The Bar Review

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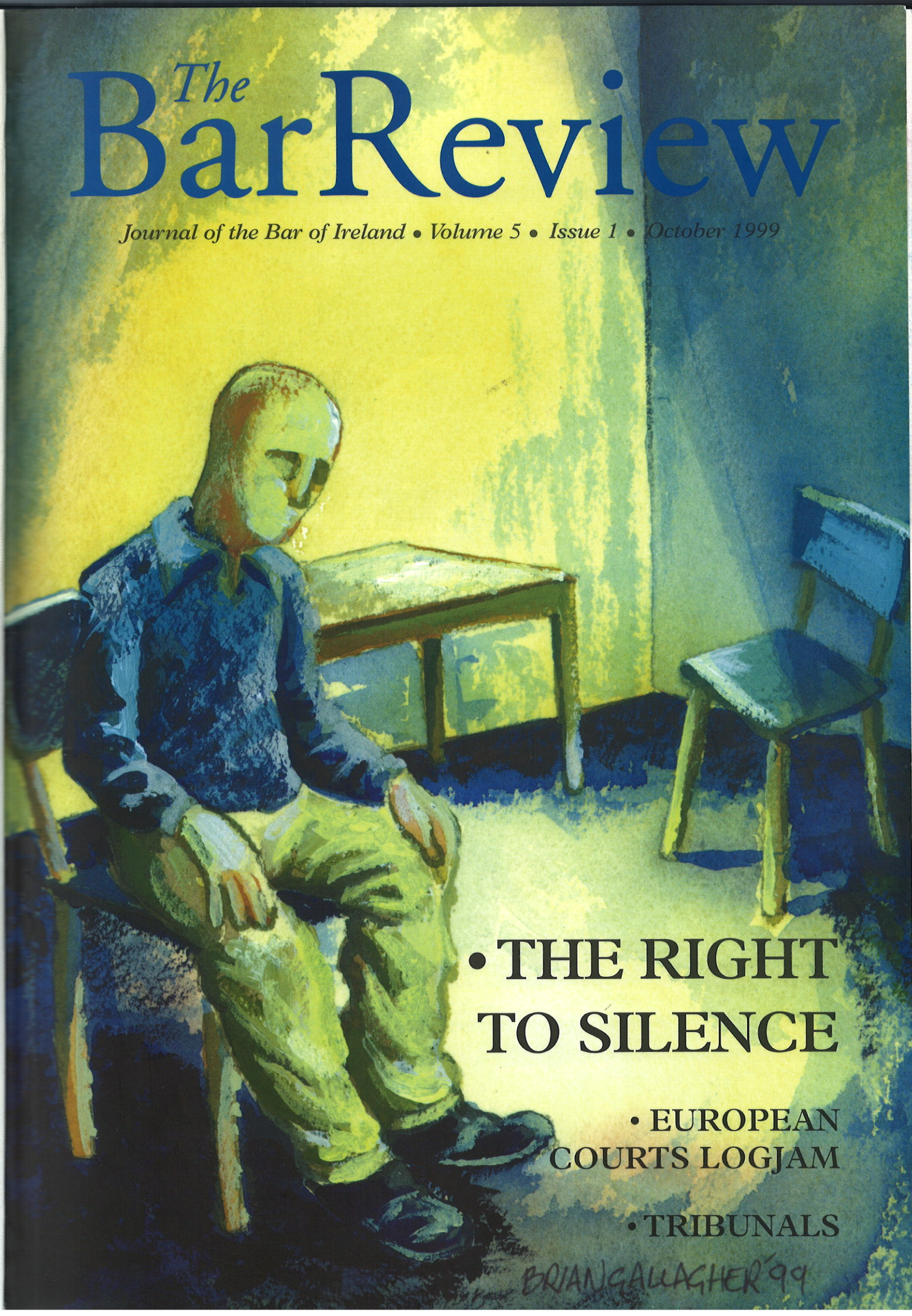

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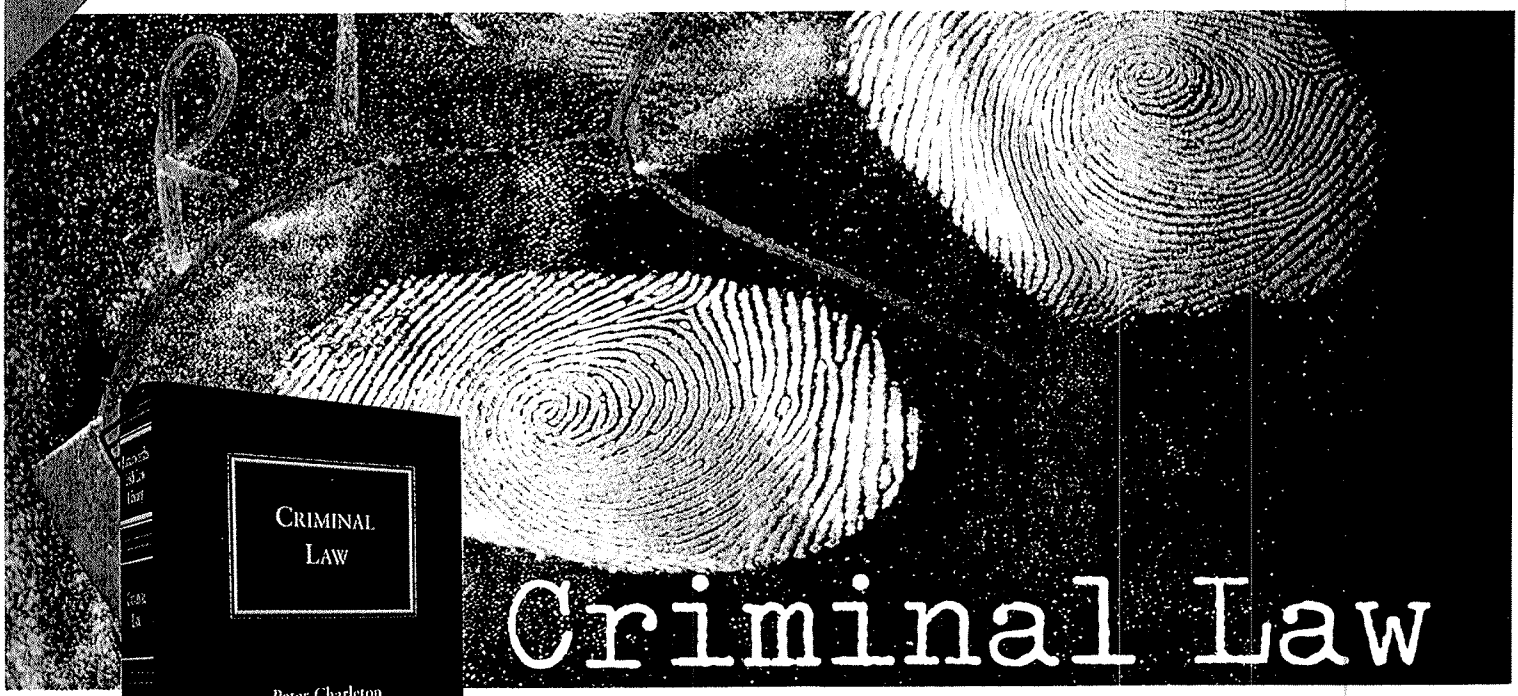

By Peter Charleton SC, Paul Anthony McDermott and Marguerite Bolger
With a foreword by Mr Justice Paul Carney

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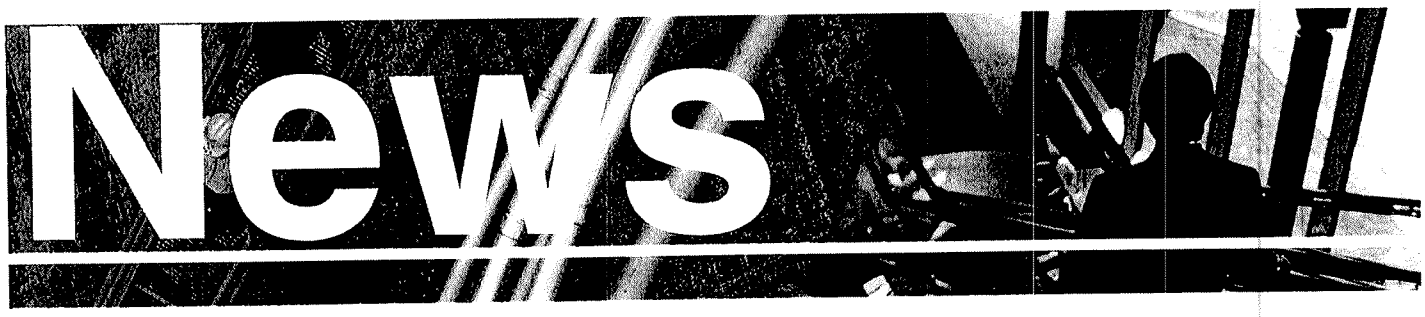

ICCL TO HOLD MAJOR CONFERENCE ON EQUALITY

The Irish Council for Civil Liberties are holding a two-day conference on the new regime for equality under the Employment Equality Act, 1998 and the Equal Status Bill, 1999 on 22 - 23 October in Dublin Castle. The conference will have two plenary sessions and nine workshops dealing with each of the areas of discrimination prohibited by the new legislation.

For further information contact
01-8783136/7 or *iccl@iol.ie*. Advance registration is strongly advised as there is considerable interest in this conference.

Calls to the Inner Bar

The following members took Silk on Friday 1st and Tuesday 5th October. Congratulations to all on their new positions.

George Birmingham,
Mel Christie, Cormac Corrigan,
Marcus F. Daly, Mark DeBlacam,
Patricia Dillon, Peter Finlay,
David Goldberg, Patrick Horgan,
Feichin McDonagh,
Deirdre Murphy, John O'Kelly,
Brian O'Moore and Brian Spierin.

New Entrants to the Law Library

There are 90 new entrants to Law Library Bar this year, the highest number ever. We welcome them to the Law Library and wish them the best of luck in their new careers.

The Children's Hour

The Children's Hour is a world-wide initiative taking place this year to mark the millennium and raise funds for disadvantaged children throughout Ireland. People at all levels in the workforce are being asked to donate one hour's earnings to this cause, every penny of which will go directly towards the charities involved, as sponsorship is covering all administrative and marketing costs for the event.

The week beginning October 18th has been designated the Industry week for the legal profession and it is hoped that barristers, solicitors, court officials, the judiciary and anyone associated with their work will contribute an average hour's pay during this time. You can give this hour's earnings to the Children's Hour any time from now until the end of the year.

Leaflets will be distributed throughout the Law Library for direct debits, or contributions can be made directly to the Children's Hour account in AIB, A/C 20000-900, 37 Upper O'Connell Street (Sort Code: 93-11-36). Credit card donations can be made by ringing 1850 31 12 99, and cheque donations can be made payable to Children's Hour and sent to Children's Hour FREEPOST.

Irish Society for European Law Meeting

Tuesday 2 November 1999
at 6.15pm sharp

At the European Commission Offices
Dawson Street, Dublin 2

Advocate General Nial Fennelly will deliver a paper on 'Recent EC Case Law relating to Intellectual Property'

All welcome.
Members (and prospective members) wishing to dine after the meeting at 'Fitzers' in Dawson Street should conta
Gerald Fitzgerald, Chairman,
at ph: 829 0000, fax: 829 0010 or
gerald.fitzgerald@mccann-fitzgerald.ie
no later than

Thursday
28th October 1999

RIGHTS OF VICTIMS

AND RIGHTS OF ACCUSED

The recent publication by the Department of Justice, Equality and Law Reform of a Victims Charter is long overdue and to be welcomed. The proposals, while modest, concentrate on offering victims an inclusive role in the investigation and prosecution of crimes, and where appropriate, the punishment of offenders.

Hitherto an injured party could make a complaint and not be kept abreast of subsequent developments. Not any more. Complainants now have specific rights and guarantees. The Gardaí must inform a complainant when a suspect is charged, his remand status, the time and place of Court hearings and the entitlement, if giving evidence, to help available from Victim Support. People who are the victims of violent crime must now be advised by the Gardaí of their right to have a victim impact report prepared for consideration by the Judge imposing sentence. The Charter also seeks to ensure in serious cases injured parties are notified of an offender's release. Doubtless many Gardaí will point out that the Charter is no more than good practices, which is already followed. However, practises will vary and it is a significant benefit that victims have good practices as rights set out and furthermore, if necessary, to have a right of complaint to the Garda Victim Liaison Officer.

The Charter also sets out rights in respect of the Courts, Prisons, Probation Service, the Chief State Solicitor, the Director of Public Prosecutions and the Victim Support Group. In reality, much of what is contained in these sections is generalised and aspirational. Specific provisions include an undertaking by prisons to notify Gardai of the release of a sex offender or a person convicted of an offence involving violence but only when they are requested to do so by the injured party. The Director of Public Prosecutions will examine a request for a review of its decision not to prosecute and in appropriate cases, carry out an independent internal review. The implementation of this proviso will be watched with interest. There is a commitment to providing accommodation and facilities for the use of victims and their families in new and refurbished buildings.

The Charter also promises to provide, in conjunction with Victim Support, the services of what is termed a Court Victim/Witness Service. The purpose is apparently to provide complainants with a trained volunteer to give support, encouragement and companionship when attending court. The section dealing with the Chief State Solicitor warns that while consultations can be arranged in advance of a hearing evidence cannot be discussed in advance of the trial. This recognises that such discussions are sensitive and not permitted. There is an assurance that volunteers (who presumably are not paid) will be fully trained. The nature of the training and who will pay for it is not set out. This gives cause for concern. Roles need to be clearly defined and delineated. Otherwise volunteers unwittingly may stray into the territory of witness coaching.

The law, to be effective, often requires striking a balance between opposing interests. The rights of accused are as important as those of victims. The demand for electronic recording of interviews stemmed from miscarriages of justice in which convictions were obtained on foot of discredited confessions. Recording is in everyone's interests. It prevents concocted confessions. It protects Gardai against false allegations. A huge amount of court time will be saved trying what occurred in Garda interviews.

The failure of the Government to ensure that interviews with suspects in custody are recorded is another cause for concern. The power to record was contained in the Criminal Justice Act, 1984. It took ten years to commence a pilot scheme which operated in just four Garda stations. The installation and operation of the pilot schemes has been the subject of two interim reports by the Steering Committee on Audio and Audio-Video Recording established by the Minister for Justice in 1993.

In the Steering Committee's most recent report in March of this year it called for recording to be commenced nationally at the earliest practicable opportunity. The Minister has the benefit of the information collated and analysed by the Committee over a five year period. His committee's findings have been definitive and urge immediate action. There can be no excuse or justification for either ignoring or delaying implementation of their findings. Such a scheme must be commenced now. •

THE RIGHT TO SILENCE

BY FAYE BREEN BL &
PADDY MACENTEE SC, QC

In light of Deaglan Lavery v The Member-in-Charge, Carrickmacross Garda Station

The Supreme Court in the recent case of *Deaglan Lavery* v *The Member in Charge, Carrickmacross Garda Station*[1] was given the ideal opportunity to consider the rights of those in custody in the context of the Offences Against the State (Amendment) Act, 1998 passed last year in reaction to the bombing at Omagh.

It was hoped that the Court would analyse and eliminate the absurdities which this Act has created, but instead it chose to deliver another blow to the right to silence by enshrining the principle that persons in detention are not entitled to have their solicitors present at Garda interviews, nor are they entitled to insist upon an audio-visual recording of the interviews or to see interview notes before the end of the detention period.

The Provisions of the Offences Against the State (Amendment) Act, 1998.

Those who seek to protect the right to silence have been concerned by the provisions of this Act for a number of reasons, not the least of which are sections 2, 5 and 9 of the Act.

Section 2[2] and 5[3] of the Act allow inferences to be drawn from the failure of an accused to mention facts later relied on his defence when being questioned or charged by the Garda Siochana.

Section 9[4] makes it an offence for a person to stay silent without a reasonable excuse, when he has information which he knows or believes might be of material assistance to the Garda Síochána. This section echoes Section 52 of the Offences Against the State Act 1939 which made it an offence for persons in detention not to account for their movements during a specified period[5].

To consider the situation which pertains when a person is being interviewed in the custody of the Garda Siochana, it is clear that if he fails to answer a question which is put to him, adequately or at all, he is exposing himself a) to prejudice to his defence as interences may be drawn from his decision to remain silent under sections 2 and 5 (of the 1998 Act and b) to prosecution under section 9 (of the 1998 Act) or section 52 (of the 1939 Act)

One would be forgiven for believing that such an extraordinary attack on the constitutional right to silence[6] would surely be tempered by strong safeguards to prevent abuse of the system. The kind of safeguards which have been put into place in England and Wales, and Northern Ireland, include the presence of a solicitor during interviews and audio-visual recording, audio recording or meticulous verbatim note-taking of all questions put and all answers given in all interviews[7].

Safeguards

Warning

In fact, none of these safeguards have been provided for in the legislation. Instead, section 2 and section 5[8] provide for a warning so that the accused must be told by the interviewing Garda in ordinary language, when being questioned, charged or informed, as the case may be, what the effect of a failure to mention a material fact would be. Nowhere does it say who is to deliver this warning nor how often it is to be administered. If there is no solicitor at the station one assumes that the onus will fall upon a Garda to inform the person in custody of the dangers of staying silent and that the Garda will not be expected to warn the person every time that he is asked a question which may expose him.

The appropriate person to advise a detained person of his legal rights and obligations is his lawyer. On the face of it there is a potential conflict of interest between those investigating an offence and a person suspected of having committed that offence or of having information in relation to it. Reference to "ordinary language" in the sections is an implicit acceptance that the wording of the sections is arcane and needs to be interpreted. The appropriate person to advise on the meaning of arcane statutes is the solicitor of the person requiring such advice.

Section 9, which makes it an offence to withhold information of material assistance to the Garda Síochána, does not mention any warning to be given to a person in custody.

Presence of a legal advisor during interview

An accused's defence to a criminal charge is a legal concept. It is not appropriate to impose an obligation upon a person in custody (who may not yet have been charged) to decide what his defence will be and answer questions put to him with that defence in mind. To prevent this unfairness, the accused's right to silence worked so that inferences could not be drawn from his failure to establish his defence during his pre-trial communications with the Garda Siochana.

The significance of an erosion of this right by sections 2 and 5 of the 1998 Act cannot be underestimated and the situation is compounded by the fact that the right of reasonable access to

a solicitor as enshrined in cases such as *DPP v Healy*, does not stretch so far as to provide a right to the presence of one's solicitor during Garda interviews[10].

In addition, section 9 creates the absurd scenario whereby interviewees are expected to analyse the questions posed by the member, assess in a legal fashion whether or not failing to answer adequately or at all any question could amount to an offence under the section and answer accordingly. The presence of a solicitor during the questioning would allow the detained person the opportunity to obtain legal advice in relation to each question.

In England and Wales the Police and Criminal Evidence Act 1984 provides for more ample protection of the position of detained persons. All interviews are tape-recorded in the presence of a solicitor (including those charged under the Prevention of Terrorism Act 1989). If a person in custody does not have legal representation there exists a rota scheme of specially trained "duty solicitors" to attend on the accused person.

Solicitors play a very active role in the detention and questioning of suspects in England and Wales. There is a practice whereby the solicitor is shown witnesses statements, given a summary of the facts by an interviewing officer and given an opportunity to consult privately with the client to advise him on the implications of his exercising his right to stay silent. The solicitor is allowed to remain in the interview room and is given a transcript of the interview on its completion.

In Northern Ireland the position is similar except that section 15 of the Northern Ireland (Emergency Provisions) Act of 1987 allows for a restriction of the right of access to a solicitor in relation to certain terrorist offences[11].

In contrast, in Ireland, in the context of the 1998 Act, solicitors have been denied the opportunity to give their clients real and effective legal advice while in police detention. Only certain Garda stations have the capacity to conduct audio-visual recording of interviews and interviews are never tape-recorded as they are in the UK. The position in relation to note-taking during interviews was dealt with in the 1999 case of *Deaglan Lavery v The Member-in-Charge, Carrickmacross Garda Station*[12]. This case has sought to explore the rights of individuals in custody in the context of the 1998 Act and the effect of that legislation on the right to silence.

Deaglan Lavery v The Member-in-Charge, Carrickmacross Garda Station

Mr Lavery was arrested under Section 30 of the Offences against the State Act, 1939, on suspicion of being a member of an unlawful organisation and was brought to Carrickmackross Garda Station.

An hour after his arrest he spoke on the telephone to his solicitor, Mr MacGuill, who gave him general advice including advice regarding his obligations under the 1998 Act. Mr MacGuill further requested that the interviews with his client be audio-visually recorded, or in the alternative, that complete notes be taken and made available to Mr Lavery and Mr. MacGuill prior to the end of the detention period. Both of these requests were refused.

Mr Lavery was detained for a total period in excess of 60 hours pursuant to Section 30 of the 1939 Act. During that period he met with his solicitor twice. He deposed that during the interviews with Gardai, notes were taken which did not record all the questions put and answers given.

Mr MacGuill sought such notes as were made from the Garda Siochana on a number of occasions so that he could advise his client as to whether or not the questions posed or answers given, exposed him to prosecution under Section 52 of the 1939 Act or Section 5 of the 1998 Act. He was repeatedly refused access to the notes.

"One would be forgiven for believing that such an extraordinary attack on the constitutional right to silence would surely be tempered by strong safeguards to prevent abuse of the system."

The point at issue in the case was whether this refusal rendered the detention of Mr Lavery unlawful. In the High Court, McGuinness J. having heard the application for habeas corpus considered that in the light of the new obligations under the 1998 Act, persons in custody should have access both to legal advice and to notes taken of Garda interviews. This would allow the individual and his solicitor the opportunity to make an informed legal assessment of the information the detained person was obliged to volunteer in light of the questions that have been posed.

The learned judge ordered the release of the Applicant. The decision was appealed to the Supreme Court. O'Flaherty J., delivering the judgement of the Court, overturned the judgment of the High Court and held that the refusal of access to the interview notes did not render unlawful the detention of Mr Lavery.

The Court considered that the right of a detained person to reasonable access to a solicitor was "beyond doubt". At page 9 of his judgement O'Flaherty J. said

"Without any doubt, if a person in custody is denied blanket access to legal advice then that would render his detention unlawful[13]."

However, the court would not go so far as to consider that Gardaí should give solicitors of persons in custody "regular updates and running accounts of the progress of their investigations". Nor are solicitors entitled to prescribe the manner in which interviews may be conducted nor what notes should be taken. Further, the bald statement was made that "The solicitor is not entitled to be present at the interviews[14]".

The Court pointed out that had Mr Lavery been charged following the detention (under section 52 of the 1939 Act or section 9 of the 1998 Act), he and his legal advisors would have been entitled to view all relevant documentation including such interview notes as came into existence. The case of *Paul Ward v Special Criminal Court*[15] was cited to this effect. It is respectfully submitted that the purpose of the request for the notes was to prevent the commission of an

offence under the Acts by failing to disclose a material fact or information. Therefore, it would hardly have benefited Mr. Lavery to view the notes after he had been charged.

The overall effect therefore, of the *Lavery* case, is that while the 1998 Act encroaches seriously upon the right to silence of a person in custody, there is to be no adequate safeguards to protect the person in custody from an abuse of the system.

Compatibility with The European Convention on Human Rights

The Supreme Court judgement in Lavery must be assessed in the light of the ECHR decision in *Murray v United Kingdom*[16]. In that case the provisions of the Criminal Evidence (Northern Ireland) Order 1988 which allowed adverse inferences to be drawn from the silence of the accused was upheld on the basis that they merely created "a formalised system which aims to allow common sense implications to play an open role in the assessment of the evidence"[17]

John Murray was denied access to any legal advice for the first 48 hours of his detention under the 1988 Order. He was interviewed by the police on twelve occasions without the attendance of his solicitor. When he was finally granted access he was advised to remain silent because his solicitor would not be permitted to remain during questioning. At his trial strong inferences adverse to Mr. Murray were drawn by the trial judge.

"The 1998 Act represents a very serious encroachment upon the right to silence."

It was argued before the ECHR that where it was possible to draw inferences from an accused's failure to answer questions put while in custody it was extremely important that such person in custody have the benefit of legal advice at an early stage.

