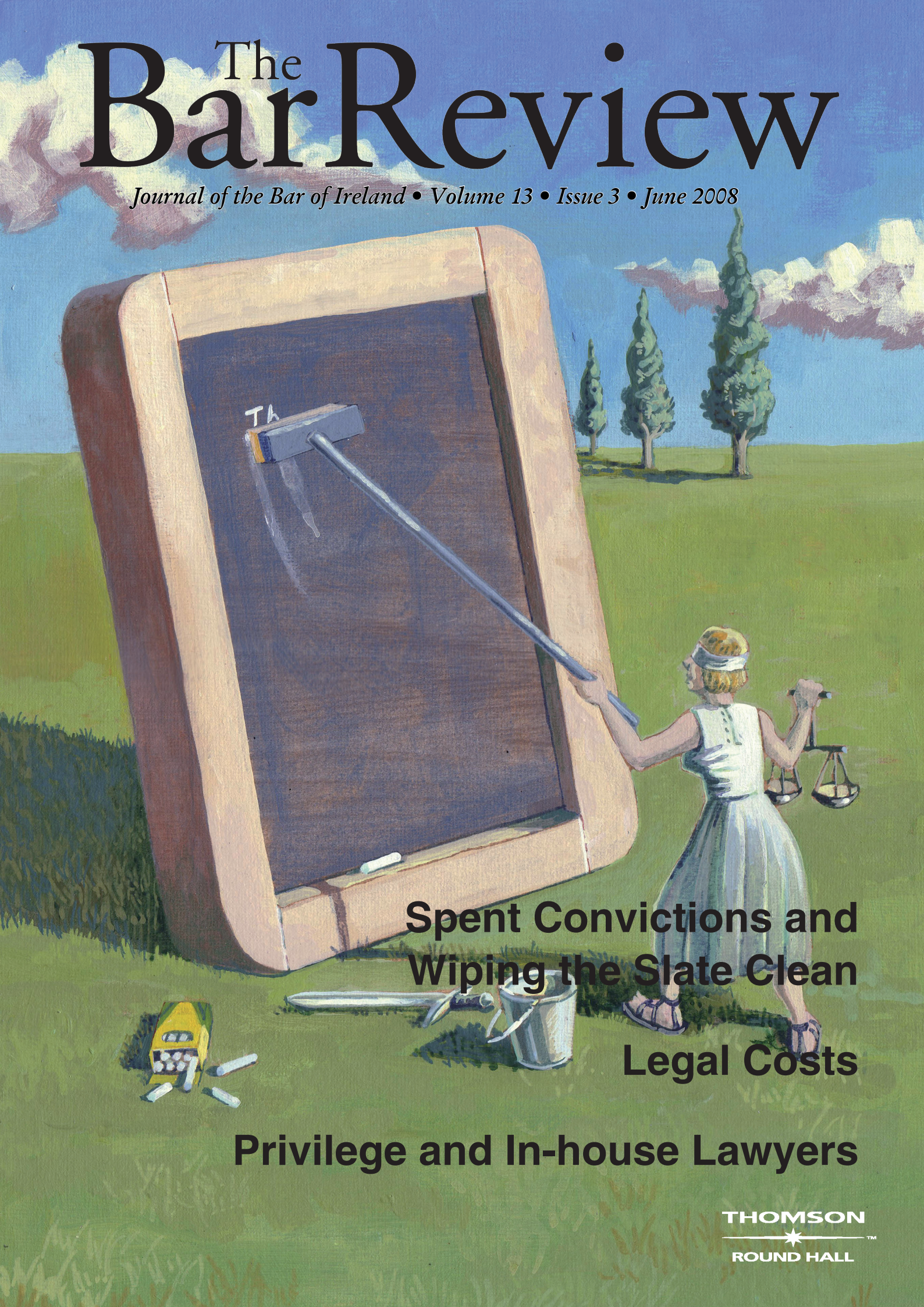
The Bar Review

Journal of the Bar of Ireland • Volume 13 • Issue 3 • June 2008



Spent Convictions and Wiping the Slate Clean

Legal Costs

Privilege and In-house Lawyers

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The Bar Review

Volume 13, Issue 3, June 2008, ISSN 1339-3426

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The Bar Review is published by Thomson Round Hall in association with The Bar Council of Ireland.

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Subscriptions: January 2008 to December 2008—6 issues
Annual Subscription: €210.00

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Underprivileged in EC Law: In-house lawyers and the ruling in *Akzo Nobel*

Emily Gibson BL

Introduction

The European Court of First Instance ("CFI") has recently clarified limitations on the scope of legal professional privilege ("LPP") for in-house counsel in the context of European competition law investigations. In its judgment in *Akzo Nobel and Akcros Chemicals v European Commission*[1] ("Akzo"), the CFI has disappointed in-house lawyers by confirming that communications between a client and its in-house lawyer do not benefit from LPP. However, the decision offers some light by expanding the category of documents protected by LPP and providing useful guidance on the procedure to be followed in the event of a dispute.

The Concept of Legal Professional Privilege – Irish v EC law

In competition law investigations, the European Commission often uses its wide-ranging powers to require the production of large volumes of information and documentation. During a dawn raid, the Commission can obtain access to business systems and files.[2] It is imperative that companies understand which documents are privileged (and need not be disclosed) and those, which are not.

The ruling in Akzo is in direct contrast with rules of LPP in Ireland. The origins of the concept of LPP, as it exists in Ireland, lie in the procedures for discovery.[3] It has long been held that documents passing between a lawyer and a client containing legal advice are "privileged" from disclosure in civil proceedings. The privilege is that of the client, not the lawyer. This is an exception to the general principle that all relevant information should be before the court.

> "The recognition of legal professional privilege goes back many centuries. The privilege attaches to confidential communications passing between lawyer and client for the purpose of obtaining legal advice or assistance and also where litigation is contemplated or pending…its purpose is to aid the administration of justice, not to impede it. In general, justice will be best served where there is the greatest candour and where all relevant documentary evidence is available." [4]

The Irish courts have distinguished between two different types of LPP: "legal advice privilege" and "litigation privilege". First, legal advice privilege protects communications between lawyers and their clients where it is sought and given independently of any actual or potential proceedings. Secondly, litigation privilege protects advice or documents created for the purpose of litigation. This covers not just client-lawyer communication but also documents or advice given by third parties for the dominant purpose of which is litigation.[5] Under Irish law, the definition of a lawyer includes, solicitors, barristers and employed in-house legal advisers. [6]

The European Court of Justice ("ECJ") first dealt with LPP in 1982 in *Australian Mining & Smelting Europe Ltd v. Commission of the European Communities* ("AM&S").[7] It held that only written communications exchanged between an independent lawyer (i.e. one who was not employed under a contract of employment) and his client, which were made "for the purposes, and in the interests, of the client's rights of defence" were privileged.

Community law is narrower than Irish law. First, for LPP to arise the lawyer must be independent of his client; in-house lawyers are not covered. The ECJ linked the legal adviser's independence to the lawyer's role in the administration of justice and the overriding interests of that cause, which trump client needs. Secondly, only communications, which are made for the purpose and are relevant to a client's rights of defence, fall within the ambit of LPP. This is much narrower than LPP under Irish law as it is confined solely to litigation privilege. It appears this would not include legal advice privilege where that is given for a reason other than "for the purposes, and in the interests, of the client's rights of defence".

Facts in *Akzo*

Akzo Nobel was investigated in 2003 by the Commission in relation to a price fixing enquiry. Commission officials, assisted by representatives from the Office of Fair Trading in the UK, carried out a dawn raid at Akzo Nobel's Manchester premises in search of evidence of possible anti-competitive practices. During the raid, the Commission reviewed, copied

1 Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals/Akcros Chemicals v Commission* (Court of First Instance, 17 September 2007).

2 Articles 17-20, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

3 See further, "Evidence", Declan McGrath, Roundhall, (2005) Chapter 10, page 523

4 *Per O'Flaherty J. Gallagher v Stanley* [1998] 2 I.R. 267 as confirmed by the Supreme Court in *Payne v Shovlin & Ors.* [2006] IESC 5

5 *Gallagher v Stanley* [1998] 2 IR 267

6 *Geraghty v Minister for Local Government* [1975] I.R. 300 at 312

7 Case 155/79 *Australian Mining & Smelting Europe Ltd v Commission of the European Communities* [1982] E.C.R 1575 at 21

and seized several documents threatening the company with potential criminal sanctions if they failed to co-operate.[8]

The Commission officials stated that it was necessary for them to briefly examine the documents in question in order to form their own view as to whether the documents were privileged. In the course of the examinations, a dispute arose in relation to five documents.

The disputed documents fell into two categories: Set A comprised two copies of a memorandum from the general manager of an Akzo subsidiary to a superior which Akzo said contained information gathered for the purpose of obtaining outside legal advice in a competition law compliance programme. One copy had handwritten references to contact with a named external lawyer. There were also some handwritten notes made by the general manager of his discussions with the employees and two emails which he had exchanged with a competition lawyer employed in Akzo's legal department and also a member of the Dutch Bar. These documents were called Set B. Akzo said that the handwritten notes were used to prepare the Set A memorandum.

Akzo asserted that LPP applied to both sets of documents and objected to the Commission looking at the documents, even taking a "cursory look" because it argued that the Commission would become aware of their content. The officials decided immediately that the Set B documents were not privileged and took copies away for the case file without sealing them in an envelope. The officials were unsure whether the documents in Set A were privileged and decided to copy them, place them in a sealed envelope and take them back to Brussels. They later determined that they did not benefit from LPP.

Akzo sought to annul the Commission's decisions.

The Court considered three main issues: (i) the procedure to be followed where confidentiality is claimed for certain documents (ii) the categories of documents that are covered by the protection of confidentiality and (iii) whether the protection extends to communications to/from the company and its in-house lawyers.

i) Procedures to be followed where confidentiality claimed

The CFI gave important guidance on the procedure to be followed where confidentiality is claimed for documents during an investigation by the competition authorities.

The Commission in *Akzo* had argued that it was entitled, at the least, to take a "*cursory glance*" at the documents in order to decide for itself whether the documents were protected, and to add them to the file if it considered that confidentiality could not be claimed. It was then for the undertaking, if it disagreed, to challenge the matter later.

The Court, however, held that an undertaking is entitled to refuse to allow the Commission to view the document, even cursorily, for these purposes unless to do so would not risk revealing the contents of the document.

The power to prevent the Commission from looking at a privileged document can often be crucial, as the information contained therein, while it cannot be used by the Commission to prove an infringement, might otherwise be used by the Commission to obtain "leads" to begin new investigations. The CFI found that the Commission could cause harm to a company simply by casting a "cursory glance" at potentially privileged documentation during a dawn raid and it confirmed that such harm could not be undone by excluding the documents from the investigation.

The CFI held that if an undertaking is claiming during an investigation that a document is privileged, it should provide the Commission with relevant information to demonstrate why the document should be protected. This would include: details of the identity of the author and intended recipient, their respective duties, the context in which the document was created and in which it was found, the way in which it was filed and related documents.

If officials are not satisfied with this explanation, a copy of the document should be placed in a sealed envelope and removed by the investigating officials. Officials must not read the document before the Commission has adopted a formal decision rejecting the claim of LPP and the time limit for appealing against the decision to the CFI has expired. The undertaking cannot extend the period during which the document may not be read by officials by commencing an appeal; to do this, the undertaking must seek interim relief from the CFI.

These requirements compel the Commission to adhere to certain procedures during an investigation. As a result, the Commission may face lengthy litigation before it can actually use evidence contained in sealed documents. It was argued that companies might use the sealed envelope procedure to obstruct investigations. However, the CFI refuted this by stating that any abuse of this procedure can be penalised by the Commission and the courts using their powers under Regulation 1/2003.[9]

The CFI concluded that the Commission officials had infringed the procedure for protecting LPP during the raid by forcing Akzo to allow officials to look over the documents. However, this did not result in Akzo bring unlawfully deprived of protection in relation to the documents as the Commission had not erred in deciding that the documents did not enjoy the protection of privilege (see below).

ii) Categories of documents protected by LPP

Previous EC case law established three categories of documents protected under the doctrine of LPP[10]:

1) Written communications exchanged with an external independent lawyer after the initiation of a competition investigation;
2) Earlier written communications exchanged with an external independent lawyer which have a relationship to the subject matter of that procedure; and,
3) Internal notes circulated within an undertaking, which are confined to reporting the text or the

8 Section 65 of the UK Competition Act, which is punishable by a term of imprisonment and a fine.

9 *Akzo* at 89

10 *AM&S* and *Hilti v Commission* [1991] 2 ECR 1439

content of such communications with external independent lawyers containing legal advice.[11]

Akzo adds a fourth category, namely preparatory documents drawn up exclusively for the purpose of seeking legal advice from an external independent lawyer in exercise of the rights of defence, even though those particular documents are not sent to the external lawyer or they were not created for the purpose of being sent physically to the external lawyer.[12]

What is the meaning of drawn up "exclusively" for the purposes of seeking legal advice? The CFI made it clear that the fact that a document has been discussed with a lawyer is not sufficient to give it such protection, and that the possibility of treating a preparatory document as covered by LPP must be construed restrictively. In particular, the fact that a document has been drawn up under a competition law compliance programme is not sufficient in itself for that document to benefit from protection under LPP.[13]

In *Akzo*, the Court was not satisfied that the memorandum in Set A had been drawn up exclusively for the purpose of seeking external legal advice. Instead, the Court held, on the facts, that the most plausible explanation was that the memorandum had been drawn up to enable the manager concerned to seek agreement on the recommendations regarding the company's conduct.

iii) In-House Lawyers

The CFI confirmed the ruling in *AM&S* which "expressly excluded communications with in-house lawyers, that is, legal advisers bound to their clients by a relationship of employment", from protection under LPP.[14]

The CFI in *Akzo* confirmed the concept of independent lawyer as defined by the ECJ in *AM&S* in negative terms: "such lawyer should not be bound to his client by a relationship of employment" rather than positively, "on the basis of membership of a Bar or Law Society or being subject to professional discipline and ethics".

Akzo's in-house lawyer, while employed, was also a member of the Dutch Bar, and his contract explicitly required Akzo to respect his ethical obligations in that respect. It was argued that even if he was employed, he was "independent". This was not enough for the CFI and the Court stressed that in *AM&S*, the ECJ had taken a "conscious decision" (contrary to Advocate General Slynn's opinion) not to allow LPP for employed lawyers, even if they were still members of a Bar[15]. The CFI held that legal advice should be provided "in full independence", which the CFI defined as "that provided by a lawyer who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice".[16]

Despite arguments from Akzo[17] and various interveners representing the interests of external and in-house lawyers[18], the CFI refused to be persuaded even though it (i) accepted that the specific recognition of the role of in-house lawyers and the protection of communications with such lawyers is relatively more common today than at the time of *AM&S* judgment in 1982 and (ii) recognised that some EU Member States treat the role of in-house lawyers and the protection of their communications differently. The CFI ruled, however, that it was not possible to identify tendencies, which are uniform or have clear majority support in that regard in the laws of the EU Member States.

