, to apply for asylum status at Russia's border.<sup>24</sup>

In a short article, it is impossible to do justice to a text of the length and detail of "The Rights of Refugees Under International Law". I hope that the examples set out above illustrate the invaluable assistance that this new work may provide for practitioners. They are only examples. There is a wealth of information, in respect of both law and practice, to assist lawyers and administrators working in the rapidly developing area of refugee law. ●

16 See "UNHCR position on Immigration Bill, 2002", which can be accessed on [www.unhcr.ch](http://www.unhcr.ch). The UNHCR criticised section 2 of the Bill which introduced penalties on transporters bringing in aliens without proper travel documentation and/or entry permits, and which did not provide for any asylum related defences to liability.  
17 The expectation of exemption from prosecution where the person transported applies for asylum is made in the Preamble to the EU Council Directive 2001/51/EC (June 28, 2001), rather than codified in an express requirement.  
18 p404.  
19 p533.  
20 p537.  
21 p559.

22 p537.  
23 The conference, "Public Interest Law in Ireland", was organised by FLAC, and held on 6th October, 2005. Professor Hathaway provides detailed references to Australia's record, including adverse findings against Australia by the United Nations Human Rights Committee.  
24 See, for example, p406 of the book.

# Book Review

*Kings Inns Barristers 1868 -2004*

Reviewed by John McGuiggan BL

On the practitioners notice board in the bar room of Phoenix House, someone with a sense of satire, probably a solicitor, has placed an extract from an unidentified law book that seeks to make the slightly exaggerated claim that "The members of the Bar form one of the most brilliant sections of society..." Well we could hardly demur from that could we?

Those who hold such iconoclastic opinions of the profession will probably be delightfully reinforced in their views by the publication of Dr. Kenneth Ferguson's book on "*Barristers 1868 - 2004*". "Look", they will shout, "Only a profession so arrogant and so elite could possibly publish a book like that"

Perhaps they are right. And yet, this is magnificent. It is much more than a mere recitation of the historical record of those called to the Bar. Such a list has here been turned into a rich history reflecting the changing nature of Ireland, of the Irish, of politics, of the role of women, of partition, of the profession and of the law through turbulence to peace.

The core of the book is Dr. Ferguson's extended essay entitled "A Portrait of the Irish Bar". It is unquestionably the finest history of the profession in Ireland yet written and a pure joy to read, full of surprising statistics and penetrating insights. It embraces a history, through the eyes of the Bar, that takes us from the age of crown loyalty and the FitzGibbons to the new order, brilliantly and emotionally captured in the report of the Irish Law Times and Solicitors Journal of June 1924, and to the rise of the Sullivan clan in all its complexities, taking in the first world war, the troubles, the destruction and rebuilding of the four courts, political preferment, women barristers and all the leading legal figures that strode that turbulent judicial stage. If I might steal one of the author's own quotes, generously made of an earlier literary and legal figure, the sheer scale of the essay establishes Dr. Ferguson to be much more than gifted historian. He writes with a grace that testifies to the muse's special favour.

On the First World War, Dr Ferguson sets out how some 130 barristers abandoned their practices for the trenches. At the time, the Bar only numbered some 300 barristers so almost 50% of its members went off to war. And the names of those who went are, for the first time, listed here, many of the names as familiar now as they were then. Not all of course, came back. Those who did not go, the more elderly members of the Bar, turned their hands to munitions work, Serjeant Sullivan recalling how the Law Library ran a munitions factory from one o'clock on a Saturday afternoon till nine o'clock on Monday mornings until

eventually, the barristers were objected to as blackleg labour and resigned from the unpaid work under pressure from the trade unions.

Dr. Ferguson also publishes, again for the first time, the extract from the 1956 minutes of the Kings Inns containing the memorial in which Sergeant Sullivan was condemned for revealing the homosexual orientation of his former client Roger Casement, the 34 signatories whose names have never before been published, pray that the Honourable Benchers remove the said Alexander M. Sullivan from the roll of Benchers and disbar him from the Bar of Ireland. One can still read in the lines of the motion the bitterness that it must have engendered.

There is an extensive treatment of the struggle of women to enter into the profession both in Ireland and in England, with a quaint contemporaneous commentary on what was then the perplexing question of what should be the proper forensic dress for women barristers - the English, favouring the wearing of a black biretta over the ludicrous practice, adopted in Ireland, of allowing women to wear ordinary horse hair wigs. Some discussion too, on a prohibition of low necklines.

The only small criticism of the book is that the print quality of the many photographs does not match the outstanding quality of the writing. But that should not inhibit you from buying it. It is the type of book that will find a favoured spot on all our bookshelves and one that will be taken down and consulted with affection every time colleagues meet for dinner; it will provide endless hours of discussion while dining at the Kings Inns and is a volume that will be handed down through the family for generations yet to come. And should you be at all concerned about what those prejudiced souls outside the profession will think about barristers buying books about themselves, then why not purchase an additional copy or two, and give them as a gift.

*Publisher: The Honorable Society of King's Inns in association with The Irish Legal History Society.*

*Price: €40.00*