The Bar Review

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- Environmental Impact Assessments and recent EU law
- The Haran Report on Legal Costs
- *Eurofood* and EU Insolvency regulation

THOMSON
ROUND HALL

The Bar Review

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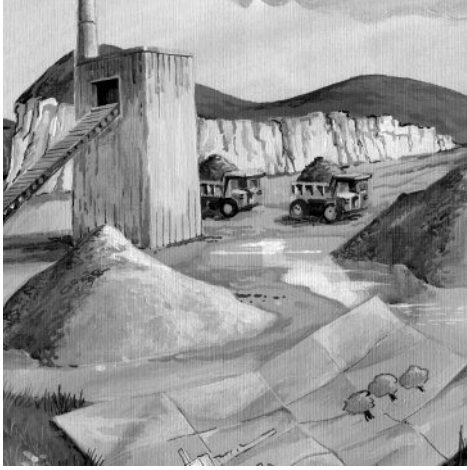

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Medico-Legal Society Conference

The Medico-Legal Society of Ireland is celebrating its 50th Anniversary with a conference on the 7th October, 2006 in Dublin Castle. The conference will include sessions on Bio-ethics and acquired Infections. The conference will be opened by the Attorney General, Rory Brady SC and speakers include Dr. Siobhain O'Sullivan, Bioethics Council, Prof. Gerry White, Trinity College, Prof. Hilary Humphries, Royal College of Surgeons in Ireland and Dr. Brian Farrell, Coroner, Dublin.

To register for the conference, please contact Dr. Antonia Lehane, 59, Main Street, Swords, Co. Dublin.
Tel; 01-8407430 or e-mail; antonialehane@eircom.net

The conference fee for Members is €60.00, Non-members €120.00. Dinner €100.

Kings Inns Debating team win John Smith Memorial Mace

King's Inns students Barry Glynn and Mark Murphy won the coveted John Smith Memorial Mace for 2006 in May at Cardiff Castle. Barry is a first year diploma student at King's Inns and Mark is a student on the full time professional degree course at King's Inns. The John Smith Memorial Mace is the largest and oldest debating competition in Europe attracting over one hundred and fifty participant teams. King's Inns has won the competition once before, in 1986. The competition was formerly known as the Observer Mace.

Calcutta Run

Congratulations to Annette Kealy BL, who was the first woman to cross the line in the Calcutta Run this year.

Distillery Extension

Pictured at the opening of the new extension and the dedication of the Eamon Leahy Room and Peter Shanley Room are Marian Shanley, Taoiseach Bertie Ahern T.D., Mary Hanafin T.D., Minister for Education and Hugh Mohan SC.

The Haran Report on Legal Costs

Colm O'Dwyer BL

The report of the Legal Costs Working Group (known as the Haran Report) was published at the end of 2005 against a backdrop of concerns about the perceived high costs of litigation and lawyer fees. This report examines the way in which legal costs are determined and assessed and makes a number of recommendations which, in the view of the Group, would lead to a reduction in the costs associated with civil litigation. The Minister for Justice Equality and Law Reform has recently established a Legal Costs Implementation Advisory Group which will prepare a report on the implementation of the Haran recommendations by October, 2006, and it now seems that very significant changes to the rules governing legal costs could be introduced within the next year.

There seems to be very little awareness among barristers of the recommendations. Yet their implementation could have profound effect on the way we operate as a profession. The purpose of this article is to list, and provide a brief comment upon, the recommendations which I think would most affect barristers if implemented[1].

The Recommendations

a) Guidelines for recoverable costs

The Group has recommended the establishment of a Legal Costs Regulatory Body to formulate costs guidelines setting out the amounts that barristers can normally expect to recover in respect of particular types of proceedings, or steps within those proceedings, for each court jurisdiction[2]. The Group emphasises that these would be prescribed guidelines rather than a fixed scale for recoverable party and party costs (the legal costs which may be recovered by one party to proceedings from another party). However, in practice, I do not think that the guideline system as proposed would be dissimilar to a fixed fee scale. The report cites the system in New Zealand, which includes a fixed fee scale, as a model. It also states that the onus would be on the party trying to claim more than the fees prescribed to show why, in the circumstances of the particular case, a higher amount than the guideline fee should be paid[3] which suggests that the so called 'guidelines' would in fact be mandatory.

It is proposed that the actual guideline amount set for a particular task such as drafting a Statement of Claim would be based on what the members of the Legal Costs Regulatory Body deem reasonable with reference primarily to the time that would generally be expended on that task. The complexity of the particular type of proceedings and the court jurisdiction would also be relevant considerations in formulating the guideline amounts. For more complex types of proceedings, such as perhaps a defamation action, it is suggested that there may be a band or range of guideline amounts for particular tasks rather than a single amount. It is stated in the strongest terms in the report that the level of recoverable costs would not be directly proportionate to the value of the case[4].

The essential point about the guideline system is that the fees barristers recover would at least appear to be linked directly to an estimation of the work done and time expended. The expertise, experience, reputation or ability of the barrister, or the shared risk taking involved in 'no foal no fee' litigation, would not be a taken into account at all. Such an approach seems to clash with the Groups concern that "it might not be realistic to have a 'one price fits all' fee"[5]. In reality, the service provided by the most inexperienced and junior barrister simply cannot be equated with the service provided by the most experienced and this raises serious issues about the equality of arms in litigation. If the costs which a litigant can recover in the event of winning a case are limited excessively and on the basis of objective criteria such as time expended, he may be a disadvantage to a more well resourced opponent who can afford to pay legal fees greater than those set in the guidelines and attracts the best and most experienced or expert barristers.

It should also be noted that the Competition Authority has expressed disapproval of any system of fixed costs stating that "the setting of fees by regulation is harmful to competition"[6].

b) Paying Junior and Senior Counsel in accordance with work done rather than grade or level

The Group recommends that the all encompassing brief fee be scrapped and the barristers instead deconstruct the fee into a detailed set of charges for the time actually spent and the work actually done at each stage of the proceedings. The significance of this proposal would be that barristers, whether they be Junior or Senior Counsel, would have to calculate charges based primarily upon hours actually worked on the case. Such an approach would surely end what the report calls the "unacceptable and unfair"[7] practice of Junior Counsel charging two thirds of what the Senior Counsel charges (the Bar Council has rejected that this is a set practice). The report goes on to highlight that, under the proposed guideline system for recoverable costs, a Junior could recover a higher fee than the Senior where they have carried out more of the work involved in the case (for example, where the case is settled and most of the work was front loaded in drafting, opinions, motions, call-overs etc.) and that a Junior might be employed for a full High Court action and recover the fee that a Senior would traditionally command.

The question that then arises is whether the guidelines would allow for a successful litigant to recover costs for both a Senior and a Junior Counsel in all High Court cases. The general thrust of the report would suggest that the answer in the majority of cases would be in the negative and costs will only be recoverable for one or the other. This would naturally discourage Junior Counsel from bringing Senior Counsel into a case and would again raise questions about equality of arms in litigation.

1 The Bar Council has prepared and submitted a far more detailed analysis of the recommendations to the Implementation Group which is available from the Bar Council Office or website: *www.lawlibrary.ie*

2 See the Report of the Legal Costs Working Group Section 5.22 (p 31)

3 See the Report of the Legal Costs Working Group Section 5.23 (p 31)

4 See of the Report of the Legal Costs Working Group Section 5.23 (p 31)

5 See of the Report of the Legal Costs Working Group Section 5.20 (p 31)

6 See the Competition Authority, Study of Competition in Legal Services at Section 12.22

7 See the Executive Summary of the Report of the Legal Costs Working Group (p 12)

There are many other concerns about the introduction of a costs system for barristers where the costs payable are primarily calculated and assessed on the basis of hours worked. Such a system, by its very nature, must encourage inefficiency (inefficiency in time terms is rewarded with higher remuneration) and discourage early resolution of matters.

c) Changing the jurisdictional limits

The Group expresses the belief that many cases are unnecessarily heard in the High Court because the upper jurisdictional limit for the Circuit Court is so low but finds that the jurisdictional changes suggested in the Courts and Court Officers Act, 2002, which provided for the Circuit Court jurisdiction to be increased to €100,000 and the District Court's to be increased to €20,000 would be "too much of a shock to the system" if implemented overnight. The Group instead recommends that the personal injury jurisdictions remain the same to see what happens with the PIAB but that, for all other areas, the limits be progressively increased to take account of inflation for the 15 years since 1991 when the current limits were set[8] (by my estimation this would probably come out at about a 45% - 50% increase) and then would be adjusted regularly to keep up with inflation.

While this is a sensible recommendation, there are many, many cases that fall into the €30,000 - €50,000 bracket that are now run in the High Court and an adjustment upwards of the Circuit Court jurisdiction to, say, €50000, would have quite a dramatic effect on legal fees because there would be no allowance in the guidelines for Senior Counsel's fees to be recovered in these cases.

d) Charging for court time

The Group recommends that the Courts Service should seek to recover some or even all of the costs of court time (if the constitutional aspects of such a move can be clarified)[9]. This would seem to clash with the overriding objective of the Group which is to decrease the cost of civil litigation. It is true that such a move might encourage people to settle cases before going to court but this would only occur because the financial risks of taking a case all the way to court would be far higher (which will once again disproportionately affect the less well-off litigant).

On a practical (but lighter) note, if the Courts Service is to charge for the judges' time, then surely there would have to be different rates for different judges. Judge A would have to be cheaper than Judge B because Judge A takes far longer to hear any given case. If the rates were the same per hour of judicial time, could the plaintiff or defendant not refuse to take Judge A on a 'value for money' basis? Is it suggested that the Courts Service should bill by the second for the Common Law Motions List where an application can be dealt with in less than a minute?

e) Not reserving pre-trial costs

It has been a problem for defendants in civil litigation that the costs of motions that they have won (or motions that are struck out) often end up being reserved. The plaintiff then wins the substantive case and can recover all of the reserved costs despite the fact that they may have been in default in respect of, for example, delivering a Statement of Claim. The defendant may as well have lost the motion. The Group recommends that costs of pre-trial motions not be reserved but should be awarded and measured at the motion hearing and then be payable by set off against any award of damages or costs which may be made in favour of the successful plaintiff[10].