The CFI concluded that the protection of LPP is an exception to the Commission's powers of investigation and that the ECJ and the CFI have been "at pains to develop a Community concept of LPP" for the uniform application of the Commission's powers in the common market.[19]

Akzo maintains the status quo and the advice of in-house lawyers is not protected under EC law by LPP, and can be examined and used by the European Commission.

Potential application of *Akzo* to Irish Competition Authority investigations?

The concept of Community LPP is clearly distinct from Irish law on LPP. The practical implications of this is that the LPP enjoyed by an in-house counsel under Irish law cannot be used as a shield in a Commission competition investigation, but could possibly be relied on in an investigation by the Irish competition authority under the Competition Act 2002.

However, it is doubtful that in-house counsel LPP as recognised under Irish law could be relied upon in an investigation by the Irish Competition Authority of a breach of EC law and the principles of Community LPP would arguably apply. This question is particularly relevant following the modernisation of EC competition law under Regulation 1/2003 under which the Irish Competition Authority has full power to investigate and enforce Articles 81 and 82 of the EC Treaty.[20]

Conclusion

Unsurprisingly, *Akzo* has drawn sharp criticism both from groups representing the interests of in-house lawyers as well as from business leaders. The Law Society of England and Wales published a press release "vigorously" condemning the *Akzo* judgment.[21] It is worth noting that the judgment has been appealed to the European Court of Justice but it could be up to two years before the case is heard. [22] ■

11 *Akzo*, at 117.
12 *Akzo,* at 123.
13 *Akzo* at 127.
14 Case 155/79 *Australian Mining & Smelting Europe Ltd v Commission of the European Communities* [1982] E.C.R 1575 at 27.
15 *Akzo* at 167
16 *Akzo*, at 168.
17 Akzo argued for an expansion of the independence requirement given that a person admitted to the Dutch Bar gave the advice.
18 The Council of the Bars and Law Societies of the European Union, the *Algemene Raad van de Nederlandse Orde van Advocaten* (Netherlands Bar Association), the European Company Lawyers Association, the American Association of Corporate Counsel and the International Bar Association.
19 *Akzo*, at 176.
20 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
21 http://www.lawsociety.org.uk/newsandevents/pressreleases/view=newsarticle.law?NEWSID=360053
22 Case C–550/07 P.

The Kenyan Women Lawyers Federation

Sheena Greene BL

Last summer, I spent three weeks in Kenya working as a volunteer with the Kenyan Federation of Women Lawyers (FIDA Kenya). FIDA is a not for profit, non partisan NGO established in 1985, whose aim is the creation of a Kenyan society free from all forms of discrimination against women on the basis of gender. It focuses attention on enhancing and empowering women's rights and on the provision of free legal aid to women in need.

The existence of voluntary legal organisations such as FIDA is vital to many women in Kenya, which lacks a free legal aid service and where the legal system has frequently failed to protect and uphold their human rights. Women and girls are most disadvantaged and vulnerable to the effects of poverty, poor education and violence of all types. Traditional lack of positive female role models and poor participation by women in politics and public life has proven challenging to the elimination of gender based violence and discrimination. FIDA believes that ensuring women are empowered to combat and overcome violence and discrimination is fundamental to human dignity and reaching their potential in the sustainable development and social harmony of any just and fair society.

The executive director, Jane Onyango, oversees FIDA Kenya and it's dedicated team of committed professionals, the majority of whom are postgraduate experienced lawyers. The organisation is structured into four teams from three main offices, the headquarters based in Nairobi and two branch offices in Mombasa and Kisumu. The teams comprise legal aid services, strategic leadership, advocacy and human rights and finance. Financial support and funding is provided for by up to 30 donor agencies and is efficiently and rigorously supervised by the finance section so that all monies expended on individual projects are fully accountable.

I worked in the Nairobi office with the Women's Rights Monitoring and Advocacy Team and was given an excellent overview of the dynamic work engaged in creating awareness on gender and legal rights through advocacy and legal reform. Christine Ochieng, former Senior Program Officer, led and focused the team's activities and skills so that participation by the individual team members on different projects was maximised. Alice Maranga, Hilary Muthui, Moses Otsieno, MaryFrances Lukera and Goretty Osur work on programs addressing discriminatory constitutional and legislative provisions[1] and also the evaluation of implementation of new laws prioritizing elimination of violence[2]. The team focuses on developing dialogue with government officials and legislators, providing training sessions, giving interviews to and doing opinion pieces for the media, participating in panel discussions. FIDA also coordinates the use of gender mainstreaming strategies to counterbalance prevalence of negative stereotyping by looking beyond partisan considerations to promote the greater interests of women as a whole. The team produces annual reports on the legal status of women to ensure that FIDA's advocacy and lobbying initiatives towards gender parity are valid and adequately informed. Monitors are trained across the country on specific areas of concern and they observe women's rights violations in their localities and submit monthly reports for evaluation.

These areas of concern have included programs targeted at eradicating harmful cultural and traditional customs and practices such as child marriage[3]and bride price, polygamy, female genital mutilation[4], gender and domestic violence[5], widow inheritance[6] and reproductive health[7]. Sometimes these activities and reports are conducted in conjunction with national partner organisations or international donor bodies. Topics focus on creating awareness on harmful practices that have received limited exposure or scrutiny to date. Projects aim at changing harmful behavioural practices by raising public awareness of their detrimental consequences.

1 The Constitution of Kenya contains prohibition of discrimination under article 82(4 b &c), but notes that the prohibition against discrimination is subject to various limitations, exceptions and qualifications in article 82 (1 & 2). See Shadow Report to the 5th and 6th Combined Report of the Government of Kenya, on the International Convention On The Elimination Of All Forms Of DiscriminationAgainstWomen(CEDAW)presented by FIDA to the 39th Session of the United Nations Committee in New York 23 July-10 August 2007.

2 The Sexual Offences Act was enacted in 2006 and despite the appointment of a task force to implement the act, implementation remains limited, and sexual offences remain largely underreported.

3 While the Marriage Act forbids marriage under the age of 16 for a girl and 18 years for a boy, customary and Islamic laws generally allow adolescents who have reached puberty marry regardless of their age. There is a widespread practice of forced child marriage.

4 The Children's Act 2001 outlaws performing FGM on girls under 18 years but not to women. According to 2003 Kenya Democratic Health Survey (KDHS) 32% of the women interviewed indicated that they had been circumcised.

5 Domestic violence remains a serious problem. The 2004 KDHS indicated that 40% of women interviewed had experienced domestic abuse between the age of 15 and 49 years. See Gender Series: Domestic Abuse in Kenya Tony Johnson 2002. Gender Series: Sexual abuse of Kenyan women & girls Tony Johnson 2003.

6 Certain communities practice wife inheritance, in which a man inherits the widow of his brother or other close relative, irrespective of her wishes.

7 Estimates from a study on magnitude and consequences of unsafe abortion in Kenya in 2003 estimated that 300,000 unsafe abortions occur each year.

During my weeks at FIDA's offices team members were engaged in a variety of projects; including the creation of a police training manual and course on Gender and Human Rights, a research project on human rights violations against sex workers in Kenya and various other proposals for new projects. FIDA conducts ongoing legal training programs with leaders and chiefs of tribal and minority communities, in different provinces, to equip them with legal knowledge of women's rights in areas such as education, healthcare, marriage and succession law. It has advocated constantly for the education of women at all stages; seeing it as the key to their advancement and participation in an inclusive, just and fair society.

The Legal Aid Teams core aim is the provision of legal aid clinics to vulnerable and disadvantaged women in three locations; Nairobi, Mombasa and Kisumu. Each of these clinics work with the disparate challenges posed by local conditions of cultural, ethnic, religious and linguistic variety. Nairobi's legal aid clinic reflects the urban problems of any modern metropolis and diversity of its inhabitants who have left their rural homeland to seek a living there. It is the international regional hub for many companies, international aid organisations and foreign journalists reporting on the East Africa region; although Nairobi's favourable climate and proximity to excellent safari trips might also be a factor in this. It is also home to two of the largest slum dwellings in East Africa, Mathare and Kibera. I spent one week in Kibera prior to joining FIDA and saw at first hand the level of deprivation and determination of the many of the estimated one million slum dwellers who struggle everyday for basic survival. I also observed the determination of local primary schoolchildren to maximise their only opportunity for education by arriving hours before school classes begin so that they could avail of the school's electricity to do their homework[8].

Mombasa and the coastal region have a large Muslim population who are subject to Islamic law[9], which is enshrined in the Kenyan Constitution; in matters relating to personal status, marriage, divorce or inheritance. As the Kenyan coast develops it's tourist industry, so too does the legal aid section of the Mombasa office expand to assist the growing number of foreign or migrant clients and child victims of the international sex industry. The Mombasa office has been particularly pro active in facilitating children who have experienced abuse by having child friendly facilities within the office and also by forging links with the Children's Court and social services. It has also introduced family mediation and ADR services.

The individual offices also participate in a referral system with counselling services, relevant government departments and pro bono lawyers' networks nationwide. The use of *pro bono* lawyers is particularly important in a geographical base as large as Kenya[10]. The lack of a national legal aid system has resulted in the provision of access to legal services being largely left to the limited resources of NGO's such as FIDA. While potential clients might not be able to travel large distances to one of the FIDA offices, they are still able to access their legal services through outreach programs or through referral to local pro bono lawyers. Each clinic receives an average of 100 clients per day, seen by a total of 9 in house lawyers. The clinics are so busy that FIDA's manpower is overburdened.

One practical and effective solution to this has been the introduction of training courses on self representation and advocacy skills. Obviously these courses have to be tailored to the educational levels of the recipients. The legal aid offices also use mediation and ADR and have found this to be extremely positive in reaching swift resolution in cases and having the additional benefit of reducing litigation. FIDA is widely recognised by both men and women throughout Kenya as a legal organisation which represents, supports and redresses injustices suffered by women on the basis of their gender, in the home, workplace or throughout the educational system. This is significant as Kenya has approximately 42 different ethnic communities and countless local languages. Frequently, there are stories of women using the threat of contacting FIDA's services as a method of defence to domestic abuse.

Over the last 23 years, FIDA has grown from a small grassroots legal organisation to gaining national recognition as a leading force influencing policy on law reform, legal education and focused litigation. It has retained it's core values of providing legal services to the most needy and vulnerable members of Kenyan society. FIDA lawyers are becoming increasingly involved in public interest litigation, as their experience is that precedent judgments result in greater and more visible effects than the addressing of individual cases.

FIDA Kenya gained an international profile by providing a shadow report on Kenya's implementation of all the articles of the Convention on the Elimination of All Forms of Discrimination against Women to the CEDAW Committee last summer in New York. In April 2007, the University of California honoured FIDA for its provision of exemplary mediation services in Kenya and FIDA was granted observer status with the African Commission in May 2007. In September 2007, the organisation was appointed, along with other civil society organisations, to undertake voter education by the Electoral Commission of Kenya for the general elections.

It was a fascinating and invaluable experience on the merits of bringing universal principles of human rights to bear, with courage and vision, to create a flexible and varied solution balancing the influence of multiple cultures and traditions. Recent post election violence in Kenya has emphasised it's ongoing challenges.

Information on the work of FIDA is available on www. info@fida.co.ke ■

8 The introduction of free compulsory primary education up to 8th grade in 2003 transformed opportunities for children of many poor Kenyan families and has been a major step in gender mainstreaming by eliminating the need to choose which child should benefit from a basic education.

9 Article 66(1-5) of the Kenyan Constitution provide for the establishment of Kadhis' Courts to apply personal status law for Muslims by way of the Kadhis' Courts Act 1967. Muslim law applied by the Kadhis' Courts where "all parties profess the Muslim religion" relating to personal status, marriage, divorce or inheritance.

10 Kenya is 580,367 km2 or approximately 6 times the size of Ireland. It is estimated that 80% of the 35 million population still live in rural areas.

Preliminary challenges to affidavit evidence: *Director of Corporate Enforcement v. Bailey*

Robbie Slattery BL

Introduction

The recent High Court decision of Irvine J. in the case of *Director of Corporate Enforcement v. Bailey & Anor*[1] is one of the most important recent decisions on the law of evidence as it applies to civil proceedings in this jurisdiction. The judgment deals with the issue of challenging the admissibility of evidence contained in affidavits which ground proceedings and contain the entirety of the evidence to be relied on in those proceedings. It is proposed in this article to examine what type of evidence was challenged in the case, the decision of Irvine J. regarding the stage of proceedings at which such a challenge may be made, and the potential ramifications of the judgment.

Affidavit evidence in general: The Rules of the Superior Courts and case law

Order 40 of the Rules of the Superior Courts (R.S.C.) governs the use of affidavits in general. Order 40 rule 4 provides[2] that affidavits shall be confined to facts within the deponent's knowledge, save on interlocutory applications. This provision prohibits hearsay or opinion evidence for instance, except in interlocutory matters. Order 40 rule 12 provides[3] for scandalous matters to be struck out of affidavits by the Court. As Irvine J. noted in the course of judgment: "Order 40, r.4 appears almost mandatory in its terminology when referring to non-interlocutory matters, and seems to be designed to ensure that there is no falling short of proper evidential proof when proceedings are to be disposed of on affidavit rather than by way of oral evidence"[4].

Some of the recent Irish cases on affidavit evidence clarify the position which existed prior to this case. The fact that Order 40 rule 4 allows hearsay evidence to be included in affidavits grounding interlocutory applications[5] is evident in the judgment of O'Caoimh J. in the case of *Walsh v. Harrison*[6] where the learned judge states that "the defendant is entitled to rely upon hearsay in advancing this motion and accordingly I am not disposed to strike out the affidavit"[7]. In *Bridgeman v. Kilcock Transport Ltd*[8] Keane J. (as he then was) refused to make an order sought on foot of an affidavit which did not state the grounds of the deponent's belief of certain matters of a hearsay nature. Keane J. stated in relation to Order 40 rule 4: "[t]he provisions of this Rule undoubtedly permit the reception of hearsay evidence on an interlocutory application such as this. But the deponent must also state the grounds of his belief and he is not entitled to deprive the court of an opportunity of determining whether such a ground exists"[9]. In *Bula Ltd v. Tara Mines Ltd & Ors*[10] Murphy J. refused to strike out a supplemental affidavit grounding an application to strike out the defendant's defence pursuant to Order 40 rule 12, but the learned judge did state that: -

> "I have no doubt but that the Defendants are correct in contending that the Court does have an inherent jurisdiction to strike out an affidavit which would constitute an abuse of the process of the Court and in that context the prolixity of a document, the extent to which the material therein contained was irrelevant or inadmissible, the intention of the deponent in filing the affidavit and the consequences for the other party in dealing with the irrelevant matters would be material considerations but perhaps the primary and decisive consideration will be the relevance of

1 [2007] IEHC 365; unreported, High Court, Irvine J., 1st November 2007.

2 Order 40 rule 4 in full provides as follows:
> "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of any affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall not be allowed."