The court considered that notwithstanding that the denial of access to a solicitor was lawful pursuant to Section 15 of the Northern Ireland (Emergency Provisions) Act 1987, it was a breach of fair procedures and denied the accused his right to a fair trial which right is protected by Article 6 of the European Convention of Human Rights.

The court identified (at paragraph 66) the fundamental dilemma which faces a person in custody:

> "If he chooses to remain silent, adverse inferences may be drawn against him. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him."

Without the benefit of legal advice this dilemma becomes a very serious problem. So

> "under such conditions the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation".

Those who hoped that the *Murray* decision would stem the tide of short-sighted legislation and related case law confirming the erosion of the right to silence, were disappointed. Rather, the decision copper-fastens the compatibility of legislation which either allows inferences to be drawn from a persons silence or which limits a person's access to legal advice, with the Convention. It was only a combination of drawing inferences from an accused's silence and limiting his access to legal advice which would give rise to incompatibility with the Convention. The Court considered that a limited delay of access to a lawyer is permissible provided that the restriction does not deprive the accused of a fair hearing[18]. In the circumstances of *Murray*, the delay did deprive the accused of a fair hearing because of the restriction of the right to silence and the "fundamental dilemma" which the accused faced.

The overall principle which could perhaps be gleaned from *Murray* is that when a person may be exposed as a result of remaining silent, he should at the very least be granted access to legal advice from the initial stages of the questioning. To consider the facts of *Lavery v Members-in-Charge, Carrickmacross Garda Station,* it is clear that Mr Lavery did in fact have legal advice from the early stages of his detention. It could said therefore that the Supreme Court decision falls squarely within the principles of Murray.

However, the *Murray* decision did go a step further than *Lavery* as while in *Murray,* the ECHR was willing to identify the problems which a person in custody faces as a result of the invasion of his right to silence and to consider the circumstances of his detention in light of those problems in *Lavery* the court was not even prepared to recognise the need for any special treatment for those exposed under the new legislation.

Conclusion

The 1998 Act represents a very serious encroachment upon the right to silence. The position of a person in custody in Ireland is quite clear as a result of the decision of the Supreme Court in *Lavery v Member-in-Charge, Carricmacross Garda Station.* The detained person has a right to access to legal advice from an early stage of his period of detention. He does not have a right to have his solicitor present with him during interview or questioning. He does not have a right to demand that the interview or questioning be audio-visually recorded and if notes of the interview are kept they do not have to be comprehensive and certainly do not have to be furnished to the detained person or his legal advisor.

Whilst the law as stated by the Supreme Court in *Lavery* in relation to the role of solicitors during the interview process may not fall foul of the European Convention on Human Rights, it does little to protect the individual in custody faced with the fundamental dilemma identified by the ECHR in *Murray.* The presence of a solicitor and the full recording of interviews would go a long way to protect the Gardai from accusations of abuses of their powers under the 1998 Act. It would further more counteract the unrealistic burden placed on a person in custody by the 1998 Act. •

1 Unreported decision of O'Flaherty j., for the Supreme Court, of 23rd February 1999

2 Section 2 provides as follows;

(1) Where in any proceedings against a person for an offence under Section 21 of the Act of 1939 evidence is given that the accused at any time before he or she was charged with the offence, on being questioned by a member of the Garda Siochana in relation to the offence, failed to answer any question material to the investigation of the offence, then the court in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence, but a person shall not be convicted of the offence solely on an inference drawn from such a failure.

(2) Subsection (1) shall not have effect unless the accused was told in ordinary language when being questioned what the effect of such a failure might be.

(3) Nothing in thus section shall, in any proceedings-

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged, in so far as evidence thereof would be admissible apart from this section or

(b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused from which could properly be drawn apart from this section.

(4) In this section-

(a) references to any question material to the investigation includes references to any question requesting the accused to give a full account of his or her movements, actions, activities or associations during a given period,

(b) references to a failure to answer include references to the giving of an answer that is false or misleading and references to the silence or other reaction of the accused shall be construed accordingly.

(5) This section shall not apply to the failure to answer a question if the failure occurred before the passing of the act.

3 Section 5 provides as follows:

(1) This section applies to -

(a) an offence under the Acts
(b) an offence that is for the time being a scheduled offences for the purposes of Part V of the Act of 1939,
(c) an offence arising out of the same set of facts as an offence referred to in paragraph (a) or (b), being an offence for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment, be punished with a term of 5 years or by a more severe penalty.

(2) Where in any proceedings against a person for an offence to which this section applies evidence is given that the accused-
(a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Siochana in relation to the offence, or

(b) when being charged with the offence or informed by a member of the Garda Siochana that he or she might be prosecuted for it tailed to mention any fact relied on in his or her defence in those proceedings, being a fact which in the circumstances existing at the time he or she could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, then the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or subject to the judge's directions the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure is material, but a person shall not be convicted of an offence solely on an inference drawn from such a failure.

(3) Subsection (2) shall not have effect unless the accused was told in ordinary language when being questioned, charged or informed, as the case may be, what the effect of such a failure might be.

(4) Nothing in this section shall, in any proceedings-

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged, in so far as evidence thereof would be admissible apart from this section, or

(b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could properly be drawn apart from this section.

(5) This section shall not apply in relation to a failure to mention a fact if the failure occurred befure the passing of the act.

4 Section 9 provides as follows:

(1) A person shall be guilty of an offence if he or she has information which he knows or believes might be of material assistance in -

(a) preventing the commission by any person of a serious offence, or

(b) securing the apprehension, prosecution or conviction of any person for a serious offence and fails without reasonable excuse to disclose that information as soon as is practicable to a member of the Garda Siochana.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding five years or both.

(3) In this section "serious offence" has the same meaning as in Section 8.

5 This section was upheld in *Heaney and McGuinness v Ireland* [1997] 1 ILRM 117

6 In *Heaney and McGuiness v Ireland* it was held that the locus of the right to silence was Article 40.6.1.i.

7 The Steering Committee on Audio and Audio/Video Recording of Garda Questioning of Detained Persons in its 2nd Interim Report published March 1999 recommended the introduction of audio- and video-recording of all interviews with persons detained in custody in all Garda Stations. It remains to be seen whether such recommendations if implemented would address the underlying problem of the 1998 Act.

8 *Subsection* 2 of section 2 and subsection 3 of section5

9 [1990] 2 IR 73

10 see *Lavery, supra*

11 In material part, Section 15 provides as follows:

(1) a person who is detained under the terrorism provisions and is being held in police custody shall be entitled, if he so requests, to consult a solicitor privately.

(2) A person shall be informed of the right conferred on him by subsection (1) as soon as is practicable after be has become a person to whom the subsection applies

(3) A request made of a person under subsection (1), and the time at which it is made, shall be recorded in writing unless it is made by him while at a court and being charged with an offence.

(4) If a person makes such a request, he must be permitted to consult a solicitor as soon as practicable except to the extent that any delay is permitted by this section.

(8) An officer may only authorise a delay in complying with a request under subsection (1) where he has reasonable grounds for believing that the exercise of the right conferred by that subsection at the time when the detained person desires to exercise it...

(d) will lead to interference with the gathering of the information about the commission, preparation, or instigation of acts of terrorism; or

(e) by alerting any person, will make it more difficult

(1) to prevent an act of terrorism, or

(2) to secure the apprehension, prosecution or conviction of any person in connection with the commission, preparation or instigation of an act of terrorism

12 *supra*

13 The court referred to a number of cases relating to the right of reasonable access to a solicitor; *Re Emergency Powers Bill, 1976* [1977] IR 159; *The People v Shaw* [1982] IR 1 and *The People (D.P.P.); v Pringle & Ors* 2 Frewen 57

14 at page 10 of the judgement

15 [1998] 2 ILRM 493

16 [1996] 22 ECHR 29. See also the case of *Funke v France* [1993] 16 EHRR 297.

17 This is a quote from the Commission decision set out by the ECHR at paragraph 54 of the ECHR judgement.

18 The ECHR in *Funke v France* located the right to silence in Article 6(1) of the European Convention of Human Rights which guarantees a fair trial.

TRIBUNALS

Colm O'h'Oisin BL considers some of the difficulties arising from the clash of the inquistorial and adversarial cultures in our system of Tribunals of Inquiry

"A Tribunal is not a Court of law - either civil or criminal. It is a body - unusual in our legal system - an inquisitorial Tribunal. It has not an adversary format.[1]"

The function of a Tribunal of Inquiry is to inquire into definite matters which have been resolved by the Houses of the Oireachtas to be of urgent public importance and to report back to the Houses of the Oireachtas. In order to fulfil this purpose the Tribunal is given "exceptional inquisitorial powers". The inquisitorial nature of such a Tribunal contrasts greatly with the nature of Court proceedings, whether civil or criminal. According to the Report of the United Kingdom Royal Commission on Tribunals of Inquiry, 1966 ("the Salmon Report"):

> "There are important distinctions between inquisitorial procedure and the procedure in an ordinary civil or criminal case. It is inherent in the inquisitorial procedure that there is no lis. The Tribunal directs the Inquiry and the witnesses are necessarily the Tribunal's witnesses. There is no plaintiff or defendant, no prosecutor or accused; there are no pleadings defining issues to be tried, no charges, indictments or depositions.[2]"

This type of inquisitorial procedure is completely alien to our common law culture. Distrust of the inquisitorial procedure is evident in the following passage from the Salmon Report:

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

These comments have been adopted by the Irish Courts in a number of decisions concerned with Tribunals. For instance, in *Charles Haughey & Others v. Mr. Justice Michael Moriarty & Others*[3], the Supreme Court specifically cited the passage and continued on at page 112 of the Court's Judgment as follows:

> "[Historically] ... both in the United Kingdom and in Ireland, the principal function of such Tribunals has been to restore public confidence in the democratic institutions of the State by having the most rigorous possible Inquiry consistent with the rights of the citizen into the circumstances which gave rise to the public disquiet ... the underlying policy of the 1921 Act, as subsequently amended, is thus not in doubt. It is to provide the machinery, wholly independent of the political process, whereby matters of grave public concern may be investigated and the true facts brought to light."

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Later at page 125 of the Judgment the Court stated the following:

> "The effect of such resolutions [that a Tribunal be established] is undoubtedly to encroach upon the fundamental rights of the Plaintiffs/Appellants in the name of the common good. The encroachment of such rights is justified in this particular case by the exigencies of the common good. Such encroachment must however be only to the extent necessary for the proper conduct of the inquiry."[4]

In order to protect against the risks inherent in the inquisitorial procedure, the Salmon Report recommended six cardinal principles which it said should be strictly observed. They were as follows:

> "1. Before any person becomes involved in an Inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
>
> 2. Before any person who is involved in an Inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of him.
>
> 3. (a) He should be given an adequate opportunity for preparing his case and of being assisted by legal advisers.
>
> (b) His legal expenses should normally be met out of public funds.
>
> 4. He should have the opportunity of being examined by his own

Solicitor or Counsel and of stating his case in public at the Inquiry.

5. Any material witnesses he wishes to call at the Inquiry should, if reasonably practicable, be heard.

6. He should have the opportunity of testing by cross examination conducted by his own Solicitor or counsel any evidence which may affect him." [5]

In Ireland the Courts have regularly asserted that Tribunals should be conducted in accordance with fair procedures and the principles of constitutional justice.[6] The principal authority on fair procedures in this context in Ireland is *Re Haughey*[7] where O'Dalaigh C.J. held, in the context of the Dáil Committee of Public Accounts investigation into the expenditure of the grant in aid for Northern Ireland relief, that:

"A person whose conduct is impugned as part of the subject matter of the Inquiry must be afforded reasonable means of defending himself."

Those means were as follows:

"(a) That he should be furnished with a copy of the evidence which reflected on his good name;

(b) That he should be allowed to cross examine, by Counsel, his accuser or accusers;

(c) That he should be allowed to give rebutting evidence; and

(d) That he should be permitted to address, again by Counsel, the Committee in his own defence."

There is a considerable overlap between these principles and the six cardinal principles referred to above in the Salmon Report. What is also clear is that both the "*Re Haughey*" procedural safeguards and the Salmon Report six cardinal principles are derived from the adversarial system. This is evident from the use of words such as 'accuser', 'allegations', 'case' and 'defence'.

The Irish Courts clearly feel that a purely inquisitorial process would not adequately safeguard the interests of witnesses appearing before such an Inquiry. The grafting onto the inquisitorial process of adversarial mechanisms is not, however, without its difficulties. There can be a tension between the efficiency and effectiveness of a Tribunal and the protection of the rights of witnesses. In recent years in the United Kingdom there has been some efforts made to divest inquiries of some of what was perceived as adversarial baggage. The Scott Inquiry into illegal exports of arms to Iraq attempted to apply exclusively inquisitorial procedures. The procedure at the Inquiry was described as follows by Lord Howe of Aberavon in an article entitled 'Procedure at the Scott Inquiry' [8].

"Throughout the three working years of the Inquiry, all the evidence was adduced in response to questions from Sir Richard Scott himself or from Counsel to the Inquiry, Presiley Baxendale, Q.C. No distinction was drawn by either between examination-in-chief or cross examination of witnesses. There was no cross examination of any witness save by the Inquiry itself, no closing speeches, no face-to-face dialogue between the Inquiry and any representative of the outside world. When I first complained that this was to be an Inquiry at which - as never before in modern times - "defence Lawyers may be seen but not heard", I had scarcely believed myself. But Sir Richard had indeed explicitly discarded almost every one of the established principles."

Sir Richard Scott outlined the justification for the procedures at his Inquiry in a lecture given to the Chancery Bar Association on 2nd May, 1995[9]. His approach can be seen in the following passage:

" In an inquisitorial Inquiry there are no litigants. There are simply witnesses who have, or may have, knowledge of some of the matters under investigation. The witnesses have no "case" to promote. It is true that they may have an interest in protecting their reputations and an interest in answering as cogently and comprehensively as possible allegations made against them. But they have no "case" in the adversarial sense. Similarly there is no "case" against any witnesses. There may be damaging factual evidence given by others which the witness disputes.

There may be opinion evidence given by others which disparages the witness. In these events the witness may need an opportunity to give his own evidence in refutation. But still he is not answering a case against himself in the adversarial sense. He is simply giving his own evidence in circumstances in which he has a personal interest in being believed."[10]

In the course of this lecture Sir Richard Scott rejected the majority of the Salmon cardinal principles as being unsuited to inquisitorial proceedings. He did not, for instance, feel that a witness should have the right to cross examine other witnesses. As regards representation, he accepted that a party should, if they desired, be entitled to have legal assistance available whilst giving evidence, but otherwise rejected the right of the witnesses' Lawyers to participate in the oral hearings. Hence the reference by Lord Howe to "Lawyers being seen and not heard".

"The grafting onto the inquisitorial process of adversarial mechanisms is not however, without its difficulties".

It is fairly clear that without a seismic shift in judicial reasoning in this area, a Scott type approach could not be adopted at a Tribunal of Inquiry in Ireland. It has been accepted however that during the initial stages of a Tribunal the Haughey safeguards do not have the same application. In *Haughey & Others v. Moriarty & Others* at page 169-170 the Supreme Court described the work of the Tribunal as a five stage process. The five stages were as follows:

"1. A preliminary investigation of the evidence available;

2. The determination by the Tribunal of what it considers to be evidence relevant to the matters into which it is obliged to enquire;

3. The service of such evidence on persons likely to be affected thereby;

4. The public hearing of witnesses in regard to such evidence, and the cross examination of such witnesses by or on behalf of persons affected thereby;

5. The preparation of a report and the making of recommendations based on the facts established at such public hearing." [11]

In *Liam Lawlor v. Minister for Justice, Fergus Flood & Others* [12] Kearns J. stated that the "panoply of rights described in *Re Haughey*" did not arise at the investigative stage of the Tribunal's work. He drew parallels in this regard between a Tribunal's work at this stage and the work of an inspector appointed under the Companies Acts. As regards the latter, Shanley J. had stated in *Re National Irish Bank*[13]:

> "I am satisfied that there is no entitlement to invoke the panoply of rights identified by the Supreme Court at the information-gathering stage of the inspector's work. The procedures identified by the inspectors following the outcome of the first stage accord, in my view, with the requirements of fairness and justice and guarantee, where appropriate, the exercise of the rights identified in the Haughey case."

The adversarial elements which have been imported into the procedure of Tribunals of Inquiry serve only one important purpose, namely that of protecting the rights of witnesses appearing before the Tribunal. It is submitted, however, that there is a danger of importing further elements of the adversarial system, unnecessary for protection of witnesses, into the proceedings of a Tribunal. The use of adversarial procedures can blur the inquisitorial nature of the process and create a confusion and tension between the Tribunal and parties appearing at the Tribunal.

The nature of a Tribunal is not just alien to a lawyer. The public often misunderstand the inquisitorial task of a Tribunal, and the fact that it has a purely fact-finding mission. It would seem that

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sections of the public find it difficult to distinguish between a Tribunal and a Court - hence frequently expressed criticisms of the failure of Tribunals to penalise or otherwise sanction parties in relation to whom findings have been made. Given this public confusion, Tribunals of Inquiry must take extreme care to ensure that its procedures are not open to misunderstanding.

In the eyes of a non-lawyer there may not be much to distinguish a Tribunal from a Court. The Chairman of the Tribunal appears to preside over the proceedings in the same way as a Judge. The fact the Chairman is invariably a judge, although not acting in that capacity, does not help matters. The Tribunal's legal team may also be seen as a distinct entity to the Tribunal and as one of the parties to the proceedings. This of course is not the case. Solicitor and Counsel appointed for the Tribunal have no independent role, but are there solely to assist the Tribunal in the five stage process which has been described above.

There is a considerable investigative, administrative and organisational task in the preparatory work before the public hearings of the Tribunal. Vast numbers of documents need to be processed, studied and collated. Statements need to be obtained from many different witnesses and there may be interviews to be conducted. It would be extremely difficult, if not impossible, for the Tribunal to conduct this process on its own. In practice the Tribunal legal team, both Solicitor and Counsel, play a very active role in assisting the Tribunal with this work. Whilst the Tribunal may be assisted in its functions by Solicitor and Counsel, it may not delegate any of those functions to them. A Tribunal has statutory powers under the Tribunal of Inquiry (Evidence) Acts 1921-1998, powers for instance to compel the attendance of witnesses and to examine them upon oath. As was made clear by Kearns J. in *Lawlor v. Flood*, those powers cannot be delegated to Counsel for the Tribunal but must be exercised by the Tribunal itself. In that case Kearns J. quashed an order made by the Sole Member of a Tribunal that the applicant attend at the offices of the Tribunal to answer questions put to him by Counsel to Tribunal. It seemed the Sole Member would not be present during this proposed questioning, which would also be in private.

The type of work described above falls outside the normal scope of tasks which a barrister performs. The Chairman of the Tribunal is not a client in the normal sense. The *Lawlor* case seems to highlight the need for some a proper definition of the role of Counsel in assisting the Tribunal particularly in the preparatory stages of the Inquiry. It will be interesting to see whether the Supreme Court which is due to deliver a judgment in the appeal from Kearns J.'s will provide that definition[14].

Once the public hearings of the Tribunal commence the Tribunal Counsel perform the role of presenting the evidence at the proceedings. In this regard however Tribunal Counsel are not exercising any independent function, but are merely assisting the Tribunal. The Tribunal Counsel have in no sense a prosecutorial role. The examination of witnesses could be performed by the Tribunal itself but there are good reasons why this does not happen. According to the Salmon Report it would be highly undesirable as it would force the Tribunal to descend into the arena and make the tribunal "appear hostile to witnesses whose conduct was being investigated".

It is to be remembered that every witness at a Tribunal is the Tribunal's witness. Some of those witnesses may be represented, others may not. Some witnesses may be in jeopardy as a result of the matters being inquired into by the Tribunal, others may be tendering evidence which is damaging to others, and sometimes there may be an overlap between the two.

However, from the Tribunal's point of view there should be no preference, except for the truth. As was stated by M.C. Harris in an article entitled '*Fairness and the Adversarial Paradigm: An Australian Perspective*'[15]:

> "The function of the investigative body consists as much of exonerating as of blaming the person or body under investigation."

The Salmon Report suggested that witnesses should be first examined by their own Solicitor or Counsel. This is not a practice which has been adopted at Irish Tribunals. The Salmon Report also stated, however, that:

> "No witness should ever be examined and cross-examined by the same Counsel. This presents an air of unreality. The purpose of examination in chief is to establish the evidence being given by the witness. The purpose of cross-examination is to test, and if necessary destroy it. If both these tasks are undertaken by the same Counsel, however brilliant the tour de force, the witness may be perplexed and left with the feeling that he has not been fairly treated".[16]

Different Tribunals of Inquiry have adopted different methods of presenting the evidence. The most established procedure is for the Tribunal Counsel to conduct an examination-in-chief of the witness. This is then followed by a cross-examination by Counsel for parties whose "reputation could be affected by the findings of the Tribunal".[17] Finally the Tribunal Counsel then have the opportunity for any re-examination or cross-examination. In an alternative procedure used in some Tribunals however the examination-in-chief has been dispensed with. The statement of the witness has been taken as read and Counsel for the Tribunal have essentially been free to cross examine from the commencement of the witness' oral evidence.

Particularly when the latter procedure is used there is a danger that accusations may be made that different witnesses are being treated differently by Tribunal Counsel. This risk could be diminished somewhat by insisting that the initial examination by the Tribunal of a witness should be an examination-in-chief. It will of course be argued that reading the statement of a witness into the records saves time. In circumstances however where the proceedings of a Tribunal are given wide media exposure, it is important that the witness' own side of the story as expressed in the statement, be given the same prominence at the proceedings as the cross-examination which challenges or undermines that witness' evidence. Where the Tribunal's Counsel wish to cross-examine, it is submitted that the Salmon Report recommendation should be followed and the cross-examination should be conducted by a different member of the Tribunal legal team. It is important that the Tribunal legal team are perceived as treating witnesses even-handedly. If all witnesses are Tribunal witnesses and yet some are perceived to be treated as 'prosecution witnesses' and others as 'defence witnesses' there will inevitably be tensions in the proceedings. The legal representatives of the witnesses who perceive themselves to be 'Defendants' may well feel compelled to act as if the proceedings were adversarial.

A feature of the workings of the Tribunal which tends to cause confusion as to the role of the Tribunal legal team is the manner Tribunal legal teams have tended to make submissions on the various issues which require rulings during the course of the proceedings. On a superficial level, at least, this is an adversarial process with an adjudication by the Tribunal Chairman based on the competing arguments. The problem however is that, unlike in the adversarial model, the adjudicator between the two competing arguments is not independent. One side of the argument has been presented by the Chairman's own Counsel. Given the necessity for close contact between the Chairman and its legal team, he may well have discussed the issues and expressed his tentative or provisional opinion with those Counsel. There is a danger in those circumstances that the procedure being adopted for legal submission can be misunderstood. Whilst the format being used may look like the adversarial procedure used in Court, it is clearly not. What is the purpose of the Tribunal legal team's submissions? There appear to be two alternatives. Firstly, the submissions may serve the purpose of reciting the tentative or provisional views of the Chairman of the Tribunal on a particular issue, thereby allowing the legal representatives of the witness a fuller opportunity of persuading the Chairman to change from that tentative or provisional view. If this is the case however should the role of the Tribunal's counsel not be expressly stated?

An alternative purpose for the submissions may be to furnish the Tribunal with legal assistance as to the resolution of the matter in issue. One wonders in those circumstances however, whether it is necessary for the Tribunal legal team to proffer such advice at the public hearing, when such advice could be given in private. There is a danger that by making these type of legal submissions the Tribunal legal team is asserting some form of independent identity when it clearly does not have.