The benefit for barristers of the costs of every motion being awarded is that they might get paid for motions even if they appear for the losing side in the case or if they were only appearing in the motion. If costs are measured immediately after the application, there is also the chance that the hard work that goes into fighting more complicated motions will be properly rewarded.

f) Forcing parties to make full disclosure of financial information in family law cases

It is interesting that the Group did not consider costs in family law cases in any detail because, in my experience, this is the area that most people who have been involved in litigation actually complain about – particularly those who have been involved in High Court judicial separation or divorce proceedings. The Group only recommends more stringent penalties be introduced for failure to disclose assets and that immediately after the breakdown of the marriage, each party should have the right to require the other party to make full and complete disclosure of assets[11].

Although party and party costs often don't apply in family law because there is no 'winner', a change in billing practices away from the all encompassing brief could have a real impact on costs' which often appear to be calculated primarily upon the basis of the value of the marital assets.

g) Increasing Judicial Resources

The Group recommends that the Government should ensure that there are enough judges to carry out the work of each bench. International comparisons indicate that we should have twice the number of High Court and Circuit Court judges we have.

This recommendation, if followed, would have a very significant and positive impact on the practice of most barristers because it would be possible to list less cases before each judge and there would be a good chance that all cases listed on a given day would be reached. The current situation where barristers are not paid anything for cases (quite often against an arm of the State) that are not reached on any given day because the State has failed to appoint enough judges to deal with the case load, is entirely unfair.

h) Replacing the existing costs taxation system

The Group recommends that the legal costs taxation system be replaced by an entirely new and more straightforward system of costs assessment carried out by a Legal Costs Assessment Office within the Courts Service rather than by the Taxing Masters' Office (or the County Registrars for the Circuit Court). The general idea appears to be that the Legal Costs Assessment Office will follow the Regulatory Body's costs guidelines. Section 27 of the Courts and Court Officers Act, 1995, already permits the Taxing Master to "examine the nature and extent of any work done" but the Minister himself recently pointed out that this does not happen in practice[12].

8 See the Report of the Legal Costs Working Group Section 5.41 (p 34)

9 See the Report of the Legal Costs Working Group Section 5.52 (p 36)

10 See the Report of the Legal Costs Working Group Section 8.37 (p 57)

11 See the Report of the Legal Costs Working Group Section 5.44 (p 35)

12 See the Bar Review (February 2006) Article on an address by the Minister to the TCD Historical Society.

The Group does not indicate what the background of the staff of the Assessment Office should be but states that the management of the office should be under the management of staff of the Courts Service[13]. If the assessors are not lawyers, it is likely that the guidelines will be adhered to in almost all cases. It is difficult to see how a non-lawyer could assess the complexity of a given case where an application is made to recover more than the guideline amount, which is one of the reasons why I believe that the prescribed guidelines would not, in effect, be dissimilar to a fixed cost scale.

The Group also recommends that parties should be encouraged to have only those elements of costs under dispute assessed and that the charge for the assessment be adjusted accordingly[14]. In respect of the costs of an assessment, or an appeal of the assessment, the Group recommends that these be confined to recovery of the administration fees for the assessment or the appeal.

Another proposed change is to allow the party liable to pay costs to make a lodgement or tender in respect of the assessment, and in the event that the amount of the lodgement or tender is not exceeded on assessment, that the opposing party should be liable to pay the administration fees. The aim of these changes is stated to be to make it easier and cheaper for "those seeking to challenge excessive legal costs"[15]. It is true that under such a system, litigants would be able challenge any bill without the risk of an award of significant costs against them but it is questionable whether this is really desirable.

The Group also recommends the creation of the post of an Appeals Adjudicator to conduct the appeals of costs assessments[16]. The concern about these types of positions (and, indeed, with the make up of the Legal Costs Regulatory Body) is that individuals may be appointed on the basis of their political affiliation rather than relevant expertise or experience. However, the Group does at least specify that there should be an open competition for the Appeals Adjudicators positions conducted by Public Appointments Service. It also specifies that the competition should be open to non-lawyers, which I assume is to assuage the persistent (and unfair) criticism that the Taxing Masters are solicitors assessing bills of costs from their peers and are therefore unlikely to want to cut them down. In reality, it is hard to see how someone without legal experience could do the job.

i) Legislative action to confine plaintiffs to recovering costs appropriate to the court jurisdiction of the lodgement on acceptance of that lodgement

The Group recommends legislative action to prevent the plaintiffs from claiming High Court costs where a lodgement has been accepted, which falls within a lower jurisdictional ambit. The Supreme Court decision in *Cronin v Astra Business Systems Limited* [2004] 3 I.R. 476), which said that a taxation which allowed the plaintiff to recover costs on a scale appropriate to the higher jurisdiction in these circumstances was not unjust, is found by the Group to discourage "efforts by defendants to bring proceedings to a conclusion pre-trial"[17] and to make lodgements commercially unattractive for a defendant. However, the rationale behind the *Cronin* decision (in both the High Court and Supreme Court) is entirely sound. People accept lodgements for a variety of reasons, including fear of going to court, and the true value of a case cannot in all cases be measured by the amount of an accepted lodgement. Acceptance of a lodgement is not the same as the court, after hearing all the evidence, finding that the case is worth less then the court jurisdiction (a situation where the Section 17(1) of the Courts Act, 1981 provides that the plaintiff cannot recover the higher court costs). Both objective and subjective considerations come into play. The barrister that caused the claim to be issued in the higher court may have been correct in their estimation of the value, but the plaintiff, perhaps because he is in urgent need of money (as in the *Cronin* case), decides to accept less then the true value. The barrister should not be punished in these circumstances. Furthermore, if acceptance of lodgements is to be encouraged, the plaintiff should be able to accept a lodgement without the penalty of having to pay the difference between the higher and lower court to his solicitor.

j) Tougher sanctions for delay

The Group recommends that the rules of court should contain a specific Order (incorporating and expanding upon Order 33 Rule 11 of the Rules of the Superior Courts) facilitating supervision by the court of the pace of litigation and containing strong measures to sanction delay[18]. It is also suggested that, in order to limit the burden on judicial time of case management, the rules could assign appropriate supervisory functions to suitably qualified court officers. These 'Mini-Masters' would be given the power to make a limited category of orders of an interlocutory nature. In practice, I think that this system could just create another level of bureaucracy. The decisions of the court officials would undoubtedly be appealed on a regular basis, particularly in higher value cases, which would have the effect of creating more work for the courts.

The Group also recommends that a new Order be introduced to provide for the making of 'unless' orders in respect of directions given by the court which would mean that the party that is in default would, without the need for a further application to the court, suffer judgement or dismissal of their claim or liability for costs[19]. 'Unless' orders are already used in many High Court lists and are very effective. Clarifying when they can be used and attempting to extend their use would seem to be a sensible and positive proposal .

k) Provision for letters of offer of settlement to be considered before the judge makes any award as to costs

The Group recommends that provision should be made, if necessary in legislation, to give effect to a letter offering settlement on a "without prejudice save as to costs" basis[20]. This would mean that the settlement letter could be considered by the judge when deciding on costs. It is suggested that the plaintiff could also make an offer to settle which would have the same effect on the defendant's costs. This proposal would obviously be most effective in cases where satisfaction other than by means of monetary payment is involved in the settlement because, if money is the only issue, there would no real difference between a tender and a settlement letter. Areas where such a proposal could really work are in proceedings brought under section 117 of the Succession Act, 1965 or section 205 of the Companies Act, 1963. What would be very interesting and innovative would be to introduce this type of proposal in defamation cases, where the defamation is denied.

13 See the Report of the Legal Costs Working Group Section 7.16 (p 45)

14 See the Report of the Legal Costs Working Group Section 7. 21 (p 47)

15 See the Report of the Legal Costs Working Group Section 2.17 (p 13)

16 See the Report of the Legal Costs Working Group Section 7.37 (p 49)

17 See the Report of the Legal Costs Working Group Section 2.24 (p 14)

18 See the Report of the Legal Costs Working Group Section 8.33 (p 57)

19 See the Report of the Legal Costs Working Group Section 8.34 (p 57)

20 See the Report of the Legal Costs Working Group Section 8.39 (p 57)

I) The provision of estimates of costs at any stage of proceedings

The Group recommends that the court be empowered by rule of court to require the parties to produce to the court and exchange with each other estimates of costs incurred at any stage of the proceedings, including the pre-trial stage[21]. There are also recommendations in the report that solicitors regularly update clients about the costs they will incur if they move to the next stage of litigation. It is not clear whether barristers would also have to provide this sort of information to the client . It is often very difficult for a barrister to estimate what his costs will be in advance because of the dynamic nature of litigation and it may be unfair if the estimate was binding even if the trial went on for far longer than expected. It is a worry that if the client is relying on a more detailed Section 68 letter (as is proposed in the report) which in turn is partially based on the barrister's initial estimate of the costs of the case, that the barrister will be criticised for providing an estimate which it is impossible for him to stand over because of circumstances that are outside his control.

Conclusion

The purpose of this article is to explain what changes may be on the way before they are actually upon us. It seems to me that barristers should welcome many of the Haran recommendations, particularly those that have the objective of making court systems more expeditious and efficient, but that it would not be realistic or beneficial to try to introduce all of them at once. There is no question that many people feel that access to the courts is now prohibitively expensive and that this is the fault of greedy lawyers but this does not mean that the whole civil litigation system has to be comprehensively re-cast. For example, the way that legal costs are calculated does need to changed to better reflect the work actually done by the solicitor or barrister but a prescribed guideline system, which operates in the same manner as a fixed cost scale, and which doesn't allow for any proper consideration of the complexity of the case or the knowledge and experience of the barrister involved will discourage competition on fees between barristers and may have the effect of abrogating the principle of indemnity for costs for the successful party. This would certainly be to the detriment of the Irish legal system because, in the absence of a proper Civil Legal Aid system, a person who wins an action could end suffering a financial penalty in vindicating their rights. This would also conflict with the Haran Group's own support for the principle of costs following the event.