3 Order 40 rule 12 states that:
> "The Court may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client."

4 At p. 11 of the unreported judgment.

5 See also *F.M.K. V. G.H.* [2005] IEHC 125; Unreported, High Court Finnegan P., 15th April, 2005, where Finnegan P. declined to grant an order sought under Ord.40 r. 12 striking out portions of an affidavit to be used in an action under the Proceeds of Crime Act 1996.

6 Unreported, High Court, O'Caoimh J., 31 July 2002; (2002 WJSC-HC 7186).

7 2002 WJSC-HC 7186 at p. 7202.

8 Unreported, High Court, Keane J., 27th January 1995; (1995 WJSC-HC 274).

9 1995 WJSC-HC 274 at p. 276.

10 Unreported, High Court, Murphy J., 17 September 1990; (1990 WJSC-HC 1450).

the document however voluminous and however embarrassing."[11]

Order 40 rule 4 allows hearsay in interlocutory matters, but it must be noted that in England, it has been held that certain pre-trial motions may not be treated as interlocutory for the purposes of admitting hearsay evidence. For instance, in the case of *Gilbert v. Endean*[12] Cotton L.J. stated that: -

> "[M]any of the cases which are brought before the Court on motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards evidence. They are to decide the rights of the parties, and whatever the form may be in which such questions are brought before the Court, in my opinion the evidence must be regulated by the ordinary rules, and must be such as would be admissible at the hearing of the cause. In my opinion, therefore, on such applications, if an affidavit on information and belief is made, the other side is not called upon to answer it under the peril of its being said to him, "You have in fact admitted this by not denying it, and therefore the Court may act upon the admission."[13]

Background to *Director of Corporate Enforcement v. Bailey & Anor*

The facts of this case were that proceedings pursuant to s. 160 of the Companies Act 1990 had been initiated against the respondents, seeking their disqualification as directors. These proceedings were commenced by an originating Notice of Motion, which was grounded on two affidavits. The respondents sought, by way of Notice of Motion, to curtail the evidence which was put forward in the two original grounding affidavits. The respondents sought this relief on three principal grounds,but this article will focus on the submission of the respondents that certain aspects of the grounding affidavits contained inadmissible hearsay evidence. Three distinct elements of the evidence were objected to on behalf of the respondents. It is proposed only to analyse the principles laid down as to the nature of the application made and correct time for making such an application, rather than the questions of admissibility of the individual pices of evidence themselves. The three pieces of evidence in question were: -

1. Extracts from the second interim report of the Tribunal of Inquiry into certain planning matters and payments. Extracts of the report were set out in one of the grounding affidavits and the entire report was referred to "when produced";
2. Documentation from the Revenue Commissioners in the form of two letters which included the opinion of an Officer from the Revenue that the company which the respondents were directors of may have commited offences under the Companies Acts;
3. Hand written memoranda prepared by an employee of the firm of chartered accountants which was the auditor of Bovale. The memoranda purported to record a meeting held with the respondents in 2000. The memoranda were exhibited to one of the grounding affidavits and the affidavit itself contained an averment that the memoranda in question caused the employee in question to form the view that proper books of account were not being kept by the respondents

Judgment of Irvine J.

The most important element of the judgment of Irvine J. is the portion which relates to preliminary challenges to affidavit evidence and the permissiblity or otherwise of such an approach. The applicant submitted that the respondents' motion to strike out portions of the affidavits was premature and should not be adjudicated on prior to trial. It was further argued that the application was in effect the trial of a preliminary point of law which should not be allowed in the circumstances of the case. Evidential issues could be overcome, it was argued, through the use of procedures such as interrogatories or notices to admit. Irvine J. rejected these contentions and held that the respondents' motion had been brought at the correct time. Firstly, the learned judge pointed out that disqualification proceedings are heard on affidavit evidence only, unless the court otherwise directs[14]. This means that the totality of the evidence to be relied upon by the applicants should be contained in the grounding affidavits and therefore no new evidence should emerge thereafter, meaning that the court in dealing with a preliminary application, can already view what is likely to be the entirety of the evidence involved. Irvine J. referred to the fact that the R.S.C. provide that affidavits in proceedings determined solely on affidavit should exclude hearsay evidence[15] and provide a mechanism to ensure compliance with this rule.

Irvine J. held that the fact that the disqualification proceedings could possibly be heard on oral evidence did not mean that the application was premature. The affidavits sworn on behalf of the applicant could not be assumed to be of an interlocutory nature within the meaning of O. 40, r. 4, so as to permit evidence to be introduced which emanates other than from the means of knowledge of the two deponents. Particular weight was attached to the fact that if the respondents had to file replying affidavits to the applicant's affidavits as they stood, they would effectively be replying to matters which the applicant may never be in

11 1990 WJSC-HC 1450 at p. 1457.
12 (1878) 9 Ch.Div. 259.
13 *Op. cit.* at p. 269.
14 See Order 75B rules 7 and 9.
15 See the comments of Irvine J. at p. 11 of the unreported judgment:
> "Order 40, r.4 appears almost mandatory in its terminology when referring to non-interlocutory matters, and seems to be designed to ensure that there is no falling short of proper evidential proof when proceedings are to be disposed of on affidavit rather than by way of oral evidence".

a position to prove. Alternatively, if the respondents chose not to reply to the allegations in question they might later be deemed to have accepted them:

Irvine J. concluded that the correct time to challenge the admissibility of this type of affidavit evidence is when the affidavit itself is delivered. A party who wishes to make such a challenge need not wait until he has filed replying affidavits or indeed wait until the trial of the action. Irvine J. stated as follows:

> "Applications such as the present one assist in defining the actual issues which will be pursued by the applicant and thus bring about a reduction in legal costs. In terms of natural justice and fair procedures the Court concludes that it would be unfair to permit an applicant in proceedings which carry a significant potential penalty to swear an affidavit containing a myriad of serious allegations of wrongdoing against a respondent when many of the allegations emanate from the opinion of third parties not under the deponents control, relate to matters outside the deponents own personal knowledge and when neither the deponent nor the author of the opinion can reasonably be challenged thereon. It would be unjust to require the respondents to deliver a sworn reply to such assertions thus exposing them to cross examination thereon when the party responsible for the allegations of wrongdoing is not similarly open to cross examination."[16]

In addition to the finding that the application can and should be made upon the delivery of the allegedly offending affidavits[17], a number of reasons were outlined which supported this decision. Irvine J. found that a procedure whereby preliminary applications to challenge affidavit evidence in proceedings to be heard on affidavit evidence alone had other procedural advantages, including the saving of costs.

Ramifications of the judgment

The clear finding by Irvine J. that affidavit evidence in proceedings to be heard on affidavit alone may be challenged by way of a preliminary application may have ramifications beyond the narrow confines of this case. While this case involved disqualification proceedings under s.160 of the Companies Act 1990, it is surely arguable that the reasoning behind the judgment could be applied to an even wider range of proceedings where affidavit evidence will comprise the totality of the evidence before the court.

The judgment of Irvine J. itself refers to "the appropriate time for a party to object to the admissibility of evidence in an affidavit supporting proceedings brought by way of originating notice of motion" being the time at which that affidavit is delivered. This language does not confine the application of the decision to disqualification proceedings alone, but instead envisages all proceedings commenced by originating Notice of Motion.

Certain types of proceedings are brought by way of originating notice of motion grounded on affidavit by virtue of Practice Directions, such as applications under s. 150(1) of the Companies Act 1990[18] and applications to the High Court under the Commissions of Investigations Act 2004[19]. There is further provision for proceedings by way of originating notice of motion under the R.S.C.. For example, company law proceedings such as applications to appoint an inspector under the Companies Act 1990[20], appeals and applications to the president of the High Court under the Solicitors Act 1954[21], appeals to the High Court under the Freedom of Information Acts 1997 – 2004[22], appeals to the High Court under the Taxi Regulation Act 2003[23]. Interestingly, the Civil Liability and Courts Act 2004 makes provision for affidavit evidence to be used as evidence of any matter[24].

Perhaps the largest area of law where proceedings are generally by way of originating notice of motion and heard on affidavit is Judicial Review.

Conclusions

It seems clear from this judgment that it applies to all proceedings brought by originating notice of motion. However certain English cases such as *Gilbert v. Endean*[25], quoted above, state that certain proceedings, although technically interlocutory, are not interlocutory for the purposes of the rules of evidence, and that therefore hearsay evidence should not be admitted. The remaining question is whether a preliminary application to challenge affidavit evidence could be made successfully in such proceedings. ■

16 At pp. 17 – 18 of the unreported judgment.

17 See further the comments of Irvine J. at p. 21 of the judgment:
> "Whilst the Court accepts that the evidence which the respondents wish to have excluded at this point cannot be described as either scandalous or vexatious such as to justify its exclusion under O. 40, r. 12, there is nothing in O. 40, r.4 which suggests that an application to be made under that section should not be made until a replying affidavit has been delivered. The intent of that rule appears to be to ensure compliance with the rules of evidence in affidavits of a non-interlocutory nature, and thereby to provide an efficient and fair mechanism for the disposal of the dispute between the parties. The Court concludes that having regard to above reasoning, the applicant's assertion that the respondents' motion is premature is not well founded."

18 See Practice Direction HC28 – Companies Acts – Applications under s. 150(1) Companies Act 1990.

19 See Practice Direction HC39 - Commissions of Investigation Act 2004.

20 Order 75B rule 3.

21 Order 53 rules 12 and 16.

22 Order 130.

23 Order 91A.

24 See s. 19(1) of the Act, which provides:
> "In a personal injuries action evidence as to any matter shall, where the court so directs, be given by affidavit."

25 (1878) 9 Ch.Div. 259.

Time Limits on Execution of Judgments

Grainne Fahey BL

Introduction

Having obtained judgment, many a litigant has discovered that the real battle lies in enforcing the judgment. The law and practice governing execution of judgments is set out in Order 42 of the Rules of the Superior Courts, Rule 36 of the Circuit Court Rules and Order 53 of the District Court Rules. The Statute of Limitations provides that an action to recover on foot of a judgment must be brought within twelve years but practitioners should note that some further time restrictions apply in relation to execution. These restrictions are examined below.

Enforcing a Judgment

There are several steps involved in enforcing a judgment. First you must get your judgment order. The next step is to issue execution (the step of applying for an execution order). You have successfully issued execution when an execution order is granted. The execution order entitles you to take certain action to enforce the judgment. If the action taken on foot of the execution order proves fruitful then execution is complete. Execution is therefore a process.

The Rules provide for several methods of execution. An execution order, if unexecuted, shall remain in force for one year only from its issue. Execution orders available include orders of *fifa,* sequestration, possession, garnishee and committal[1]. The appropriate execution order to seek depends on the nature of the judgment i.e. judgments for a liquidated sum, judgment relating to the possession or delivery of property or judgments directing a party to do or abstain from an act. The Rules provide guidance as to the appropriate execution order and clearly set out the procedure to be followed in applying for such an order. Certain execution procedures must be initiated by issuing court proceedings and other methods simply require an application to the High Court Central Office or the appropriate District Court or Circuit Court Office.

Execution Orders

A party seeking to enforce a judgment for a liquidated sum must consider whether the likelihood of recovery lies in real property, personal property or income and then choose the appropriate execution order. The execution order most commonly sought to enforce a High Court judgment for a liquidated sum is an order of *fifa*[2]. An order of *fifa* issues from the Central Office and does not require a judgment creditor to issue court proceedings. It entitles a judgment creditor to direct the sheriff to seize and sell property belonging to the debtor. Another common means of enforcing a judgment for a liquidated sum is the creation of a judgment mortgage. This is done by filing an affidavit of ownership in the court where it was entered. This affidavit must be registered in the Registry of Deeds or the Land Registry.[3]

As indicated above, actions to recover on foot of a judgment must be brought within twelve years of obtaining judgment[4] but a party acting within this time period may nonetheless require leave of the Court before issuing execution. The Rules provide, *inter alia*, that where a change has taken place to the original parties to the judgment or order or where six years have elapsed since judgment, leave to issue execution (leave to apply for an execution order) may be required[5]. An application for leave should be made by motion on notice to that party sought to be made liable.

Execution is a process rather than a single step and a judgment creditor may issue execution a number of times and act on foot of more than one execution order in respect of the same judgment. In the recent High Court decision of *Hollinball v Cunningham*[6] Laffoy J confirmed that a party

1 For an explanation of these terms see Stephen Glanville, *The Enforcement of Judgments* (Dublin 1999).

2 Otherwise known as *fieri facias*. The equivalent order in the Circuit Court Rules is simply an order of execution. See Circuit Court Rules, Schedule B, Form 20.

3 The Judgment Mortgages (Ireland) Acts 1850 and 1858 set down the procedure by which a judgment mortgage can be registered against a defendant's land. See Neil Maddox, "The Law and Practice of Judgment Mortgages' [2006] Bar Review, December.

4 Section 36(1)(a) of the Statute of Limitations, 1957, provides as follows:

> "No action shall be brought to recover any principal sum of money secured by a mortgage or charge on land or personal property (other than a ship) after the expiration of twelve years from the date when the right to receive the money accrued."

5 RSC Order 42 Rule 24. In the following cases, viz.:

> (a) where six years have elapsed since the judgement or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution;
> (b) where a party is entitled to execution upon a judgement of assets in futuro;
> (c) where a party is entitled to execution against any of the shareholders of a company upon a judgement recorded against such company, or against a public officer or other person representing such company; the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly.

See also Order 36 (9) of the Circuit Court Rules states: "Every decree of the Court, and every judgment in default of appearance or defence shall be in full force and effect for a period of twelve years from the date thereof, and an execution order based on any such decree or judgment may be issued in the Office within the said period but not after the expiration of six years from the date of such decree or judgment without leave of the Court. An application for such leave shall be made by motion on notice to the party sought to be made liable."

6 *Honniball v Cunningham* [2006] IEHC 326 at 331.

may pursue two or more execution processes concurrently until the debt is discharged. Execution processes can also be pursued consecutively, for example, a writ of *fifa* might be returned *nolla bonna*[7] before a creditor registers the judgment against lands belonging to debtor. Therefore it is conceivable that a creditor would issue execution within six years of the judgment and issue execution again in year seven. In such circumstance, it could be argued that execution issued within six years because the process of execution has been triggered within the six year period. Therefore it could be said that the leave requirement in respect of the attempt to issue execution in year seven is obviated. Despite this reasoning it is safer to assume that leave to issue execution after six years is required even if execution has already issued within the six year period.

Judgment Mortgages

Judgment mortgages are not specifically included in the definition of execution contained Order 42 Rule 8 RSC. Nonetheless it is safe to assume that judgment mortgages and other charging orders[8] are governed by Order 42. There is authority for the proposition a judgment mortgage is not execution but rather is a substitute for execution[9] but the Supreme Court in *Tempany v Hynes*[10] referred to a judgment mortgage as a "process of execution". Assuming therefore, that judgment mortgages and other charging orders come within Order 42, we must then consider the applicability of Order 42 (24) to proceedings issued on foot of charging orders e.g. an application for a declaration that a mortgage is well charged.