Conclusion

Tribunals of Inquiry have been established with greater frequency than ever before in recent years. These Tribunals have highlighted the difficulty in identifying procedures which on the one hand make the Tribunal effective in its mission to ascertain the truth but, on the other hand, preserve the rights of the individual in a satisfactory manner. It is not easy for a Tribunal of Inquiry to combine its role as investigator with that as fact finder. In Lord Denning's report into the Profumo case in 1963 he expressed his dismay at having had to act during that private inquiry as "detective, inquisitor , advocate and judge". Whilst the Profumo inquiry was not conducted under the 1921 Act it is submitted that to some extent Tribunals encounter a similar dilemma. The Tribunal tries to distance itself from 'the arena' by asking its own legal team to perform some of these roles. The High Court decision in the *Lawlor* case however has highlighted problems with a Tribunal attempting to delegate tasks to the Tribunal's Counsel. Perhaps a solution to the problem would be to give at least some of the Tribunal's legal team an independent function under which they would conduct an investigation with 'Inspector like' powers and would be totally detached from the Tribunal. The Tribunal would then be able to hear the evidence as presented by the 'Inspectors' unburdened by any concurrent role as 'detective'. Of course any such change would require a completely new statutory framework. It is also likely that this would lead to a more adversarial format at the Tribunal's proceedings. The crucial test however as to the desirability of any such change is whether it would achieve a more even balance between the two competing interests identified in Sir Richard Scott's paper as being "*on the one hand the requirement fairness and on the other the need for an efficient process*"[18]. •

1 *Boyhan v. Beef Tribunals* [1993] 1 I.R. 210 at 222 per Denham J
2 para. 30
3 Unreported, Supreme Court 28th July, 1998
4 Almost identical language was used in *Redmond v. Flood* [1999] 1 ILRM 241 at250
5 para. 32
6 *See for instance Haughey v. Moriarty* at page 128 of the Judgment.
7 [1971] I.R. 217
8 [1996] P.L. (Autumn) 445 at 446
9 published at [1995] 111 LQR 596
10 at p.598-599
11 at p. 169
12 Unreported High Court, 2nd July, 1999
13 [1999] I ILRM 321 at 343
14 The Supreme Court judgement had not been delivered at date of going to press
15 [1996] P.L. (Autumn) 508 at 513
16 Para. 57.
17 See Report of Inquiry into Beef Processing Industry, para. 36
18 at p.597 of Chancery Bar Association Lecture.

EUROPEAN JUDICIAL ARCHITECTURE:

BACK TO THE DRAWING BOARD

John Cooke, Judge of the European Court of First Instance[1], outlines the "appalling vista of judicial gridlock" facing the European Courts and chronicles some of the measures proposed to tackle the problem.

The Court of Justice is overworked so urgent reforms are necessary - again. Ten years ago the Court of First Instance was set up to relieve the Court of Justice of an increasingly unmanageable case load. But with the accession of three new members in the interim and an unstoppable expansion in litigation at Community level, both courts are now working at the limits of their capacities. So the 'wise men' have once again been called in to reflect on what, if anything, can be done to stop the entire judicial machine grinding to a halt. The ECJ has recently published some of its own thoughts but, if anything, the problem is worse and more intractable this time around.

First the practical problem: the numbers. In the years immediately prior to the setting up of the CFI, the ECJ had been receiving approximately 380 new cases per year and giving judgements in roughly 200. It's year-end stock of pending cases had risen over ten years from about 250 to 550 and the average time taken to process an Article 177[2] reference had gone from six months to eighteen.

On the setting up of the CFI, it recieved 150 existing cases but the ECJ still recieved 385.

Although the jurisdiction of the CFI has been enlarged twice during the period to transfer further categories of case from the ECJ, this trend has continued inexorably.

In 1998, 485 new cases were commenced before the ECJ and 420 cases were disposed of. Its annual stock of pending cases has risen from 580 in 1990 to 750 in 1998. In 1998 the average time for an Article 177 reference had stretched to 21 months. In the CFI the annual figure of 55 new cases had risen to 220 in 1998 and the stock of pending cases had risen from 170 in 1991 to over 1000 at the end of 1998. (This latter figure is however slightly misleading as it includes two large blocks of parallel cases - milk quotas and customs agents - which may eventually be resolved en bloc but the effective stock of pending cases is still in excess of 500.)

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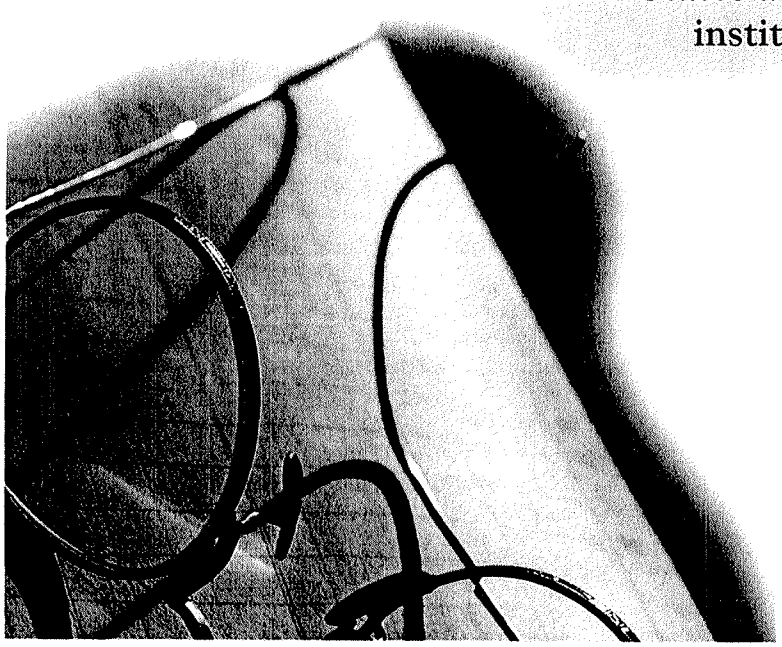

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The position is also complicated by the prospect of major enlargement of the Union within the foreseeable future. If all goes as the Member States currently intend, there will probably be four or five new members within five years. There is the possibility that the Union may have 25 or even 30 member states within a period of 20 years and a population in excess of 400 million.

Apart from the inevitable expansion in potential litigants that this involves, it has two particular implications for the work of the European Court. From now on almost every new member state will bring with it an entirely new language and translation is one of the major exacerbating factors in the existing caseload of both courts. Approximately one third of the personnel of the institution is engaged in translation or related tasks. Cases can be brought in any one of 11 languages and when brought in a language other than the internal working language, French, almost every document thrown up by the case must be translated into the working language.

The written pleadings in a case may close within six or eight months but the reporting judge may well be unable to begin work on it until those pleadings together with several files of annexes have been translated. The Report for the Hearing will be drafted in French but the hearing cannot be fixed until it has been translated. A judgment may well be ready within a few weeks of a hearing but it may not be delivered for several months while the French text is first reviewed by the French *lecteur d'arrets* (literally, the reader of judgments,) checked by a *correcteur* and then sent for translation into the other languages.

The 21 month wait for a ruling on an Article 177 reference is not therefore attributable to judicial indolence so much as to the bottlenecks created when an under-resourced service is expected to meet an ever increasing volume of work.

The expansion of the Union will inevitably involve an increase in the legislative and administrative activities of the institutions with a consequential increase in the flow of judicial review applications and constitutional challenges before the two courts.

In addition to the consequences of the geographic and demographic expansion, there will be further increased litigation brought about by the creation of new institutions (the European Central Bank, for example) and by the new competences the Union has taken on under the Amsterdam Treaty and new conventions. For the CFI there is a threatened deluge of appeals from the new Community Trade Mark Office in Alicante. If even a modest proportion of the decisions of the Alicante tribunals are appealed to the CFI, its case load will double from that source alone within two or three years.

Faced with this appalling vista of judicial gridlock, the two courts reflected internally and in May last presented a 'Document of Reflection' to the Council of Ministers. It describes the extent of the imminent problem and, without taking any particular stand on the optimum solution, sets out a number of tentative remedies. It looks at some steps that might be taken within the existing legislative framework to simplify and accelerate disposal of cases: it suggests some changes that might be made with minor amendments to the existing statutes and then throws out some thoughts on possible long term structural changes which would be possible only with major Treaty amendments.

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It has to be said, of course, that the ECJ finds itself in something of a tactical dilemma in this regard. It must balance its own immediate interest in achieving quick solutions to its practical problems of excess work-load against the need to preserve a coherent approach to the long term evolution of the institution as a constitutional Supreme Court of a European Union. An increased workload can be remedied by throwing additional judges at it. But if the number of judges of the ECJ is to be increased while the tacit principle of one-judge-per-member state is retained, the Court will become so large that it will be incapable of sitting in its full plenary composition to deliver the single final judgment on constitutional issues which has hitherto been considered essential in the interest of ensuring the uniformity of interpretation of Community law.

Furthermore, if the existing number of 15 judges is thought to be the maximum at which the plenary composition can effectively operate, any break with the principle of one-judge-per-member state ought logically to be decided upon before the next expansion of the Union occurs. If the Court expands to 20 judges plus advocates general, it may well be politically impossible to retreat from that position in the future.

There is, thus, a real danger in allowing the immediate pressures of the case load to dictate the adoption of ad hoc, short term solutions which will later make it even more difficult to adopt the fundamental changes required to give the European Union a coherent, effective and easily understood judicial structure. At the end of the day, the only justification for any particular form of organisation of the judicial system of a democratic political entity is that it is the one which best serves the needs of that society in the administration of justice and is best adapted to its social, economic and cultural characteristics.

Some of the Court's suggestions for reform merit the attention and even the concern of practitioners, particularly, I think, in the common law jurisdictions.

For example, as one of its proposals for speeding up the flow of cases, the Court proposes to amend the rules so as to provide that oral hearings will only take place when the Court itself considers it appropriate or when one of the parties makes a reasoned application for a hearing setting out the points on which it is proposed to address the court. It is easy to see that such an amendment could quickly lead to a situation in which the holding of a hearing becomes the exception rather than the rule so that the procedure before the ECJ evolves gradually into an exclusively written procedure. A supreme court which rarely sits in public may be more efficient but it will inevitably be more remote both from the legal profession and the public.
The desirability of such a development ought also to be assessed in the light of the actual working methods of the Court. The pressure of work is such that in many cases, judges other than the reporting judge will be obliged to rely for their knowledge of the case on the summary of the issues contained

in the preliminary report on the case presented to the court or the chamber by the reporting judge. The detailed consideration of the judgment by the members of the court does not occur until the advocate general has delivered his opinion several weeks after the hearing. The hearing, therefore, may be a crucial opportunity for counsel to alert all of the judges to some important nuance or controversial aspect of the case which may not have been apparent from the written pleadings to the reporting judge responsible for drafting the preliminary report.

It may be questionable too whether it is prudent in the present state of European integration radically to reduce the opportunities for European citizens to have actual physical access to the administration of justice at Community level. We have become accustomed to seeing on the television news every now and then some aggrieved victim of social discrimination filmed on the steps of the Court complaining that he or she has had to come all the way to Luxembourg 'to get justice'. Is it wise in the interests of fostering popular acceptance of the Community judicature to reduce the possibility of such occasions?

Ironically, just as the ECJ has been contemplating the elimination of oral hearings as a means of speeding up its through-put, the CFI has been tending in the opposite direction. In order to reduce the delays caused by exchanges of pleadings and resulting translation, the CFI has sought to encourage parties to forego the second round of reply and rejoinder by offering an early hearing and an extended time for addressing the court in the belief that the essential issues, once identified in writing, can be teased out more effectively in the verbal exchanges rather than on paper. (Of course time is relative in this regard: a judicial review hearing which would take two days in the Irish High Court will still take only a morning in the CFI.)

The ECJ also proposes to introduce a fast-track procedure for straight-forward cases arising under Article 177 where the question raised by the national court presents no novel problem and can be replied to on the basis of the existing case law. In such cases it is proposed that the Court should have power to rule on the application by order without proceeding to a hearing and a formal judgment. This seems perfectly reasonable given that large numbers of Article 177 references are banal and unnecessary. It is proposed however that this power would not be exercised without first hearing the views of the parties, the Commission (or other relevant institutions) and the Member States on the point. If speed is the objective, this seems an unnecessary delay if the Court is convinced from the terms of the reference that the answer sought by the national court is self-evident.

It is, of course, this sheer volume and the frequently banal or unintelligible content of the Article 177 references which constitute the nub of the ECJ's workload problem and a large part of its paper is devoted to possible methods of filtering out the dross so that it can concentrate on the direct actions which raise major constitutional issues and on references which raise genuine issues of general importance. This is no easy task. In the first place, the preliminary reference under Article 177 is the one area of jurisdiction which, by virtue of Article 168a (now Article 225) of the Treaty, cannot be delegated to the CFI. Secondly, the procedure is one of the constitutional novelties of the European Community and there is a strong political and judicial attachment to the manner in which it creates a direct relationship between the ECJ and the national courts as a means of ensuring the uniform interpretation and application of Community law.

The Court's paper therefore toys with a number of possible ways of filtering out the more unmeritorious references. One suggestion is to limit the number of national courts which can present Article 177 references either by excluding the lower courts (national courts of first instance) or by confining references to the national supreme courts. The paper inclines against this solution on the ground that the availability of the Article 177 procedure to all national courts is a key factor in

"It is suggested that in lieu of sending a reference for a prliminary ruling to the European Court, a national judge would send it to a court specialised in Community law established or designated for the purpose in his own member state within his own legal system."

achieving the uniform interpretation and speedy application of Community law as a means of underpinning the operation of the internal market and the elimination of discrimination.

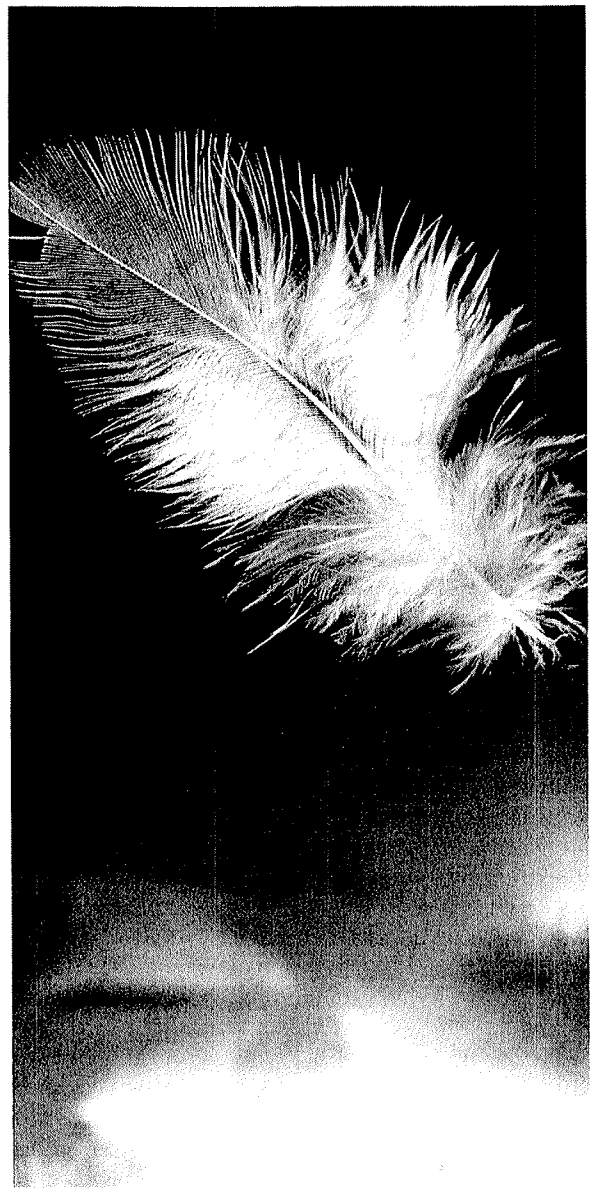
The further possibility of a power, like the U.S. Supreme Court, to simply refuse to rule on worthless cases is also rejected on the basis that it would only deter national judges from making references even in important cases for fear of having their question dismissed as unworthy of the ECJ's consideration. Such a power, even if only sparingly exercised (and therefore of limited use in draining off the deluge) could ultimately rebound to the disadvantage of the Court by undermining the concept of co-operation between the Community and national courts in the application of Community law.

A further variation of the 'filtration' solution which is put forward for debate, is the possibility of requiring the national court to deliver its judgment in a case before the reference is made. The ECJ would thus be examining the Community law question in the light of determined facts as opposed to the inchoate circumstances of many applications which arise under the Article as it stands. The Court would then, in effect, merely consider whether there was reason to interfere with the national judgment having regard to the bearing which its application of Community law had had on the outcome of the case.

Quite how this solution would necessarily effect a reduction in the number of Article 177 references or in the number of unmeritorious cases is unclear. Nor is it clear how such a procedure would fit in with the national appeal procedures. Certainly, it would radically alter the basis of Article 177 itself in that the reference would no longer be for a 'preliminary' ruling but would become a form of alternative or parallel route of appeal for the party dissatisfied with the national judge's decision. If an appeal lay also at national level, of what value are the findings of fact to the ECJ? Which court then suspends its procedure to await the outcome of the parallel appeal, the ECJ or the national appeal court? At least under the existing regime all parties to the case at national level have an interest in getting a quick and final ruling on the issue of European law in order to proceed to the conclusion of their litigation. If the reference arises out of a judgment, the successful party has every

incentive to hold on to that judgment and to frustrate and delay any procedure which might deprive him of his win.

Perhaps the most radical solution suggested is one which appears to turn Article 177 on its head. It is proposed, in effect, to transfer its function back to the national courts. (The people who brought us 'subsidiarity' and the 'communitarisation of Schengen' will no doubt call this the 'de-communitarisation of the preliminary ruling'.) It is suggested that in lieu of sending a reference for a preliminary ruling to the European Court, a national judge would send it to a court specialised in Community law established or designated for the purpose in his own member state within his own legal system. This would have the advantage, according to the paper, of removing the bulk of the cases from the ECJ roll, of avoiding all the language and translation delays and would confer the benefit of having the rulings made by a court wholly familiar with the legal system in which the issue arises.



The paper acknowledges that such a solution would represent a radical derogation from the hitherto sacrosanct principle of the uniform interpretation of Community law. It must also, of course, have serious implications for the primacy of the ECJ itself in its role as final forum of interpretation of Community law. The effect of the proposal must also be somewhat at variance with the original rationale of Article 177, namely the creation of a mechanism which ensured that issues of interpretation of Community treaties and legislation were not left to the vagaries of purely national interpretation but reserved to a single Community-wide body in which the combined experience of all the Union's legal systems was represented.

The paper is undecided as to whether such courts would be established as Community courts on the basis of some Community statute or as national courts established within the domestic judicial branch - presumably in response to some Community directive adopted for the purpose.

While divesting the ECJ of most references, the paper nevertheless acknowledges that in order to minimise some of the risks inherent in this solution, there would have to be some mechanism whereby these special courts would be required to refer to the ECJ all questions of interpretation involving an issue of 'general interest'; or whereby the judgments of these courts could be brought before the ECJ by means of appeal 'in the general interest of the law' pursuant to procedures which the paper leaves undefined. The paper admits that such a system could give rise to divergences from one member state to another but suggests that in order to ensure that the special courts are endowed with sufficient authority, they should be required to be inserted into the national judicial system at its highest level.

It is difficult, on the basis only of the Court's tentative outline of this proposal, to envisage how such an alternative to Article 177 would work in practice especially in Ireland. If it is to be 'inserted at the highest level' one would envisage some adjunct to the Supreme Court. How many judges would it have to have: one, three, five? Would it be a permanent court or merely one convened when needed and whose members would be otherwise engaged elsewhere when there was insufficient work for them? If so, where would they be engaged: Supreme Court or High Court: and in either event how would that effect their ability to sit in judgment on references from either of those courts?

One possible way of dealing with the essential problem of the excess numbers of references of lesser importance without incurring the disadvantages identified in the various 'filtration' solutions is mentioned in passing in the paper but may well merit more detailed consideration. This is the possibility, subject to deleting the second sentence of Article 168a(1) of the Treaty, of devolving jurisdiction under the Article in whole or in part to the CFI. This possibility has been mooted from time to time and was debated even when the CFI was being introduced in the Single European Act. It has always encountered a variety of objections both practical and political.

On the practical side it was felt that direct access from the national courts to the ECJ should be preserved for cases raising issues of constitutional significance or points of interpretation of general interest beyond the particular case. But how could one define such a distinction? One could, for example, define the devolved category by subject matter: all cases about milk levies, bananas or tariff classification would go to the CFI. But who is to say that any of those cases will not also raise a constitutional issue? It is by no means unusual for a reference to raise a wide-ranging plethora of diverse issues.

It was also objected that there would still have to be a right of appeal against the ruling of the CFI to the ECJ so that there would be further complication, delay and expense introduced to the litigation at national level. A further objection is that the finality and uniformity of the ECJ's rulings on the interpretation of Community law would be diminished if a multiplicity of chambers of the CFI are issuing advices to national courts.

My own personal view is that these objections can be met in the manner in which the exercise could be carried out and that they are in any event of far less substance from the point of view of the integrity of the Community legal system than the problems inherent in the other solutions canvassed in the paper.

There is one simple way in which potential references can be divided into two categories for the purposes of limiting those which would have direct access from the national court to the ECJ and it is, in effect, a distinction which can be found in Article 177 itself. This is the distinction based on the origin of the application namely, the distinction between applications for preliminary ruling made by a national court against whose decision there is no appeal and those coming from courts whose eventual judgment will be subject to further appeal. It would be interesting to conduct a comparative survey to verify the fact, but I suspect that only a minority of Article 177 cases are presented by national courts of final appeal and that the bulk of the cases which the ECJ regards as unnecessary, incoherent or ill-prepared emanate from the lower courts. (A very rough analysis of the breakdown by Member State of the 3,902 references introduced since 1961 seems to suggest that less than 20% have come from courts of final appeal)[3].

"There is one simple way in which potential references can be divided into two categories for the purposes of limiting those which would have direct access from the national court to the ECJ and it is, in effect, a distinction which can be found in Article 177 itself."

An amendment providing that all Article 177 cases other than those coming from the national supreme courts or other jurisdictions of final appeal, were henceforth brought before the CFI, would dramatically reduce the number of cases before the ECJ without depriving any national court of access to the Community judicature. At the same time, it would ensure that those applications made directly to the ECJ will more likely be better prepared, be genuinely necessary and will arise in cases already reduced to issues of law by their progress through the national court system.

Nor does there seem to be any reason in principle why the parties to a case should have an automatic right of appeal in respect of a ruling under Article 177 from the CFI to the ECJ. The Article 177 procedure is essentially advisory in character, although, of course, its ruling on the interpretation of Community law is binding on the national court. The European Court does not decide issues in the national litigation: it advises the national judge on the point of construction of Community law and remits the answer for him to apply. Once there is the possibility of further appeal at national level, there does not seem to be any constitutional reason why such an immediate appeal at Community level should be available at the instance of one of the parties. One might, perhaps, consider the possibility of allowing the national judge, either on his own initiative or on the application to him by the parties, to refer the CFI ruling for reconsideration by the ECJ if he thought it crucial to his judgment or desirable in order to obviate further litigation at national level. Otherwise, however, the fact that the parties can pursue the case to the final court of appeal in the national system should suffice to ensure that truly contentious issues could still reach the ECJ where the CFI's ruling had failed to resolve them.

If experience shows that many Article 177 cases raise issues that can be answered by reference to existing jurisprudence or involve interpretation of technical legislation of importance only to limited sectors, there can be very little objection to the cases being dealt with by the CFI rather than the ECJ. Almost every judgment of the CFI involves the interpretation of some aspect of Community law or legislation: only a small percentage of its judgments are appealed and only a tiny proportion are overturned for having got the law wrong. If all the majority of first instance judges at national level need in many cases is authoritative guidance on an issue of interpretation and which is frequently available in settled jurisprudence, there seems no reason why that function cannot be adequately performed by the CFI.

Devolving the majority of Article 177 references to the CFI on the basis of a distinction as to the origin of the reference rather than the content or subject matter of the issue raised, has the advantage that the procedure is easily understood and simple to apply in much the same way as the distinction made for the purpose of the direct annulment actions under Article 173 (now Article 230) between those brought by institutions or member states and those brought by private parties.

It is arguable, of course, that devolving part of the Article 177 function to the CFI would alter the nature of the relationship with the national courts in that, while the rulings of the CFI on interpretation would be authoritative and still, presumably, binding on the national judge, they would lack the finality of the existing rulings of the ECJ so long as the possibility of later reconsideration by the ECJ exists.

A case that has thrown up a novel or controversial interpretation might not proceed further at national level and not then reach the ECJ. This might frustrate academics and irritate constitutional purists but it is a situation that frequently arises in many national systems. A High Court judgment may well stand as the only authority on a particular point for many years until chance or a fresh case afford the Supreme Court the opportunity to affirm or overrule it. (Thirteen years elapsed between *Candler & Co. v Crane, Christmas & Co.*, and *Hedley Byrne & Co. v Heller & Partners Ltd.).*

Finally, the transfer of that part of the Article 177 jurisdiction to the CFI is more consistent with facilitating the likely long-term evolution of the structure of the judicial institution. Whatever practical and political problems there may be about increasing the size of the ECJ's composition, there is no obstacle to increasing the number of judges in the CFI according as expansion of the Union and the increase in litigation requires. Indeed, it seems highly probable that a Union with 25 member states and a population of over 400 million will need a lower tier jurisdiction of at least fifty judges and may well require some form of regional or circuit system of organisation designed to make access easier and to alleviate the language problems.