Finally, I think that it is important to note that the research on the legal costs charged which underpins the Haran Report is based primarily upon samples generated from data provided by the Taxing Master's Office in 1984 and 2003. Thus, the vast majority of cases included in the samples were personal injury cases taken on a 'no foal, no fee' basis. This situation has changed dramatically since 2003 with the introduction of the Personal Injuries Assessment Board (PIAB) in 2004 and personal injury cases now constitute a far smaller proportion of civil litigation. The question arises whether the recommendations only really deal with a historical situation, closing the gate after the horse has bolted. ●

[21] See the Report of the Legal Costs Working Group Section 8.41 (p57)

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Continuing Professional Development

Inga Ryan

Continuing Professional Development Manager

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Eurofood IFSC Limited

Judicial Clarification of Insolvency Regulation 1346/2000

Glen Gibbons BL
Mark O'Riordan BL

Introduction

The European Court of Justice ("ECJ") was recently provided with an opportunity to interpret and clarify a number of key principles of Insolvency Regulation 1346/2000 including the concept of the "centre of main interest" by virtue of the Irish Supreme Court's reference for a preliminary ruling in *Eurofood IFSC Limited*[1]. The purpose of this article is to analyse this important judgment and discuss its implications.

Background

Following a serious financial crisis, Parmalat SpA (Parmalat), the Italian food conglomerate, entered into extraordinary administration[2] by an order of a Parma Court in December 2003. The Italian authorities appointed Signor Enrico Bondi as extraordinary administrator of the Parmalat group of companies on the 24th December 2003.

One of the companies in the Parmalat group was Eurofood IFSC Limited (Eurofood). This company was incorporated and registered in Ireland in late 1997 as a wholly owned subsidiary of Parmalat. Eurofood provided financing facilities to other companies in the Parmalat group. It was based in Ireland with two Irish and two Italian directors. It paid Irish corporation tax. All of its fifteen meetings were held (either wholly or partly) in Ireland. As a result of the Parmalat fall-out, the company became "...hopelessly insolvent".[3] Bank of America (who ran the day to day business of Eurofood) was owed in the region of $3.5 million and Metropolitan Life Insurance Company, another creditor, was owed in the region of $122 million. These two creditors represented up to 75% of Eurofood's indebtedness.

On 27th January 2004, Bank of America presented a winding up petition in respect of Eurofood. On that date, Lavan J. made an Order appointing Pearse Farrell as provisional liquidator in respect of Eurofood.[4] Three days later, Mr. Farrell informed Signor Bondi that he had been appointed by the Irish High Court as provisional liquidator of Eurofood. At this stage there was some confusion as to the relationship between the Irish and Italian administrators.

In cases where a provisional liquidator is appointed,[5] the application is normally made *ex parte* by a creditor. It is, in effect, a fire engine remedy in cases where there is a serious risk that company assets will not be available at the full petition hearing. Indeed section 229(1) of the *Companies Act, 1963* recognises that the nature of the provisional liquidator is to take into his custody or under his control all the property of the company. It is at a subsequent presentation of the petition with all relevant parties present that the provisional liquidator is, in essence, transformed into an official liquidator with all the relevant powers that result.

(a) Events of February 2004

On the 9th February 2004, the Italian Ministry for Productive Activities appointed Signor Bondi as extraordinary administrator of Eurofood (despite Mr. Farrell's prior appointment and Signor Bondi's knowledge of such appointment). Signor Bondi then attempted to appoint three directors of Eurofood and to remove an Irish director while there was a valid and current Irish provisional liquidator *in situ*.

Following Signor Bondi's appointment as extraordinary administrator of Eurofood, a declaration of insolvency was required from the Criminal and Civil of Parma (the Parma Court). This hearing was scheduled for Tuesday, 17th February 2004 and Signor Bondi was expected to put "all parties interested" on notice of the hearing. Signor Bondi notified Mr. Farrell after the close of business on the Friday preceding the Tuesday hearing and failed to inform the petitioner (Bank of America) or other creditors (including Metropolitan Life Insurance Company) of the proposed hearing. Consequently, vital parties to the hearing were excluded from it and not heard.

(b) Proceedings Before the Parma Court

At the Parma Court on February 17th, Mr. Farrell, as Irish provisional liquidator of Eurofood and a notified party to the hearing was not furnished with a copy of the petition in advance despite repeated requests for it. The hearing lasted about an hour and was apparently "...conducted with a degree of informality"[6] so much so that "...of the three judges on the panel dealing with the matter only one was present for the entire duration of the hearing."[7] It also appears that the hearing was held *in camera*.[8]

The Parma Court gave its decision on 20th February 2004 and made a declaration that Eurofood was insolvent, but more importantly, that its

1 *Re Eurofood IFSC Ltd* [2004] 4 IR 370.
2 Italian extraordinary administration is a form of company re-organisation with a relatively quick time-scale and applies only to large companies (the company must have at least 1,000 employees and its debt must exceed at least €1 billion). The purpose behind this procedure is to re-organise a company's finances and indebtedness in an attempt to return it to financial health. The extraordinary administrator's report is due 180 days after appointment.
3 *Per* Kelly J. *op cit* at 375 (paragraph 10).
4 As a provisional liquidator, the High Court set out Mr. Farrell's powers as including the power to take possession of all company property, to manage the company's affairs, to open a bank account in the name of the company and to instruct a solicitor.
5 See section 226 of the *Companies Act, 1963*.
6 *Op cit* at 380 (paragraph 31).
7 *Ibid.*
8 See the comments of Fennelly J. *op cit* at 415 (paragraph 78).

"centre of main interest" was in Italy and not Ireland. Thus the potential conflict between Irish and Italian insolvency laws crystallised. The central issue became which insolvency proceedings in respect of Eurofood ought to take precedence: the Irish insolvency proceedings that commenced with the appointment of a provisional liquidator on 27th January 2004 or the Italian insolvency proceedings that were declared on 20th February 2004.

Key Aspects of Overview of Regulation 1346/2000

Regulation 1346/2000 is of principal importance in EU Insolvency law.[9] One of the stated purposes for the Regulation is the prevention of forum shopping;[10] others are stated in the twenty-second recital.[11] Murphy J. in *Flightlease Ireland Limited v Companies Acts*[12] stated that the purpose of the Regulation "...is to ensure that the creditors[13] of an insolvent company domiciled within the Union are entitled to be treated equally in terms of their participation in the distribution of assets of the insolvent company".[14]

The Regulation is divided into Chapter I (concerning general provisions); Chapter II (concerning recognition of insolvency proceedings); Chapter III (concerning secondary insolvency proceedings); Chapter IV (concerning the provision of information for creditors and lodgement of their claims) and Chapter V (concerning transitional and final provisions).

(a) Chapter I: General Provisions

Article 1 provides that the Regulation shall apply to collective insolvency proceedings that entail the partial or total divestment of a debtor and the appointment of a liquidator. Conversely, the Regulation does not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings (that provide services involving the holding of funds or securities for third parties), or to collective investment undertakings. Annex C to the Regulation sets out the types of procedures and in the case of Ireland it includes both provisional liquidators and liquidators. Importantly, in the case of Italy, extraordinary administration is not included in Annex C.

Article 2 of the Regulations sets out key definitions including liquidator,[15] court[16] and the 'time of the opening of proceedings'.[17] Article 3 states quite clearly that the the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings.[18] Article 3(1) also creates a *"registered office presumption"* by stating that "in the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

The "centre of main intersts" criterion does not prohibit other Member States from opening insolvency proceedings. Where a debtor possesses an establishment within that other jurisdiction, the pertinent court may also open insolvency proceedings but crucially those proceedings will be limited to the assets of the debtor situated in that jurisdiction.[19] These proceedings are classified as "secondary proceedings" when initiated after the proceedings under Article 3(1) and must be winding up proceedings.[20]

Once the principal jurisdiction is established under Article 3(1), save where explicitly excluded by the Regulation, the pertinent law will be of that jurisdiction *i.e.* if a debtor's main interests is situated in Ireland, then Irish law in the main will apply. Consequently, the law of that Member State determines the conditions for the opening of insolvency such as determining, for example, the respective powers of the debtor and the liquidator and the rules governing the lodging, verification and admission of claims.[21] The jurisdictional breath of Article 4(1) is weakened considerably though by a number of subsequent exclusionary Articles.[22]

(b) Chapter II: Recognition of Insolvency Proceedings

Article 16 of the Regulation states quite clearly that any judgment opening insolvency proceedings by a court of a Member State that has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.[23]

The effect of the opening of proceedings produces the same effects in any other Member State as under the law of the opening Member State without the necessity of any further formalities (unless specifically stated otherwise under the Regulation or where there are secondary proceedings)[24].

The powers of a liquidator in main and secondary proceedings are delineated in Article 18. Article 20 of the Regulation provides that a creditor who after the opening of the main proceedings obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State shall return such to the liquidator.[25] Publication of the judgment opening insolvency proceedings is dealt with under Article 21 and Article 22 allows for the registration of this judgment in a land, trade or other public register kept by other Member States.[26]

9 See also *European Communities (Corporate Insolvency) Regulations 2002* (S.I. 333/2002).

10 See 4th recital.

11 The 22nd recital states (emphasis added): "This Regulation should provide for *immediate recognition of judgments* concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be *based on the principle of mutual trust.* To that end, *grounds for non-recognition should be reduced to the minimum necessary*.."

12 [2005] IEHC 274.

13 In *Cederlease Ltd. v Companies Acts* [2005] IEHC 67, Laffoy J. interpreted the term creditor as including the UK Commissioners of Customs and Excise (the petitioner in the case) and held that Regulation 1346/2000 reverses the common law principle that a court would not entertain a suit brought to enforce a revenue claim by a foreign state.

14 *Ibid* at paragraph 6.1. The judgment interprets Article 4(h) and Article 15 of the Regulation.

15 Liquidator is defined as: "any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C".

16 Court is defined as "the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings". See also the 10th recital which states that the expression "court" in the Regulation should be given a broad meaning to include a person or body empowered by national law to open insolvency proceedings.