This issue arose in *Cooke v Finlay*[11]. In 1996, the Plaintiff, having obtained judgment in 1995, sought to realise the debt by way of appointment of an equitable receiver and by writ of *fifa*. The *fifa* having been returned *nulla bonna*, and the appointment of the receiver having been unsuccessful, the Plaintiff registered the judgment against the Defendant's family home in 1997. In 2006, the Plaintiff issued High Court proceedings by way of special summons seeking various reliefs including a declaration that the monies secured by the judgment mortgage stood well charged. This was approximately eleven years after judgment was given. The Defendant argued that the application should be struck out because the Plaintiff had not sought leave to issue execution as required by RSC Order 42(24). The Defendant contended that the step of issuing the special summons, not the step of registering the judgment, constituted "issuing execution".

The Plaintiff put forward the contrary view that the step of issuing execution had been completed in 1997 when the judgment was registered. The Plaintiff argued that RSC O 42 applies to a judgment whereas the application before the Court was in reference to a mortgage. He argued that registering a judgment has the effect of transforming the judgment into a mortgage; registering a judgment as a mortgage creates the ordinary relationship of mortgagor and mortgagee[12]. He contended that because of this change in relationship, Order 42 no longer applied to the Plaintiff's application. In summary, he submitted, when the judgment mortgage was created, execution thereby issued and therefore Order 42 was not applicable.

Ms Justice Dunne[13] held that Order 42 (24) was not applicable. The Court affirmed the view that the creation of a judgment mortgage has the effect of creating the relationship of mortgagor and mortgagee. Ms Justice Dunne distinguished between an execution order and the process of execution and noted that while creating a judgment mortgage is part of the process of execution, this does not have the effect of bringing an application for a well charging order within the remit of Order 42(24).

Among the authorities considered by the Court in *Cooke v Finlay* was the English Court of Appeal decision of *Overseas Aviation Engineering (G.B.) Ltd.*[14] In that case, the Defendant judgment creditor had registered the judgment on the company lands but had not registered the charge with the Register of Companies prior to the debtor company going into liquidation. The company liquidator challenged the charge on the basis that execution had not been completed prior to the commencement of winding up.[15] The Defendant argued that the charge was not subject to the registration requirement because it was not a form of execution.

Delivering the majority judgment in the Court of Appeal, Lord Denning M.R. held that a charging order on lands is execution:

> "I am clearly of opinion that when a judgment creditor obtains a judgment charge on specific land of a company, he thereby issues "execution" against the land of the company…It is a modern order which takes the place of the old writ of elegit. As the old was "execution," so is the new… Execution means, quite simply the process for enforcing or giving effect to the judgment of the court: and it is "completed" when the judgment creditor gets the money or other thing awarded to him by the judgment… In cases where execution was had by means of a common law writ, such as fieri facias or elegit, it was legal execution: when it was had by means of an equitable remedy, such as the appointment of a receiver, then it was equitable execution. But in either case it was

7 If there are no goods available to satisfy the judgment debt the Sheriff, acting on foot of a *fifa*, makes a declaration of *nolla bonna* to the Central Office.

8 For example an order charging company shares as was made in *Honniball v Cunningham* pursuant to the Common Law Procedure Amendment Act (Ireland) 1853.

9 *Re Flood's Estate* (1867) 17 Ir. Ch. R. 127 See also Glanville at p 154.

10 *Tempany v Hynes* [1976] IR 101, followed in *Acc v Markham* [2005] IEHC 437.

11 Ex tempore judgment delivered by Ms Justice Dunne 24th July, 2007.

12 See Scanlon on Practice and Procedure in Administration and Mortgage Suits in Ireland at p 80.

13 *Ex tempore* July 16th 2007.

14 [1963] Ch. 24.

15 Sections 325 of the Companies Act, 1948 (as amended by section 36 (4) of the Administration of Justice Act, 1956) which provides that "where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up."

> execution because it was the process for enforcing or giving effect to the judgment of the court"[16]

The Court also held that execution is "completed" when the judgment creditor gets the money or other thing awarded to him by the judgment."

Overseas Aviation seemed to signal a departure from previous English authorities which were also opened to the Court in *Cooke v Finlay*. In *Barnett v Bradley,*[17] the Court of Appeal considered whether the registration of a judgment mortgage constituted a breach of a stay on execution of a judgment. In holding that registering the judgment did not breach the stay, FitzGibbon LJ stated:

> "when we speak of execution we mean taking some step beyond mere registration of the judgment, such as commencing proceedings to raise the amount of it."[18]

Similarly in the case of *Re Lambe's Estate*[19] the Lord Chancellor noted:

> "The only question is whether the registering of a judgment as a mortgage is "process" within the meaning of 343rd section of the Irish Bankruptcy and Insolvent Act, 1857. I am of the opinion it is not. It is not execution, it is merely attaching the debt to the lands, leaving it to the creditor to realise it by the other processes of the Courts".

Conclusion

Notwithstanding the older authorities, it now appears to be settled law that judgment mortgages and other charging orders are processes of execution. The judgment in *Cooke v Finlay* confirms this but the decision would also suggest that registering a judgment in the Registry of Deeds or the Land Registry has the effect of transforming the judgment into a mortgage. This transformation takes the mortgage outside the procedural rules set down in Order 42. It should be noted however that for the purpose of the Statute of Limitations, the cause of action is still the judgment and that therefore any proceedings on foot of the mortgage must still be initiated within twelve years of the judgment. ■

16 Supra 14 at 39, 40.
17 *Barnett v Bradley* 24 Ir. L. T. (1890) 41.
18 Ibid at 42.
19 3 Ir. L. T. 224.

Historic Agreement Signed between Irish and Spanish Bar Associations

Pictured at the signing of an agreement between the Consejo General de la Abogacia Espanola and the Irish Bar are Turlough O'Donnell SC, Chairman of the Bar Council and Don Carlos Carnicer Diaz, President of the Spanish Bar. The agreement, which was signed in Madrid on the 31st of March 2008, provides for co-operation in the exchange of young lawyers between the two Bars and also for co-operation in sharing ideas and information (such as periodicals and journals). This agreement is an example of increasing co-operation between the European Bars and is part of a drive to more fully understand the different European legal systems.

Round Hall Criminal Law Conference

L-R: pictured at the Thomson Round Hall Criminal Law Conference are: Mr James Hamilton, The DPP; The Hon. Mr Justice Nicholas Kearns, The Supreme Court; Catherine Dolan, Commercial Manager Round Hall; Alisdair Gillespie, Speaker. The Annual Criminal Law Conference was held on Saturday the 12th of April in The Law Library Distillery Building. The conference was chaired by The Hon Mr Justice Nicholas Kearns. Speakers at the conference were as follows: The DPP Mr James Hamilton (The Prosecutor's Role in Sentencing Hearings), Tom O'Malley (Sentencing in Sexual Offences Cases); Alisdair Gillespie (Test Purchasing and the law); Dara Robinson (Criminal Law Insanity Act); and Tony McGillicuddy (The Criminal Justice Acts 2006 + 2007). The papers are available for purchase from Round Hall.

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 13, Issue 3, June 2008

A directory of legislation, articles and acquisitions received in the Law Library from the 31st March 2008 up to 9th May 2008.
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

ADMINISTRATIVE LAW

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Control of dogs - Whether meaning of "dwelling" extended to outbuildings and curtilage of house – "Animals kept for farming purposes" – Whether keeping and raising of animals with view to breeding and selling them constituted farming – *AG v M'Lean* (1853) 1 H & C 750, *Campbell v O'Sullivan* [1947] SASR 195, *Thompson v Ward*, *Ellis v Burch* (1871) 6 LRCP 327, *Lewin v End* [1906] AC 299, *Rukwira v DPP* [1993] Crim LR 882, *People (AG) v O'Brien* [1965] 1 IR 142, *Belfast Corporation v Kelso* [1953] NI 160 and *Lowe (Inspector of Taxes) v Ashmore (JW) Ltd* [1971] Ch 545 considered – Control of Dogs Act 1986 (No 32), s 16 – European Communities (Protection of Animals Kept for Farming Purposes) Regulations 2006 (SI 75/2006) – Claim dismissed (2007/246, 370, 485 & 486JR – Murphy J – 22/10/2007) [2007] IEHC 344
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SI 816/2007

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ANIMALS

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ARBITRATION

Award

Remittal of award – Whether grounds for remitting or setting aside award – Whether error so fundamental as to require that award be remitted or set aside – Whether arbitrator misconducting himself so as to require award to be set aside – Reasoned award – Extent to which party can rely on reasons published separately from award – *Mutual Shipping v Bayshore Shipping* [1985] 1 WLR 625, *Tame Shipping Limited v Easy Navigation Limited (The "Easy Rider")* [2004] 1 Lloyd's Rep 626 and *McCarthy v Keane* [2004] 3 IR 617 considered - Arbitration Act 1954 (No 26), ss 36 and 38 - Proceedings dismissed (2006/287SP – Laffoy J – 29/8/2007) [2007] IEHC 295
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COMPANY LAW

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Shadow directors – Whether company can be shadow director – Direction or instruction – Test applicable – Advice – Whether non-professional advice can constitute direction or instruction – Whether directors of company can have discretion in relation to directions or instructions of shadow director – Whether directors required to always follow directions or instructions – Agency – Test for implied agency between related companies – Test for treating group of companies as single entity – Equity – Fiduciary duties – *Re Worldport Ireland Ltd* [2005] IEHC 467 (Unrep, O'Leary J, 16/2/2005), *Australian Securities Commission v AS Nominees Ltd* (1995) 13 ACLC 1822, *Sec of State for Trade v Deverell* [2001] Ch 340, *In re Lo-Line Ltd* [1988] Ch 477, *Smith, Stone & Knight v Birmingham Corpn* [1939] 4 All ER 116, *Nedco Ltd v Clark* (1973) 43 DLR (3d) 714, *DHN Ltd v Tower Hamlets* [1976] 1 WLR 852 and *Munton Bros Ltd v Secretary of State* [1983] NI 369, *Power Supermarkets Ltd v Crumlin Investments Ltd* (Unrep, Costello J, 22/6/1981), *The State (McInerney) v Dublin County Council* [1985] IR 1 and *Lac Minerals Ltd v Chevron Mineral* [1995] 1 ILRM 161 and *Cahill v Grimes* [2002] 1 IR 372 followed; *Salomon v Salomon & Co* [1897] AC 22, *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1955] 1 WLR 352, *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, *Rex Pet Foods Ltd v Lamb Brothers (Ireland) Ltd* (Unrep, Costello J, 5/12/1985), *Adams v Cape Industries Plc* [1990] Ch 433 and *Allied Irish Coal Supplies Ltd v Powell Duffryn Int'l Fuels Ltd* [1998] 2 IR 519 considered - Companies Act 1990 (No 33), s 27 – Plaintiff's claim dismissed (2002/1183P – Laffoy J – 21/12/2005) [2005] IEHC 477
Fyffes plc v DCC plc

Insider dealing

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Price sensitive information – Sale of shares – Information contained in management accounts received in capacity as director – Test applicable – Whether price sensitivity can be assessed through eyes of reasonable investor – Whether implied requirement of intention or motivation – Whether market factors can be offset against price sensitivity – Common sense approach – Whether court can identify comparator to consider effect of information on market – Test for evaluating comparator – Test applicable – *Von Colson and Kamann/Land Nordrhein-Westfalen* (Case 14/83) [1984] ECR 1891, *SEC v Texas Gulf Sulpher Company* (1968) 401 F 2d 833, *TSC Industries Inc v Northway Inc* (1976) 426 US 438, *Public Prosecutor v Allan Ng Poh Meng* [1990] 1 M.L.J. v, *Public Prosecutor v Chua Seng Huat* [1999] 3 MLJ 305, *SEC v Bausch & Lomb Inc* (1977) 565 F 2d 8, *Elkind v Liggett & Myers Inc* (1980) 635 F 2d 156, *SEC v Lund* (1983) 570 F Supp 1397, *Chase Manhattan Equities v Goodman* [1991] BCLC 897 and *SEC v Falbo* (1998) 14 F Supp 2d 508 considered - Companies Act 1990 (No 33), ss 107, 108 and 109 – Council Directive 89/592/EEC – Plaintiff's appeal allowed (144/2006 – SC – 27/7/2007) [2007] IESC 36
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WASTE MANAGEMENT

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Waste management (collection permit) regulations 2007
SI 820/2007

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Sfar v Louth County Council

AT A GLANCE

EUROPEAN DIRECTIVES IMPLEMENTED INTO IRISH LAW UP TO 09/05/2008

Information compiled by Clare O'Dwyer, Law Library, Four Courts

Bathing water quality regulations 2008
DIR/2000-60, DIR/2006-7
SI 79/2008

European Communities (additives, colours and sweeteners in foodstuffs) (amendment) (no.2) regulations 2008
DIR-2006/128
SI 59/2008

European communities (Democratic People's Republic of Korea) (financial sanctions) regulations 2008
SI 64/2008

European communities (European Aviation Safety Agency) (amendment) regulations 2008
REG/216-2008
SI 95/2008

European communities (evidence in civil or commercial matters) regulations
REG/1206-2001
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European communities (foot and mouth disease) (restriction on imports from the United Kingdom) (no. 2) (fourth amendment) regulations 2007
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SI 814/2007

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SI 799/2007

European communities (Iran) financial sanctions) regulations 2008
REG/2007-423
SI 67/2008

European communities (labelling, presentation and advertising of foodstuffs) (amendment) (no. 2) regulations 2007
DIR/2006-142
SI 808/2007

European Communities (licensing and supervision of credit institutions) (amendment) regulations 2007
DIR/2006-48
SI 797/2007

European Communities (passenger car entry into service) (amendment) regulations 2007
DIR/2005-64, DIR/2006-40

SI 803/2007

European communities (pesticide residues) (amendment) (no. 3) regulations 2007
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SI 37/2008

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SI 89/2008

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DIR/2006-129
SI 94/2008

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DIR/2004-49
SI 61/2008

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SI 83/2008

European Communities (road transport) (working conditions and road safety) regulations 2008
REG/3821-85, REG/561-2006
SI 62/2008

European communities (settlement finality) regulations 2008
DIR/98-26, DIR/1996-26
SI 88/2008

European Communities (Sudan) (financial sanctions) regulations 2007
REG/131-2004, REG/1184-2005
SI 800/2007

European communities (undertakings for collective investment in transferable securities (amendment) regulations 2007
DIR/2007-16
SI 832/2007

European communities (vehicle driver's certificate of professional competence) regulations 2008
DIR/2003-59
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Financial Transfers (Sudan) (Prohibition) order 2007
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Sea-fisheries (fishing for cod) regulations 2008
REG/40-2008, REG/423-2004
SI 45/2008

BILLS OF THE OIREACHTAS AS AT 9TH MAY 2008 (30TH DÁIL & 23RD SEANAD)

Information compiled by Renate Ni Uigin & Clare O'Dwyer, Law Library, Four Courts.

[pmb]: Description: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dáil or Seanad. Other Bills are initiated by the Government.