From the point of view of building a coherent constitutional structure for the 'judicial architecture' (as the Community jargon would have it,) it seems very clear that the characteristics of such a Union will require a two tier organisation in which the lower tier is efficient, accessible and constituted so as to be popularly accepted as competent, impartial and immune from any element of national bias.

It is also clear that in such a Union the upper tier should ideally consist of a single court of final appeal and constitutional review which is sufficiently representative of the legal systems of the Union to be able, when sitting in its plenary composition, to resolve with authority the great constitutional controversies which arise from time to time in all democracies and which are often so acute that the political and legislative institutions are incapable or unwilling to resolve them. The need for such a unique source for ensuring the uniform interpretation and impartial application of constitutional rules is all the greater in a Union which will be far larger than the United States while lacking many of the unifying characteristics of common nationality, language and experience which serve to relieve constitutional tensions.

That then is the final dilemma. How can the existing structure evolve to respond to the needs of 25 or more member states speaking over 15 languages? Ideally, a European Supreme Court should comprise, at most, nine or eleven judges so as to ensure that it can sit and deliberate effectively as a single chamber in the cases of greatest constitutional importance. It is generally accepted that with 15 judges at the moment, the Court is operating at the limit from this point of view. Politically, however, it is likely that there is now no going back from this position so that any eventual European Supreme Court is most likely to have 15 judges. The expansion of the Union therefore involves a break from the principle of one-judge-per member state. It is at this point that national self-interest confronts constitutional feasibility and not necessarily in a negative sense. There may well be sound reasons for ensuring that no member state is given the excuse of claiming that its interest is unrepresented within the composition of the Court. One could well imagine the tension that could be created if one of the recurrent disputes over the sittings of the European Parliament fell to be resolved by the ECJ at a time when, as a result of rotation, lot or otherwise, there was no member of the court from one or more of the three protagonist states, Belgium, France or Luxembourg.

Although politically sensitive, the issue is not insoluble. The composition of the Court includes the advocates general, at present nine in number. Thus, if membership of the institution rather than the presence of a judge as such is taken as the basis of reflecting the national interest, the Union could expand to 24 Member States without the need to make any increase in the overall size of the court. If one thinks, therefore, of a collegiate supreme court in which the number of members (judges plus advocates general,) is equal to the number of member states, it should not be beyond the ingenuity of the draughtsmen to devise a system in which the Court could function efficiently as a plenary composition of 13 or 15 judges while having additional members acting as advocates general.

When the CFI was established in 1989 no additional advocates general were provided for. Instead, when the CFI considers that a particular case requires the benefit of an advocate general's opinion, one of the judges is nominated to fulfil that role for that case. (It has only ever happened twice.) The concept of the interchangeability of the positions of judge and advocate general, thus, already exists within the system and there does not appear to be any reason of constitutional principle why it might not be adapted to solve the problem of the ECJ. Thus, within a college of members of the ECJ the first 15 (or whatever lesser number was thought acceptable) in order of seniority or annual rotation would constitute the plenary composition of the court for the major constitutional issues. No doubt a convention could develop or even be laid down whereby, for a case of particular sensitivity for a member state unrepresented by a judge at a given point, that state's member of the college would be designated as the advocate general for the case.

These are, however, issues of extreme political sensitivity for the Member States and a considerable leap of political faith will be required if they are to be resolved. In a way, the ECJ is the victim of its own success in this regard. The numerous occasions on which its judgments have pressed ahead the objectives of the Treaty when the legislative and executive institutions were unable or unwilling to confront the issues, have given it an authority and standing such that the Member States and especially the large ones, will be reluctant to relinquish any perceived influence over its composition and deliberations. •

"Ideally, a European Supreme Court should comprise, at most, nine or eleven judges so as to ensure that it can sit and deliberate effectively as a single chamber in the cases of greatest constitutional importance."

1. The author is a judge of the Court of First Instance. The Views expressed are entirely Personal.

2. I know: Article 177 is now, post Amsterdam, Article 225 but I am slow to adjust and it seems easier to retain the former numbering when written about pre-Amsterdam conditions and events.

3. See table 18 of the 1998 Annual Report of the Court.

MINIMUM NOTICE - *BOLANDS v. WARD* RECONSIDERED

Donal O'Sullivan B.L analyses the recent High Court decision in The Bell Lines cases which considered the requirments for effective notice of termination of employement.

Introduction

The Minimum Notice and Terms of Employment Act was enacted in 1973. The common law provided protection for workers on the termination of their employment by requiring an employer to give to an employee notice of such a termination. The length of such a notice varied according to whether the employment was from week to week or month to month and so on. The Act did not alter the requirement to give notice, rather it introduced certain minimum periods of notice, the length of which depended on the employee's length of service. The key section is s.4(1) which provides:

> An employer shall in order to terminate the contract of employment of an employee who has been in his continuous service for a period of thirteen weeks or more, give to that employee a minimum period of notice calculated in accordance with the provisions of subsection (2) of this section.

However, nowhere does the Act state precisely what constitutes a 'notice', or the requirements a 'notice' must comply with to be valid under the Act. This lack of a statutory definition has resulted in the requirements of a 'notice' being left to the courts and the Employment Appeals Tribunal to define[1]. No cases reached the courts until the mid-1980s. However, the Employment Appeals Tribunal (hereinafter EAT) had been busier, and had decided a number of cases on the point. In *McAuley v. McGee* (1983)[2] the EAT held that the notice must have absolute certainty about it. In *Mullen v. Coras Iompair Éireann* (1980)[3] the EAT held that in particular the precise date of expiry must be stated. If a number of weeks pass after the expiry date, the notice is deemed to have lapsed. However, when the issue finally came before the courts, the situation was changed utterly.

Bolands v. Ward

In *Bolands Ltd. v. Ward*[4] the courts were concerned with the closure of the well known Dublin bakery, Bolands. The bakery had gone into receivership and the employees had been given their statutory notice entitlements. However, the receiver decided to attempt to carry on the work of the bakery in the hope of selling it as a going concern. To this end each week the employees received a note in their paypackets that their notice was to be extended by a week. This went on for eight weeks, when a final extension was given. The employees claimed that they had not received adequate notice in accordance with the Act, as the notice they had received had run out a number of weeks before their employment had actually terminated and that therefore they were entitled to fresh notice. The last extension was actually their notice and the length of this did not satisfy the requirements of the Act. The EAT agreed. On appeal to the High Court, Murphy J. upheld the decision of the EAT, holding that the Act required that a specific date be nominated in the notice. If the employment is not terminated on that date the employer must be taken as having waived the notice or re-employed the employee. This decision was appealed to the Supreme Court.

The appeal was heard by Henchy, McCarthy and Hederman JJ. Henchy J (Hederman J concurring) stated at page 389 of the report:

> "The form of the notice is not dealt with at all by the Act. The Act does not even require the notice to be in writing. What the Act is primarily concerned with is the length of the notice."

He continued on the same page:

> "The Act is concerned only with the period referred to in the notice, and it matters not what form the notice takes so long as it conveys to the employee that it is proposed that he will lose his employment at the end of a period which is expressly or necessarily implied in the notice. There is nothing in the Act to suggest that the notice given should be stringently or technically construed as if it were analogous to a notice to quit. If the notice actually given - whether orally or in writingconveys to the employee that at the end of the period it is proposed to terminate his employment, the only question normally arising under the Act will be whether the period of notice is less than the statutory minimum."

He also stated at page 390:

> "It is conceded in this case that the receiver acted in good faith in granting the extensions of the period of the first notice. The legal position would be different if a plurality of notices were used to mislead an employee or to subvert the proper operation of the Act."

McCarthy J. in his judgment echoed Henchy J's comments. At page 391:

> "I do not read the statute as making it a statutory requirement other than to include in the notice of termination, however long it may be, the minimum period."

"However, nowhere does the Act state precisely what constitutes a 'notice', or the requirements a 'notice' must comply with to be valid under the Act".

The appeal was allowed and the Supreme Court in so doing overturned the prevailing view of the matter in the EAT. It must be said that the Supreme Court adopted a very pragmatic approach to the interpretation of the section. It is respectfully submitted that the judgment was incorrect. The Court placed great emphasis on the fact that no guidance was contained in the Act. Henchy J. appeared to equate this lack with the loosest possible interpretation, that the notice was not a notice to quit and should not be stringently construed. This is surely wrong. Considering the purpose of the Act (stated by Murphy J. to be to allow an employee a minimum period of time in which to secure alternative employment), and the very great importance of an individual's employment to that person, a certain degree of formality in the form and content of the notice should be required. If a notice is given then should it not contain the specific date that an employment is to terminate? If a receiver decides to issue notice to employees (which he does not have to do) and then decides to keep on the employee beyond the expiry of the notice should he not have to issue a fresh notice? If he was not sure that he wished to let those employees go on those dates, why did he issue those initial notices? Should the employees pay for the receiver's uncertainty? It is respectfully submitted that the Supreme Court failed to adequately address these issues in the *Bolands* decision.

The *Bell Lines* cases

The matter did not came up for consideration by an Irish court again until earlier this year. In the joined cases of *Waterford Multiport Ltd (in liquidation) v. Fagan and ors; Bell Lines Ltd* (in liquidation) *v. Deegan and ors* and *Bell Lines Ltd.* (in liquidation) *v. Boyle and ors*[5] Macken J. considered this issue. The two companies that were in liquidation had run into difficulties in early 1998 (Waterford Multiport was a subsidiary of Bell Lines). In February of that year the companies were put into examinership and a scheme of arrangement was put in place. Pursuant to this scheme many of the employees of the companies were sent letters giving them notice. The letters were phrased in such a way that the notices seemed to be conditional upon the success of the scheme. The letters gave adequate periods of notice under the Act, and they applied to two categories of employee, those whose employment was to terminate in June 1998 and those whose employment would end in November. The employees whose notice was to expire in June were not in fact actually left go when their notice expired, and no express extension was given to them. The scheme however was not approved by the High Court on the 4th of July 1998 and as a result the companies were put into liquidation by order of Shanley J. on the same date. This decision had the immediate effect of terminating the contracts of employment of all the employees of the companies.

The employees alleged that proper notice in accordance with the Act had not been given, as the notices that had been received were conditional on the success of the scheme of arrangement, and therefore as the scheme had fallen, the notices had fallen with it. They brought their claims to the EAT. In two of the cases *(Fagan* and *Deegan)* the EAT unanimously agreed. In the *Boyle* determination the EAT (by a majority) utilised similar reasoning to the other cases, however it also considered the position of employees whose notices were due to expire in June. In relation to these it held that there was no evidence that the notices had been extended beyond the expiry date set forth in them (as in the Bolands scenario) and therefore the employees whose employment had continued after the expiry of their notices had not received proper notice in the absence of such an extension. These decisions were appealed by the companies to the High Court on a point of law. Macken J. heard the appeal in January and February of this year and delivered her judgment in May. In her judgment the Learned Judge outlined the history of the proceedings and considered that the issue of law that she had to decide was simply the following: Did the notices that were issued comply with section 4?

The Learned Judge firstly went through the Supreme Court judgment in *Bolands Ltd. v. Ward*[6] in some detail and came to the conclusion (at page 8 of her judgment):

> "It seems to me that the Supreme Court has clearly stated that what is required under the Act is that the length of notice given is what must be specific, that it is not necessary that the actual termination date be included, but that in no case should the words used not be clear and certain. In the case of the letters used here, the length of time given all other things being equal was wholly lawful. Moreover, the actual date of termination in the notice was certain, namely the 20th of June on the one hand and the 7th of November on the other hand."

This is undoubtedly a correct interpretation of the *Bolands* decision, and it is clear that the letters that constituted the notices in this situation were perfectly lawful. However there were other factors that the respondents claimed swung the pendulum in their favour.

Firstly there was the issue of conditionality of the notices, which had won the day at the EAT. Macken J. answered this contention in the following terms (at page 15):

> "The requirement for notice is met merely by giving appropriately lengthy notice, and no more. Indeed it is quite clear, having regard to the provisions of the Companies Act, 1990, and the manner in which an Examiner's scheme must be prepared and brought to court under that Act, that it would be very difficult to serve a valid statutory notice (under the 1973 Act) in anticipation of a possibly successful scheme, if the notices inevitably fell once the scheme failed because the scheme is always subject to the court's approval. In the *Deegan* and *Fagan* cases the EAT appears to have conceded that the original notices were valid, but that they ceased to be valid when the scheme did not proceed. As a matter of law, having regard to the *Boland* decision, that finding does not appear to me to be well founded."

She further stated on the same page:

> "[the notices] must be looked at prospectively, that is to say, at the date on which the notices are given. The only requirement at law under s.4 is to ensure that the actual notice furnished is of sufficient length. It is also clear from the decision in the *Boland* case that even if viewed prospectively, the notice could still be impugned (despite being of appropriate statutory length) if the notice was given for spurious reasons or mala fides."

She held that in this case this latter consideration did not arise.

A further argument that was raised by the respondents concerned the category of employees whose notice expired in

June, before the liquidation occurred. They were not let go at that time and remained on and so had their employment terminated along with everyone else on the 4th of July when the liquidator was appointed. There were no express extensions of their notices as in the *Bolands* case. Therefore the respondents argued that the employees became re-employed and were thus entitled to fresh notice. Macken J. held (at page 17):

> "An extension of the notice period, howsoever made, or a continuation in employment after the expiry date of the notice, does not in law, have any effect on the lawfulness or otherwise of the notice. The Supreme Court [*in Bolands*] expressly held that the failure of the employer to fire the employees at the time of the expiry of the notice period, did not constitute the employees re-employed by the employers, nor was this failure a waiver of the notice. I do not find in that judgment any suggestion that, absent mala fides or a spurious notice, the statutory requirement covers anything other than length of notice."

Therefore the failure by the employers to ensure that those employees whose notice ran out in June actually left does not mean that those employees were re-employed or had their contracts renewed. Macken J rejected all arguments put forward by the respondents and allowed the appeal.

Analysis

Was Macken J. correct in allowing the appeals? Great emphasis was laid on *Bolands v. Ward* by Macken J. Her interpretation of the ratio of that judgment is completely correct and the High Court was bound by the law as previously determined by the Supreme Court.

However, it is submitted that Macken J. could have distinguished the *Bolands* case as the facts of the cases before her were different in two material respects. Firstly, there was the question of conditionality, and secondly there was the issue of whether the June employees who were kept on after the expiry of their notices had become re-employed.

Regarding the conditionality issue, Macken J. held that the fact that the notices were conditional upon the success of the scheme did not mean that the notices were invalid. This is of course true. The notices were perfectly acceptable and if the scheme had been successful would have fulfilled the statutory requirements. However, despite the conditional phrasing of the letters Macken J. held that they were still valid, and seemed to do this on the basis that it would be very difficult to issue valid notices in the context of an examinership if she held that the notices in this case were invalid. It is submitted that this view is incorrect. Notices that did not refer to the examinership could have been issued. They would have been just as effective. If an examiner sees fit to issue notices that are phrased in such a manner as to make them conditional on the success of a scheme of arrangement, then why should he not be held to that? If the scheme failed, then the notices which were phrased (unnecessarily) in terms of that scheme by the examiner should fall with it. *Bolands* never stated that notices which initially were valid could not be held to be invalid due to later circumstances. There is no general legal principle that states that a document once held to be valid cannot become invalid due to later circumstances[7].

As regards the re-employment issue, Macken J. appears to have taken the view that because in *Bolands* the employees were not let go on the expiry of their notices that this establishes a principle that employees are not re-employed after said expiry. However this is overlooking the important point that in *Bolands* the receiver expressly extended the notices each week. No such extensions occurred in these cases. Some support for her view can be found in the judgment of McCarthy J. in that case where he stated:

> "The subsequent weekly extension or postponement of such notice did not negate the compliance by the employer with the requirements of s.4."

However, this comment is founded in the weekly extensions that occurred in that case. As nothing of that sort occurred here it is arguable that Macken J. was incorrect in her finding in this aspect of the case and these employees did in fact become re-employed and were therefore entitled to fresh notice.

Conclusion

For the reasons set forth above it is submitted that Macken J.'s judgment in this case is questionable in two important aspects. Whilst the Learned Judge correctly interpreted the requirements of a notice under the 1973 Act, she failed to adequately take into account the other factors that existed in this case. Simply because the notices that were issued in this case were at one time valid does not mean that they remain so irrespective of all later developments. And if a notice expires and an employee remains on at the workplace performing his or her daily duties then in the absence of an express extension (be it oral or written) of the notice, the original notice should not be kept alive. In the absence of statutory intervention, it is inevitable that hard cases like *Bolands* and *Bell Lines* will come before the courts. It is to be hoped that the Oireachtas will intervene to clarify this narrow but important area of our employment law. •

It is submitted that Macken J. could have distinguished the Bolands case as the facts of the cases before her were different in two material respects

1. s.12 nominates the Employment Appeals Tribunal as the arbiter of any disputes that may arise concerning the Act. From there an appeal lies to the High Court on a point of law.
2. See "Employment Law in Ireland" (2nd Ed.) Von Prondzynski and McCarthy at page 121.
3. Ibid.
4. [1988] I.L.R.M. 382
5. Unreported, High Court, Macken J, 13th May 1999.
6. See note 5 supra.
7. E.g. The law of contract in the context of mistake where some contracts are voidable, not void.
8. [1988] I.L.R.M. 382 at 391

LegalUpdate

A directory of legislation, articles and written judgments from the 26th July to the 24th September 1999.
Judgment information compiled by the Legal Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative Law

Article
Anti-social behaviour of local authority tenants: when will the authority be liable?
Stack, Siobhan
1999 CPLJI 2

Statutory Instrument
Local Elections (Forms) Regulations, 1999 SI 136/1999

Arbitration

Article
Alternative dispute resolution and the insurance industry
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Undue influence, misrepresentation and guarantees: what is a bank to do?
Donnelly, Mary
1999 CLP 167

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Articles
Investigating child abuse *M.Q. v Robert Gleeson and the City of Dublin Vocational Education Committee and Frances Chance and the Eastern Health Board*
Blake, Teresa
4(8) 1999 BR 362

The Children Act, 1997
O Riordan, Raghnal
4(8) 1999 BR 371

Statutory Instruments
District Court (Custody and Guardianship of Children) Rules, 1999
SI 125/1999

Civil Liberties

Library Acquisition
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Downey, Conor
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Contracts

Articles
Contracting authorities under public procurement rules
Collins, Anthony M
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Contracts for the international sale of goods
O'Neill, Maria 1999 IBL 82
Proprietary estoppel - frustrated expectations and the doctrine of unconscionability. Breen, Oonagh
1999 CPLJI 9

Undue influence, misrepresentation and guarantees: what is a bank to do?
Donnelly, Mary
1999 CLP 167

Conveyancing

Article
Recent developments in conveyancing practice
Sweetman, Patrick
1999 IPELJ 72

Copyright, Patents & Designs

Article
Copyright and Related Rights Bill 1999: defences to copyright infringement
Walley, Pauline
4(8) 1999 BR 366

Copyright: Ireland turns the tables on the United States
Scales, Linda
1999 IBL 77

Internet domain names and trademark disputes
Bolster, Fergus A
1999 ILTR 185

Coroner

Hanley v. Cusack
High Court: McGuinness J.
10/06/1999

Judicial review; certiorari; decision by Coroner to accept a limited post-mortem; whether respondent's decision was ultra vires his jurisdiction; whether decision was contrary to natural and constitutional justice; whether decision was unreasonable; whether relief should be refused as a matter of discretion.
Held: Relief refused.

Credit Unions

Library Acquisition
Quinn, Anthony P
Credit Unions in Ireland
Dublin Oak Tree Press 1999
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Criminal Law

D.P.P. v. Goulding
Supreme Court: Barrington J., Lynch J., Barron J. (ex tempore)
02/07/1999

Bail; remand; temporary release; applicant had pleaded guilty to a charge of attempted robbery; case adjourned for sentence; refusal to grant bail pending sentence; application to High Court for

bail; applicant already serving sentence; no provision allowing remand prisoners temporary release from prison on compassionate grounds; High Court ordered that accused could be admitted to bail if the governor of the prison in which he was detained was satisfied that an emergency existed that justified his release; whether the High Court had authority to make such an order; whether the exercise of a judicial power had been delegated to an administrative officer, the governor of the prison.
Held: Order reversed.

J.L. v. D.P.P.
High Court: **Geoghegan J.**
08/06/1999

Judicial review; rape; delay; delay between alleged offence and complaint; applicant seeking to restrain the continuance of the prosecution; whether applicant's ability to defend himself was so impaired that the trial should not be allowed to proceed.
Held: Application refused.

Articles
Eamonn M. Barnes reflects on the past 24 years as Director of Public Prosecutions
Barnes, Eamonn M
4(8) 1999 BR 389

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Blake, Teresa
4(8) 1999 BR 362

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SI 155/1999

Criminal Justice (Location Of Victims' Remains) Act, 1999 (Independent Commission for The Location Of Victims' Remains) (Privileges And Immunities) Order, 1999
SI 156/1999

Criminal Justice Act, 1999 (Parts I And II) (Commencement) Order, 1999
SI 154/1999

Damages

Curran v. Finn
Supreme Court: **Keane J.*, Murphy J., Lynch J.** (*dissenting)
20/05/1999

Assessment of damages; appellant suffering from multiple sclerosis; appellant suffered personal injury following fall in supermarket; appellant claiming that fall aggravated her multiple sclerosis; damages awarded by trial judge on ground that progression of the appellant's multiple sclerosis was not associated with the accident; trial judge misquoted from hospital admission notes; whether error affected his finding of trial judge as to association between the appellant's multiple sclerosis and the injury sustained.
Held: Appeal allowed. Matter is to be remitted to High Court for reassessment of damages.

Duff v. Minister for Agriculture and Food
High Court: **Laffoy J.**
03/06/1999

Assessment of damages; plaintiff had commenced a development plan under the Farm Modernisation Scheme; first-named defendant had committed an error of law in allocation of quotas under Super-levy scheme; plaintiff suffered loss due to error of law; calculation of loss attributable to lost additional production; whether plaintiff entitled to damages for capital loss; whether plaintiff entitled to damages for future loss; whether plaintiff entitled to general damages.
Held: Special damages and general damages awarded.

Martin v. Byrnes
High Court: **Barr J.**
17/02/1999

Assessment of damages; personal injuries; road traffic accident; liability not in issue.
Held: Damages awarded.

Hogan v. Steel & Co Limited
High Court: **Macken J.**
08/06/1999

Damages; special damages; revenue; plaintiff while employee of notice party had been injured at defendant's premises; plaintiff's action against defendant settled; settlement included sum for lost wages; while out of work plaintiff paid by notice party; plaintiff signed an undertaking to repay money; notice party seeks to recover from defendant sums paid to plaintiff; whether plaintiff suffered lost wages; whether defendant was obliged to pay sum claimed for lost wages; whether plaintiff obliged to repay sums to notice party; whether notice party entitled to recover sums paid for tax and/or PRSI without establishing to the satisfaction of the Court that it was obliged to pay same pursuant to the Revenue or Social Welfare codes; whether the defendant was absolved from liability when plaintiff did not execute undertaking in writing prior to receipt of payments.
Held: Notice party entitled to recover sums paid for lost wages but not sums paid for tax and PRSI.