17 The 'time of the opening of proceedings' is defined as "the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not".

18 The 13th recital states that the "centre of main interests" should "...correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." The English Court of Appeal comprehensively interpreted the phrase in *Shierson v Vlieland-Boddy* [2005] 1 WLR 3966.

19 See Article 3(2).

20 A detailed discussion of secondary proceedings is outside the scope of this article.

21 See Article 4(2).

22 The following are excluded: third parties' rights in rem against assets located outside the principal jurisdiction (Article 5); the right of creditors to demand the set-off of claims againts the claims of creditors (Article 6); reservation of title claims outside the principal jurisdiction (Article 7); contracts concerning immoveable property (Article 8); employment contracts (Article 10) and the rights of the debtor in immoveable property, a ship or an aircraft subject to registration in a public register (Article 11). Noteworthy though is the existence in most of these Articles of a saving clause which does not preclude actions for voidness, voidability or unenforceability.

23 Recognition under Article 16 does not obviously preclude the subsequent opening of secondary proceedings.

24 See Article 17.

25 See Article 20(1). This is subject to Article 5 (third parties' rights *in rem*) and 7 (reservation of title clauses). Moreover, Article 20 also provides that where a creditor has obtained a dividend on his claim in the course of insolvency proceedings that it be shared in distributions made in other proceedings where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

26 The costs of compliance with the obligations under Articles 21 and 22 are regarded as the costs and expenses incurred in the proceedings. See Article 23.

The honouring of an obligation to a debtor who is subject to insolvency proceedings is dealt with under Article 24. Article 24 creates presumptions depending on whether the judgment opening proceedings has been published or not.[27] Like Article 16, Article 25 also aims to provide efficacy to judgments provided by the court that opened insolvency proceedings.

Crucially in the context of the *Eurofood* judgments, Article 26 of the Regulation provides for the non-recognition of judgments from other states on public policy grounds. Article 26 provides that:

> "Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual."

(c) Chapter IV: Provision of Information for Creditors and Lodgement of their Claims

This Chapter of the Regulation allows certain specified creditors the right to lodge claims in insolvency proceedings;[28] obligates the court or liquidator in the principal insolvency proceedings to immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States[29] and also states what information should be contained in claims lodged by creditors.[30]

Eurofood: Irish High Court

As set out above, Lavan J. made an Order appointing Mr. Farrell as provisional liquidator of Eurofood on 27th January 2004. The hearing of the petition for winding-up came before the High Court in March 2004. This full hearing of the petition came after both Lavan J.'s order and the Italian appointment of Signor Bondi as extraordinary administrator of Eurofood.

Kelly J. noted that under the Insolvency Regulation, two criteria must be met for the main insolvency proceedings to have been opened in Ireland: first, that insolvency proceedings had been opened in Ireland and secondly that the "centre of main interests" of the company be in Ireland. The Court had little difficulty in holding that insolvency proceedings had been opened in Ireland. It held that a provisional liquidator was appointed on 27th January 2004 (the date of presentation of the *ex parte* petition to Lavan J.) and that from that date, insolvency proceedings had been opened in Ireland.

The Court further held that under Irish company law[31], even if a provisional liquidator were not appointed, that insolvency proceedings would still be deemed to have opened on the date of presentation of the petition (*i.e.* January 27th 2004), even though "an order directing the winding-up of the company post-dates the date of the presentation of the petition."[32] Kelly J. noted that this situation might seem peculiar to foreign observers but that "Such a provision…has long been a part of the law of this State and its nearest neighbour and was known to the drafters of the Regulation."[33]

Having satisfied itself as to the question of where the proceedings were first opened, the High Court proceeded to determine the "centre of main interests" issue. After referring to the registered office presumption and the 13th recital, the Court noted that the issue was essentially a question of fact. Of relevance in answering the question in present case was: (i) the evidence that the day-to-day administration of Eurofood was carried out in Ireland; (ii) that all but one of the fifteen board meetings were held in Ireland; (iii) the registered office of Eurofood was in Ireland; (iv) Eurofood paid Irish taxes and (v) that Eurofood operated pursuant to a certificate under the *Finance Act, 1980*.

The High Court was satisfied that the "centre of main interests" of Eurofood "…was, and is in Ireland"[34] and consequently made an order for the winding-up of Eurofood. Thereafter, Kelly J. analysed the criticisms of the provisional liquidator in relation to the Parma Court hearing on the 17th February 2004. After noting Article 26 of the Insolvency Regulation (stated *supra*) and on the basis of the evidence before him regarding the Parma Court's proceedings, Kelly J succinctly said:

> "This lack of due process appears to me, quite apart from the other considerations, to warrant this court refusing to give recognition to the decision of the Parma court."[35]

Eurofood: Irish Supreme Court

Signor Bondi appealed the decision of the High Court to the Supreme Court. Three main issues arose on appeal:

(i) Whether insolvency proceedings first opened in Ireland or Italy?
(ii) Where was the company's "centre of main interests"?
(iii) Whether the decision of the Parma Court ought not to be recognised in Ireland (due to lack of fair procedures)?

In order to determine those issues, the Supreme Court felt that a preliminary ruling from the ECJ was necessary.[36] The Court posed the following questions:

Question 1: Provisional Liquidator Question

This question related to provisional liquidators being appointed pending a full winding-up order being made and whether that order combined with the presentation of the petition constitutes a judgment opening insolvency proceedings for the purposes of Article 16 of the Regulation.

27 Article 24 states:
"1. Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings.
2. Where such an obligation is honoured before the publication provided for in Article 21 has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings; where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings."

28 Article 39.

29 Article 40. See also Article 42.

30 Article 41.

31 Section 220(2) of the Companies Act, 1963.

32 *Per* Kelly J. *op cit* at 387 (paragraph 54).

33 *Ibid.*

34 *Per* Kelly J *op cit* at 391 (paragraph 62).

35 *Op cit* at 394 (paragraph 73).

36 Two separate judgments of the Supreme Court were delivered: the first related to the preliminary reference to the ECJ; the second dealt with the "public policy" questions.

Question 2: The Petition Question

The Supreme Court then asked, if the first answer is negative, does the presentation, in Ireland, of a petition to the High Court for the compulsory winding up of a company by the court constitute the opening of insolvency proceedings for the purposes of that Regulation.[37]

Question 3: Main Insolvency Proceedings Question

The third question of the Supreme Court enquired whether Article 3 of the Regulation, in combination with Article 16, has the effect that a court in a Member State (other than that in which the registered office of the company is situated and other than where the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, *but where insolvency proceedings are first opened*) has jurisdiction to open main insolvency proceedings.

Question 4: "Centre of Main Interests" Question

The Supreme Court then asked that where,

(i) the registered offices of a parent company and its subsidiary are in two different Member States,

(ii) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the Member State where its registered office is situated and

(iii) the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary.

Are the governing factors those referred to at (b) or (c)?

Question 5: Public Policy Question

The Supreme Court finally asked a public policy question. It enquired that where it is manifestly contrary to the public policy of a Member State to permit a judicial or administrative decision to have legal effect in relation to persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision in a second Member State, whether that first Member State can refuse to recognise the decision. Or whether that first Member State is bound, by virtue of Article 17 of the Regulation, to give recognition to a decision of the courts of that second Member State (in particular, where the applicant in the second Member State has refused, in spite of requests and contrary to the order of the court of the second Member State, to provide the provisional liquidator (or indeed the creditors) of the company, duly appointed in accordance with the law of the first Member State, with any copy of the essential papers grounding the application).

Thus the reference for a preliminary ruling was sent to the ECJ. However, as in the High Court, matters did not end there. In order to address the public policy issue, the Supreme Court delivered a separate unanimous judgment. In that judgment, Fennelly J. held that to recognise the Parma Court's decision would be "manifestly contrary to the public policy" of Ireland and that the High Court would have been perfectly right in refusing to recognise it on that basis alone. Despite the fact that the High Court judgment did not turn on it, it is assumed that the Supreme Court handed down this separate judgment on the public policy question to copper-fasten the Irish view of the Italian proceedings from a public policy perspective.

Luxembourg's Response: Succinct Answers to Detailed Questions

After outlining pertinent provisions of Regulation 1346/2000, national legislation,[38] and the factual background, the ECJ reproduced the referral questions (as listed *supra*) and answered them in the following sequence:

(a) "Centre of Main Interests" Question:

The Court first answered the centre of main interest question. It referred to Article 3 of Regulation 1346/2000 and the option to institute main or secondary proceedings there under. After noting the registered office presumption in Article 3(1), the Court stated that the concept of the 'centre of main interest is peculiar to the Regulation with an autonomous meaning and with the consequence that it should be interpreted independently of national legislation.[39]

It referred also to the 13th recital of the Regulation[40] and stated that that recital "...shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties".[41] The ECJ therefore concluded that the registered office presumption might only be rebutted where factors that are both objective and ascertainable by third parties exist such as a letterbox company. However, like the facts in the present case, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its "...economic choices are or can be controlled by a parent company in another Member State..." is not sufficient to rebut the registered office presumption.[42]

37 By virtue of section 220(2) of the *Companies Act, 1963* deeming the winding up of the company to commence at the date of the presentation of the petition.

38 Namely: sections 212, 215, 220, 225, 226(1) and 229(1) of the *Companies Act, 1963* (as amended).

39 See paragraph 32.

40 See fn. 18.

41 At paragraph 33.

42 At paragraph 36.

(b) Main Insolvency Proceedings Question

The ECJ in answering this question initially referred to the 22nd Recital of Regulation 1346/2000 and the underlying rationale of the principle of mutual trust. It then stated:

> "It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings..."[43]

Based on this key concept of mutual trust, the ECJ stated that it is imperative that a Court (in this case the Parma Court) check that is has the appropriate jurisdiction under Article 3(1) before hearing an application. A reciprocal duty exists on other Member States to respect this process and decision. Anybody dissatisfied by such an initial decision has the option according to the ECJ of availing of internal legal remedies of the initial Member State rather than attempt to review such a decision in another Member State. Consequently, the ECJ answered this question in a general manner stating: "...on a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State."[44]

(c) Provisional Liquidator Question

In essence, this question is whether the appointment of a provisional liquidator constitutes a decision to open insolvency proceedings for the purpose of Article 16(1) of Regulation 1346/2000. In answering this question, the ECJ first considered Article 1(1) and the four characteristics contained therein, namely: that there be collective proceedings on the debtor's insolvency, which entail at least partial divestment of that debtor and prompt the appointment of a liquidator. The ECJ noted that such proceedings are listed in Annex A of the Regulation with Annex C containing a list of liquidators (which, as stated, in Ireland includes the appointment of a provisional liquidator).