Biofuels (Blended Motor Fuels) Bill 2007
Bill 11/2007
2nd Stage – Dáil **[pmb]** *Deputies Denis Naughten, Richard Bruton, Fergus O'Dowd, Olivia Mitchell and Bernard J. Durkan*

Broadband Infrastructure Bill 2008
Bill 8/2008
1st Stage – Seanad **[pmb]** *Senators Shane Ross, Feargal Quinn, David Norris, Joe O'Toole, Rónán Mullen and Ivana Bacik*

Charities Bill 2007
Bill 31/2007
Committee Stage – Dáil

Chemicals Bill 2008
Bill 23/2008
1st Stage – Dáil

Civil Law (Miscellaneous Provisions) Bill 2006
Bill 20/2006
Report Stage – Dáil

Civil Partnership Bill 2004
Bill 54/2004
2nd Stage – Seanad **[pmb]** *Senator David Norris*

Civil Unions Bill 2006
Bill 68/2006
Committee Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Climate Protection Bill 2007
Bill 42/2007
2nd Stage – Seanad **[pmb]** *Senators Ivana Bacik, Joe O'Toole, Shane Ross, David Norris and Feargal Quinn*

Cluster Munitions Bill 2008
Bill 19/2008
2nd Stage – Dáil **[pmb]** *Deputy Billy Timmins*

Competition (Amendment) Bill 2007
Bill 47/2007
2nd Stage – Dáil **[pmb]** *Deputies Michael D. Higgins and Emmet Stagg*

Consumer Protection (Amendment) Bill 2008
Bill 22/2008
2nd Stage – Seanad **[pmb]** *Senators Dominic Hannigan, Alan Kelly, Phil Prendergast, Brendan Ryan and Alex White*

Coroners Bill 2007
Bill 33/2007
Committee Stage – Seanad (Initiated in Seanad)

Credit Union Savings Protection Bill 2008
Bill 12/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Feargal Quinn, Shane Ross and Ivana Bacik*

Criminal Law (Human Trafficking) Bill 2007
Bill 43/2007
Report Stage – Dáil

Defamation Bill 2006
Bill 43/2006
Report Stage – Seanad

Defence of Life and Property Bill 2006
Bill 30/2006
2nd Stage – Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

Dublin Transport Authority Bill 2008
Bill 21/2008
Committee Stage – Seanad **[pmb]** *Senator Donie Cassidy*

Electricity Regulation (Amendment) (EirGrid) Bill 2008
Bill 17/2008
1st Stage – Dáil

Electoral Commission Bill 2008
Bill 26/2008
1st Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Employment Law Compliance Bill 2008
Bill 18/2008
1st Stage – Dáil

Enforcement of Court Orders (No.2) Bill 2004
Bill 36/2004
1st Stage – Seanad **[pmb]** *Senator Brian Hayes*

Ethics in Public Office Bill 2008
Bill 10/2008
1st Stage – Dáil **[pmb]** *Deputy Joan Burton*

Ethics in Public Office (Amendment) Bill 2007
Bill 27/2007
2nd Stage – Dáil (Initiated in Seanad)

Finance Bill 2008
Bill 3/2008
Committee Stage – Seanad

Fines Bill 2007
Bill 4/2007
1st Stage – Dáil

Freedom of Information (Amendment)

Bill 2008
Bill 24/2008
1st Stage – Seanad **[pmb]** *Senators Alex White, Dominic Hannigan, Brendan Ryan, Alan Kelly, Michael McCarthy and Phil Prendergast*

Freedom of Information (Amendment) (No.2) Bill 2008
Bill 27/2008
1st Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Freedom of Information (Amendment) (No. 2) Bill 2003
Bill 12/2003
1st Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Garda Síochána (Powers of Surveillance) Bill 2007
Bill 53/2007
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Genealogy and Heraldry Bill 2006
Bill 23/2006
1st Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Housing (Stage Payments) Bill 2006
Bill 16/2006
2nd Stage – Seanad **[pmb]** *Senator Paul Coughlan*

Immigration, Residence and Protection Bill 2007
Bill 37/2007
1st Stage – Seanad (Initiated in Seanad)

Immigration, Residence and Protection Bill 2008
Bill 2/2008
Committee Stage – Dáil

Irish Nationality and Citizenship (Amendment) (An Garda Síochána) Bill 2006
Bill 42/2006
1st Stage – Seanad **[pmb]** *Senators Brian Hayes, Maurice Cummins and Ulick Burke*

Juries (Amendment) Bill 2008
Bill 25/2008
1st Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh*

Land and Conveyancing Law Reform Bill 2006
Bill 31/2006
Committee Stage – Dáil (Initiated in Seanad)

Legal Practitioners (Irish Language) Bill 2007
Bill 50/2007
Committee Stage – Dáil

Legal Practitioners (Qualification) (Amendment) Bill 2007
Bill 46/2007
2nd Stage – Dáil **[pmb]** *Deputy Brian O'Shea*

Legal Services Ombudsman Bill 2008
Bill 20/2008
1st Stage – Dáil

Local Elections Bill 2008
Bill 11/2008
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Local Government Services (Corporate Bodies) (Confirmation of Orders) Bill 2008
Bill 9/2008
Committee Stage – Seanad (Initiated in Seanad)

Mental Capacity and Guardianship Bill 2008
Bill 13/2008
2nd Stage – Seanad **[pmb]** *Senator Joe O'Toole*

Mental Capacity and Guardianship Bill 2007
Bill 12/2007
Committee Stage – Seanad **[pmb]** *Senators Joe O'Toole and Mary Henry*

National Pensions Reserve Fund (Ethical Investment) (Amendment) Bill 2006
Bill 34/2006
1st Stage – Dáil **[pmb]** *Deputy Dan Boyle*

Nuclear Test Ban Bill 2006
Bill 46/2006
Committee Stage – Dáil

Offences Against the State (Amendment) Bill 2006
Bill 10/2006
1st Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Mary Henry and Feargal Quinn*

Official Languages (Amendment) Bill 2005
Bill 24/2005
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Paul Coghlan and David Norris*

Privacy Bill 2006
Bill 44/2006
1st Stage – Seanad **[pmb]** *Senator Donie Cassidy*

Protection of Employees (Agency Workers) Bill 2008
Bill 15/2008
1st Stage – Dáil **[pmb]** *Deputy Willie Penrose*

Protection of Employees (Agency Workers) (No. 2) Bill 2008
Bill 16/2008
1st Stage – Seanad **[pmb]** *Senators Alex White, Dominic Hannigan, Alan Kelly, Michael McCarthy, Phil Prendergast and Brendan Ryan*

Registration of Lobbyists Bill 2008
Bill 28/2008
1st Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Seanad Electoral (Panel Members) (Amendment) Bill 2008
Bill 7/2008
1st Stage – Seanad **[pmb]** *Senator Maurice Cummins*

Spent Convictions Bill 2007
Bill 48/2007
2nd Stage – Dáil **[pmb]** *Deputy Barry Andrews*

Student Support Bill 2008
Bill 6/2008
2nd Stage – Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005
2nd Stage – Dáil

Twenty-eighth Amendment of the Constitution Bill 2008
Bill 14/2008
Report and Final Stages – Dáil

Victims' Rights Bill 2008
Bill 1/2008
1st Stage – Dáil **[pmb]** *Deputies Alan Shatter and Charles Flanagan*

Witness Protection Programme (No. 2) Bill 2007
Bill 52/200
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

ACTS OF THE OIREACHTAS AS OF 8TH MAY 2008 (30TH DÁIL & 23RD SEANAD)

Information compiled by Renate Ni Uigin & Clare O'Dwyer, Law Library, Four Courts.

1/2008	Control of Exports Act 2008 *Signed 27/02/2008*
2/2008	Social Welfare and Pensions Act 2008 *Signed 07/03/2008*
4/2008	Passports Act 2008 *Signed 26/03/2008*
5/2008	Motor Vehicles (Duties and Licences) Act 2008 *Signed 26/03/2008*
6/2008	Voluntary Health Insurance (Amendment) Act 2008 *Signed 15/04/2008*
7/2008	Criminal Justice (Mutual Assistance) Act 2008 *Signed 28/4/2008*

ABBREVIATIONS

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Law Society of Ireland
IBLQ = Irish Business Law Quarterly
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILR = Independent Law Review
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ISLR = Irish Student Law Review
ITR = Irish Tax Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
QRTL = Quarterly Review of Tort Law

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

Legal Costs: A House Less Bleak

Michael M. Collins S.C.*

This paper was first presented at the Bar of Ireland Annual Conference Madrid, 26th May 2007

Dickens, in a famous passage in *Bleak House*,[1] said that

> "The one great principle of the English law is to make business for itself. There is no other principle distinctly, certainly and consistently maintained through all its narrow turning. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think of it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense and they will cease to grumble."

The dislike of lawyers as a class may however be at least in part as stereotypical as the portraits of lawyers commonly peddled by imitative journalists. There is, for example, a curious distinction between the public's view of lawyers as a class and the respect which individual clients generally hold for their lawyers, particularly their barristers. Even Dickens dedicated the *Pickwick Papers* to a barrister. His most romantic hero, Sidney Carton, who goes to the scaffold in place of his double and rival, Charles Darnay, for the sake of the woman they both love, is a barrister. Why this discrepancy exists and why the adverse image of the profession collectively persists notwithstanding the frequently contrary experience of the consumers of barristers' services is a question which is too large for adequate discussion today.[2] Whatever other factors are at work, however, the question of costs looms large.

The tribunals have probably done more damage in modern times to our standing as a profession than any other single circumstance because of the popular image of serried ranks of barristers, sitting through endless days of tribunal hearings, allegedly doing little and earning fees which, when the aggregate of several years gross incomes before expenses are added together, are deemed by the press to create "tribunal millionaires." But it would be wrong to think that this is a new perception. Consider one of the few depictions by Dickens of actual courtroom proceedings in *Bleak House*:

> " "Mlud," says Mr. Tangle. Mr. Tangle knows more of Jarndyce and Jarndyce than anybody. He is famous for it – supposed never to have read anything else since he left school.
>
> "Have you nearly concluded your argument?"
>
> "Mlud, no – variety of points – feel it is my duty tsubmit – Ludship," is the reply that slides out of Mr. Tangle.
>
> "Several members of the Bar still to be heard, I believe?" says the Chancellor with a slight smile.
>
> Eighteen of Mr. Tangle's learned friends, each armed with a little summary of eighteen hundred sheets, bob up like eighteen hammers in a pianoforté, make eighteen bows, and drop into their eighteen places of obscurity.
>
> "We will proceed with the hearing on Wednesday fortnight," says the Chancellor.
>
> For the question at issue is only a question of costs, a mere bud on the forest tree of the parent suit …"

This view of multiple representation and its associated costs translates into a popular perception of lawyers as parasites on the diminishing corpses of their clients. When describing the chambers of the secretive and malevolent solicitor, Mr. Tulkinghorn ("an oyster of the old school, whom nobody can open … the butler of the legal cellar"), Dickens writes:

> "The crow flies straight across Chancery Lane … into Lincoln's Inn Fields. Here, in a large house, formerly a house of state, lives Mr. Tulkinghorn. It is let off in sets of chambers now, and in these shrunken fragments of its greatness, lawyers lie like maggots in nuts."[3]

Though a caricature that in truth bears little relationship to reality (and it is noteworthy that because many evils of the Chancery Court attacked by Dickens had already been reformed by the time he was writing in the 1850s, he was obliged to set the novel in the 1820s)[4] this imagery of obsession with self-interest and the generation of fees remains popular and pervasive. There was therefore reason for concern that the Legal Costs Working Group set up by the

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* Vice-Chairman of the Bar Council.

1 Charles Dickens, *Bleak House* (1853) Penguin Books edition.

2 Some commentators have suggested that it has to do with the public expectation that the "correct" application of legal rules will result in a "legally correct" outcome which in turn should correspond to a morally desirable result. The argument is that the complex relationship between law and morality is such that such expectations are frequently disappointed.

3 Dickens based his description on an actual house, No. 58 Lincoln's Inn Fields in which lived Dickens' friend, business adviser and primary biographer, John Forster (1812-1865).

4 For example, the requirement of excessive and expensive copying of legal documents and the requirement that the Lord Chancellor personally review all cases were abolished prior to the publication of *Bleak House*. See Holdsworth, *Charles Dickens as a Legal Historian* (1972); Boyer, *The Antiquarian and the Utilitarian: Charles Dickens versus James Fitzjames Stephen*, 56 Tennessee Law Review 595 (1989); Posner, *Law and Literature: A Misunderstood Relationship* (1988).

Minister for Justice, Equality and Law Reform in 2004 would, despite their best intentions, find themselves susceptible to the power of such imagery. It should be said at once that the report of the Working Group of the 7th November 2005, shows every sign that the Group did, in approaching its task of making recommendations which would lead to a reduction in the costs associated with civil litigation, approach the issue in the words of its Chairman "with open minds, ready to explore all options and [to] come to conclusions designed to serve the public interest"[5] and their report is a valuable one both in terms of its stated aims and as assistance to us in our own process of re-examining our profession.

In 2006, the Minister (by then Tánaiste) established the Legal Costs Implementation Advisory Group to progress the recommendations of the Working Group. The Implementation Group was given the task of elaborating "on the general recommendations of the Legal Costs Working Group and to identify suitable structures and processes to implement those recommendations."[6] Their report was published in November 2006 and it is with three of their recommendations in particular that I want to concentrate upon.

Bearing in mind however that the task of the Implementation Group was essentially to advise on how the recommendations of the Working Group could be implemented, it is worth recalling the essential recommendations of the Working Group because one of the concerns I have is that in certain areas, and particularly in one or two upon which I will elaborate, the Implementation Group has appeared to have gone beyond mere recommendations of how to implement the earlier report and has purported to, in effect, make certain fresh recommendations, at least one of which finds no basis in the Working Group report and the other of which is variously expressed in different ways which are difficult to reconcile.

The Working Group report had three strands running through it. First, its recommendations were primarily concerned with the assessment of recoverable legal costs i.e. the costs to be paid by the losing party rather than the setting or measurement of fees as between lawyer and client. Secondly, the Group focussed on the need for clearer information about costs to be furnished to clients in advance of litigation. Thirdly, it made a number of suggestions for procedural reform designed to reduce delays in the Court system. The key recommendations so far as barristers are concerned were as follows:

- The establishment of an independent Legal Costs regulatory body "to exercise regulatory functions, to set guidelines on recoverable standards and have a public information role."[7] The guidelines referred to are for the assessment of recoverable costs (i.e. party and party costs) and the report acknowledges that the assessment should be based on elements such as

  "the appropriate hours expended by the various person to be remunerated,

  the complexity of the proceedings and the stages therein, and

  the level of the Court in which the case is heard."[8]
- One criticism of the report is directed at the global nature of the solicitors' instructions fee which it recommends should be broken down into its component parts having regard to the guidelines but it recommended that a similar approach be adopted in relation to counsels' brief fee.[9]
- The current taxation system should be replaced by a new Legal Costs Assessment Office with shorter and more clear procedures.
- The practice of paying junior counsel brief fees as two thirds of senior counsel's brief fees should be abolished. (The old rule to this effect in the Bar's Code of Conduct has been abolished for some time but the concern is that the practice still remains).