Education

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Glendenning, Dympna
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Employment

O'Toole v. The Minister for Defence
High Court: **Geoghegan J.**
09/06/1999

Judicial review; certiorari; legitimate expectation; fair procedures; applicant was a member of the armed forces; applicant had been re-graded for medical purposes to a lower grade and consequently discharged; applicant seeking an order of certiorari; whether applicant had a legitimate expectation that he would not be downgraded medically; whether decision to re-grade was an irrational decision; whether there was a breach of natural justice; whether there was a breach of fair procedures in reaching the decision to discharge plaintiff.
Held: Decision to discharge plaintiff was fundamentally flawed and contrary to fair procedures

O' Donnell v. An Post
High Court: **McCracken J.**
18/06/1999

Terms of employment; promotion; plaintiff employed by defendant; terms of employment contained in Leabhair Eolas and in agreement between defendant and Communication Workers Union; plaintiff downgraded from post of Overseer to Post-Office Clerk and excluded from Acting List (Post Office Clerks who may act as overseers in a temporary capacity) for four years as disciplinary measure; plaintiff then restored to Acting List; plaintiff placed in most junior position on Acting List; plaintiff claims he was placed in the incorrect place on the Acting List and consequently missed promotion; whether plaintiff when he was restored to the Acting List should have been given seniority which he would have had, had he been put on the list on the date he was excluded from it; whether plaintiff would have been promoted had he been placed in the correct place on the list.

Held: Plaintiff should have been given seniority on acting list, which he would have had, had he been on the list the date he was excluded from it; this position on the list would not have entitled plaintiff to promotion.

Statutory Instruments
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Environmental Law

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A decade of waste management in Ireland
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Equity & Trusts

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Burton, Gregory
1999 CLP 176

Proprietary estoppel - frustrated expectations and the doctrine of unconscionability
Breen, Oonagh
1999 CPLJI 9

European Communities

Stewart's Foundation Ltd. v. Minister for Tourism, Sport and Recreation
High Court: **Geoghegan J.**
16/06/1999

Public procurement; judicial review, certiorari; prohibition; respondent refused to entertain a tender submitted by applicant for construction of a 50 metre swimming pool; tender dependent on state funding which exceeded maximum set out in letter accompanying contract documentation; maximum amount not specified in invitation to tender documentation; applicant submitted that respondent was introducing new criteria at a late stage contrary to Council Directive No. 93/37/EEC; whether respondent was in breach of Directive; whether maximum state funding is a "criterion" within the meaning of Directive; whether expression "contract documents" includes covering letters; S.I. 36/1992 and S.I. 293/1994.
Held: Relief refused.

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SI 166/1999

European Communities (Amendment) Act, 1998 (Commencement) Order, 1999
SI 167/1999

Extradition

Egan v. Conroy
High Court: **McGuinness J.**
16/03/1999

Extradition; application for order for release; lapse of time; plaintiff escaped from prison in England; an extradition warrant was issued two months after the escape; plaintiff seeks order of release by reason of lapse of time between the commission of offence and issue of extradition warrant; whether court should consider lapse of time between commission of offence and issue of extradition warrant or, lapse of time between escape from prison and issue of extradition warrant; whether there was an excessive lapse in time; whether a warrant which was apparently properly issued in a foreign jurisdiction could be invalidated on the basis of a mere supposition as to the evidence before the justice and his reaction to it; whether the warrant was invalid because all possible information might not have been disclosed to the justice; whether a doubtful assertion as to the evidence before the justice amounted to a 'good reason to the contrary' under Section 55 of the Extradition Act, 1965, so as to rebut the presumption of validity of the warrant; Section 50(2)(bbb) of the Extradition Act, 1965.
Held : Relief refused.

Family Law

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Fisheries

Southwestern Regional Fisheries Board v. Judge O'Leary
High Court: **McGuinness J.**
19/05/1999

Judicial review; certiorari; statutory interpretation; conviction for illegal capture of fish in fresh water; appeal against conviction had been allowed on the basis of law; applicant seeking order of certiorari; whether the phrase "use a net for the capture of fish" requires the actual capture of a fish in order to constitute an offence; Section 95(1), Fisheries (Consolidation) Act, 1959.
Held: Relief granted.

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International Law

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Contracts for the international sale of goods
O'Neill, Maria
1999 IBL 82

Judicial Review

Murphy v. D.P.P.
Supreme Court: **Murphy J.**, Lynch J., Barron J.
24/02/1999

Judicial review; applicants had been convicted of a breach of the peace in District Court; Circuit Court upheld conviction; High Court refused judicial review of Circuit Court decision; whether finding of fact by the Circuit Court on appeal can be subject matter of judicial review.
Held: Appeal dismissed.

Legal Profession

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1999 (July) GILSI 16

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Local Government

Article
Anti-social behaviour of local authority tenants: when will the authority be liable?
Stack, Siobhan
1999 CPLJI 2

Medical Law

Casey v. The Medical Council
High Court: **Kelly J.**
04/06/1999

Judicial review; certiorari; powers of the Medical Council under Part V, Medical Practitioners Act, 1978; decision by respondent regarding fitness to practise found no professional misconduct on the part of the applicant; later decision of respondent requiring applicant to comply with a number of conditions in order to have his name retained on the General Register of Medical Practitioners; applicant seeking order of certiorari to quash later decision; whether ss. 47, 48, Medical Practitioners Act, 1978 can be applied in the absence of a finding of professional misconduct; whether respondent acted ultra vires its powers.
Held : Relief refused.

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O'Halloran, Ray
1999 3(2) IILR 41

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Planning

TDI Metro Limited v. Judge Delap
High Court: **McGuinness J.**
09/06/1999

Judicial review; certiorari; powers of planning authority to prosecute criminal offences under planning legislation; applicant seeking an order of certiorari quashing conviction; applicant had been prosecuted by notice party; whether notice party had statutory power to prosecute or to commence prosecution in respect of an indictable offence.
Held : Relief granted.

Articles
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Grace, Michael
1999 IPELJ 57

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Galligan, Eamon M
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The draft retail planning guidelines
Spain, John
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Practice & Procedure

Hayes v. Callanan
High Court: **Smith J.**
25/03/1997

Practice and procedure; estoppel; negligence; plaintiff seeking damages for personal injuries; plaintiff had been awarded damages for material injury; whether claim for personal injuries was barred by cause of action estoppel; whether defendant entitled to plead accord and satisfaction by reason of payment of sum decreed in original action; whether more than one set of proceedings can arise out of one accident; whether second set of proceedings can be entertained by the Court.
Held : Court can entertain proceedings.

Brennan v. The Western Health Board
High Court: **Macken J.**
18/05/1999

Practice and procedure; delay; motion to strike out on grounds of delay; personal injury to infant plaintiff; proceedings commenced in third year after plaintiff came of age; whether delay was inordinate and inexcusable; whether infant plaintiff should be fixed with delay on part of parents or guardians; whether it unjust in all the circumstances to require the defendant to defend the case.
Held : Motion granted.

O'Reilly v. Daly
Supreme Court: O' Flaherty J., Barrington J., Murphy J.
11/02/1999

Res judicata; dispute regarding joint venture agreement to build a fish farm; plaintiff alleging that first named defendant lured him into agreement by false pretence and deceit; plaintiff seeking damages and injunction restraining defendants from finalising or making any court orders in relation to plaintiff's property; plaintiff had previously been ordered to give up vacant possession of property to facilitate sale thereof; subsequent order permitting sale of plaintiff's property by private treaty; plaintiff had failed to take an appeal against these orders within permitted time limit; plaintiff had made several attempts to prevent enforcement of orders for sale; whether plaintiff's claim was now res judicata.
Held: Purpose of proceedings was to reopen matters already determined by Circuit Court from which no appeal had been taken within the time limited for that purpose; no further proceedings to be brought in the matter without consent of High Court.

Supermac's Ireland Limited v. Katesan (Naas) Limited
High Court: **Macken J.**
15/03/1999

Motion to strike out claim; inherent jurisdiction; plaintiff seeking specific performance of

contract to purchase property from defendant; defendant seeking to strike out claim; whether it could be established from proceedings that claim was vexatious or frivolous; whether arrangements reached between parties could not possibly constitute an oral agreement; whether the possible oral agreement was unenforceable because it did not satisfy Statute of Frauds; O.19 r.28, Rules of the Superior Courts.
Held: Application dismissed.

Bolger v. O'Brien
Supreme Court: Hamilton C.J., Denham J., Barrington J., Keane J., Lynch J.
16/03/1999

Statutory limitation period; statutory interpretation; date of knowledge in respect of personal injury claims; plaintiff knew of injury but not significance of injury; trial judge held personal injury claim was not statute barred; whether claim statute barred; Statute of Limitations Acts, 1957-1991.
Held: Appeal allowed.

McG. v. W.
High Court: McGuinness J.
18/06/1999

Nullity; re-opening of proceedings; joinder of an additional party; Attorney General seeking to be joined as a notice party subsequent to the conclusion of proceedings; whether absence of Attorney General in the original proceedings invalidated declaration of nullity; whether it was open to Court to make a declaration in absence of a proper contradictor; whether Court has the jurisdiction to re-open proceedings and join a new party; whether Court had the jurisdiction to alter a previous order.
Held: Relief refused.

Norbrook Laboratories Ltd. v. Smithkline Beecham (Ireland) Ltd.
High Court: Kelly J.
18/05/1999

Defamation; slander; defendant wished to admit liability in respect of allegation of slander of goods and in respect of certain allegations of defamation; whether it was open to defendant pursuant to O. 22 Rules of the Superior Courts to make a lodgment with an admission of liability in respect of defamation and certain innuendoes while maintaining a defence in respect of others; whether a defence of partial justification in respect of an alleged defamation is possible; whether each innuendo constitutes a separate cause of action allowing a lodgment to be made in respect of each severally; whether lodgment should be a single lodgment . Held: Payment into court by defendant in respect of plaintiff's allegation of slander of goods and in respect of some of the plaintiff's allegations of defamation with an admission of liability is a valid payment and in conformity with O. 22 Rules of the Superior Courts provided that the notice of such lodgment specifies the particular allegations in respect of which payment has been paid; lodgment to be in the form of a single payment

An Bord Altranais v. O' Ceallaigh
High Court: Morris P.
13/05/1999

Application to have proceedings dismissed; delay; applicant midwife had been restrained from engaging in the practice of nursing (including midwifery) pursuant to an interim order made under s.44, Nurses Act; applicant claiming that respondent was failing to prosecute proceedings expeditiously to final judgment; applicant further submitted that respondent did not satisfy statutory prerequisites for commencing proceedings; whether there has been inordinate and inexcusable delay in setting summons down for final hearing; whether court should entertain submissions regarding the respondent's entitlement to obtain the original order under s.44; whether it is appropriate for the issue regarding statutory prerequisites for commencing proceedings to be reargued whenever the interim order is listed for hearing;
Held: Relief refused; direction that Special Summons be listed for hearing at the first available opportunity.

Flaherty v. Judge Crowley
Supreme Court: O' Flaherty J., Murphy J., Barron J. (ex tempore)
23/02/1999

Appeal; judicial review; fair procedures; road traffic offence; summons not served until six clear days in advance of court hearing; summons not lodged four clear days in advance of hearing; delay in lodging summons was due to administrative error; trial judge abridged time for service and lodgment; whether there was a lack of fair procedures in failing to invite the solicitor for defendant to make submissions regarding abridgment of time; whether District Court Judge had jurisdiction to hear the case; Rules 13 & 47 (1) of the District Court Rules, 1948.
Held: Appeal allowed.

Conroy v. Murphy
Supreme Court: O' Flaherty J., Lynch J., Barron J. (ex tempore)
26/02/1999

Case stated; whether party entitled to costs.
Held: costs awarded.

Property

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Recent developments in conveyancing practice
Sweetman, Patrick
1999 IPELJ 72

Splitting the freehold: a novel approach to the property shortage
Courtney, Fergus
1999 CPLJI 7

Statutory Instruments
Acquisition of Land (Assessment of Compensation) Fees Rules, 1999
S.I. 115/1999

Road Traffic

D.P.P. v. Corcoran
High Court: McCracken J.
22/06/1999

Road traffic; evidence; case stated; certificate of Medical Bureau of Road Safety was dated eleven days after taking of sample; solicitor for accused submitted certificate should not be relied on as it had issued more than ten days after taking of sample; submission based on evidence given in an earlier case before the District Judge; whether accused had a case to answer; whether onus of proof can be satisfied by evidence given in an earlier case; s. 19(1),(4) & s.21(3) Road Traffic Act, 1994.
Held: Onus of proof can only be satisfied by evidence given before the court in the instant case; District Judge ought to have found that accused had a case to answer.

Solicitors

Rafter v. Solicitors Mutual Defence Fund Limited
High Court: McCracken J.
10/05/1999

Solicitors; professional negligence; indemnity fund; plaintiff seeks payment from defendants on foot of an order of damages for professional negligence against one of its members; obligations of defendant; whether defendant obliged to indemnify its members; whether indemnification obligatory or discretionary; whether a policy of insurance existed.
Held : Action dismissed.

Statutory Instrument
Solicitors Act, 1954 (Section 44) Order, 1999
S.I. 133/1999

Taxation

O'Connell v. Fyffes Banana Processing Limited
High Court: Geoghegan J.
19/05/1999

Case stated; statutory interpretation; manufacturing relief; case-stated by Appeals Commissioners; whether respondent entitled to manufacturing relief; whether respondent fell within the provisions of Section 39(5), Finance Act, 1980 (as inserted by Section 41(1)(c), Finance Act, 1990); whether Section 39(2), Finance Act, 1980 has been affected by s.39(5).
Held : Appeal dismissed; respondents entitled to manufacturing relief.

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S.I. 197/1999

Torts

Duffy v. Electricity Supply Board
High Court: **Budd J.**
18/02/1999

Personal injury; contributory negligence; quantum; plaintiff tripped and fell on pavement; pavement in poor state of restoration; whether injury was attributable to any negligence on part of defendants; whether plaintiff guilty of contributory negligence.
Held : Damages were awarded. Plaintiff contributorily negligent. Plaintiff's liability assessed at 75%.

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Appeal - Rules of Procedure of the Court of First Instance - Reopening of the oral procedure - Commission's Rules of Procedure - Procedure for the adoption of a decision by the College of Members of the Commission

C-172/97 Commission of the European Communities v SIVU du plan d'eau de la Vallee du Lot & Hydro-Realisations SARL
Judgment delivered: 10/6/1999
Arbitration clause - Non-performance of a contract

C-337/97 CPM Meeusen v Hoofddirectie van de Informatie Beheer Groep
Judgment delivered: 8/6/1999
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C-338/97 Pelzl v Steiermarkische Landesregierung
Judgment delivered: 8/6/1999
Article 33 of Sixth Directive 77/388/EEC - Turnover taxes - Contributions to tourism associations and to a tourism development fund

C-350/97 Monsees v Unabhangiger Verwaltungssenat fur Karnten & Bundesminister fur Wissenschaft und Verkehr
Judgment delivered: 11/5/1999
Articles 30, 34 and 36 of the EC Treaty (now, after amendment, Articles 28, 29 and 30 EC) - Free movement of goods - Prohibition of quantitative restrictions and measures having equivalent effect - Derogations - Protection of health and life of animals - International transport of live animals for slaughter

C-376/97 Bezirksregierung Luneburg v Karl-Heinz Wettwer
Judgment delivered: 10/6/1999
Special premium for beef producers - Obligation to keep cattle on the applicant's holding for a minimum period - Transfer of the holding during that period by way of anticipated succession inter vivos - Effect on entitlement to the premium

C-412/97 ED Srl v Italo Fenocchio
Judgment delivered: 22/6/1999
Free movement of goods - Freedom to provide services - Free movement of capital - National provision prohibiting the issue of a summary payment order to be served outside national territory - Compatibility

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Judgment delivered: 10/6/1999
Officials - Pension rights - Apportionment of pension rights in divorce proceedings

C-186/98 Portugal v Nunes & de Matos
Judgment delivered: 8/7/1999
Financial assistance granted from the European Social Fund - Improper use of funds - Penalties under Community law and national law

C-215/98 Commission of the European Communities v Hellenic Republic
Judgment delivered: 8/7/1999
Failure by a Member State to fulfil its obligations - Directive 91/157/EEC on batteries and accumulators containing certain dangerous substances - Failure by a Member State to adopt the programmes provided for in Article 6 of the Directive

C-354/98 Commission of the European Communities v French Republic
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Failure by a Member State to fulfil its obligations - Failure to implement Directive 96/97/EC

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

European Communities (Minimum Requirements for Vessels Carrying Dangerous or Polluting Goods) (Amendment) Regulations, 1999
S.I. 96/1999
(DIR 98/55, 98/74)

European Communities (Marine Equipment) (Amendment) Regulations, 1999
S.I. 112/1999
(DIR 98/85EC (which amends DIR96/98EC)

European Communities (Authorisation, Placing on the Market, use and Control of Plant Protection Products) (Amendment) Regulations, 1999
S.I. 198/1999
(DIR 91/414, 97/73, 1999/1)

European Communities (Seed of Fodder Plants) (Amendment) Regulations, 1999.
S.I. 199/1999
(DIR 66/401)

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

Activity Centres (Young Persons' Water Safety) Bill, 1998
2nd Stage - Dail [P.M.B.]

Broadcasting Bill, 1999
1st Stage - Dail

Broadcasting (Major Events Television Coverage) Bill, 1999
Committee - Dail

Companies (Amendment) Bill, 1999
2nd Stage - Dail [P.M.B.]

Companies (Amendment) (No.2) Bill, 1999
Committee - Dail

Censorship of Publications (Amendment) Bill, 1998
2nd Stage - Dail [P.M.B.]

Children Bill, 1996
Committee - Dail [Re-Introduced At This Stage]

Criminal Justice (United Nations Convention Against Torture) Bill, 1998
Report- Seanad

Criminal Justice (Safety Of United Nations Workers) Bill, 1999
1st Stage - Dail

Criminal Law (Rape)(Sexual Experience Of Complainant) Bill, 1998
2nd Stage - Dail [P.M.B.]

Control Of Wildlife Hunting & Shooting (Non-Residents
Firearm Certificates) Bill, 1998
2nd Stage - Dail [P.M.B]

Copyright & Related Rights Bill, 1999
Committee - Seanad

Education (Welfare) Bill, 1999
Report - Seanad
Eighteenth Amendment Of The Constitution Bill, 1997
2nd Stage - Dail [P.M.B.]

Employment Rights Protection Bill, 1997
2nd Stage - Dail [P.M.B.]

Energy Conservation Bill, 1998
2nd Stage - Dail

Equal Status Bill, 1998
2nd Stage - Dail [P.M.B]

Equal Status Bill, 1999
Committee - Dail

Family Law Bill, 1998
2nd Stage - Seanad

Home Purchasers (Anti-Gazumping) Bill, 1999
1st Stage - Seanad

Human Rights Bill, 1998
2nd Stage - Dail [P.M.B.]

Illegal Immigrants (Trafficking) Bill, 1999
1st Stage - Dail

Intoxicating Liquor Bill, 1999
1st Stage - Dail

Licensed Premises (Opening Hours) Bill, 1999
1st Stage - Dail

Local Government (Planning and Development)(Amendment) Bill, 1999
Committee - Dail

National Beef Assurance Scheme Bill,1999
Committee - Seanad1999

Prevention of Corruption (Amendment) Bill, 1999
2nd Stage - Dail

Prohibition Of Ticket Touts Bill, 1998
Committee - Dail [P.M.B.]

Private Security Services Bill, 1999
1st Stage- Dail

Protection of Children (Hague Convention) Bill, 1998
Committee - Dail

Protection of Patients And Doctors In Training Bill, 1999
1st Stage - Dail

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

Radiological Protection (Amendment) Bill, 1998
Committee- Seanad

Refugee (Amendment) Bill, 1998
2nd Stage - Dail [P.M.B.]

Registration of Lobbyists (No.2) Bill 1999
1st Stage - Dail

Registration of Lobbyists Bill, 1999
1st Stage - Seanad

Regulation of Assisted Human Reproduction Bill, 1999
1st Stage - Seanad [P.M.B.]

Road Traffic Reduction Bill, 1998
Committee - Dail [P.M.B.]

Safety Health and Welfare at Work Bill, 1998
2nd Stage - Dail [P.M.B.]

Safety of United Nations Personnel & Punishment of Offenders Bill, 1999
2nd Stage - Dail [P.M.B.]

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

Sea Pollution (Amendment) Bill, 1998
Committee - Dail

Shannon River Council Bill, 1998
2nd Stage - Seanad

Solicitors (Amendment) Bill, 1998
Report - Seanad [P.M.B.]

Statute of Limitations (Amendment) Bill, 1998
2nd Stage - Dail

Statute of Limitations (Amendment) Bill, 1999
2nd Stage - Dail

Telecommunications (Infrastructure) Bill, 1999
1st Stage - Seanad

Trade Union Recognition Bill, 1999
1st Stage - Seanad

Tribunals of Inquiry (Evidence)(Amendment)(No.2) Bill, 1998
2nd Stage - Dail [P.M.B.

Twentieth Amendment of The Constitution (No.2) Bill, 1999
A.P.B.H.

Udaras Na Gaeltachta (Amendment)(No.2) Bill, 1999
1st Stage - Dail

Udaras Na Gaeltachta (Amendment)(No.3) Bill, 1999
1st Stage - Seanad

Whistleblowers Protection Bill, 1999
Committee - Dail

Wildlife (Amendment) Bill, 1999
1st Stage - Dail

Acts of the Oireachtas 1999

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

1/1999 The British - Irish Agreement Act, 1999

2/1999 Finance Act, 1999

3/1999 Social Welfare Act, 1999
Signed 1/3/99

4/1999 Bretton Woods Agreements (Amendment) Act, 1999
Signed 7/4/99

5/1999 Postal & Telecommunications Services (Amendment) Act, 1999
Signed 7/4/99

6/1999 Irish Sports Council Act, 1999

7/1999 Local Elections (Disclosure of Donations and Expenditure) Act, 1999

8/1999 Companies Amendment Act, 1999

9/1999 Criminal Justice (Location of Victims' Remains) Act, 1999
Signed By The President 19/05/1999

10/1999 Criminal Justice Act, 1999
Signed 26/05/1999

11/1999 Udaras Na Gaeltachta (Amendment) Act, 1999
Signed 26/05/1999

12/1999 Declaration Under Article 29.7 of The Constitution (Extension of Time) Bill, 1999

13/1999 Health (Eastern Regional Health Authority) Act, 1999
Signed 02/06/1999

14/1999 National Disability Authority Act, 1999

15/1999 Road Transport Act, 1999
Signed 23/06/1999

16/1999 British-Irish Agreement (Amendment) Act, 1999
Signed 25/06/1999

17/1999 Local Government (Planning and Development) Act, 1999
Signed 30/06/1999

18/1999 Sea Pollution (Amendment) Act, 1999
Signed 30/06/1999

19/1999 Architectural Heritage (National Inventory) & Histori Monuments (Miscellaneous Provisions) Act, 1999
Signed 06/07/1999

20/1999 Regional Technical Colleges (Amendment) Act, 1999
Signed 06/07/1999

21/1999 Minerals Development Act, 1999
Signed 07/07/1999

22/1999 Immigration Act, 1999
Signed 07/07/1999

23/1999 Electricity Regulation Act, 1999
Signed 11/07/1999 (Commenced On 14/07/1999 By S.I. 214/1999)

24/1999 Horse & Greyhound Racing (Betting Charges & Levies) Act, 1999
Signed 11/07/1999

25/1999 Courts (Supplemental Provisions)(Amendment) Act, 1999
Signed 13/07/1999

26/1999 Qualifications (Education & Training) Act, 1999
Signed 13/07/1999

Amendments of the Constitution

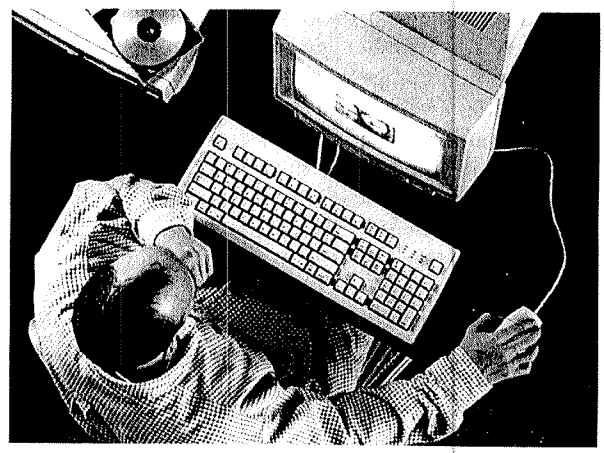
Twentieth Amendment of the Constitution Act, 1999
Signed 23/06/1999

Abbreviations

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

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

IRISH LEGAL WEBSITES



There has been an explosion in the amount of Irish legal information on the World Wide Web. ***Adél Murphy BL*** *outlines the main sites and assesses their value*

This article looks at a number of legal websites but it is a sign of the times that this is far from a definitive guide to legal sites in Ireland. The majority of the sites included provide information on substantive law, the main exception being First Legal which aims to provide an online legal advice service. FirstLaw site is not reviewed here as it has already been the subject of an article in the Bar Review[1]. The sites mentioned below were by and large well-presented and easy to use. Furthermore a number of sites have developed very useful search facilities.