The ECJ noted that:

> "By requiring that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings, the first subparagraph of Article 16(1) of the Regulation lays down a rule of priority, based on a chronological criterion, in favour of the opening decision which was handed down first. As the 22nd recital of the Regulation explains, '[t]he decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision'."[45]

However, the ECJ acknowledged the opaqueness of the phrase a 'decision to open insolvency proceedings'. It stated that the conditions and formalities of such were a matter for national law (which obviously varies greatly throughout the European Union). Importantly, the ECJ held in the context of this question that

> "...a 'decision to open insolvency proceedings' for the purposes of the Regulation must be regarded as including not only a decision which is formally described as an opening decision by the legislation of the Member State of the court that handed it down, but also a decision handed down following an application, based on the debtor's insolvency, seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment involves the debtor losing the powers of management which he has over his assets. In such a case, the two characteristic consequences of insolvency proceedings, namely the appointment of a liquidator referred to in Annex C and the divestment of the debtor, have taken effect, and thus all the elements constituting the definition of such proceedings, given in Article 1(1) of the Regulation, are present."[46]

Equally of importance is its conclusion that such an interpretation cannot be invalidated merely on the ground that the liquidator appointed is a provisional one.[47] The ECJ also rejected the argument of Signor Bondi and the Italian Government that an inference may be drawn from Article 38 and the 16th recital of the Regulation that a provisional liquidator cannot open the main insolvency proceedings.

In light of the ECJ's answer to the provisional liquidator question,[48] the court did not answer the petition question.

(d) Public Policy Question

The ECJ's answer to this question is obviously motivated by a desire to ensure that Regulation 1346/2000 is effective and not unnecessarily disrupted by judicial non-recognition of decisions of the 'opening court'. After reference to Article 26 and the 22nd recital, the ECJ made analogous reference[49] to Brussels Convention jurisprudence and the principle that the public policy argument should only be acceded to in "exceptional cases" *i.e.* infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.[50]

43 At paragraph 40. The ECJ referred to analogous jurisprudence in the context of the Brussels Convention, namely: *Gasser* [2003] ECR 1-14693 at paragraph 72 and *Turner* [2004] ECR I-3565 at paragraph 24.

44 At paragraph 44.

45 At paragraph 49.

46 At paragraph 54. Emphasis added.

47 See paragraph 55.

48 Its full answer to the provisional liquidator question is listed at paragraph 58 as: "In view of the above considerations, the answer to the first question must be that, on a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets."

49 It actually stated at paragraph 64 that the case-law is transposable to the interpretation of Article 26.

50 See *Krombach* [2000] ECR 1-1935.

The ECJ then specifically considered whether a party had a right to be notified of procedural documents and more generally the right to be heard. It first re-stated the fundamental principle of Community law that every litigant is entitled to a fair legal process.[51] In relation to more specific rights of notification and to be heard, the Court stated that:

> "...these rights occupy an eminent position in the organisation and conduct of a fair legal process. In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency.
>
> 67. In the light of those considerations, the answer to the fifth question must be that, on a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys."[52]

The Court added a caveat to the Supreme Court in deciding whether the decision of the Parma Court was contrary to public policy. It should not in answering this question transpose "...its own conception of the requirement for an oral hearing and of how fundamental that requirement is in its legal order, but must assess, having regard to the whole of the circumstances, whether or not the provisional liquidator appointed by the High Court was given sufficient opportunity to be heard".[53]

Conclusion

The judgment of the ECJ is praiseworthy for its adherence to the spirit of the Insolvency Regulation. It provides a pragmatic interpretation of the "centre of main interests" in acknowledging that strong grounds must be present to rebut the registered office presumption but that this could easily occur in the case of "letterbox" type companies. In other aspects it is also interesting, not least, its exemplification of the court's willingness to embrace fundamental rights protection organically.

The ruling is also very pragmatic on the public policy point in that it recognises that public policy is a very subjective thing. As in this case, procedures in different Member States vary greatly and may seem alien to each other. However, the ECJ was careful to restrict and delimit the use of the public policy exception. The Court ruled that it cannot be used as an easy way out by a Member State and that it can only be used in exceptional circumstances. However, while the Italian authorities and indeed Signor Bondi are now required under the Regulation to recognise that the primary proceedings were opened in Ireland, it remains to be seen whether they will attempt to avoid recognition on public policy grounds in the Italian courts. Notwithstanding the ECJ's clear position on the public policy exemption, the possibility remains live that the Italian courts could refuse to recognise the Irish proceedings for public policy reasons.

The Supreme Court's judgment will also be of interest.[54] The ECJ's elucidation of the Insolvency Regulation has made its ability to determine the matter less burdensome. Certainly the Supreme Court's judgment can be predicted with relative ease. ●

51 It referred to *Baustahlgewebe* v *Commission* [1998] ECR I-8417 (at paragraphs 20 and 21); Joined Cases C-174/98P and C-189/98P *Netherlands and Van der Wal* v *Commission* [2000] ECRI-1 (at paragraph 17) and *Krombach op cit* (at paragraph 26). The ECJ also stated at paragraph 65 that the principle of a fair legal process "...is inspired by the fundamental rights which form an integral part of the general principles of Community law which the Court of Justice enforces, drawing inspiration from the constitutional traditions common to the Member States and from the guidelines supplied, in particular, by the European Convention for the Protection of Human Rights and Fundamental Freedoms...".

52 At paragraphs 65-66. Emphasis added.

53 At paragraph 68.

54 The Supreme Court heard the matter on the 19th June, 2006 and reserved judgment.

Legal Update

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A directory of legislation, articles and acquisitions received in the Law Library from the 4th May, 2006 to 23rd June, 2006.
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SI 186/2006

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Please see S.I as it implements a lot of Directives
SI 144/2006

European Communities (statistics) (business accounts surveys) regulations
2006
REG/1165-1998, REG/1158-2005, REG/450-2003
SI 247/2006

European Communities (Sudan) (financial sanctions) regulations 2005
REG/1184-2005
SI 900/2005

European Communities (takeover bids directive 2004/25/EC) regulations 2006
SI 255/2006

European Communities (trade with Iraq) regulations 2006
REG/1210-2003
SI 130/2006

European Communities (Uzbekistan) (financial transfers) regulations 2005`
REG/1859-2005
SI 902/2005

European Communities (Zimbabwe) (sanctions) regulations (no. 3) 2005
REG/314-2004
SI 904/2005

Financial transfers (Burma/Myanmar) (prohibition) order (no 3) 2005
REG/798-2004
SI 898/2005

Financial transfers (Democratic Republic of Congo) (prohibition) order
(no.2) 2005
REG/889-2005
SI 889/2005

Financial transfers (Iraq) (prohibition) order (no.3) 2005
REG/1210-2003
SI 893/2005

Financial transfers (Ivory Coast) (prohibition) order (no.3) 2005
REG/174-2005, REG/560-2005
SI 891/2005

Financial transfers (Liberia) (prohibition) order (no 3) 2005
REG/872-2004
SI 895/2005

Financial transfers (Sudan) (prohibition) order 2005
REG/1184-2005
SI 899/2005

Financial transfers (Uzbekistan) (prohibition) order 2005
REG/1859-2005
SI 901/2005

Financial transfers (Zimbabwe) (prohibition) order (no. 3) 2005
REG/314-2004
SI 903/2005

Fishing effort for vessels in the context of the recovery of certain stocks regulations 2006
REG/51-2006, REG/423-2004
SI 176/2006

Fishing opportunities and associated conditions (no. 2) regulations 2006
REG/51-2006
SI 173/2006

Satellite-based vessel monitoring systems regulations 2006
REG/2244-2003
SI 183/2006

Sea fisheries (conservation and rational exploitation of cod in the North Sea and to the west of Scotland) regulations 2006
REG/2056-2001
SI 177/2006

Sea fisheries (conservation and rational exploitation of cod in the Irish Sea) regulations 2006
REG/2549-2000
SI 178/2006

Sea fisheries (conservation and rational exploitation of deep-sea fisheries species) regulations 2006
REG/2347-2002
SI 175/2006

Sea fisheries (conservation and rational exploitation of hake) regulations, 2006
REG/494-2002
SI 179/2006

Sea fisheries (conservation and rational exploitation of hake) (no.2) regulations, 2006
REG/881-2004
SI 180/2006

Sea fisheries (control of catches) regulations 2006
REG/2807-1983, REG/2847-1993
SI 170/2006

Sea fisheries (inspection of boats) regulations 2006
REG/1382-87
SI 181/2006

Sea fisheries (marking and documentation of sea-fishing boats) regulations
2006
REG/1381-1987
SI 182/2006

Sea fisheries (technical conservation measures) regulations 2006
REG/3440-1984, REG/850-1998
SI 171/2006

Sea fisheries (weighing procedures for herring, mackerel and horse mackerel) regulations 2006
REG/51-2006
SI 172/2006

Sea fisheries (weighing procedures for herring, mackerel and horse mackerel) (no. 4) regulations 2006
REG/27-2005, REG/1300-2005
SI 732/2005

Acts of the Oireachtas 2006 (as of 23rd June 2006)

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

1/2006 University College Galway (Amendment) Act 2006
Signed 22/02/2006

2/2006 Teaching Council (Amendment) Act 2006
Signed 04/03/2006

3/2006 Irish Medicines Board (Miscellaneous Provisions) Act 2006
Signed 04/03/2006

4/2006 Competition (Amendment) Act 2006
Signed 11/03/2006

5/2006 Social Welfare Law Reform and Pensions Act 2006
Signed 24/03/2006

6/2006 Finance Act 2006
Signed 31/03/2006

7/2006 Aviation Act 2006
Signed 04/0/2006

8/2006 Sea-Fisheries and Maritime Jurisdiction Act 2006
Signed 04/04/2006

9/2006 Employees (Provision of Information and Consultation) Act 2006
Signed 09/04/2006