The shape of the final report, in relation to barristers, was significantly affected by the submissions made to the Working Group by the Bar Council and the report accepts a number of key propositions which had been argued for on behalf of the Bar. Three are worthy of particular mention.

First, the Group had seriously considered a move to the American system whereby the losing party does not have to pay the costs of the winner save in a number of narrowly defined circumstances.[10] We believe however that the "costs follows the event" principle is an integral part of a fair concept of justice whereby a successful plaintiff or defendant should not be penalised by being unable to recover his or her legal costs when successful in vindicating his rights or defeating an unwarranted attack upon his rights. In Ireland in particular, the absence of a widespread civil legal aid system has meant that what is still the most common form of litigation, personal injury litigation, is brought on behalf of plaintiffs who could not otherwise afford to bring their case

5 Foreword to the Report of the Legal Costs Working Group, 7th November 2005.

6 Foreword to report of the Legal Costs Implementation Advisory Group, November 2006.

7 Report of Working Group, paragraphs 2.21 and 7.17.

8 Report of Working Group, paragraph 2.3.

9 Report of Working Group, paragraphs 5.28-5.32. "The essential point being that fees will be directly linked to the work actually and appropriately done, time expended and complexity involved and not to the professional grading structures. Furthermore, adopting guidelines for the various stages of work based on work actually and appropriately done may result in counsel expending more time and effort in drafting pleadings and opinion (if they are appropriately remunerated under the guidelines) thereby changing or delimiting the scope of the case and potentially reducing costs later in the process. Indeed, it was suggested to us that such increased effort earlier on in a case might limit the tendency to go to Court … A brief fee is an all encompassing amount which could be described as including tangible elements such as preparation and research and intangible such as counsel's reputation and expertise. As with the instructions fee, the Group recommends that the single fee be abandoned and be replaced by the guidelines on recoverable costs, deconstructing the fee into a set of charges for work actually and appropriately done in respect of steps within a case's progression" (paragraphs 5.30 and 5.32).

10 For example, a dispute over a common fund where the outcome of a dispute will affect a large number of persons; class actions; abusive or bad faith conduct of litigation; certain specific statutory exceptions, generally in the context of public interest litigation.

to Court, on a no foal no fee basis. The American rule, though it has a number of merits, tends to lead to an incentive to bring frivolous claims, court congestion and the contingency fee system whereby the lawyer takes a percentage, usually a third, of the damages awarded to the plaintiff. The threat to the necessary independence of counsel allied to the failure to provide full compensation to the successful plaintiff are well documented dangers to the administration of justice and acknowledged as such by many commentators in the United States.[11]

The Working Group accepted these arguments, referring to "the absence of a convincing case for changing this cornerstone of our system."[12] Therefore the Working Group concentrated on improving the costs recovery process leaving the question of fees to be paid by the client to his or her own lawyer to be a matter of private negotiation. This is a fundamental point to remember when considering the report of the Implementation Group.

The second fundamental feature which had been advocated on behalf of the Bar and was accepted by the Working Group was that there should be no fixed scale of fees beyond which costs would not be recoverable.[13] Aside from the lack of realism in a "one price fits all" fee given the variety and complexity of the range of litigation, and the inevitable "minimum floor" effect which such scales create, the Working Group acknowledged that such a scale would tend to undermine the principle of equality of arms because "a litigant faced with an opponent who uses resources greater than the scale permits may find himself at a disadvantage."[14] This reflects the Bar's concern that assessment of fees should be concerned with work actually and appropriately done rather than some so called "objective" fixed scale which, by definition, is unrelated to the work done and the complexity of an individual case.

Thirdly, the Working Group report, while recommending that recoverable fees should not be directly linked to "the professional grading structures" does not, unlike the Competition Authority, recommend the abolition of the distinction between senior and junior counsel stating that it

> "believes that adopting its recommendations for a system of recoverable costs guidelines on the basis of work done will address the cost implications arising from the present grading structure."[15]

In describing the brief fee, the report acknowledges that it includes both tangible elements such as preparation and research and intangibles such as counsel's reputation and expertise. While it recommends that the guidelines should, as it puts it, "[deconstruct] the fee into a set of charges for work actually and appropriately done *in* respect of steps within a case's progression,"[16] it does not suggest that counsel's reputation and expertise is not a legitimate factor in ultimately determining the fee to be allowed. In particular, since the report is not addressing the issue of lawyer and client costs, it is readily apparent that the reputation and expertise of counsel will form a significant factor in the fee actually charged by counsel and the fee that a client will be prepared to pay.

Broadly therefore, the Bar welcomed the report of the Working Group. Most of its recommendations, including many that time does not permit discussion of, such as the detail of the proposed new Legal Costs Assessment Office and the various recommendations designed to reduce Court delays are clearly sensible. However, in its recommendations to the Implementation Group, the Bar Council identified, among other points, a number of inconsistencies in the suggested content of the proposed guidelines on recoverable costs in the Working Group's report.[17] Unfortunately, and despite drawing express attention to this issue, the confusion was exacerbated rather than clarified by the report of the Implementation Group. Though there are many aspects of the Implementation Group's report which are to be welcomed, I propose to concentrate on three interrelated areas where I believe the report's recommendations have to be treated with some caution. The three areas are the guidelines for recoverable costs, time-based billing and brief fees, where the latter two are connected.

Guidelines for recoverable costs

The first of the Implementation Group's recommendations is that "the assessment of costs in a particular case must involve an examination of the work actually done in the case concerned."[18] This reflects the Bar Council's submission against the so-called "objective" methods of assessing recoverable costs such as exist in New Zealand where a case is designated into one of three categories depending upon its complexity and significance which in turn dictates the time deemed reasonably required for the work in question and therefore the resulting level of costs recoverable, which may have nothing to do with the costs actually incurred or the work actually done.[19] This rejection of the objective basis is also reflected in the fact that the Implementation Group does not recommend fixed scales and points out that

> "there is a wide range of litigation and it would neither

11 See, for example, Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 California Law Review 792, particularly at 794-800 (1966); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 University of Pennsylvania Law Review 636, particularly at pages 637-655 (1974); Shea, *Closing Pandora's Box: Litigation Economics*, 22 Cal. W.L. Rev. 267, particularly pages 276-88 (1986).

12 Working Group report, paragraph 5.17.

13 Working Group report, paragraphs 5.18-5.21.

14 Working Group report, paragraph 5.20.

15 Paragraph 5.29.

16 Working Group report, paragraph 5.32.

17 A summary of the submissions made by the Bar Council to the Implementation Advisory Group are attached as an appendix to this paper.

18 Implementation Group report, Executive Summary, paragraph 1.

19 A curious feature of the Implementation Group's report is that despite the centrality of this point as reflected in its position as the first of the Group's recommendations, the subjective versus objective basis is not discussed in the paragraphs of the report to which the recommendation is cross-referenced (2.27-2.142). The Competition Authority report on the legal profession, which was published in December 2006, subsequent to the Implementation Group report, also recommends that fees should be marked on the basis of work done (recommendation 26).

be desirable nor feasible to put in place guidelines of a type which would provide a simple, mathematical model designed to predetermine the legal costs recoverable in every type of case."[20]

Insofar as the relevant factors to be incorporated in the guidelines are concerned, the Bar Council's submission listed the following factors:

- time spent on the matter;
- the labour and effort involved;
- the skill, responsibility, and specialised knowledge involved;
- the complexity, novelty or difficulty of the issues;
- the value of the claim or subject matter;
- the importance of the case to the client or in the public interest;
- the quality of the work done;
- the place and circumstances in which the work is done;
- any time limitations imposed on the lawyers by the client or the circumstances; and
- the seniority, experience, reputation and ability of the lawyer."[21]

Many of these factors are acknowledged by the Implementation Group report to be proper matters to be taken into account but while the report does not purport to lay down an exhaustive list, it is not clear whether it is by accident or design that there is no reference to the skill, experience, reputation or specialised knowledge of the barrister. As I have pointed out above, the Working Group, in discussing brief fees, appears to have acknowledged the significance of the reputation and expertise of the barrister. What excites concern that the omission is more than accidental is the contrast between the form of the bill of costs suggested for solicitors and barrister respectively in Appendix 2 to the report. For solicitors, the grade of solicitor is to be specified[22] whereas there is no such reference in the case of counsel.

Even more remarkably, given the express acknowledgement of the various factors which legitimately affect the assessment of the relevant fee, there is no provision in the draft bill of costs (for either solicitors or barristers) for such matters and the sole criterion referred to in the draft bill of costs is the time spent.

This leads to the area where, I suggest, the Advisory Group report makes recommendations which are not merely ill considered but at best have no foundation in the Working Group report and at worst may even contradict the Working Group report. This is the area of time-based billing.

Time-based billing

In the body of its report and in its first substantive chapter headed "Assessing Legal Costs" (chapter 2 of the report), the Implementation Group commences with the following recommendation:

> "2.1 The IAG is of the view that solicitors and barristers should be obliged to have in place a proper system of time recording and that bills in relation to legal costs should, as appropriate, be supported by time records.
>
> 2.2 The introduction of time recording should also be accompanied by solicitors and barristers setting out, as the basis for their charging generally for legal services, their hourly or daily rates, as appropriate."[23]

This is, with respect, a remarkable recommendation for the Advisory Group to have made because there was no recommendation in the report of the Working Group on time-based billing or that barristers should be obliged to set out "as the basis of their charging generally for legal services" their hourly or daily rates. Indeed, other than two inconsequential references,[24] there is no reference whatsoever in the Working Group report to time recording, hourly rates, daily rates or time-based billing. The Working Group report did, at different points of the report, refer to the factors which could be mentioned in the guidelines as relevant to the assessment of costs including "the appropriate hours expended by the various persons to be remunerated"[25] but this was in the context of a wide variety of factors to which I have referred above including the complexity of the case, the level of the Court, and the value of the case (without making the level of recoverable costs directly proportionate to the value of the case).[26]

The Working Group report referred to the nature of the guidelines and the factors which might be contained in them on at least 8 separate occasions in the report, some of which references are not entirely consistent with each other. But none of them envisage that barristers' fees should be primarily based on a system of time recording or that barristers should hold themselves out (and therefore presumably publicise whether by way of advertisement or otherwise) their hourly or daily rates "as the basis of their charging generally for legal services." This is, in effect, an entirely new recommendation which can hardly be regarded as a mere logistical implementation of some recommendation in the Working Group report. Indeed, given the varied elements that the Working Group report recommends be taken into account in the assessment of the fees, it seems to me that the Implementation Group's recommendation in this respect is in fact contrary to the Working Group report it is supposed to be implementing.

In its submission to the Implementation Group, the Bar

20 Advisory Group report, paragraph 3.6.
21 Bar Council submission to the Implementation Group, paragraph 2.110 (submission 11).
22 E.g. senior partner, assistant solicitor, legal executive.
23 Page 12, emphasis added.
24 A reference in paragraph 5.25 of the Working Group report to the system in the Federal Court of Australia as a piece of background information and a reference in paragraph 5.52 to the fact that "some" but not all Group members thought the time-based charging "might reduce certain time consuming strategies employed in Court" although it is difficult to understand how being paid to be more long-winded is an incentive to be shorter.
25 Working Group report, paragraph 2.3.
26 Working Group report, paragraph 5.23.

Council addressed the question of the proposed guidelines and in the context of considering the criterion on time spent, commented on the issue of time-based billing, both here and in other jurisdictions. In New South Wales, Chief Justice Spigelman commented at the opening of the law term dinner on the 2nd February 2004 as follows:

> "One thing that has occurred over that period of 10 years is that time-based charging has become almost universal. I do not believe that this is sustainable. I note that last year, your past President, Robert Benjamin, published in the Law Society Journal a thoughtful piece on the tyranny of the billable hour. As I and my predecessor, Chief Justice Gleeson, have often said over the years, it is difficult to justify a system in which inefficiency is rewarded with higher remuneration. The difficulty of course is that the person providing the service, namely the legal practitioner, does not have a financial incentive to do the service as quickly as possible."

A Legal Fees Review Panel looked at the whole issue of time-based billing in a discussion paper published in November 2004 and pointed to some of the negative consequences including inflated fees, unethical billing practices, damage to the lawyer/client relationship, rewards for inefficiency, and the lack of any connection between the outcome of the matter and the fee charged. In a 1956 article in the Harvard Law Review, Professor George Hornstein stated:

> "1,000 plodding hours may be far less productive than one imaginative brilliant hour. A surgeon who skilfully performs an appendectomy in 7 minutes is entitled to no smaller fee than one who takes an hour; many a patient would think he is entitled to more. The dubious value of the time factor as a standard for legal services has been recognised by many courts. The value of a lawyer's services is not measured by time or labour merely … Another factor to be borne in mind is that when hours become a criterion, economy of time is ceased to be virtue. Inexperience, inefficiency, even incompetence will be rewarded. Expeditious termination of litigation will be discouraged - to the great cost of all concerned."[27]

The American Bar Association has also criticised hourly billing in an ABA Commission Report on Billable Hours (2001-2002) on these and other grounds. Even in the United States, time billing did not become popular until the mid-1960s when the American Bar Association released the results of a study entitled *"The 1958 Lawyer and his 1938 Dollar"* which claimed that lawyers who recorded time expended per client and used that information to formulate their legal fees actually made more money than lawyers who relied on a variety of value-based billing methods such as fixed fees, contingent fees, percentage fees or value billing.[28] Lawyers had previously kept a track of time spent but not for the purpose of billing the client for each hour spent, but as a recognition of time as one but only one ingredient in determining a fair and proper fee for the work done.[29]

In England, the Supreme Court Costs Office published a Guide to the Summary Assessment of Costs on the 21st December 2004 in which it stated:

> "Counsel's fees depends upon the seniority of counsel which it was reasonable to instruct and the market price for the item of work in question … It is not appropriate to specify an hourly rate for counsel and to remunerate them at a multiple of that rate according to the number of hours reasonably spent. Such an approach would reward the indolent and penalise the expeditious."

These points were made by the Bar Council in its submission to the Advisory Group and specific further concerns in the Irish context were articulated. For example, a great deal of routine work by counsel such as appearances in Court in lists to fix dates, call-overs, uncontested adjournments and so forth are traditionally not charged for by counsel who treat the brief fee as recompense for such matters (assuming the matter does actually come to trial, which it frequently does not). Under a time-based billing system, all of these items will now be charged for and if counsel spends 2 hours waiting in the common law list on a Monday morning for a 10-minute motion, the client will be billed for that 2 hours. This problem may be reduced although not eliminated in the case of a busy counsel who has a number of motions listed for that morning but there is a corresponding increase in administrative complexity in then dividing waiting and similar unproductive time as between clients. Counsel currently do not charge for disbursements such as photocopying, postage, telephone calls, research expenses, travel and accommodation expenses and so forth which will have to be recouped under a time-based billing system resulting in further charges to the client and higher administrative costs.