"The government's website is well-organised and easy to use and a search engine is available that allows you to search the government's website specifically."

The Irish Government[2]

The government's website is well-organised and easy to use and a search engine is available that allows you to search the government's website specifically. The website is divided into the Office of the President, the Houses of the Oireachtas, the Government of Ireland, and the Department of Taoiseach and Government Press Information Office. There are also a number of links to government related sites, including the IRTC[3] and the Environmental Protection Agency[4].

The full text of the Dáil and the Seanad debates from 1997, 1998 and 1999 are available and according to the site, debates are normally put on the website within twenty four hours of the debate taking place. A major project to make the Dail and Seanad debates available since 1919 in electronic format is currently being undertaken and it is also planned to include committee debates dealing with bills since 1998. Information is also available at this site on the Committees of the Houses of the Oireachtas, their membership, functions and reports.

The Department of Taoiseach and Government Press Information Office[5] includes a section on press releases and speeches from 1/1/99. It also includes an up to date publications section - the green paper on abortion was available on the internet on the same day as its publication was announced on TV and radio (10/9/99). A search engine is available that allows you to search specifically across the Government Press Information Office. The search engine is quick, accurate and well presented.

The Attorney General's site provides basic information on its functions, including relator actions, and a copy of the Attorney General's scheme is also available[6]. The Irish statutes are also available but they are not working well on the Internet. You can access a Statute if you know the year but the search engine doesn't allow you to carry out a general search.

The Department of Justice, Equality and Law Reform[7] contains a number of publications from the 1/1/97 and press releases since 1/1/99. The publications include a guide to the small claims court and information on asylum and citizenship procedures.

The Courts Information Home Page[8] is quite bare at the moment. A lone judgment is currently available in the judgments section, that of *Donnelly v Ireland*. However the site has great potential as it is anticipated that all Supreme Court judgments will be accessible at this site. The site also contains the full text of the reports of the courts commission.

The Competition Authority

The Competition Authority has a website (accessible from the Irish Government site above) with the full text of approximately 40 decisions, the first having been delivered on the 12/5/98. A useful feature of the site is that it allows you to navigate within decisions by clicking on following heads - Introduction, the Facts, Assessment, the Undertakings. The site also includes press releases from January 1997 and published papers of the Authority. However I was unable to access the actual text of publications and got instead a an error message.

The Bar Council

The Bar Council's website at www.lawlibrary.ie/barcouncil provides information on the Bar and the work that barristers do. The Law Library Home Page has a very good collection of links to international legal sites and associations. If you are a barrister, a facility is available to allow you to connect in from home and access the databases available in the Library, both in house and commercial.

The Law Society

The Law Society's Home Page at www.lawsociety.ie provides general information on the society and the events and conferences that it runs. The Law Society Gazette is now available online and is archived to April of 1999. However you cannot do a general search - you have to know the month of the article.

Information is available on all Acts passed from 1/1/99, including how the act was commenced or how it is to be commenced, whether an explanatory memorandum comes with the act and it also includes a very useful synopsis of the Act. An alphabetical listing of acts in 1998 is also available but does not include synopses. This is a very useful facility as it bridges the electronic gap in the Attorney General's Statutes. The site is archived to March 1999 but again there is no search facility.

Newspapers

The Irish Times[9] is probably the best Irish website - it is certainly one of the most frequently accessed. The daily paper is available and back issues from 1996 onwards can be searched. The site is rarely down and its search engine is easy to use with results presented in a very clear manner. It allows you to narrow down by month and ranks searches. The one disadvantage of the site is that it does not contain the Irish Times weekly law reports (they are only available on LEXIS). The Examiner[10] has a similar search facility across its archives - however the online archives do not go as far back as The Irish Times'. While the site does not say how extensive the archives are, they appear to only cover 1999. The Irish Independent[11] has an archive facility but it is not very useful for research as papers can only be accessed by date.

FirstLegal[2]

Firstlegal claims to be Ireland's first online legal service. It is a very useful site that gives basic information on making a personal injuries claim or buying a house. An e-mail form is also available on the site that allows potential clients to fill in wills online or in the case of a personal injury, set out what happened to them and they will advise as to whether the client has a case or not. The site would be mostly relevant to clients and as a model for other solicitors wishing to provide advice over the web.

IrishLaw

As a general rule universities[13] and Institutes[14] use their websites as information points for students, prospective students and other academic institutions. They tend to provide information on courses that they run and the research interests in the particular department. As a rule they do not use their websites to publish articles or to provide links to other legal research sites.

The two exceptions are UCG[15] and UCC. UCG has begun to publish the full text of the Galway Student Review on their website while UCC is the one university to have recognised the potential of the Internet as a discussion forum. However 'IrishLaw'[16] is not strictly speaking a product of UCC. The site was originally based in Tallaght RTC (as it was then known) and only changed when Darius Whelan (webmaster) moved to UCC. Unfortunately the site has not been updated in a while and the information is not very well presented. The Irish Law List is an e-mail discussion list on Irish and Northern Irish law. The list can be easily subscribed to and it's a useful spot for getting answers to obscure queries.

Current Awareness Services

A number of legal sites have begun to provide current awareness bulletins on recent developments. The frequency of the bulletins and the extent of the archives varies from site to site. On the whole these sites are extremely useful but generally the information available on such bulletins is commercial in nature.

William Fry[17] have a site that provides general information about the firm and its areas of expertise. "Irish Legal News" is updated monthly and is archived for 1998 - 1999. The bulletin gives a (very readable) synopsis setting out the history and likely impact of the relevant legislation or proposed measure and is particularly good on EU developments. A search engine allows you to search within the site and more usefully within "Irish Legal News". The site is well designed and is easy to use and has been used by other sites as a valuable link.

Legal Briefing[18] is the name of McCann Fitzgerald's current awareness service and although it serves the same purpose as 'Irish Legal News' it is designed in a slightly different way. Information is divided into subject matter as opposed to an overall monthly briefing. As with Fry's, the subjects covered are commercial in nature. The information on the site goes back to 1997 and a search option is also available.

Matheson Ormsby Prentice have a similar site called Legal News[19]. While the archive is not as extensive as the above sites (June 1999) the information contained in 'Legal News' is equally readable and informative, e.g. there is a commentary on Employment Equality Act which is very comprehensive and easy to read. One disadvantage of Legal News is that there is no internal search engine. As there are only two back issues available at the moment it does not pose any problem but as the site grows the lack of an internal search engine will be a difficulty.

Techlaw[20] is the name of Goodbody's bulletin and as the name suggests it focuses on areas of law connected with computers, e.g. Intellectual Property, Information Technology and Telecommunications. However a decided disadvantage is that none of the links seem to work[21].

Conclusion

The amount of Legal information on the Web has dramatically increased in the last number of years and is constantly increasing. Information that was formerly difficult to get, e.g. Dail Debates and government reports, is now available at the press of a button. Not only has it become easy to get such information but the quality and text of such documents have also improved so it is very easy to directly import information from the web into word processing documents. The growth in the number of and quality of legal websites is proof that Irish legal profession is beginning to fully exploit the advantages of the Internet. •

Tip of the Month.

'iesearch' allows you to search across all .ie domain names, in other words the majority of Irish sites. It is accessible via a number of sites including the government's site (http://www.irlgov.ie) and the Examiner (http://www.examiner.ie)

1 1999 Bar Review, vol. 4(8) 395
2 http://www.irlgov.ie
3 http://www.irtc.ie
4 http://www.epa.ie
5 http://www.irlgov.ie/taoiseach
6 http://www.irlgov.ie/ag
7 http://www.irlgov.ie/justice
8 http://www.irlgov.ie/justice /courts
9 http://www.ireland.com
10 http://www.examiner.ie
11 http://www.irishindependent.ie
12 http://www.firstlegal.ie/
13 UCD, http://www.ucd.ie; UL, http://www.ul.ie; TCD, http://www.tcd.ie
14 DIT, http://www.dit.ie; LIT, http://www.lit.ie; WIT, http://www.wit.ie
15 http://www.nuigalway.ie/law/
16 http://www.ucc.ie/ucc/depts/law/irishlaw/
17 http://www.williamfry.ie/legal.htm
18 http://www.mccann-fitzgerald.ie/legal_briefing/index.htmlIr
19 http://www.mop.ie/papers/papers.htm
20 http://www.algoodbody.ie/
21 The site was updated on the 12th of September and none of the links worke on the 15th.

KING'S INNS NEWS

CONFERRING OF BARRISTER-AT-LAW DEGREE
AT KING'S INNs - JULY 1999
L to R: Jane Rothwell, Elaine Forrest, Helen O'Driscoll, David Leahy

ROBERT MALLET

Visitors often note the beautiful wrought iron work furniture of the Library Reading Room at King's Inns. The unique tables date from about the 1830s and are believed to be the work of the engineer Robert Mallet (1810-1881).

Mallet was a prolific character in every sense. A graduate of Trinity in classics and mathematics, he joined his father's iron founding business at the age of 21. When he ultimately gained control, he transformed the company into one of the leading engineering companies in Ireland. The firm was responsible for the iron work required for the expansion of the railway network, some of the lighthouses dotted around Ireland, designs for villas, and so on.

Robert Mallet was also devoted to studies of earth sciences and produced a two-volume catalogue of major earthquakes. In fact it was he who coined the word seismology in a paper presented to the Royal Irish Academy in 1846. He also introduced the word epicentrum to describe the zone of maximum seismic activity. In the last few months, as a result of the tragic earthquakes in Turkey, Greece and Taiwan, these contributions by Mallet to the science of earthquakes have been much in use.

Mallet's elegant and scientific craftsmanship is captured beautifully in Print No. 2 in the King's Inns Print series (The Reading Room by David Evans). For further details, telephone David Curran at 874 4840.

JONATHAN ARMSTRONG 21 YEARS ON

Most graduates of King's Inns have encountered our Librarian, Jonathan Armstrong, either as a student going through the Inns or as a barrister returning to the Library in Henrietta Street. Given his high standing amongst barristers and his own community of librarians, we decided that the 21st anniversary of taking up his appointment with the Society should be remembered. The celebration with the staff took place on Friday 6 August.

Visitors to the Library are always treated with great courtesy by Jonathan and his staff. Indeed, anybody who has ever used King's Inns Library will vouch for Jonathan's helpfulness and knowledge. Not only does he know where every book is located, he also knows a lot about the contents of most of the volumes. His understanding of the care of old and rare books and manuscripts is astonishing. In the last few years, he has brought King's Inns within the IT ambit by providing users with legal databases that are networked to the Law Library.

We look forward to seeing Jonathan around for many years to come.

KING'S INNS DINING (MICHAELMAS)

Why not commemorate your year of graduation with an anniversary dinner in King's Inns. We believe that graduates from 1949, 1959, 1979 and 1974 (25 years) might like to know how we can help you celebrate. Telephone Claire Hanley on 878 0410 for further information. The main office at King's Inns may be able to help you locate lost addresses (telephone Miriam Riordan at 874 4840).

Dates for your diary:

Friday 5 November
Benching for The Hon. Mr. Justice O'Neill

Saturday 20 November
Mr Fergal Foley, 30th Anniversary of call to the Bar

Friday 19 November
Spouses' Guest Night

CAR PARKING
A few spaces remain in King's Inns Car Park.
For information, please telephone David Curran at 874 4840

Michaelmas Dining Term 26th October to 22nd November

Dining is at 6.30 pm on every evening except Friday 19th November (Spouses' Guest Night) when guests are encouraged to arrive at 7.30 pm for dinner at 8.00 pm sharp.

Barristers (practising and non practising) are encouraged to dine and to bring guests on Wednesdays and Fridays with the exception of the benching night for the Hon. Mr Justice O'Neill (Friday 5th November 1999).

Enquiries and Reservations:
Claire Hanley 878 0410

THE IMMIGRATION ACT, 1999

Rory Mulcahy BL considers the provisions of the Immigration Act, 1999 enacted in part to overcome the infirmities of the earlier refugee law identified by the High Court and Supreme Court in the Laurentiu case.

1. Introduction

In 1996, the Government introduced the Refugee Act 1996 in order to bring Ireland's treatment of refugees into line with international standards. The purpose of the Act was to give effect to the Geneva Convention[1] and the New York Protocol[2] regarding the legal status, rights and treatment of refugees, as well as the Dublin Convention[3] which determines which EU Member State should deal with an individual's asylum application.

The Act defined a refugee as

> "[A] person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, unwilling to return to it.[4]"

The Act also laid out detailed provisions in relation to the processing of asylum applications. These provisions included the establishment of the office of Refugee Applications Commissioner[5] and the creation of the Refugee Appeal Board[6] .

The Act provided that the Minister for Justice could name the day for the Act or any part thereof to come into force. However, by this year only a handful of the Act's provisions had come into operation. Of those that had, section 5 relating to the prohibition on refoulement and section 22, which purports to give effect to the Dublin Convention, were the most significant. Also of some significance was the coming into force of the provisions relating to 'program' refugees contained in section 24(1)[7].

None of the provisions in relation to the establishment of the bodies to deal with refugee applications and appeals have come into force, and the ad hoc procedures which had been in place prior to the 1996 Act have remained in being. Also the provisions which clearly set out the status of refugees, and govern the determination of their rights in this jurisdiction, had not come into operation.

"The Bill was initiated as a response to the decision of Geoghegan J. in *Laurentiu v. the Minister for Justice Equality and Law Reform, Ireland and the Attorney General.*"

2. The Laurentiu Decision

A new Bill was placed before the Oireachtas earlier this year, also designed to deal with the position of non-nationals, including refugees, in this State. The Bill was principally concerned with giving statutory effect, so far as was constitutional, to orders made under section 5 of the Aliens Act 1935. The Bill was initiated as a response to the decision of Geoghegan J. in *Laurentiu v. the Minister for Justice Equality and Law Reform, Ireland and the Attorney General*[8].

The *Laurentiu* case involved a challenge to the Aliens Order 1946, Article 13(1) of which purported to give the Minister the power to make deportation orders, as being ultra vires the Aliens Act 1935, and a challenge to section 5 of the 1935 Act itself, as being inconsistent with the Constitution. Geoghegan's J.'s decision upheld those challenges, albeit reluctantly. The learned Judge was of the opinion that "the Minister cannot have a legislative power in relation to deportation unless some policy or principles on foot of which he is to act are set out in the parent Act." [9]In the absence of such specific grounds the impugned procedure was contrary to Article 15.2 of the Constitution.[10]

Geoghegan J. also pointed to another basis for such a finding. The statutory instrument, Article 13(1) of the 1946 Order, contained substantive legislation so far as it conferred a power to make deportation orders on the Minister. This too was inconsistent with Article 15.2 of the Constitution [11].

3. Deportation and Exclusion Orders

The Immigration Act, 1999 was passed on 7th July 1999. The Act provides the Minister for Justice, Equality and Law Reform with renewed authority to make deportation and exclusion orders in respect of certain classes of non-nationals, as well as making provision for the powers necessary to enforce such orders and for the procedures to be followed.

Section 2 of the 1999 Act seeks to give statutory effect to any Aliens Orders already made under the 1935 Act, with certain exceptions which are contained in the schedule to the Act[12]. Section 5 of the 1935 Act permitted the Minister to make orders prohibiting or restricting the entry of aliens[13] into this jurisdiction and also restricting their freedom of movement once here. The Minister also had the power to make deportation or exclusion orders in respect of aliens , and orders in relation to such matters as registration, change of abode, travel, employment, occupation etc. Section 2(2) of the Act requires that section 2(1) be subject to such limitations as are required to safeguard the constitutional rights of the individual.

"The Immigration Act, 1999 provides the Minister for Justice, Equality and Law Reform with renewed authority to make deportation and exclusion orders in respect of certain classes of non-nationals, as well as making provision for the powers necessary to enforce such orders and for the procedures to be followed."

Sections 3 and 4 deal with the circumstances in which the Minister may now make deportation and exclusion orders respectively.

Section 3 states that any authority to make a deportation order must be subject to the requirements of non-refoulement contained in section 5 of the Refugee Act, 1996. Sub-section 2 lists specific classes of person in respect of whom a deportation order might be made, and subsection 6 lists those factors which the Minister must take into account in determining whether to make a deportation order. The Act provides the substantive guidance on the circumstances in which an order for deportation might be made, which the scheme envisaged by the 1935 Act lacked. Section 3 also provides procedures whereby the person who is to be the subject of an order must be notified that such an order is being considered and the reasons why such an order is being considered, and be given a chance to respond. Sub-section 3 requires that the proposed subject be notified and given 15 working days to make written submissions in response. Sub-section 4 details what that notification must contain.

It is sub-section 6 to which the Minister must have particular regard in making a deportation order. It lists those factors which must be taken into account in arriving at his/her decision. These include the age of the person, the length of their stay in the State and the nature of their connection with the state; their family and employment circumstances; any representations made on their behalf; their character and conduct both within and outside the state. In respect to this last factor, any criminal convictions may be taken into account. The other factors which are to be considered are of a more general nature; humanitarian considerations; the common good; and considerations of national security and policy. These last three factors clearly provide considerable scope to the Minister to make a deportation order

Section 4 of the Act deals with the circumstances in which an exclusion order can be made. An exclusion order is one which seeks to prevent a person from being allowed to enter the state. In the absence of the same constitutional concerns, this section is far less detailed than Section 3. An exclusion order may be made where in the opinion of the Minister, it is in the interests of national security and public policy to do so.

Sections 5 to 10 of the Act deal with the supplementary provisions necessary to give effect to Sections 3 and 4. Section 5 deals with the powers of the Garda' to arrest, detain and remove non-nationals in respect of whom a deportation order is in force. Section 6 deals with the service of notices as required by Section 3, and Section 8 makes it an offence to obstruct the enforcement of a deportation order. Sections 9 and 10 deal with the penalties for offences under the 1935 and 1999 Acts.

4. Refugee Advisory Board

However, the original Bill was also amended to include provisions which amended the Refugee Act, 1996. In particular, the provisions which had provided for the establishment of bodies to process asylum applications were amended. Thus these statutory bodies were abolished without ever having come into being. Section 11 of the 1999 Act includes a variety of amendments to the 1996 Act. It adds a new Section 7A to the 1996 Act[4]. This section provides for the establishment of a new independent Refugee Advisory Board. The purpose of such a Board is to prepare a biennial report for the Minster for Justice on the operation of the 1996 Act. The report could include information and comment on asylum policy. The Board could also recommend legislative changes and changes in the practice and procedure regarding asylum applications. This report is then to be laid before the Oireachtas. The Minister can also request the Board to prepare reports in respect of any particular matters relating to the performance of the Board's function. The Refugee Applications Commissioner is required to give the Board any information which it requests.

The Board is to consist of 15 members, including the chairperson, at least six of whom must be men and six women at any one time. In selecting the members, regard will be had to their level of interest or knowledge in asylum, and the protection of refugees, or to their competence in general to sit on the board. Members of the Board will also include representatives of 7 different Ministers, and there must be some person or persons on the Board who represents the interests of refugees and asylum seekers[15]. The term of office is to be 5 years.

The Act provides for a number of other specific amendments to the 1996 Act. Section 8 of the 1996 Act is amended by specifically setting out what the initial interview with an asylum seeker seeks to establish[16]. This includes not only the grounds on which an application is based but also the identity and nationality of the person involved, how and why they came to this state and the legal basis for their entry into this state.

A new Section 9A is inserted which provides that an applicant can be fingerprinted[17]. This section is to avoid the possibility of applicants making applications under different names.

5.Refugee Applications Commissioner

The office of Refugee Applications Commissioner, as envisaged by the 1996 Act has been altered[18]. The 1996 Act had allowed for the appointment of a barrister or solicitor to the post by the Minister for a term of 3 years. The 1999 Act makes the office a civil service position and makes the term of office 5 years. The Commissioner's status as a civil servant allows the Minister to delegate to him/her certain powers under the Civil Service Commissioners Act, 1956 and subsequent regulations. The new role may give the Commissioner more authority, but it also means that the office will be even more rooted in the political Establishment.

6. Refugee Appeals Tribunal

The Refugee Appeals Board is abolished without ever having had the opportunity to sit. It is to be replaced by the Refugee Appeals Tribunal[19]. The chairperson of the Tribunal is not a civil servant, but must be selected by the Civil Service Commissioners. The chairperson will be a barrister or a solicitor of not less than 10 year's standing.

The remaining members of the Tribunal are to be appointed on a part-time basis, for 3-year terms. The make-up of the Tribunal does not include the same restrictions as did the Appeal Board. i.e. there is no requirement that officers of the Minister for Justice and the Minister for Foreign Affairs be on the Tribunal, nor that at least two members who are not officers of those Ministers be members of the Tribunal.

7. Conclusion

The 1999 Act strengthens the legislative regime whereby non-nationals can be excluded from this State. Furthermore, while it revisits the Refugee Act, 1996, it fails to bring into force those provisions which might improve the lot of asylum seekers or refugees within this state by defining their rights. In fact, in amending the 1996 Act, it introduces further measures that seek to work against asylum seekers by introducing the right to fingerprint asylum seekers.

The revamping of the statutory bodies which were designed to deal with asylum applications is welcome. Since the Minister has preferred to continue until now with the ad hoc procedures that had been in force prior to the 1996 Act, he was clearly dissatisfied with the 1996 Act. It is to be hoped that the statutory bodies provided for in the 1999 Act might be given an opportunity to see the light of the day. •

1. Convention relating to the Status of Refugees (Geneva) 1951.
2. Protocol Relating to the Status of Refugees (New York) 1967.
3. Convention determining the state responsible for examining the applications for asylum lodged in one of the Member States of the European Communities (Dublin) 1990.
4. Section 2, Refugee Act 1996. The section also specifically excludes various categories of person from the definition of refugee.
5. Section 6 ibid.
6. Section 15 ibid.
7. S.I. 290/1996.
8. Unreported, High Court, 22nd January, 1999.
9. Ibid. p. 18
10. 1.The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: No other legislative authority has powers to make laws for the State. 2. Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures.
11. The High Court decision has recently been upheld by a decision of the Supreme Court delivered on the 20/5/99.
12. Namely the impugned Order in the Laurentiu decision, Article 13(1) of the Aliens Order 1946, and a new Aliens (Visa) Order 1999.
13. The impugned section 5(1)(e).
14. Section 11(1)(b) Refugee Act 1996.
15. Thus the State will have at least 7 members of the Board, while refugee groups may have as few as one.
16. S. 11(1)(c) ibid.
17. S. 11(1)(e) ibid.
18. S. 11 First Schedule
19. S. 11(1)(j) ibid. and Second Schedule

WILLS

AND EXTRINSIC EVIDENCE

Brian Spierin SC outlines the law on the admissibility of extrinsic evidence in the construction of wills before the courts and offers some practical advice for those drafting wills.

The Supreme Court in its recent judgement in the case of *O'Connell & Another v. The Governor & Company of the Bank of Ireland*[1] decided unanimously to follow the reasoning of the majority of an earlier Supreme Court in the decision of *Rowe v. Law*[2] with the result that extrinsic evidence will only be admissible to assist in the construction of a will where two pre-conditions are satisfied:

(a) Where it is necessary to ascertain the intention of the testator and,

(b) Where there is an ambiguity on the face of the will.

If the will is clear and precise on its face, extrinsic evidence will not be admissible.

In the case of *Curtin v. O'Mahony*[3] the Supreme Court without admitting extrinsic evidence 'rectified' a will in order to achieve what the Supreme Court perceived to be the intention of the testator. The case for the court's intervention was based upon the fact that a literal reading of the will led to an absurd result and resulted in a partial intestacy. The Supreme Court in its judgement in the case of *O'Connell & Another v. The Governor & Company of the Bank of Ireland*[4] also suggested that the decision in *Curtin v. O'Mahony* was based upon the provisions of Section 99 of the Succession Act, 1965 which essentially provides that where there are two constructions open in relation to a particular bequest in a will, the one that will render the bequest operative is to be preferred. However in the case of *Curtin v. O'Mahony* there was only one construction open on the face of the will and the Supreme Court had to add words to the will in order to achieve an operative construction.