10/2006 Diplomatic Relations and Immunities (Amendment) Act 2006
Signed 12/04/2006

11/2006 Criminal Law (Insanity) Act 2006
Signed 12/04/2006

12/2006 Registration of Deeds and Title Act 2006
Signed 07/05/2006

13/2006 Parental Leave (Amendment) Act 2006
Signed 18/05/2006

14/2006 Road Safety Authority Act 2006
Signed 31/05/2006

15/2006 Criminal Law (Sexual Offences) Act 2006
Signed 02/06/2006

Bills of the Oireachtas as of the 23rd June 2006

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

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

Air navigation and transport (indemnities) bill 2005
1st stage- Seanad

Broadcasting (amendment) bill 2003
1st stage –Dail

Building control bill 2005
Committee – Dail

Building societies (amendment) bill 2006
1st stage- Dail

Child trafficking and pornography (amendment) (no.2) bill 2004
2nd stage- Dail **[pmb]** *Jim O'Keeffe*

Civil law (miscellaneous provisions) bill 2006
1st stage – Dail

Civil partnership bill 2004
2nd stage- Seanad

Climate change targets bill
2nd stage – Dail **[pmb]** *Eamon Ryan and Ciaran Cuffe*

Comhairle (amendment) bill 2004
2nd stage – Dail

Competition (trade union membership) bill 2006
2nd stage – Dail **[pmb]** *Michael D. Higgins*

Consumer rights enforcer bill 2004
1st stage –Dail

Courts (register of sentences) bill 2006
2nd stage- Dail **[pmb]** *Jim O'Keeffe*

Criminal Justice bill 2004
Committee-Dail

Criminal justice (mutual assistance) bill 2005
Report stage – Seanad

Defence (amendment) bill 2005
2nd stage – Dail **[pmb]** *Billy Timmins*

Defence of life and property bill 2006
1st stage- Seanad

Electricity regulation (amendment) bill 2003
2nd stage – Seanad

Electoral (amendment) (prisoners' franchise) bill 2005
2nd stage – Dail *(Initiated in Seanad)* **[pmb]** *Gay Mitchell*

Electoral (preparation of register of electors) (temporary provisions) bill 2006
1st stage- Dail **[pmb]** *Eamon Gilmore*

Electoral registration commissioner bill 2005
2nd stage- Dail **[pmb]** *Eamon Gilmore*

Employment permits bill 2005
Report stage – Dail

Energy (miscellaneous provisions) bill 2006
Committee – Dail

Enforcement of court orders bill 2004
2nd stage- Dail

Enforcement of court orders (no.2) bill 2004
1st stage- Seanad

European communities (amendment) bill 2006
1st stage - Dail

Fines bill 2004
2nd stage- Dail **[pmb]** *Jim O'Keeffe*

Fluoride (repeal of enactments) bill 2005
2nd stage – Dail **[pmb]** *John Gormley*

Freedom of information (amendment) (no.2) bill 2003
1st stage – Seanad

Freedom of information (amendment) (no.3) bill 2003
2nd stage – Dail

Fur farming (prohibition) bill 2004
1st stage- Dail

Genealogy and heraldry bill 2006
1st stage- Seanad

Good Samaritan bill 2005
2nd stage – Dail **[pmb]** *Billy Timmins*

Greyhound industry (doping regulation) bill 2006
2nd stage – Dail **[pmb]** *Jimmy Deenihan*

Health (amendment) (no.2) bill 2004
2nd stage- Dail

Health (hospitals inspectorate) bill 2006
2nd stage – Dail **[pmb]** *Liz McManus*

Health (nursing homes) (amendment) bill 2006
1st stage- Dail

Health (repayment scheme) bill 2006
Committee stage- Dail

Hepatitis C compensation tribunal (amendment) bill 2006
1st stage – Dail

Housing (stage payments) bill 2004
2nd stage- Seanad

Housing (stage payments) bill 2006
1st stage- Seanad

Human reproduction bill 2003
2nd stage – Dail **[pmb]** *Mary Upton*

Independent monitoring commission (repeal) bill 2006
2nd stage – Dail **[pmb]** *Martin Ferris, Arthur Morgan, Caoimhghín ó Caoláin, Aengus ó Snodaigh and Seán Crowe.*

Institutes of technology bill 2006
Committee- Dail

International criminal court bill 2003
Report – Dail

International peace missions bill 2003
2nd stage – Dail **[pmb]** *Gay Mitchell & Dinny McGinley*

Irish nationality and citizenship and ministers and secretaries (amendment) bill 2003
Report – Seanad

Land and conveyancing law reform bill 2006
1st stage- Seanad

Law of the sea (repression of piracy) bill 2001
2nd stage – Dail **[pmb]** *(Initiated in Seanad)*

Local elections bill 2003
2nd stage –Dail **[pmb]** *Eamon Gilmore*

Mercantile marine (avoidance of flags of convenience) bill 2005
2nd stage- Dail **[pmb]** *Thomas P. Broughan*

Money advice and budgeting service bill 2002
1st stage – Dail

National economic and social development office bill 2002
2nd stage – Dail

National oil reserves agency bill 2006
1st stage- Dail

National sports campus development authority bill 2006
Committee stage – Dail

National oil reserves agency bill 2006
1st stage - Dail

National pensions reserve fund (ethical investment) (amendment) bill 2006
1st stage- Seanad

National transport authority bill 2003
1st stage – Dail

Offences against the state acts (1939 to 1998) repeal bill 2004
1st stage-Dail

Offences against the state (amendment) bill 2006
1st stage- Seanad **[pmb]** *Senators Joe o'Toole, David Norris, Mary Henry and Feargal Quinn.*

Official languages (amendment) bill 2005
2nd stage -Seanad

Patents (amendment) bill 1999
Committee – Dail

Petroleum and other minerals development bill 2005
2nd stage – Dail **[pmb]** *Thomas P. Broughan*

Planning and development (acquisition of development land) (assessment of compensation) bill 2003
1st stage – Dail

Planning and development (strategic infrastructure) bill 2006
Committee- Seanad

Planning and development (amendment) bill 2003
1st stage – Dail

Planning and development (amendment) bill 2004
1st stage – Dail

Planning and development (amendment) bill 2005
Committee – Dail

Planning and development (amendment) (no.2) bill 2004
1st stage –Dail

Planning and development (amendment) (no.3) bill 2004
2nd stage- Dail **[pmb]** *Eamon Gilmore*

Postal (miscellaneous provisions) bill 2001
1st stage –Dail *(order for second stage)*

Prisons bill 2005
Committee – Seanad

Proceeds of crime (amendment) bill 2003
1st stage – Dail

Prohibition of ticket touts bill 2005
2nd stage – Dail **[pmb]** *Jimmy Deenihan*

Public service management (recruitment and appointments) bill 2003
1st stage – Dail

Pyramid schemes bill 2006
2nd stage- Dail **[pmb]** *Kathleen Lynch*

Registration of wills bill 2005
Committee - Seanad

Registration of lobbyists bill 2003
2nd stage- Dail **[pmb]** *Pat Rabbitte*

Residential tenancies (amendment) bill 2006
1st stage – Dail

Road traffic bill 2006
1st stage- Seanad

Road traffic (mobile telephony) bill 2006
Committee- Dail

Sea pollution (miscellaneous provisions) bill 2003
Committee – Dail *(Initiated in Seanad)*

Sexual offences (age of consent) (temporary provisions) bill 2006
2nd stage – Dail **[p.m.b.]** *Brendan Howlin*

Sustainable communities bill 2004
1st stage – Dail

The Royal College of Surgeons in Ireland (Charter Amendment) bill 2002
2nd stage – Seanad **[p.m.b.]**

Totalisator (amendment) bill 2005
1st stage – Seanad

Tribunals of inquiry bill 2005
1st stage- Dail

Twenty-fourth amendment of the Constitution bill 2002
1st stage- Dail

Twenty-seventh amendment of the constitution bill 2003
2nd stage – Dail

Twenty-seventh amendment of the constitution (No.2) bill 2003
1st stage – Dail

Twenty-eighth amendment of the constitution bill 2005
1st stage- Dail

Twenty-eighth amendment of the constitution bill 2006
2nd stage- Dail **[pmb]** *Michael D. Higgins*

Twenty-eighth amendment of the constitution (No.2) bill 2006
2nd stage- Dail **[pmb]** *Dan Boyle*

Twenty-eighth amendment of the constitution (No.3) bill 2006
2nd stage- Dail **[pmb]** *Dan Boyle*

Waste management (amendment) bill 2002
2nd stage- Dail

Waste management (amendment) bill 2003
2nd stage – Dail **[pmb]** *Arthur Morgan*

Water services bill 2003
Committee – Dail *(Initiated in Seanad)*

Whistleblowers protection bill 1999
Committee - Dail

Abbreviations

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette 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.

Development Consents and the EIA Directive

Garrett Simons BL*

Introduction

The European Court of Justice ("ECJ") has recently delivered two judgments concerning the environmental impact assessment directive, *Commission v United Kingdom*,[1] and *R. (On the application of Barker) v London Bromley Borough Council*.[2] Although the specific subject-matter of the judgments, namely, the implications of the directive for outline planning permissions, is not immediately relevant to Irish law,[3] the judgments do establish some important general principles with respect to the necessity for carrying out an environmental impact assessment. In particular, the ECJ has again elaborated upon the concept of a "development consent" within the meaning of the directive.[4] As a result of these judgments, it would seem that the adequacy of the assessment, if any, carried out at the time of the grant planning permission may be challenged months or even years after the date of grant. Notwithstanding the strict time-limits on judicial review proceedings, the happenstance of an application subsequently for some additional consent or approval might well trigger a requirement to make good the failure to have had any, or any adequate, environmental impact assessment at the earlier stage.