The remarkable thing about the Implementation Group report is that despite these detailed submissions and the widespread concern in other jurisdictions on this issue, the Implementation Group engaged in virtually no discussion of any of these issues. If one is to judge by the fact that time-based billing is the very first recommendation set out in the substantive part of the report and was a cornerstone of the

27 Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards* 69 Harvard Law Review 658 (1956) at page 660 cited by Meurer, *Value Billing: A Valid Alternative to Time Billing?* 55(7) Texas Bar Journal 719 (1992).

28 Kummel, *Note, A Market Approach to Law Firm Economics: A New Model for Pricing, Billing, Compensation and Ownership in Corporate Legal Services* (1996) Columbia Business Law Review 379, 385 note 16, cited in Jones and Glover, *The Attack on Traditional Billing Practices* (1998) 20 University of Arkansas Little Rock Law Journal 293.

29 The move to using the billable hour accelerated after the 1975 US Supreme Court decision in *Goldfarb v. Virginia State Bar* 421 U.S. 773 (1975) which set aside a scale of recommended (although not mandatory) minimum prices for common legal services as illegal price fixing in violation of the US anti-trust laws. Without these guidelines, lawyers resorted to the billable hour which was relatively easy to implement but which actually increased legal costs. See Davis, *Back to the Future: The Buyer's Market and the Need for Law Firm Leadership, Creativity and Innovation* (1994) 16 Campbell Law Review 147.

Implementation Group's press releases and speeches made at the time of the launch of the report, this is a remarkable omission. In the entirety of the report, the issue is addressed in only two paragraphs which are worth reproducing in full because they illustrate how the report pays lip service to the problems without suggesting any solutions:

> "2.3 The IAG is mindful of the dangers posed by an over reliance on a time based legal costs charging system. The point about any such system being a "plodder's charter" has been made repeatedly. However, where a paying party is of the view that there has been an unacceptable level of "plodding" in a case, they will be free to refer the matter to assessment.
>
> 2.4 The point has also been made that time recording may give rise generally to an escalation in legal costs as lawyers charge for work which heretofore has not specifically been charged for. It is not possible, however, to determine the extent to which this may occur and the costs implications. It must also be borne in mind that time recording represents one part of a series of wide ranging changes and reforms in relation to the charging of legal services and the assessment of costs where they are in dispute. As such, it is difficult to assess the effects of one measure in isolation from all of the other measures to be adopted."

The Implementation Group may well have been, and no doubt were, "mindful of the dangers" of time-based billing but they did not suggest that these concerns were misplaced or suggest any way in which they could be overcome beyond saying that they could not assess the extent to which legal costs would rise as a result of time billing and that "the plodding" problem could be referred to assessment. If, as the Advisory Group recommends, barristers should be obliged to charge on the basis of time, it is difficult to see on what grounds the body charged with the review of the bill could reduce it. It is a wholly unconvincing justification for such a radical step as introducing obligatory time billing to say that it is "difficult to assess the effects" of such a measure. Indeed, later in the report, the Group acknowledges that a great deal of empirical and statistical research would have to be conducted by the proposed regulatory costs body with a view to formulating the guidelines.[30]

In truth, there is no justification proffered in the report for the recommendation that time-based billing should become obligatory for barristers. No attempt is made to dispute the serious criticisms levelled at time-based billing, not the least of which is the resulting increase in legal costs. For a body expressly set up to implement recommendations designed to reduce legal costs, this is little short of remarkable. It is even more so when one considers that the parent report made no such recommendation.

There is a further implication of this recommendation which is whether it is indeed confined to the issue of recoverable costs. In fairness, the Implementation Group does acknowledge that:

> "insofar as solicitor and client costs are concerned, no party will be bound by recoverable costs guidelines. Parties will be free to enter into agreements with their lawyers if they see fit … parties liable to pay costs will also be free to decide to pay costs as they see fit."[31]

Nonetheless, the recommendation that barristers should not merely be obliged to keep time records (which might therefore only be relevant in the context of the assessment of recoverable costs) but that they should also be obliged to set out their hourly or daily rates "as the basis of their charging generally for legal services" implies a public holding out of time-based billing as the method of charging which would therefore be the basis of the lawyer/own client bill. I do not believe this is what the Implementation Group intended and the draft costs agreement between solicitor and counsel which is attached as an appendix to the report[32] refers to a number of factors which will inform counsel's fees of which time is only one. Nonetheless, the apparent obligation to adopt and publicise time-based billing in the body of the recommendation fits uneasily with the acknowledgement that time is only one of many relevant factors.

Nearly all goods and services are bought and sold on the basis of supply and demand where the seller has to cover his costs and earn sufficient profit to reward him or her for the risk involved in the business and where the buyer is prepared to pay a price if the value he is getting in return is at least as great or more than the price. A diamond will generally command a higher price than a glass of water but the reverse will be true for the thirsty traveller stranded in the desert. Barristers' services have a value to our clients which is only partially connected with the time spent in rendering that service. The principle that fees should be grounded upon and referable to work actually done is in our Code of Conduct but this is not the same thing as saying that the level of the fee should be calculated primarily (let alone exclusively) by reference to time spent. The value of the work done to the client is one factor, and a reasonably important factor, which can be legitimately considered in determining the fees we charge our own clients as well as the level of costs which the loser in the litigation process may reasonably be asked to pay.

The Australian Law Reform Commission, in its submissions to New South Wales' Legal Fees Review Panel in December 2004 supported the criticisms of hourly billing and encouraged

> "reforms that will place greater emphasis on value billing. Event-based fees would provide a greater certainty about costs for clients, and also enhance the development of practice techniques based on quality and efficiency rather than the time spent on the matter."[33]

"Value billing" or "event-based billing" is almost always

30 Implementation Group report, paragraph 3.9.

31 Implementation Group report paragraph 3.5.

32 And is reproduced as Appendix B to this paper.

33 Australian Law Reform Commission, submissions to the New South Wales Legal Fees Review Panel (December 2004) at paragraph 9. The criticisms of hourly billing are referred to in paragraph 4.

satisfactory to the client, by definition, because the fee is related to the value received by the client. I referred above to the fact that American law firms began in the 1960s and more particularly in the 1970s to switch from value billing to time-based billing. It is noteworthy that there is now a noticeable shift in the United States back to value billing, partly driven by the utilisation of computer and internet technology which reduces the necessary research time (and therefore the billable hours) albeit at what is often a higher overhead cost than that of maintaining a traditional library. The efficiencies and reduction in billable hours generated by such technology has on the one hand made more stark the contrast between the level of fee calculated by reference to the billable hours and the value enjoyed by the client, and on the other hand has exacerbated the ethical problems of lawyers who have striven to maintain their revenues by unnecessary work or, even worse, billing hours that were never incurred at all. Jones and Glover point out that

> "a partner at a major New York law firm, who was described as "a powerful rainmaker" was disbarred when it was discovered that he falsely billed clients over $45,000. A partner at a Chicago firm was ridiculed for claiming to have logged 6,022 billable hours in 1993 and for exceeding 6,000 in each of the four consecutive years."[34]

The Model Rules of Professional Conduct of the American Bar Association lists the factors to be considered in setting a fee, which are broadly similar to those suggested by the Bar Council and largely accepted by the Working Group, all of which versions are distinguished by the acknowledgement of time as a relevant factor but the rejection of time-based billing as the primary determinant of fees.

Brief fee

It is part of our Code of Conduct that barristers' fees are based upon work done.[35] There is sometimes a misunderstanding (more on the part of clients than instructing solicitors) that brief fees are not related to work done. This is partly due to the lack of transparency which does sometimes attach to the way in which barristers charge and the Working Group and the Implementation Group both make recommendations as to the greater level of information on costs which should be given to clients both before the commencement of litigation and during litigation to enable clients to both understand for what they are being charged and to enable them to keep control over the process as litigation proceeds. Indeed, the Bar Council, after reviewing the practice in a number of common law jurisdictions, set out the detail of proposed disclosure obligations on barristers to make the necessary costs disclosure to the instructing solicitor which letter of disclosure will contain a detailed description of the work that is expected to be required for the matter in question, an estimate of the overall costs or the range within which costs are likely to fall, and the likely allocation of costs which might be made by the Court at the end of the litigation, which letter would be subject to an obligation to provide updates at least once every 12 months or on the occurrence of some event which is likely to have a significant effect on the estimate of costs. This obligation is proposed to become binding on all barristers[36] to be issued by the Professional Practices Committee. [*Editorial note –since this paper was delivered, this proposal is now binding on all barristers.*]

Brief fees are in fact related to work done and are designed not merely (and indeed not even primarily) to remunerate counsel for the first day of the action but for all the preparation for the hearing (including their legal research, their review of all of the papers, the preparation of their strategy for their examination of witnesses and cross-examination of witnesses, and other work done by counsel in the preceding months or even years in preparation for the trial, much of which work is not otherwise billed at all). That is, I think, where the confusion arises because the client who receives bills from time to time for particular events in the months or years prior to the actual hearing (e.g. interlocutory injunctions, consultations with clients etc.) does not always understand that there is a host of other work done by counsel which does not appear on the bill as the interlocutory procedures progress and which work increases in intensity as the trial date looms closer.

The Working Group recommended that counsel's brief fee "be abandoned and be replaced by the guidelines on recoverable costs, deconstructing the fee into a set of charges for work actually and appropriately done in respect of steps within a case's progression."[37]

The ambiguities in the Working Group's proposals on the content of the guidelines has already been commented upon. But the principle behind the Working Group recommendation is sound provided one remembers that the brief fee is in fact designed to be and is related to work actually done and where the level of the fee is set by reference to various factors to be enumerated in the guidelines such as the complexity of the matter, the expertise of the practitioner, the urgency and so forth. Thus, the Bar Council made a submission to the Implementation Group that

> "In marking a brief fee, a barrister shall identify and enumerate the work undertaken in preparation for the hearing of the matter, such as the legal research conducted, the procedural matters considered, all papers that were reviewed, discovery and background material that were examined and considered, the preparation of strategies, the planning of witness examinations, the outlining and drafting of legal submissions and factual background documents, and other such work done by the barrister in the proceeding months or years in preparation for the trial."[38]

34 Jones and Glover, op. cit., page 294. Referring to the impact of technology in reducing time spent, they say that *"Putting all of the above factors together, the climate is right for a switch from hourly billing to fixed and value rates"* (page 296).

35 Rule 12.1(a).

36 Subject to exceptions such as cases of a low value or by written agreement with the client.

37 Working Group report, paragraph 5.32.

38 Submission page 18, paragraph 5.19 of the Bar Council submission to the Implementation Advisory Group, 10th May 2006.

What the Implementation Group actually did was to treat the solicitor's instruction fee and the barrister's brief fee as two more or less indistinguishable "global fees" which should be abolished and "replaced" by a set of charges for work done, as if the brief fee was not a charge for work done. This is a subtle but important misunderstanding. However, whatever about the misunderstanding about brief fees being related to work actually done, the real concern with the Advisory Group's recommendation in this respect is not so much with what they say in the body of the report but with the recommendations as set out in the foreword to the report. The foreword recommends that

> "In tandem with the setting of guidelines, the practice … by barristers of charging global fees such as brief fees … be abolished and that, in [its] place there be substituted fees and charges set out on an hourly rate or a daily rate as appropriate."

This is not only inconsistent with and indeed contradictory of the Working Group's recommendation that the brief fee merely be broken down into its component parts in accordance with the recommended guidelines (and therefore takes account of all of the many relevant non-time based factors) but reveals again the Implementation Group's preoccupation with time-based billing which forms no part of the Working Group's recommendations whether in relation to brief fees or otherwise.

This incompatibility also derives from the Implementation Group's failure to appreciate that the brief fee is related to work actually done. Indeed, they go so far as to say that they do not "believe that the retention of these fees [i.e. brief fees and instructions fees] - as presently constituted - is compatible with a move towards charging for work on the basis of "work done"."[39] This confuses the issue of transparency in explaining the makeup of the brief fee with the function of the brief fee.

Conclusion

Though I have been critical of the Implementation Group's report in certain areas, it is important to emphasise that subject to inevitable differences of detail, the Bar Council has welcomed most of the recommendations of the Working Group report and much of the Implementation Group's report. Leaving aside the ambiguities and contradictions which arise from the time billing proposal, there is broad agreement on the relevant factors that inform the level at which a barrister's fee is set and there is a recognition on the part of the Bar that our charging structure has to be more transparent. We should, quite properly, be subject to an obligation to spell out our charging structure in advance and in writing while making due allowance for the inherent unpredictability of the course litigation takes and its associated costs. There are four pillars of our profession which lie at the core of the values we cherish and which we believe are fundamental to the fair administration of justice in Ireland and the vindication of people's rights through our legal system. They are:

- the independence of the Bar as a sole trader referral profession whose members will, within their sphere of competence, fearlessly act for any clients no matter how unpopular the cause;
- the maintenance of the very highest standards of ethics in our dealings with each other, with solicitors and clients and, above all, with the Court in terms of, for example, disclosure, non-misleading submissions and honesty;
- the maintenance of the very highest standards of legal advice and forensic advocacy which is at minimum comparable with the best advocacy in any other jurisdiction and which is responsive to the needs of clients; and
- the delivery of value for money services, where we should not be in any way embarrassed about the fact that we provide valuable and frequently essential services both for individual clients and in the wider public interest, but where our fees and charging structures must be not merely fair and reasonable but transparently fair and reasonable.

Lengthy, costly and perhaps, like *Jarndyce v. Jarndyce*, even *"perennially hopeless"*[40] cases do still occur. That there is surely at least an echo of *Jarndyce v. Jarndyce* in the opening words of Mr. Justice Lynch's judgment in *Bula Limited (in receivership) v. Tara Mines Limited* on the 6th February 1997:

> "This case arises out of circumstances which commenced more than a quarter of a century ago. It has its origin in business dealings undertaken in the hopes of arriving at a very large crock of gold, which in the end of the day turned into a bottomless pit of debt and misery for those who most avidly sought the crock of gold. It is from that bottomless pit that the remaining plaintiffs in this action hope by this litigation to escape."

At the end of *Bleak House*, a new Jarndyce will is discovered which, if valid, will result in victory for Richard Carstone. But it transpires that the validity of the new will has become moot because the estate has now been eaten up entirely in costs. The last lawyer to leave the Court is Mr. Carstone's solicitor, Mr. Vholes:

> "He gave one gasp as if he had swallowed the last morsel of his client, and his black buttoned up unwholesome figure glided away to the low door at the end of the hall."

The record of the Bar in recent years in terms of its willingness to embrace change, its openness to competition, the continued high quality of its services, the acknowledgement of the necessity to deliver transparent value for money, and our unforgiving defence of our independence, means that today at least, the house is certainly less bleak. ■

39 Paragraph 3.3 of the Implementation Group report.

40 "This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. … There are not three Jarndyces left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffee house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless."

The Spent Convictions Bill, 2007 and wiping the slate clean

Caroline O'Connor BL

The consequences of a criminal record may not become obvious to an individual for some years, and it is worrying that there is as yet no legal provision in Ireland to provide for spent conviction. The reality is that persons who are convicted of minor offences, and receive fines and a criminal record are often unaware that they now have a criminal record for life. A criminal record, however minor, can have adverse consequences in respect of, among other things, visas, employment, insurance, entry to professions and the acquisition of a licence, such as PSV (public service vehicle) and firearms, despite the fact that there may be little or no nexus between the informal effects of the criminal record and the formal sentence imposed. A vicious spiral develops in that the ex-offenders are unable to obtain a legitimate source of income and may resort to illegal means. This obviously leads to the possibility of capture and further imprisonment and the spiral continues.