Section 90 of The Succession Act , 1965 provides as follows:

> '90.- Extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a will.'

"The practical importance of the admissibility of extrinsic evidence for persons drafting a will, is that care should be taken when transposing the instructions to ensure that the wishes of the testator are clearly reflected in the terms of the executed will. A mistake may not be capable of being rectified later because evidence that might show what the testator intended will most likely be inadmissible."

Section 99 of the Succession Act, 1965 provides as follows:

> '99.- If the purport of a devise or bequest admits of more than one interpretation, then, in case of doubt, the interpretation according to which the devise or bequest will be operative shall be preferred.'

The latter section has achieved scant judicial interpretation and the decision in *O'Connell & Another v. The Governor & Company of the Bank of Ireland*[5] was one of the few occasions of which the court had regard to the provisions of that section. One would have thought that it would have been called in aid more often.

'Extrinsic evidence' might be defined as evidence of matters outside of the will itself.
The question of the admissibility of extrinsic evidence will only arise when the will falls to be construed and after the terms of the will are something of a fait accompli. Examples of what might constitute extrinsic evidence would be as follows:

(a) Evidence as to the testator's religious persuasion as was found to be inadmissible in the case of *In Re Julian*[5]

(b) Previous wills as in the case of *Curtin v. O'Mahony.*

(c) Instructions for a will as in the case of *Rowe v. Law.*

(d) Statements made by the testator both prior to and after the will was executed in relation to his or her testamentary intentions, as in the case of *O'Connell & Another v. The Governor & Company of the Bank of Ireland.*

(e) Evidence that a particular person is likely to be the intended beneficiary.

in the case of doubt, due to a close relationship with the testator or carrying out services works for the testator as in the case of *Bennett v. Bennett*[6]

The practical importance of the admissibility of extrinsic evidence for persons drafting a will, is that care should be taken when transposing the instructions to ensure that the wishes of the testator are clearly reflected in the terms of the executed will. A mistake may not be capable of being rectified later because evidence that might show what the testator intended will most likely be inadmissible.

Legal practitioners who draft wills tend to strive for clear and unambiguous terms. It is sometimes possible that through the use of 'legalese' that the precise meaning may become clouded. Generally speaking a will drafted by a legal practitioner would admit of only one meaning and where that meaning does not in fact reflect what the testator intended, the legal practitioner may be looking at a potential suit in negligence from a disappointed beneficiary *(see Wall v. Hegarty*[7] *).*

A look at the facts in relation to the cases of *Curtin v. O'Mahony* and *O'Connell & Another v. The Governor & Company of the Bank of Ireland* will illustrate the point.

In the case of *Curtin v. O'Mahony* the deceased, Mr. Curtin, left his dwelling house to his niece, Ms. O'Mahony. He provided that if his dwelling house was sold during the course of his lifetime that his estate was to be divided in certain percentages. Mr. Curtin did not dispose of his dwelling house in the course of his lifetime. The result was that the detailed disposition of his estate, which was to take effect only in the event of his selling his dwelling house during his lifetime, was ineffective and a substantial residue was to pass on the basis of intestacy. Mr. Curtin in disposing of the residue of his estate had divided his estate into very small percentages but many of the intended beneficiaries were charitable. In fact when one added all the percentages stated in the will, they added to 100.5%. On a literal reading of the will therefore, Mr. Curtin disposed of his dwelling house by way of specific bequest to his niece and the remainder of his estate passed under the intestacy rules to the next-of-kin living at the date of his death.

The will was first considered by Lardner J. in the High Court. Efforts were made to adduce extrinsic evidence by reference to earlier wills made by Mr. Curtin but Lardner J. following the decision of the Supreme Court in *Rowe v. Law* held that such evidence was inadmissible. The will had been drafted in a solicitor's office but no one came forward to identify the person who had drafted the will, a fact commented upon by the Supreme Court when the case was appealed. Lardner J. held that despite the result being 'absurd' and 'illogical' the estate must pass to the next-of-kin on the basis of the intestacy rules.

Because a number of the legatees named in the will were charitable, the Attorney General had been joined in the proceedings in his role as Protector of Charities. The Attorney General decided to appeal the decision of Lardner J. and in the Notice of Appeal, the first ground of appeal was whether 'on a point of law of public importance', the earlier decision of the Supreme Court in *Rowe v. Law* was correctly decided. When the appeal came on for hearing before the Supreme Court the Attorney General withdrew this point of appeal and argued the appeal on its merits.

"Lardner J. held that despite the result being 'absurd' and 'illogical' the estate must pass to the next-of-kin on the basis of the intestacy rules."

The Supreme Court held in a unanimous judgement, delivered by O'Flaherty J., that Mr. Curtin who was 'a most meticulous testator' could not have intended to die intestate as regards the bulk of his estate and that a court of construction in construing a will must give a pre-eminence to the intention of a testator. The court in the circumstances found it unnecessary to consider the question of the admissibility of extrinsic evidence and held that this particular will could be construed without the necessity to resort to extrinsic evidence. The court reserved for another case the question of the correctness of the decision in *Rowe v. Law* when the question of admissibility of extrinsic evidence under the terms of Section 90 could be fully debated before the court.

Such an opportunity arose in the case of *O'Connell & Another v. The Governor & Company of the Bank of Ireland.* Ms. O'Connell was a widow without issue. Prior to the death of her husband they had both made a number of wills which were in identical terms leaving all of their property to each other and providing for alternative dispositions in the event one should predecease the other.

Sometime after the death of her husband Ms. O'Connell decided to make a new will. She confided her intention in a close friend, Ms. Healy who visited her nightly. She told her close friend that she intended leaving her dwelling house to her husband's godson and his wife. Ms. Healy had had experience of a case where a person had left a house to a beneficiary and failed to mention the contents of the house. This had apparently resulted in a dispute between the persons taking the house and, presumably, the next-of-kin of the testator and which caused considerable trouble to those involved. She suggested to Ms. 0' Connell that if she was leaving the house to her husband's godson and his wife, she should also specify that the contents were to pass to them.

Shortly after this conversation, Ms. O'Connell attended upon her solicitor for the purposes of making her will. When she returned home, she spoke again to Ms. Healy and expressed herself satisfied that she had carried her intention into effect. She made her will around the beginning of December and she spent Christmas of that year with her husband's godson and his wife. During the course of her stay with them, she took them aside and, in a rather formal and solemn manner, told them that she was leaving them her house, and told them to go to the solicitor after she had died and that he would deal with the legal formalities.

After Ms. O'Connell's death, the Plaintiffs in the case called upon Ms. O'Connell's solicitor. When the will was read over, it transpired that the will left the contents of the house to the Plaintiffs, but the will did not specifically mention the house at all, which was the Deceased's principal asset. Instead, it appeared under the terms of the will that the house was to pass under a charitable legacy.

There was ample and cogent evidence, in particular the evidence of Ms. Healy, which would show that the will of the Deceased did not carry the intention of Ms. O'Connell into effect. Ms. Healy was

unrelated to the Plaintiffs and did not stand to benefit in any way by the evidence she could give to the Court.

When the case came before the High Court, the learned trial judge, Barron J., heard *inter alia* the evidence of Ms. Healy, the Plaintiffs and also the evidence of the solicitor who drafted the will. The learned trial judge having heard the evidence was satisfied that the Deceased had intended to leave the dwelling house to the Plaintiffs. However, he held that as the will was clear on its face, the evidence as to her intention was inadmissible and therefore the estate had to be administered in accordance with the literal terms of the will.

An appeal was taken by the Plaintiffs to the Supreme Court on the basis that the decision in *Rowe v. Law* was too restrictive in its interpretation of Section 90 of the Succession Act, 1965 and that extrinsic evidence should be admissible where it was necessary to ascertain the intention of a testator, even though there be no ambiguity on the face of the will. In the alternative, it was argued before the Supreme Court that as the dwelling house was the testatrix's principal asset, it was absurd and illogical that no specific mention of it appeared in her will and that therefore the Court should exercise its jurisdiction as established by the decision in *Curtin v. O'Mahony* to rectify the will by the insertion of words into the will which would allow the dwelling house to pass to the Plaintiffs.

The Supreme Court in a unanimous judgement delivered by Keane J., (Hamilton C.J., O'Flaherty J., Murphy and Lynch J. J. concurring) held that the earlier decision of the Supreme Court in *Rowe v. Law* was correctly decided. The Court held that the construction of Section 90 contended for by the Plaintiff/Appellant was too broad and would undermine the certainty of every will as admitted to Probate. The Supreme Court further distinguished the *O'Connell* case from the *O'Mahony* case on the basis that no manifest illogically or absurdity arose in the *O'Connell* case where it had manifestly arisen in the *O'Mahony* case. The decision therefore of Barron J. was affirmed.

It is absolutely clear therefore that extrinsic evidence will only be admissible now where:

(a) It is necessary to ascertain the intention of the testator, and

(b) There is some ambiguity or contradiction on the face of the will.

Unless one can bring oneself within the narrow confines of the somewhat exceptional circumstances that arose in the case of Curtin v. O'Mahony, a will must be construed in accordance with its literal terms.

The finer points on the admissibility of extrinsic evidence may seem somewhat esoteric and academic as a solicitor commences to draft a will. But as the above cases show it has a very practical aspect to it. In order to avoid difficulties which may arise, it is essential that a legal practitioner taking instructions for the drafting of a will would take the following precautions:

"The Supreme Court in a unanimous judgement delivered by Keane J., (Hamilton C.J., O' Flaherty J., Murphy and Lynch J J. concurring) held that the earlier decision of the Supreme Court in *Rowe v. Law* was correctly decided"

(a) Identify all of the assets of the testator in so far as is possible.

(b) Identify which of those assets the testator wishes to make the subject matter of general, specific or demonstrative legacies and devises.

(c) Identify with precision the intended beneficiary of each general, specific or demonstrative legacy or devise. In particular in this connection, identify whether it would be possible for confusion to arise in relation to the identity of a particular beneficiary e.g. where a testator has two nephews or nieces bearing the same name, or perhaps two friends bearing the same name. The wording of the will should eliminate the possibility of any confusion concerning the beneficiary's identity.

(d) Identify and explain to the testator what will be comprised in the residue of his or her estate. This should eliminate the possibility of a particular asset coming within the scope of the residuary bequest when the testator might intend that it would pass to a specific legatee or devisee or be otherwise disposed of generally.

(e) When the will has been engrossed, the will should be read over aloud to the testator and checked with the testator clause by clause. It is better that the legal practitioner read over the will clause by clause and check it clause by clause with the testator, than to allow the testator to read the document him or herself. It is possible that a testator who is anxious or nervous about executing his or her will might miss a certain nicety or nuance in the will. If the will is read over to the testator clause by clause and checked clause by clause, this should not happen. Legal practitioners should avoid the temptation of paraphrasing the terms of the will (as happened in the *O'Connell* case) to avoid any potential misunderstanding.

(f) A careful and detailed attendance should then be prepared recording all that transpired, so as to avoid disputes and potential litigation in negligence at a later date. •

Brian Spierin SC is author of the recent publication 'Wills - Irish Precedents and Drafting' available directly from the author.

1 Unreported, Supreme Court, April [1998]

2 [1978] IR 55

3 [199]1 2 IR 562

4 [1950] IR 57

5 [1950] IR 57

6 [1980] ILRM 124

7 [1980] ILRM 124

FREEDOM OF INFORMATION

THE EUROPEAN DIMENSION

TJ McIntyre BL analyses the extensive Freedom of Information provisions that exist in European Law.

1. Introduction

The recent enactment of the Freedom of Information Act, 1997[1] (the "FOI Act") means that Ireland now has a comprehensive range of freedom of information legislation (comprising the FOI Act, the Access to Information on the Environment Regulations, 1998[2] and the Data Protection Act, 1988, together with certain more specialised access provisions[3]). That legislation is, however, of domestic application only. This article briefly describes its equivalent at European level, by outlining the legislative framework governing access to documents held by European Union bodies, detailing the recent cases in this area, and finally noting the proposals which have been made for reform.

2. Access to Council and Commission Documents

The law in relation to freedom of information at European level has its origin in a declaration annexed to the Maastricht Treaty, which affirmed a commitment to "transparency in the decision-making process" and recommended that the Commission should submit to the Council a report proposing measures to improve public access to information held by the institutions[4].

On foot of that recommendation, and following discussion of the issue at three successive European Councils[5], in December 1993 the Council and the Commission agreed a Code of Conduct[6] concerning public access to documents held by both institutions. This was implemented in respect of the Council by Council Decision 93/731/EC[7], and in respect of the Commission by Commission Decision 94/90/EC[8].

The access regimes created by these two decisions are almost identical, reflecting their common origin. Each creates a general right of access to documents (including "any written text, whatever its medium"[9]) created and held by each institution. It is important to note that this right of access covers only those documents created by each institution, and does not extend to, for example, documents originating with a Member State or another institution. This is a significant limitation on the scope of the right of access as compared with the FOI Act which confers a general right of access to documents held by public bodies[10].

"It is important to note that this right of access covers only those documents created by each institution, and does not extend to, for example, documents originating with a Member State or another institution."

In each case, the right of access extends to documents which predate the Code of Conduct. In this way, the Code of Conduct is somewhat wider than the FOI Act, which as a rule confers no right of access to documents which predate its commencement[11]. The right of access is available to any natural or legal person[12]. Requesters need not be citizens of the European Union, nor have their place of residence or registered office in a Member State.

No reasons need be given for a request, nor may the identity or motive of the requester be taken into account in responding to the request. In this regard, the Code of Conduct follows the model established by the United States Freedom of Information Act, under which:

> "[The requester's] need for or interest in the documents is irrelevant, and his rights are neither increased nor decreased by such a need or interest. His purpose is irrelevant, and his rights are neither lessened nor enhanced by the private nature of his purpose."[13]

Accordingly, the fact that a requester seeks documents for the purpose of litigation is not a factor which the institution can take into account to refuse his request.[14] However, the converse is also true, and the requester who is also a litigant (or potential litigant) will not thereby enjoy any enhanced rights of access.

The general right of access is, of course, subject to exceptions. All but one of these are mandatory: that is, each institution must refuse access to any document where:

- "disclosure could undermine: the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations);
- the protection of the individual and of privacy;
- the protection of commercial and industrial secrecy;
- the protection of the Community's financial interest; or
- the protection of confidentiality as requested by the natural or legal persons that supplied the information or as required by the legislation of the Member State that supplied the information".[15]

"The remaining exception is permissive, and allows (but does not require) each institution to refuse access "in order to protect the institution's interest in the confidentiality of its proceedings".[16]

Applications for access are to be made in writing, and must be "sufficiently precise [to] enable the document or documents concerned to be identified"[17]. A decision on each application must be given within one month[18]. Should the decision indicate an intention to refuse access, the applicant has a right to seek an internal review, and a reasoned decision on that review must be given within one month of the review being sought.[19] Should the internal review confirm the refusal of access, the remedy of the applicant is either by way of complaint to the European Ombudsman[20] or by way of an action to annul the decision to refuse access.

Fees are payable where copies of documents are supplied.[21] However, the fee is solely based on the cost of photocopying or otherwise reproducing the documents: no fee is chargeable in respect of staff time spent in locating documents. This differs from the position under the FOI Act, which explicitly permits search and retrieval fees to be levied.[22]

3. Access to Documents Held by Other European Union Bodies

The move towards greater openness by the Council and Commission has now been matched by most European Union bodies. This took place, it must be said, only after some prodding by the European Ombudsman who conducted, in 1996, an inquiry[23] into public access to documents held by bodies other than the Council and Commission. Having carried out this inquiry, the Ombudsman made recommendations to those bodies to the effect that they should adopt rules governing public access to documents. In a follow-up Special Report to the European Parliament[24] the Ombudsman outlined their responses. Of the fifteen bodies[25] covered by the initial inquiry, fourteen had put in place rules governing access to documents before the follow-up report. The remaining body was the European Court of Justice, which has postponed any changes pending consideration of amendments to the Rules of Procedure of the Court.

The rules which have been adopted vary from body to body[26]. For the most part they are based on the Council/Commission Code of Conduct; however, some rules depart significantly from that Code. For example, the European Agency for the Evaluation of Medical Products ("EMEA") has adopted rules[27] which provide for a detailed system under which documents are classified either "restricted" or "confidential" at the time they are produced, in particular having regard to whether they contain commercially sensitive information. Access is then determined according to the classification of the document. There are, as yet, no authorities on the operation of the rules of any body other than the Council and Commission.

4. Caselaw

The first case to come before the Court of First Instance concerning the right of access established under the Code of Conduct was *Carvel v. Council*[28]. In that case, a journalist had sought access to documents relating to Council of Ministers' meetings in the areas of Agriculture, Justice and Social Affairs. Access was refused by the Council, which claimed that the documents related to its deliberations, and accordingly fell within the exception contained in Article 4(2) of Council Decision 93/731/EC allowing it to withhold the documents to protect the confidentiality of its proceedings.

"The pro-disclosure approach which was taken in Carvel was continued in the next case to come before the court, World Wide Fund for Nature v. Commission"

This argument was, however, unsuccessful. The court confirmed that the exception relating to the confidentiality of proceedings was discretionary rather than mandatory, so that "under Article 4(2)... the Council enjoys a discretion as to whether or not to refuse a request".[29] In addition, the court took the view that this exception was to be construed narrowly, having regard to "the objective pursued by [Decision 93/731/EC], namely to allow the public wide access to Council documents"[30]. It followed, the court held, that:

> "the Council must, when exercising its discretion under Article 4(2), genuinely balance the interest of citizens in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations."[31]

The Council had not, however, carried out a balancing exercise, having purported to refuse access simply on the basis of confidentiality without weighing the competing interest in disclosure. Accordingly, the court held that the Council had failed to exercise its discretion correctly, and the decision to refuse access was annulled.

The pro-disclosure approach which was taken in Carvel was continued in the next case to come before the court, *World Wide Fund for Nature WWF(UK) Fund v. Commission*[32]. In this case, the applicants sought access to Commission documents in relation to

an investigation it had carried out into the construction of the controversial Mullaghmore Interpretative Centre. The Commission had investigated complaints that the construction of the centre would be in breach of community environmental law, but had ultimately decided that the project did not infringe community law. The Commission nevertheless refused access to the documents sought, relying both on the mandatory exception relating to protection of the public interest, and on the discretionary exception relating to the confidentiality of its proceedings.

The Court of First Instance, in a significant passage, held that these exceptions were to be strictly construed:

> "[I]t is important to note that where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule. In particular, the grounds for refusing a request for access should be construed in a manner which will not render it impossible to achieve the objective of transparency."[33]

However, even applying a strict construction, the court went on to hold that documents relating to an investigation which might lead to an infringement procedure being brought against a member state were capable of falling under the mandatory public interest exception:

> "The Court considers that the confidentiality which the Member States are entitled to expect of the Commission in such circumstances warrants, under the heading of protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation."[34]

Nevertheless, the court held that the Commission had not established that this exception applied, since it had not specified with sufficient particularity the basis on which the exception was sought:

> "[T]he Commission cannot confine itself to invoking the possible opening of an infringement procedure as justification for refusing access to the entirety of the documents identified in a request the Commission is required to indicate, at the very least by reference to categories of documents, the reasons for which it considers that the documents ... are related to the possible opening of an infringement procedure." [35]

For that reason, the public interest exception could not be relied upon. The Commission was equally unsuccessful in relying upon the confidentiality exception, since it could not demonstrate that it had carried out the genuine balancing exercise required by Carvel. The decision to refuse access was, therefore, annulled.

Tidningen Journalisten v. Council[36] was a high profile action brought by a Swedish Journalists' Union, seeking access to 20 Council documents relating to the setting-up of Europol. The Council refused to disclose 16 of those documents, citing the mandatory exception relating to the public interest in public security, and citing also the discretionary exception in relation to confidentiality. The Council did not give any detailed reasons as to why those exceptions were applicable, nor did it address the different considerations which might apply to each of the documents. The applicant claimed that the reasons given by the Council were inadequate in the light of the earlier *Worldwide Fund for Nature* decision, and that the decision should be annulled as a result.

This contention was upheld by the court, which held that the reasons to be given for a refusal of access should be such as will allow interested parties to understand why the measure was adopted, and as to allow the court to exercise its jurisdiction to review the validity of the decision.[37] The reasons given by the Council, the court held, failed to specify why each exception was being invoked, and failed also to specify which exception was being invoked in respect of each document. It followed that the reasons given fell short of those required, and the decision to refuse access was annulled on that ground.

Interporc v. Commission[38] presented issues of particular interest to any person considering use of an access request as an adjunct to discovery. In this case, the applicant had been engaged in importing what purported to be high-grade beef from Argentina into the community. It emerged that the beef in question was of a lower quality, and certificates of authenticity had been forged. Consequently, a substantially higher levy was payable on the beef, which was sought to be recovered from the applicant. The applicant claimed that it had acted in good faith, and that any deficiencies in the control procedures were the fault of the Argentine authorities or the Commission. The applicant therefore sought access to a number of documents relating to the trade in this high-grade beef with Argentina during the period in question.

However, before a decision was made on this application, the applicant instituted annulment proceedings before the Court of First Instance in respect of the decision to increase the levy payable. The Commission then refused access to the documents sought on the basis of the mandatory exception relating to the protection of the public interest in respect of court proceedings. Before the court, the Commission expanded on this ground by claiming that the right of a litigant to access the documents requested should be governed by the Rules of Procedure of the court, and not by the Code of Conduct. In effect, therefore, the Commission was arguing that a requester, by instituting proceedings, thereby lost his right of access to documents related to the subject matter of the proceedings.

The court was, however, unsympathetic to this argument. In particular, it rejected the idea that the institution of proceedings meant an automatic loss of access rights. Instead, the court held that for the Commission to rely on the ground of protection of the public interest, it was necessary for it to follow the standard set out in *Worldwide Fund for Nature*: that is, it was necessary for the Commission, in its statement of reasons, to specify "the specific reasons [why] disclosure of the documents requested is precluded by

one of the exceptions contained in the first category of exceptions".[39] A bald statement that documents related to a pending case was, the court held, inadequate, and for that reason the decision to refuse access was annulled.

Van der Wal v. Commission[40] also presented issues relating to an overlap between rules of court and access provisions. Under Commission Notice 93/C 39/05, relating to co-operation between national courts and the Commission, it is open to national courts presented with competition issues under Articles 81 and 82 of the EC Treaty (formerly Articles 85 and 86) to consult the Commission for further information on points of law or factual matters. In this case, the applicant was a Dutch lawyer who sought access to the replies which the Commission had given to a number of such requests. The Commission refused access, on the basis of the mandatory exception relating to protection of the public interest in respect of court proceedings. In particular, the Commission argued that such replies were supplied to the national court on a confidential basis, and that the replies, once received by the national court, form an integral part of the national court's file. The Commission therefore claimed that the decision whether to publish the replies and/or make them available to third parties was one which should be taken by the national court, and that to release the replies could hinder the national court in administering justice.

This argument relating to the autonomy of the national court was accepted by the Court of First Instance, which held that:

> "The right of every person to a fair hearing by an independent tribunal means, inter alia, that both national and Community courts must be free to apply their own rules of procedure concerning the powers of the judge, the conduct of the proceedings in general, and the confidentiality of the documents on the file in particular."[41]

The Commission was therefore required, the court held, to refuse access on the basis of the mandatory exception, since:

> "the decision concerning access to such information is a matter to be decided exclusively by the national court on the basis of its own national procedural law."[42]

The action for annulment was, therefore, dismissed. However, the court was careful to point out that the scope of this exception would be limited, since:

> "a distinction must be drawn between documents drafted by the Commission for the sole purposes of a particular court case, such as the letters in the present case, and other documents which exist independently of such proceedings. Application of the exemption based on the protection of the public interest can be justified only in respect of the first category of documents, because the decision whether or not to grant access to such documents is a matter for the appropriate national court alone, in accordance with the essential rationale of the exception".[43]

Accordingly, this decision is not an authority for any wider proposition that documents can be withheld simply on the basis that they are related to a pending action, which proposition would, of course, be in conflict with the earlier decision in *Interporc*.[44]

Finally[45], the recent decision in *Hautala v. Council*[46] is significant. In that case, the applicant (a Member of the European Parliament) sought access to a report held by the Council in relation to the criteria applicable to the export of weapons outside the EU. She was refused access to the report on the basis of protection of the public interest concerning international relations. However, she submitted that the Council erred by not granting at least partial access to those sections of the report which did not pose any difficulties.