The judgments

Both cases concerned the English legislative scheme for outline planning permissions. In contrast to the position obtaining under Irish law,[5] it was possible under English law to apply for outline planning permission in respect of development projects subject to the environmental impact assessment directive. Under the relevant English legislation, the environmental impact assessment was to be carried out at the stage of the initial outline planning permission, and there was no provision for the possibility of assessment at the later stage of approval of the reserved matters. Similarly, any screening was also to be carried out exclusively at the stage of the application for outline planning permission. (A screening decision is a decision, in the context of sub-threshold development, as to whether a particular development project is likely to have significant effects on the environment so as to trigger a requirement for an assessment.)

The directive requires that an environmental impact assessment be carried out prior to the giving of development consent for certain development projects. A "development consent" is defined as "the decision of the competent authority or authorities which entitles the developer to proceed with the project". The United Kingdom argued that the initial grant of outline planning permission constituted the relevant development consent, and that the subsequent decision on the approval of reserved matters was merely an implementing decision.

The argument in this regard was somewhat circular. In effect, it was being suggested that a particular decision could only constitute a development consent—and thus require the carrying out of an environmental impact assessment—where national law allowed for such assessment to be carried out at the time of that decision. On this reasoning, the decision on the approval of reserved matters could not be a development consent as English law precluded an assessment at that stage.

This argument was rejected by the ECJ in *Commission v United Kingdom*. The ECJ took a literal approach to the interpretation of "development consent", ruling that as the proposed development could not "proceed" without the approval of reserved matters, same constituted part of a multi-stage development consent.

> "In the present case, it is common ground that, under national law, a developer cannot commence works in implementation of his project until he has obtained reserved matters approval. Until such approval has been granted, the development in question is still not (entirely) authorised.
>
> "Therefore, the two decisions provided for by the rules at issue in the present case, namely outline planning permission and the decision approving reserved matters, must be considered to constitute, as a whole, a (multi-stage) 'development consent' within the meaning of Article 1(2) of Directive 85/337, as amended."

The ECJ went on to rule that the fact that English law allowed for an assessment at the first stage only, *i.e.* at the stage of the outline planning permission, was contrary to the directive. The directive, as interpreted by the ECJ, requires that the possibility of an assessment at a later stage must also exist. Notwithstanding the fact that the assessment should ordinarily be carried out at the earliest possible stage of the decision-making process, an assessment may need to be carried out before the final part of the development consent is put in place.

> "[...] where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the

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1 Case C508/03; May 4, 2006.

2 Case C290/03; May 4, 2006.

3 Under Irish law, outline planning permission is not available in respect of development subject to the environmental impact assessment directive: Planning and Development Regulations 2001, art.96.

4 Prior to this the leading judgment had been that of *R. (On the application of Wells) v Secretary of State for Transport, Local Government and the Regions* (Case C-201/02) [2004] E.C.R. I-723.

5 Planning and Development Regulations 2001, art.96.

> parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure."

While there is, in effect, a presumption that the environmental impact assessment should be carried out at the first stage of a multi-stage development consent procedure, national legislation cannot *preclude* the possibility of an assessment at the later stage(s). This is because the duty to ensure that a proper assessment is carried out continues throughout the entire decision-making process: if, for whatever reason, there has been a failure either to carry out any assessment at the earlier stage, or if such assessment was deficient or inadequate, then there is an obligation on the subsequent decision-maker to remedy this.

The obligation to remedy any earlier deficiencies before the final part of a development consent is given was stated in more explicit terms in *Barker*.

> "[...] Articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location."

Discussion

Objectors to a development project will often allege that planning permission has been granted in breach of the requirements of the directive. In some cases, there will have been no assessment and it will be argued that there should have been one; in others, the contention will be that the environmental impact assessment carried out prior to the grant of planning permission was inadequate. The traditional view had been, however, that unless a formal challenge by way of judicial review was brought within time, the absence of any assessment, or the alleged inadequacy of an assessment, could not be raised subsequently.[6] This view will have to be reconsidered now in light of the two recent judgments of the ECJ. The intriguing prospect presented by the judgments is that a deficient assessment may have to be remedied where, for whatever reason, a further consent is required in respect of the development.

This (remedial) obligation may arise even in circumstances where there is no requirement under national law, still less a prescribed procedure, for environmental impact assessment at the stage of the later decision. To put the matter another way, the happenstance of an application subsequently for some form of consent or approval might well trigger a requirement to make good the failure to have had any, or any adequate, environmental impact assessment at an earlier stage. It is only where—as in the case of the then English legislation in respect of outline planning permissions—the relevant national legislation actually precludes the possibility of an assessment that same cannot be carried out. The underlying legislation itself will then be subject to challenge.

The availability of this—admittedly innovative—remedy is dependent on the later decision constituting a "development consent" within the meaning of the directive. Scannell argues that a development consent must mean an environmental consent and cannot reasonably be construed as one of the many other consents which developers may need before being entitled to proceed with projects.[7]

The ECJ has provided little guidance as to the test to be applied in this regard. It follows from the judgment in *Commission v United Kingdom*, however, that the mere fact that a decision is an implementing decision, subsidiary to a principal decision, does not preclude a finding that that decision is a development consent. The logic here seems to be that a multi-stage development consent is not complete until the last decision is in place, and, accordingly, the obligation to ensure that a proper assessment has been carried out remains right until the last piece of the jigsaw is in place.

The High Court had previously ruled that the respective decisions of An Bord Pleanála, on an application for planning permission, and the Environmental Protection Agency, on an application for a waste licence, are complementary and form two parts of the one "development consent".[8] This judgment would appear to be entirely consistent with the more recent judgments of the ECJ. The development project cannot "proceed" until the construction of the relevant structures and the carrying on of the licensed activity are both authorised.

The Environmental Protection Agency would, therefore, be subject to the remedial obligation where a proper assessment was not carried out under the planning legislation. It is arguable that in such circumstances, the Environmental Protection Agency would be obliged to call for an environmental impact statement even though there is no formal procedure under national law whereby this might be done.

It may be more difficult in other instances to say whether or not a particular decision should be regarded as a part of multi-stage development consent. For example, should a decision to extend the life or duration of a planning permission be regarded as a development consent? Ordinarily, a planning authority enjoys only a very limited discretion in this regard—confined to ensuring that the various statutory criteria under s.42 of the Planning and Development Act 2000 have been satisfied—and is not entitled to reconsider the planning merits of the permitted development. The decision is a ministerial one only. Yet, on a literal interpretation, where planning permission is expiring, the development project cannot be completed without an extension: any further works would otherwise be unauthorised. The continued development project cannot therefore "proceed" without the extension. On this view, then, it is arguable that if the initial decision to grant planning permission was deficient—whether on account of there being no environmental impact assessment or the first assessment being inadequate—then the planning authority would not be entitled to extend the duration of the planning permission without an

6 *Derrybrien Co-operative Society Ltd. v Saorgus Energy Ltd.*, unreported, High Court, Dunne J., June 3, 2005.

7 Scannell, *Environmental and Land Use Law*, Thomson Round Hall, Dublin, 2006, para.5–30.

8 *Martin v An Bord Pleanála (No. 2)*, unreported, High Court, Smyth J., November 30, 2004.

environmental impact assessment being undertaken at that stage. In practice, it would probably be simpler for the planning authority to refuse to grant the extension, in that it would be very difficult to attempt to perform an extra-statutory form of environmental impact assessment within the confines of the s.42 procedure.

Another potential grey area is in respect of planning conditions leaving matters over for agreement as between the developer and the planning authority. The scope of such conditions should properly be limited to matters of technical detail and thus should not present new environmental considerations.[9] The decision of the planning authority agreeing the various matters might, nevertheless, be regarded as the final stage of the development consent.[10] This is especially so where, as is often the case, the condition states that the various matters are to be agreed "prior to the commencement of development". In such circumstances, the development cannot "proceed" until the matters have been agreed.

"Shall not question validity"

There is a prohibition under s.50 of the 2000 Act on "questioning the validity" of the decision on, *inter alia*, an application for planning permission other than by way of judicial review proceedings. As the requirement for an extra-statutory environmental impact assessment in the case of a second development consent can, by definition, only arise because of a deficiency at the first stage of decision-making, it might be said that to demand an environmental impact assessment is to call into question the validity of the first decision. This collateral attack might be brought months, or even years, after the expiration of the statutory time limit under s.50 for challenging the decision on an application for planning permission.

A similar issue was considered in general terms by the High Court of England and Wales and the Court of Appeal in *R. (On the application of The Noble Organisation Ltd) v Thanet District Council*.[11] Outline planning permission had been granted for a business park. A second outline planning permission was subsequently granted for a plot within the business park. The facts were unusual in that—notwithstanding that there was no requirement to do so under English legislation—the relevant planning authority had decided, at the reserved matters stage, to consider whether or not to call for an environmental impact statement. Presumably this was done out of an abundance of caution, in circumstances where the House of Lords in *Barker* had previously referred questions as to the compatibility of the one-off procedure to the European Court of Justice, and that reference was, at that time, still pending.

In deciding at the reserved matter stage whether or not an environmental impact assessment was required, the planning authority relied on the fact that it had previously decided at the time of the application for second outline planning permission that the characteristics and location of the development were not such as to require an environmental impact assessment. The applicant for judicial review had sought to criticise this approach, arguing that it was almost a contradiction in terms to enquire whether the effects of the reserved matters were likely to be significantly different from those considered at the outline planning permission stage: reserved matters must fall within the scope of the outline planning permission. The argument continued that if consideration is to be given to an environmental impact assessment at the reserved matters stage, the only proper question must be whether the development *per se* was likely to give rise to significant environmental effects. That was a fresh factual question. The formal validity of earlier planning permissions was not an answer to it. The High Court rejected these arguments.

The question as to the extent to which it was permissible to criticise (to use a neutral term) previous decisions in the context of a challenge to a more recent decision was to the fore when the matter was appealed to the Court of Appeal.[12] It was urged on behalf of the applicant for judicial review that unlawful reasoning in one planning decision may vitiate a later planning decision reliant upon the same reasoning, notwithstanding the formal validity of the earlier decision. It was argued in the alternative and in any event that—irrespective of the position under domestic law—the formal validity of the earlier decisions could not be a defence to a challenge to a later decision as this would conflict with the principle of effectiveness of EC law.