Therefore, if information regarding past convictions was expunged after a qualifying period had elapsed, making it unnecessary to disclose such information, this could in the short term break the spiral of labelling as well as having more long term effects such as reducing re-offending and consequently reducing crime. The majority of common law and civil law jurisdictions have introduced some form of spent convictions scheme. A spent convictions scheme should address all aspects of criminal activity. In a survey of some 21 jurisdictions undertaken by the British Home Office, it emerged that of those jurisdictions; only Ireland and Slovenia have no scheme in place in respect of adult offenders.[1] Ireland stands dangerously isolated on this issue. It is expected that the proposed Spent Convictions Bill, 2007[2] hereafter referred to as the Bill, will go some way to remedy this unsatisfactory situation. The Bill commenced life as the Rehabilitation of Offenders Bill 2007 but has since been renamed the Spent Convictions Bill 2007. The Bill has undergone many changes since its inception in line with Law Reform Commission (LRC) recommendations and a Draft Bill prepared by the LRC, A Private Members bill of Barry Andrews TD, it has not as yet passed 2nd stage reading but it is hoped it could be law by the end of the year.. The original format of the Bill contained more details on procedural aspects of the scheme, including the role of the original Sentencing Judge and the evidential value of statements as to a person's rehabilitation from members of Gardai. Although excluded from the current draft, Mr. Andrews hopes amendments can be added at a later stage.

In this piece, I propose to evaluate the Bill, drawing on comparative jurisdictions, address underlying issues and assess the response from the Law Reform Commission and the Spent Convictions Group on the Bill. The issue of discrimination and rehabilitation for ex offenders are more complex issues which cannot be addressed within the confines of this article.

What is spent conviction?

Expungement or spent conviction is often equated to the sealing or destroying of legal records. Countries offer their own definition of spent conviction, based on different rules and laws. Generally, spent conviction can be viewed as the process to "remove from general review" the records pertaining to a case, often the records may not completely "disappear" and may still be available to law enforcement. Spent conviction or clean slate provisions in common law jurisdictions have their source in the policy debates surrounding rehabilitation which emerged in the 1960s. Wiping the slate clean can be viewed as the next logical step in the rehabilitation process. Once an individual has demonstrated the desire to return to a law-abiding life, spent conviction or clean slate policies cement this process by allowing the past misdemeanours of that person to be set aside, thus ensuring that reintegration into society can be completed without the need to disclose the existence of the criminal record in all circumstances.

The effects of disclosure of a criminal record on the prospects of an individual seeking employment are well documented. Louks, Lyner and Sullivan note that there is a: "...tendency to refuse employment to people with a criminal record, often irrespective of whether the offence relates to the post in question. Lack of employment inhibits the re-integration of ex offenders into society, which in turn, may perpetuate the cycle of offending."[3] The central fact about the vast majority of Irish offenders, whom we imprison, is that there is no pristine motivational state, no foundation of personal achievement and no secure, congenial place in mainstream society to which to bring them back. There is only a life-long history of failure and of being failed in areas that link to economic success and social acceptance.[4]

1 *See Breaking the Circle- a report of the review of the Rehabilitation of Offenders Act 1974*, Home Office, 2002 at pages 65-72.

2 http://www.oireachtas.ie/viewdoc.asp?DocID=8249&&CatID=59&StartDate=01%20January%202007&OrderAscending=0

3 Louks, Lyner and Sullivan, The Employment of People with Criminal Records in the European Union, *European Journal on Criminal Policy and Research*, Issue 6, 195, 1998.

4 Paul O' Mahony, "*Recent Penal Policy is losing touch with the goal of rehabilitation*" (2005) 23 ILT 154

Ireland and spent convictions

The only provision in Ireland that currently caters for spent convictions is s.258 of the Children Act 2001. Section 258 provides that where a person under 18 years of age has been found guilty of an offence, which did not have to be tried before the Central Criminal Court, and such person has not been dealt with for any other offences in the three years subsequent to the conviction, where those three years have actually elapsed, then the offence shall be effectively spent. Effectively spent in this context means that a person to whom this section applies shall be treated for all purposes in law as a person who has not committed or been charged with, or prosecuted for, or found guilty of, or dealt with for the offence/offences which were the subject of the finding of guilt; no evidence shall be admissible in any proceedings before a judicial authority to prove that any such person has committed or been charged with, or prosecuted for, or found guilty of, or dealt with for any offence which was the subject of that finding, and a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his or her past which cannot be answered without acknowledging or referring to a finding or findings to which the section refers.

The scheme in the 2001 Act is based on the premise that a young person who commits an offence should be permitted, at some point, to put their past behind them and move on with a law-abiding life unhindered by the requirement to disclose their past offences. Surely the same is true of adult offenders and while such, offenders cannot point to the foolishness of youth as a reason for the commission of offences, it is also important to bear in mind that most of the offences committed in this county are by males aged 18-25 years. It is well documented that many people grow out of offending behaviour and many settle down to lead law-abiding lives by the time they reach 30 years of age. Is it fair that the law prohibits those persons from a return to law abiding behaviour, without the need to disclose certain criminal convictions, when a person in a similar situation who is just one year younger may?

Which spent convictions model should Ireland adopt?

A number of common features exist in the spent conviction schemes in the various common law jurisdictions. Most are limited in the sense that certain offences, usually the most serious offences against the person, are generally not eligible for spent conviction. Others are limited in that only offences which attract a penalty below a certain threshold are eligible for spent conviction. By contrast, most of the civil law jurisdictions - with the exception of Germany - place no restriction on the length of sentence that can be erased. Most of the common law schemes also contain certain exclusions in the public interest, which means that a criminal record can be disclosed where the offender seeks employment or office in specified sensitive posts or positions, for example, working with children or vulnerable people. Civil law regimes also provide for the exclusion of offenders from certain employment and professions.[5]

A 2004 Report by the Department of Justice Equality and Law Reform on *Extending the Scope of Employment Equality Legislation* was prepared by the Law Department, University College Cork, (hereinafter referred to as the UCC report) as part of a review of the discriminatory grounds in the Employment Equality Act 1998. The UCC report identified three broad frameworks or models of spent convictions;

1. **A discriminatory model**: such a framework prevents discrimination on the grounds of a criminal record in relation to a variety of activities including employment (as provided for, e.g. in Tasmania and Ontario). Discrimination on the grounds of a criminal record is not unlawful, however, provided it can be justified on the inherent requirements of the employment position.
2. **A spent convictions model**: under such a framework, offences are expunged after prescribed qualifying periods (as provided for. e.g. New South Wales, Queensland, Great Britain and Northern Ireland). Following the prescribed period, an offender need not disclose the record of the conviction or ancillary circumstances relating to the conviction.
3. **A hybrid model incorporating spent conviction and discriminatory provisions**: under such a framework, provision is made for the elimination of discrimination on the grounds of an irrelevant criminal record. What constitutes an irrelevant criminal record, however, is provided for under special spent convictions legislation (as provided for, e.g. in the Northern Territories, Australian Capital Territory, Western Australia, British Colombia, Quebec, and as recommended in current bills in New Zealand).

Most countries had borrowed heavily from the British Rehabilitation of Offenders Act, 1974 in order to introduce best practice on the issue. The Bill falls primarily into category 2; the spent convictions model. The Bill specifically states at section 3(1) that a "rehabilitated person" refers to a person who has been convicted of an offence/s, whether before or after commencement of the Act. The conviction of the "rehabilitated person" shall be referred to as a "spent conviction". The Bill excludes a sentence triable by the Central Criminal Court, a sentence for a sexual offence and a sentence for a term exceeding 6 months. The above exclusions are in line with international norms. "Sentence" under the Bill means any custodial order made by a court in connection with a criminal conviction for the deprivation of a person's liberty for a period of time imposed by a court, and includes any such sentence which is suspended, whether in whole or in part. "Sentence" also includes non custodial orders made by a court in connection with a criminal conviction including any disqualification, penalty, fine, prohibition or order postponing sentence, which again is in line with international best practice. In the UK, convictions resulting in the following sentences can never become spent:

5 Law Reform Commission report "*Spent Convictions*", page 21.

- A sentence of imprisonment, youth custody detention in a young offender institution or corrective training, for a term of more than two and a half years.
- A sentence of imprisonment for life
- A sentence of preventative detention
- Detention during Her Majesty's Pleasure or for life or a sentence of custody for life.

Effect of a spent conviction

The general effect of a spent conviction is addressed in section 3 of the Bill, in that a rehabilitated person shall be treated for all purposes in law as a person who has not committed or been charged with, or prosecuted for, or convicted of, or sentenced for, the offence/s which were the subject of the conviction and shall not be admissible in any proceedings before a court to prove that the rehabilitated person has been committed/charged with/ prosecuted/ convicted/sentenced in connection with or which was the subject of the spent conviction. The section further provides that where a question is put to him/her otherwise than in proceedings before a court, the question shall be treated as not relating to a spent conviction and the question therefore may be framed accordingly. The section provides for the non prejudicial effect of failing to disclose a spent sentence or any circumstances ancillary to a spent sentence in answer to a question. However, a person convicted of fraud, deceit or an offence of dishonesty in respect of an insurance claim shall not be excused from the above, i.e. from admitting a spent sentence in any insurance proposal/form.

Rehabilitation periods

The Bill refers to specific "rehabilitation periods" which are "qualifying" time periods, the length of time a person must be conviction-free to qualify for the conviction to be regarded as "spent". The rehabilitation period always runs from the date of the conviction and will generally depend upon compliance with the sentence. When the sentence has been served and the applicable rehabilitation period has expired, that conviction will be 'spent' and usually will not need to be disclosed in the future, for example, when you are applying for a job, completing an insurance proposal form, or applying for credit facilities or a tenancy of property. Section 3(1) of the Bill details that in respect of a custodial sentence, a person can only apply for spent conviction on the passing of seven years reckonable from the date of completion of the sentence. Therefore, seven years is the rehabilitation period for sentences in the under six month sentence bracket. The Bill excludes a sentence triable by the Central Criminal Court, a sentence for a sexual offence and a sentence for a term exceeding 6 months. I submit that 7 years is too long a period for sentences under six months and that 5 years would be more appropriate and further that a scheme for sentences exceeding 6 months should also be considered at this opportune time. An incremental increase in rehabilitation period in line with length of original sentence imposed is more appropriate and should be adopted by the Irish legislators.

Under section 3(4) (b), in respect of any non custodial order including any disqualification, penalty, fine or prohibition, a period of 5 years from the date of conviction or when such order ceased to have effect, whichever is the earlier is the relevant rehabilitation period. This is a reduction from 7 to 5 years as was provided in the earlier Expungement of Sentences Bill, 2007. I would submit that it is disproportionate that a 20 year old who is found with a quantity of cannabis for personal use who receives a court imposed fine would have to wait 5 years for that sentence to be spent. This will affect his/her job prospects, visa applications for travel or work abroad, insurance applications etc during that period.

By comparison the UK has divided relevant rehabilitation periods into the following:

- Prison for more than two and a half years – Never- Cannot apply for spent sentence.
- Prison for more than six months but less than two and a half years – 10 years*
- Prison for six months or less – 7 years*
- Fine – 5 years*
- Probation order or community order – 5 years
- Hospital order under Mental Health Act 1983 – 5 years or 2 years after order ceases to have effect, whichever is the longer
- Absolute discharge – 6 months
- Conditional discharge, binding over, care order, supervision order, reception order – 1 year after making of order or 1 year after the order ends, whichever is longer
- Disqualification - Period of disqualification

**Note: These periods are reduced by half if the offender was under eighteen at the date of conviction.*

As seen from above, the rehabilitation period for a disqualification is the length of the disqualification which makes more sense than the 5 year period in the Bill, especially given the fact that penalty points for fixed penalty charge offences, such as speeding, have a 3 year life span.

Obligation to reveal a conviction

There is still an obligation under the Bill to reveal any conviction where an individual seeks employment or any position or office in an "excluded employment" within the meaning of Section 5 (2). Under Section 5 (2) "Excluded employment" includes, among other things, employment involving the care of children, or other vulnerable persons, employment in the provision of healthcare or legal services, prison officers and gardaí.

Procedural Issues

The procedure for applying for a conviction to be spent was contained in the original Expungment of Sentences Bill 2007 and is not provided for in the Spent Convictions Bill 2007 that is passing through the various stages. I will outline the proposals in that previous Bill. It provided that an individual who has been convicted, whether before or after the date of commencement of the Act, could apply to a judge of the

court imposing the original sentence for the sentence to be spent. I submit that a Tribunal or Parole Board system, such as that operating in Canada, would be a more appropriate forum, thereby making the need for legal representation redundant and not clogging uo Court lists. The application was proposed to be made on notice to the Superintendent of the Garda Siochana of the district in which the individual ordinarily resides and the court may, at its discretion make or refuse such an order.

Section 2(3) of the original Expungement of Sentences Bill provided that the superintendent or other member of the Garda Siochana shall be entitled to appear and be heard at the hearing of the application. This is to ensure that the person has been rehabilitated in line with the idea that a spent sentence is defined as "any sentence in respect of which a person has been rehabilitated". After the making of the order, that individual's sentence shall for those purposes be treated as spent from the date of the said order. This is in line with s258 of the Children's Act 2001 and similar provisions regarding questions relating to spent sentences apply. Section 5(3) of the original Expungement of Sentences Bill states that all convictions, including spent convictions, will still be required to be disclosed in cases involving access to children. The more recent Spent Convictions Bill 2007 does not contain any of the above provisions.

Law Reform Commission and Spent Convictions Group recommendations

The Law Reform Commission (hereinafter referred to as the LRC) made recommendations on the Bil which have largely been adopted. The Spent Convictions Group (SCG) was established with a view to formulating a submission to Government on the issue of spent conviction. The membership of the SCG is comprised of representatives from the Northside Community Law Centre, the Ballymun Community Law Centre, the Ballymun Local Drugs Task Force, Business in the Community and the Human Rights Committee of the Law Society. The Group proposed a broad scheme, open to all offenders, irrespective of the nature of the offence and the sentence imposed, requiring the ex-offender to take an active role in the process. The Group recommend that the system would be automatic, rather than requiring the person to apply to court to have their conviction declared to be spent, as an application-based system would not be transparent and consistent.

Conclusion

The Bill is a positive step forward for those hampered by one lapse in an otherwise unblemished life but also warns that the law of the land will come down hard on re-offenders. However, procedural aspects of the Bill must be addressed. This author has concerns about the appropriate disqualification periods and feels there is a need to reduce the rehabilitation period for non custodial sentences from 5 years. Further, it is submitted that the Bill should provide for an incremental increase in rehabilitation period in line with length of original sentence imposed and the remit of the Bill should be extended to cover sentences exceeding six months. ■

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