This submission was accepted by the court, which gave a strongly pro-disclosure decision. The court started by noting that while Decision 93/731/EC did not expressly require the Council to consider whether partial access to be granted, nor did it prohibit such a possibility. Accordingly, the decision had to be interpreted in light of its objective to give the widest possible access to documents. In addition, the court cited the decision of the Court of Justice in *Netherlands v. Council*[47] where it was expressly noted that the right of access to documents was a fundamental part of "the democratic nature of the institutions". Moreover, in accordance with the principles laid down in *World Wildlife Fund* and *Interporc*, the exceptions to the right of access had to be construed strictly. Finally, the court cited the principle of proportionality, stating that the aim of safeguarding international relations:

> "may be achieved even if the Council does no more than remove, after examination, the passages in the contested report which might harm international relations".[48]

Accordingly, the Court held that the Council was under an obligation to release so much of the report as it could, having deleted any sensitive portions, unless "in particular cases ... the volume of the document or the passages to be removed would give rise to an unreasonable amount of administrative work".[49] The decision was therefore annulled for failure to consider whether partial access could be granted.

5. Reform

The Treaty of Amsterdam explicitly recognises the principle of freedom of information, and inserts into the EC Treaty a new Article 255 providing for a right of access to European Parliament, Council and Commission documents. This right is to be governed by principles and limits to be determined by the Council within two years from the coming into force of the Treaty of Amsterdam. Preliminary indications (see the Commission Discussion Paper of 23 April 1999)[50] are that this post-Amsterdam legislation will introduce significant changes from the present position. In particular, it is proposed to create a single access regime in respect of all three institutions, which will extend the right of access to documents held by the institutions whether or not created by them, while at the same time narrowing the right of access in respect of certain internal preparatory documents. It remains to be seen whether this extension of the right of access to documents *held but not created by* the institutions will find favour with the Member States, who would be most affected by such a change. •

1 See generally McDonagh, Freedom of Information Law in Ireland (1998) pp 16-21; McDonagh, *Freedom of Information in Europe* in Keogh (ed), Irish Democracy and the Right to Freedom of Information (1995); O'Neill, In Search of a Real Right of Access to EC held Documentation, [1997] Public Law 446.

2 SI 125 of 1998.

3 For example, the provisions of the Waste Management (Licensing) Regulations, 1997 (SI 133 of 1997).

4 Declaration 17, annexed to the Treaty on European Union.

5 Birmingham (October 1992), Edinburgh (December 1992) and Copenhagen (June 1993).

6 [1993] OJ L340/41.

7 As amended by Council Decision 96/705/EC.

8 As amended by Commission Decision 96/567/EC.

9 Council Decision 93/731/EC Article 1(2); Annex to Commission Decision 94/90/EC.

10 Section 6.

11 Section 6.

12 Council Decision 93/731/EC Article 1(1); Annex to Commission Decision 94/90/EC.

13 76 Corpus Juris Secundum Records 98, p 178 (1994 Release), citing *Bristol-Myers Co. v. FTC 598* F 2d 18, *NLRB v. Sears, Roebuck & Co* 421 US 132, *Maycock v. Nelson* 938 F 2d 1006 and *Aronson v. US Department of Housing and Urban Development 822* F 2d 182. See also *NLRB V. Robbins Tire & Rubber* Co 437 US 214.

14 Case T- 124/96 Interporc v. Commission [1998] ECR 11-231.

15 Council Decision 93/731/EC Article 4(1); Annex to Commission Decision 94/90/EC.

16 Council Decision 93/731/BC Article 4(2); Annex to Commission Decision 94/90/EC.

17 Council Decision 93/731/BC Article 2(1); Annex to Commission Decision 94/90/BC.

18 Commission Decision 94/90/EC Article 2(2). The Council may, in exceptional circumstances, extend this period by one month: Council Decision 93/731/BC Article 7 as amended by Council Decision 96/705/BC.

19 Commission Decision 94/90/BC Article 2(4). Again, the Council may, in exceptional circumstances, extend this period by one month: Council Decision 93/731/EC Article 7(5) as amended by Council Decision 96/705/EC.

20 See, for example, the Ombudsman's decision in relation to complaint 1057/25.11.96/Statewatch/UK/UH where the Ombudsman found that the Council failed to give adequate reasons for a refusal to grant access to certain documents relating to Justice and Home Affairs, and directed that the Council should reconsider whether to grant access. Full-text decisions of the Ombudsman are available on the internet at <http://www.euro-ombudsman.eu.int>

21 Council Decision 93/731/BC Article 3; Commission Decision 94/90/EC Article 2(5) as amended by Commission Decision 96/567/BC.

22 Section 47

23 Own initiative inquiry number 616/PUBAC/F/IJH.

24 Special Report by the European Ombudsman to the European Parliament following the own initiative inquiry into public access to documents, 15th December 1997.

25 The Buropean Parliament, the Court of Justice, the Court of Auditors, the European Investment Bank, the Economic and Social Committee, the Committee of the Regions, the European Monetary Institute, the Office for Harmonisation in the Internal Market, the European Training Foundation, the European Centre for the Development of Vocational Training, the European Foundation for the Improvement of Living and Working Conditions, the European Environmental Agency, the Translation Centre, the European Monitoring Centre for Drugs and Drug Addiction and the European Agency for the Evaluation of Medicinal Products.

26 Details of these rules are provided in the Special Report.

27 By way of decision dated 3rd December 1997.

28 Case T-194/94 *Carvel v Council* [1995] ECR II-2765.

29 Para 64.

30 Para 65.

31 Para 65

32 Case T-105/95 *WWF UK v. (World Wide Fund for Nature)* v. Commission [1997] ECR II-313.

33 Para 56.

34 Para 63.

35 Para 64,

36 Case T- 174/95 *Tidningen Journalisten v. Council* [1998] ECR II-2289.

37 Para 116.

38 Case T- 124/96 *Interporc v. Commission* [1998] ECR II-231.

39 Para 54.

40 Case T-83/96 *Van der Wal v. Commission* [1998] ECR II-545. This decision is currently under appeal.

41 Para 47.

42 Para 51.

43 Para 50.

44 See also the decision of the European Ombudsman in relation to complaint 506/97/JMA against the Commission.

45 Case T- 188/97 *Rothmans v. Commission* [1999] ECR 11-0000 should also be mentioned. This case deals with a narrow point as to whether access is available to documents produced by 'comitology' committees under Article 202 of the Treaty (formerly Article 145) but held by the Commission, and holds that documents produced by such committees will be treated as having been produced by the Commission itself.

46 Case T-14/98 *Hautala v. Council* [1999] ECR II-0000.

47 Case C-58/94 *Netherlands v Council* [1996] ECR I-2171.

48 Para 85.

49 Para 86.

50 Document SG.C.2/VJ/CD D(99) 83.

EDUCATION & THE LAW

By DYMPNA GLENDENNING (B. A. H. Dip in Ed M. Ed PhD, Bl.)
(Butterworths June 1999)

Reviewed by Diarmuid McGuinness SC

This is a comprehensive and bang up-to-date textbook. However, more than that, it is a work of scholarly research. The author is both well-qualified and steeped in years of research on the Irish educational system and draws from a very impressive array of legal, educational and philosophical sources, both nationally and internationally. A consideration of the bibliography of books and articles listed by the author in preparation of the book is very impressive. It is a petty complaint perhaps that these were not cross-referenced to the body of the text where they are referred to.

"This is a valuable addition to any legal practitioner's library and will handsomely prove to have been a worthwhile purchase."

Following an introduction, Chapter 2 details clearly the historical outline and the development of Irish education both prior to and post-1922. It shows clearly how Stanley's ideal of a non-denominational school system fragmented quickly into segregated, denominationally-controlled national school systems. In Chapter 3 the background to the drafting of the 1937 Constitution relating to education is minutely considered. Here the author has had access to the De Valera papers and Hearne papers and also draws on interviews conducted by the author. Of particular interest is the correspondence that Mr De Valera had with members of the Catholic laity and senior clerics including John Charles McQuaid. She then proceeds to an examination of the principles enshrined in Article 42 and Article 44 as they relate to education, i.e. the principle of non endowment, the scope of parental rights, the extent of the State's rights and obligation to prescribe minimum standards, the right of the child to education and the constitutional protection for denominational education. This however is no mere academic exercise: it is related to all the relevant case law, for example the issues raised by the State funding of chaplains in schools which was recently considered in the *Campaign to Separate Church and State v. The Minister for Education,* the extent to which the State can assist by law on funding, the maintenance of a particular denominational ethos in a school recently touched upon by the Supreme Court in *In Re Article 26 and the Employment Equality Bill, 1996* and more practically considered in relation to the constitutionality of the redeployment scheme for secondary teachers which arose in the case of *Grealy v. The Minister for Education* (Geoghegan J., January 1999).

Of crucial importance in this area are two principal questions: one, the extent of the State's duty to make provision for education and, two, the extent of the State's obligation or right to intervene in matters of education. The first is considered not only in the light of the relevant articles and case law such as *Crowley v. Ireland, O'Donoghue v. The Minister for Education* and *O'Shiel & Ors v. The Minister for Education,* but is considered importantly against the background of the actual methods and procedures by which schools are established, managed and funded. Thus, the many footnotes (helpfully arranged at the bottom of the page of text to which they relate - other publishers please note!) refer *inter alia* to OECD Economic Surveys, the Report on the National Education Convention (1994), the Report of the Constitutional Review Group (1996), the Report of the Technical Working Group on School Accommodation (1997), the White Paper on Education and many more diverse sources.

A separate chapter deals with the special question of the provision of education for children with disability. This is

considered against a background of the comparative treatment of this issue in Europe, the United States, England and Northern Ireland before proceeding to an examination of the position in Ireland. She perhaps overstates matters in asserting 'the Courts have since 1980 played a pivotal role in securing rights for children with disability'. In my view, the Courts pivotal role starts from a much later period and really commences with the decision of O'Hanlon J. in 1993 in *O'Donoghue v. The Minister for Health* [1996] 2 I.R. 24. This is surely the decision which provided the impetus for the veritable explosion of litigation against Health Boards, Ministers and Local Authorities relating to children with special needs, educationally and otherwise and out-of-control children, and has led directly to cases such as *L v. Ireland* (High Court March 1995), *T v. The Minister for Education* (High Court, March 1995), *F N v. The Minister for Education* [1995] 2 I.L.R.M. 297 *G L v. The Minister for Justice* (High Court, March 1995), *Comerford v. The Minister for Education* [1997] 2 I.L.RM. 134 and more recently *D B v. The Minister for Justice and Others* (High Court, 29th July, 1998, Kelly J). The justification for these cases is clear: the lack of legislative action and the failure of administrative outreach to children in need and for whom little was being done.

Less critically examined is the extent of this new found or newly exercised jurisdiction in the High Court and Supreme Court, and the extent to which it can reach into areas such as formulation and execution of policy and the allocation of resources by a Minister or a Health Board. In this regard there is a very considerable body of judicial review litigation in England relating to the rationing of health care or educational resources by health authorities and educational authorities such as *R v. Gloucestershire County Council, ex p. Barry* [1997] 1 A.E.R. 1, R v. *London Education Authorities, Administrative Law Reports,* Vol II page 822, *R v. East Sussex County Council, ex p. Tandy* [1998] 2 A.E.R. 769. The most striking examples of the exercise of this jurisdiction relates to the detention under High Court Order for children and young persons, albeit for the best of motives, in places heretofore wholly reserved exclusively for the criminally deviant or for those children dealt with under the regime of the Children's Act, 1908 relating to Industrial Schools. The origin and definition and exercise of this power and the limits of the Courts' other interventions obviously remain to be definitively considered in the future, in subsequent cases.

In chapter 6 the author turns towards consideration of the Education Act, 1998 (passed in December 1998 and partially commenced by S.I. 29 of 1999). This places for the first time on a statutory basis, all of the essential features of the Irish educational system as it has operated to date in practice and as a matter of consensus. In a sense it confirms the Minister's de facto stranglehold of control and puts it on a *de jure* basis tempered perhaps by the statutory consultation required with the other partners in education.

"This is a comprehensive and bang up-to-date textbook. However, more than that, it is a work of scholarly research."

The Act clearly defines for the first time the functions of the Minister, the Inspectorate of Schools, the function of a school, the process of recognition and withdrawal of recognition of schools, the function of a patron, the Board of Management of a School, principals and teachers, and insofar as the content of education is concerned, the prescription of a curriculum under Section 30 of the Act. Part VII of the Act establishes on a statutory basis the National Council for Curriculum and Assessment. The Act is helpfully appended to the text and when fully brought into force will undoubtedly be the bedrock of the Irish educational system well into the next century. The chapter on the Act perhaps disappointingly disclaims itself as being a legal interpretation of the Act, a task which the author entrusts to the future.

In chapter 7 the text considers the extent of the competence of the European Community in the sphere of education in a clear way, by reference to the principles of equal treatment, freedom of establishment and educational rights in Member States, and in particular in relation to migrant workers and their families, and also considers the mutual recognition of professional qualifications in the area of teaching given effect to by the First and Second General System Recognition Directives. Curiously the Second General System Regulations made by the Minister (S.I. 135 of 1996) do not appear to be referred to. The chapter considers the linguistic requirements that may be imposed (upheld in *Groener v. The Minister for Education*) and other important topics relating to the development of a common vocational training policy and the Transfer of Undertakings Directive.

In the European context, the author concludes by looking at the legal basis for community legislation on education following upon the Treaty of European Union and the

Amsterdam Treaty, and there sounds a note of warning about the possible passage of Community measures without democratic legitimacy, possibly overriding national sensitivities and consensus or intruding too deeply into the substance and character of education.

In the wider international context, chapter 8 proceeds to consider the scope of educational rights as human rights derived from the European Convention of Human Rights and Protocol 1(2) and the United Nations Human Rights Instruments. An illuminating review of cases relating to the scope of educational rights under the Convention and the Protocol, deals with the linguistic preferences of parents, compulsory sex education in schools - in particular the Danish case of *Kejelsten* - the compatibility of corporal punishment with the Convention and the maintenance of religious ethos of Catholic schools. This necessarily raises a contemplation of the contemporary topic of the possible incorporation of the ECHR in Ireland and the dynamic that might arise from the establishment of the new Human Rights Commission (as part of the implementation of the Good Friday Agreement), a Bill for which is currently before the Houses of the Oireachtas.

"Chapters 9 and 10 deal respectively with a teacher's and school's duty of care in relation to negligence and school discipline. The former will make the text, if not a vade mecum for every Circuit and Round Hall practitioner, at least a necessary purchase for their library."

Chapters 9 and 10 deal respectively with a teacher's and school's duty of care in relation to negligence and school discipline. The former will make the text, if not a *vade mecum* for every Circuit and Round Hall practitioner, at least a necessary purchase for their library. The latter, in conjunction with the Sections of the 1998 Act relating to suspension of pupils, will no doubt be quickly litigated in the High Court. Of regrettably topical and necessary interest is the reporting of sexual abuse to which the Protection for Persons Reporting Child Abuse Act, 1998 now applies (again the Act is helpfully appended to the text).

The remaining chapters 11 and 12 deal with employment law relating to teachers, and Freedom of Information relating to access to records in schools, respectively. The first broad issue is covered in great detail and with reference to a surprisingly large number of cases on the topic. This discussion embraces the wide range of provisions - statutory, regulatory and European based and - also contains one of the first discussions of the Employment Equality Act, 1998 in the light of the Supreme Court decision which led to the fall of the Employment Equality Bill, 1996.

At the time of the book going to press, the decision of the Supreme Court in *DPP v. Best* was outstanding. This concerned the provision of education by a parent in the home and a consideration of the adequacy of that, whether it met what was required by the Constitution as a certain minimum standard and also focussed in particular on the question of the teaching of Irish within that standard. Inevitably however, some important decision will always be outstanding at time of publication of a book. The book however also includes a copy of the Education (Welfare) Bill, 1999 pursuant to which it is intended to establish a National Welfare Board, to allow the Minister prescribe minimum standards of education after consultation with the National Council for Curriculum and Assessment, to require the registration of children receiving education in places other than schools to revise the lacunae in the School Attendance Acts and in a modern context essentially to achieve at least some of the aims originally contained in the School Attendance Bill, 1942 which was struck down by the Supreme Court ([1943] I.R. 334). This new Bill will lay down a very detailed statutory regime designed to ensure either attendance for education at a recognised school or the registration of a child as receiving education elsewhere which lives up to the Minister's prescribed minimum standards in accordance with the regulatory provisions of the Act.

Greater critical scrutiny of this proposed measure might perhaps have been expected. It may however have been wiser to see whether and in what shape the Bill becomes law. If it's passed, it is hardly likely to escape either a referral under Article 26 or more likely, a speedy constitutional challenge.

As with most textbooks there are some errors and omissions, for example, Walsh J. is posthumously demoted to the High Court in the *Magee* case and a quotation from his judgment is erroneously attributed to the report of the *Abortion Information Referral Bill*. Also Keane J's judgment in the *Campaign to Separate Church and State* case is mis-attributed to the I.L.R.M. report of the High Court decision.

Though the Vocational Education Committee system and the development of the Universities is outlined in the historical introduction, there is however no detailed discussion of their nature and status in the body of the text. There is, in particular, much litigation relating to the Ministerial powers of appointment, suspension and dismissal of VEC teachers and no doubt there exists many's a legal *rara avis* which the author could have brought to our attention in connection with a discussion of universities and the more recent statutory colleges.

However, having regard to the wealth of information, statistics and sources and the breadth of case law referred to as a whole in the text, these are minor, perhaps trifling omissions. This is a valuable addition to any legal practitioner's library and will handsomely prove to have been a worthwhile purchase. •

THE PROPERTY RIGHTS

OF CO-HABITEES

For many years consideration of trusts in Irish Property Law was quite restricted. It was largely restricted in breadth to spousal disputes, and in range to whether the circumstances amounted to a resulting or a constructive trust. See, for example, *N(E) v. N(R) [1992] 2 I.R.116* as one of the more recent considerations of the topic. More recently, the breadth has extended beyond spousal disputes to disputes between siblings *(See Murray v. Murray unreported, High Court, Barron, J., 15th December 1995)* and to non-married co-habitees *(see Ennis v. Butterly [1996] 1 I.R. 426).*

The author of this book has produced a work that analyses the jurisprudence of five comparative common law jurisdictions concerning trusts and related concepts. By way of introduction to the substantive treatment of the issues, he addresses the social and legal background to the problems thrown up by property disputes between cohabiting couples. This introduction is comprehensive and useful in that it includes married couples and both heterosexual and homosexual co-habitees. He also refers in his introduction to cohabitation contracts.

In the substantive content of the text, the author analyses the orthodox resulting trust, the extended resulting trust and proceeds with extensive analysis of the law in jurisdictions other than Ireland, considering the unjust enrichment approach as developed in Canada, the unconscionability approach as developed in Australia and finally, the reasonable expectation approach as developed in New Zealand. The analysis of the law in Ireland commences with the fundamental question of the intention of one or other of the parties to the transaction. He proceeds to consider the extended resulting trust which he sources in *W v. W [1981] ILRM 202.* Along the way, he points out the difficulties associated with this model of trust, including conveyancing difficulties and the difficulty of calculating a share generated by indirect contributions. One of the more interesting sections of the book is the consideration of estoppel as it affects trusts and, in particular, the operation of estoppel principles in the context of unmarried cohabitation.

His consideration of the legal position and development of same in Canada, Australia and New Zealand is detailed and comprehensive. The relevance and usefulness of same in the Irish context is in being in a position to see how other jurisdictions with a comparative legal framework have dealt with similar problems. This is more so the case given the prevalence of unmarried cohabitation and same sex cohabitation is more extensive in those other jurisdictions than here, and also given the emphasis and special protection in this jurisdiction afforded to a family based on marriage. What is the worth of this book? It is clearly a book which academic lawyers in the field of property law should digest with relish. The work itself is acknowledged as being a considerably modified version of a Ph D thesis undertaken by the author. One could nearly guess that this was the background to the work given its layout and the treatment of the topic. It is certainly quite different from other treatments of the topic, which are more clearly geared towards legal practitioners.

The complaints which might be levied against the work, from a practitioner's perspective in this jurisdiction, are that it is primarily a comparative study of trust principles. It would be of greater value to a practitioner were the primary focus of the book to be trust principles in this jurisdiction, coupled thereafter with a comparative analysis of the other jurisdictions. The result of the slightly shallow treatment of the Irish position is a slightly less than full discussion of various propositions made by the author. The most glaring example of this is in the treatment by him of the case of *W v. W* which could be described as a cornerstone of trust principles in this jurisdiction. While the case is referred to in a number of places throughout the consideration of the Irish position, the substantive treatment of same occupies two pages. In the course of this, the author purports to clearly set out the basis of the case and then suggests that the doctrine established in *W v. W* is founded on a misunderstanding and should be eliminated from Irish law at the first opportunity. In terms of strict property and trust principles, there may be a case to be made to this conclusion. However, the comparative nature of the work demands that the contention resulting in this conclusion has not being fully and comprehensively reasoned.

Before setting out the conclusion to this review, it must be said that there is a

"One of the more interesting sections of the book is the consideration of estoppel as it affects trusts and, in particular, the operation of estoppel principles in the context of unmarried cohabitation."

concluding chapter comprising some twenty-five pages in the book which is an excellent summary of the substantive treatment of the topic under the various headings elsewhere in the text. Overall, this is a book which must be recommended notwithstanding the complaints made above. The reason for the recommendation that practitioners should avail themselves of this book is quite simple and straightforward. The concept of a trust and related concepts have developed in this jurisdiction over the past number of years. They have done so by way of refinement to the legal principles themselves and in response to ever increasing sophistication of the problems coming before Court. This jurisdiction and the jurisprudence in this jurisdiction can only benefit from a consideration of how other jurisdictions have dealt with this matter. This does not mean that the solutions proposed or the developments which have evolved in other jurisdictions should be adopted without scrutiny. If one accepts the viewpoint that an insular approach to the resolution of legal problems and the development of the law is to be avoided, this book commends itself to interested practitioners. An added feature of this book is that, unlike previous treatments of the topic in this jurisdiction, the author looks beyond our immediate common law neighbour for guidance, analysis and inspiration.

"His consideration of the legal position and development of same in Canada, Australia and New Zealand is detailed and comprehensive. The relevance and usefulness of same in the Irish context is in being in a position to see how other jurisdictions with a comparative legal framework have dealt with similar problems."

Finally, it is a book which I would anticipate referring to in the future whenever a dispute involving such matters arrives on my desk. •

CENTRALISED EUROPEAN UNION

CONVENTION CASEBOOK AND JUDGEMENT REGISTRY DATABASE ®

The proposed Centralised European Union Convention Casebook and Judgement Registry Database ® has recently taken a further step forward with the registration of the name as a trade mark and service mark in classes 16 and 42 in respect of publications and legal services. Our colleague Twinkle Egan BL together with her team are to be congratulated on the body of work in progressing this project, which can be seen on the www site: http://www.cyberia.ie/~twinkle.

At present there is no accessible database which can enable citizens of the EU and others, who live and trade in the single judicial area created by the Brussels Convention as amended and extended to have prompt and easy access to authoritative and up-to-date information in relation to the existence and progress of litigation in which they may have a legitimate interest. This is despite the fact that the Brussels Convention has been in existence since 1968.

The solution proposed is a Centralised European Union Convention Casebook and Judgement Registry Database. The essence of the proposal is that basic "key information" as contained on court files in the Member States would be copied by the central authorities therein and transferred or transmitted onto a centralised database for on-line access by interested parties. Key data relating to the parties and the cause of action in the court records would be submitted to the database and made available in a single standard tabular format. If it becomes a reality it will be a most valuable forensic tool. The rapid growth in international commerce and the emergence of a global e-commerce marketplace underscores the value of such a system in establishing the status of trading partners and consumer suppliers.

In a wider global context, there are ongoing initiatives to co-ordinate private international law procedures. These initiatives will become ever more pertinent with the projected expansion in e-commerce. The Final Hague Conference Meeting on Private International law for the Recognition and Enforcement of Civil and Commercial Matters will be held in The Hague from the 25th to the 30th October 1999. Twinkle Egan BL has been chosen to attend this meeting on the proposed Worldwide Judgements Convention as a representative of the International Academy of Trial Lawyers' team of which she is a Fellow. •

James Bridgeman

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