The Court of Appeal held that, as a matter of domestic law, the applicant was not entitled to challenge directly or indirectly the previous decisions to grant planning permission, nor the screening decision in respect of the second planning permission. The challenge to the decision at the approval of reserved matters stage not to require an environmental impact assessment was, in effect, an impermissible collateral challenge to those decisions. The Court of Appeal did accept that there was a difference between a challenge to validity of an earlier decision and a subsequent challenge to the *reasoning* underlying it, but considered that this did not advance the applicant's case. The relevance of the previous decisions was that they would have certain effects, and the planning authority in its screening exercise at the approval of the reserved matters stage was entitled to conclude that those matters were unlikely to have any greater significant environmental impact than that impact which resulted from the grant of outline planning permission. The Court of Appeal did not, therefore, accept that the question of whether an environmental impact assessment was required was a fresh factual question necessitating a *de novo* consideration of the whole development.

Turning now to the Court of Appeal's treatment of the argument based on the effectiveness of EC law. The applicant had argued that an unlawful failure to undertake an environmental impact assessment at the outline planning permission stage triggered a remedial obligation at the approval of reserved matters stage. This was so notwithstanding the formal validity of the previous planning permission. The Court of Appeal rejected this argument, emphasising that there was a clear domestic remedy available, if exercised promptly, for quashing the previous decisions, *i.e.* an application for judicial review. The Court of Appeal found that the domestic requirement of promptness in judicial review proceedings struck a reasonable balance between the need to provide a remedy and, in this instance, the public interest in the effective administration of planning

9 *Arklow Holidays Ltd. v An Bord Pleanála* [2006] IEHC 15, unreported, Clarke J., January 18, 2006 (if criteria under condition impermissibly wide, then arguable that the public was excluded from appropriate consultation, as required by the directive, in relation to the final determination of the matters subject to the condition).

10 cf. *O'Connor v Dublin Corporation*, unreported, High Court, O'Neill J., October 3, 2000 (at 43) where the High Court held that the compliance procedure did not constitute a "development consent" as it merely involved the implementation of a condition attached to the planning permission.

11 [2004] EWCA 2576 (Admin); [2005] 1 P. & C.R. 27; [2005] EWCA Civ 782; [2006] 1 P. & C.R. 13; [2006] J.P.L. 60.

12 [2005] EWCA Civ 782; [2006] 1 P. & C.R. 13; [2006] J.P.L. 60.

controls and legal certainty. In the circumstances, it could not be said that it was contrary to EC law to allow reliance to be placed on the formal validity of the earlier decisions.

The Court of Appeal noted that the European Court of Justice had upheld the importance of giving certainty to public decisions by holding that the application of reasonable time limits for challenging them does not infringe the principle of effectiveness; express reference was made in this regard to the case of *Rewe v Landwirtschaftskammer Saarland.*[13] The Court of Appeal also emphasised that the European Court of Justice in *R. (On the application of Wells) v Secretary of State for Transport*[14]*, Local Government and the Regions* had held that detailed procedural rules are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).

> "Applying those principles to the facts of this case, if either of the two outline planning permissions required and/or were not the subject of valid screening exercise, there was a clear domestic remedy, if exercised promptly, for quashing either of them and/or the screening opinion at the leisure park outline permission stage. The domestic requirement of promptness in the exercise of the remedy, as Miss Robinson observed, strikes a reasonable balance between the need to provide a remedy and, in this instance, the public interest in the effective administration of planning controls and legal certainty. Accordingly, in my view, this challenge to the reserved matters screening opinion was not deprived of effect by the Council's reliance on the formal validity of the outline permissions and the screening opinion in relation to the latter, since they had been challengeable by judicial review, if sought promptly - a sufficient remedy as a matter of community law."[15]

With respect, the approach of the Court of Appeal is not entirely convincing. First, the logic of the judgment in *Wells*—and of the subsequent judgments in *Barker* and *Commission v United Kingdom*—is that a failure to have any or any adequate environmental impact assessment at an earlier stage is something which should be remedied on the occasion of a subsequent application for a development consent. This logic would be entirely undermined if it was always an answer to say that environmental impact assessment could not be carried out in the context of the application for the later development consent simply because this might cast aspersions on the earlier decision. Indeed the requirement for the environmental impact assessment will, by definition, only have arisen precisely because there was some mishap at the stage of the decision on the earlier development consent. Secondly, is it not sufficient for the purposes of legal certainty that the earlier decision is not set aside; is it not going too far to say that one cannot even call into question the correctness of that decision whilst leaving its formal validity intact? ●

13 (Case 33/76) [1976] E.C.R. 1989.

14 (Case C–201/02) [2004] E.C.R. I–723.

15 ([2005] EWCA Civ 782; [2006] 1 P. & C.R. 13; [2006] J.P.L. 60, [61].

Misuse of Drugs provisions in the Criminal Justice Bill

Gerard Murphy B.L.[1]

Part 8 of the Criminal Justice Bill contains a number of provisions relating to the Misuse of Drugs Act, 1977 as amended. These provisions affect the prosecution and sentencing of a person in relation to the offence of possession of drugs in excess of €13,000[2] for sale or supply[3]. A new offence is also created of **importing** controlled drugs with a market value of €13,000 or more.

Amendment to ss. 15 and 15A of the Misuse of Drugs Act, 1977

Section 80 of the Bill relates to proceedings for an offence under s. 15A of the Misuse of Drugs Act, 1977 (possession of drugs in excess of €13,000 for sale or supply). Section 15A was inserted by s.4 of the Criminal Justice Act, 1999. Section 80 provides that it shall not be necessary for the prosecution to prove that a person knew that the market value of the drugs amounted to €13,000 or more or that he or she was reckless in that regard. The section makes it clear that the simple possession of drugs with a market value in excess of €13,000 is sufficient to constitute the offence. The accused need not have been aware of the market value of the drugs he is alleged to have possessed.

Section 15 of the original Misuse of Drugs Act provides for a rebuttable presumption in subsection 2[4] that the person was in possession of the controlled drug for the purpose of selling or otherwise supplying it to another. Section 84 of the Bill provides that a person may rebut this presumption by showing that at the time of the alleged offence s/he was in lawful possession by virtue of regulations made under s. 4 of the 1977 Act.

New offence under s. 15B of the Misuse of Drugs Act, 1977

Section 81 of the Bill provides for a new Section 15B offence of importing controlled drugs with a market value of €13,000 or more. It shall not be necessary for the prosecution to prove that the person knew that the market value of the drugs amounted to €13,000 or more. The consent of the DPP is required for a prosecution under this section.

Penalty Provisions

Section 83 of the Bill provides that the penalty provisions in s. 27 of the Misuse of Drugs Act, 1977 (as amended by s. 5 of the Criminal Justice Act, 1999) which apply to an offence under s. 15A shall also apply to an offence under section 15B. Section 27[5] of the 1977 Act provides that a person convicted on indictment may be imprisoned for life or such shorter period as the court may determine, and also provides for the so called "mandatory minimum 10 year sentence", although, as the Chief Justice said in a recent case, the use of the term "mandatory" is misleading[6].

A new s. 27 (3AA) is introduced into the Misuse of Drugs Act, 1977 whereby the court may, in imposing sentence for an offence committed under s. 15A or s. 15B, have particular regard to whether the person has a **previous conviction** for a drug trafficking offence.

A new subsection 3CC is also introduced. The court when deciding not to impose a sentence of not less than 10 years may have regard to the following two factors:-

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1 Faculty of Law, UCC. This paper was given at the Criminal Justice Conference organised by the Faculty of Law, UCC on 1st June, 2006.

2 The original amount was IR£10,000 but this was converted to €13,000 by the Euro Changeover (Amounts) Act, 2002.

3 Under s. 15A of the Misuse of Drugs Act, 1977

4 Section 15 (2): "Subject to section 29 (3) of this Act, in any proceedings for an offence under subsection (1) of this section, where it is proved that a person was in possession of a controlled drug and the court, having regard to the quantity of the controlled drug which the person possessed or to such other matter as the court considers relevant, is satisfied that it is reasonable to assume that the controlled drug was not intended for the immediate personal use of the person, he shall be presumed, until the court is satisfied to the contrary, to have been in possession of the controlled drug for the purpose of selling or otherwise supplying it to another in contravention of regulations under section 5 of this Act." A similar provision exists in s. 15A (2).

5 Section 5 of the Criminal Justice Act introduced the following subsections into s. 27 of the Misuse of Drugs Act, 1977. The passages in italics are the amendments introduced by the Criminal Justice Bill.

"(3A) Every person guilty of an offence under section 15A *or 15B of this Act* shall be liable, on conviction on indictment—

(*a*) to imprisonment for life or such shorter period as the court may, subject to subsections (3B) *to (3CC)* of this section, determine, and

(*b*) at the court's discretion, to a fine of such amount as the court considers appropriate.

(3AA) The court, in imposing sentence on a person for an offence under s. 15A or s. 15B of this Act, may, in particular, have regard to whether the person has a previous conviction for a drug trafficking offence.

(3B) Where a person (other than a child or young person) is convicted of an offence under section 15A *or s. 15B of this Act* the court shall, in imposing sentence, specify as the minimum period of imprisonment to be served by that person a period of not less than 10 years imprisonment.

(3C) Subsection (3B) of this section shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances and for this purpose the court may have regard to any matters it considers appropriate, including—

(*a*) whether that person pleaded guilty to the offence and, if so,
(i) the stage at which he indicated the intention to plead guilty, and
(ii) the circumstances in which the indication was given,
and whether that person materially assisted in the investigation of the offence.

(3CC) *The court, in considering for the purposes of subs. (3C) of this section whether a sentence of not less than 10 years imprisonment is unjust in all the circumstances, may have regard, in particular, to – whether the person convicted of the offence concerned was previously convicted in respect of a drug trafficking offence, and whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence ...*

(3G) In imposing a sentence on a person convicted of an offence under section 15A of this Act, a court—

(*a*) may inquire whether at the time of commission of the offence the person was addicted to one or more controlled drugs, and
(*b*) if satisfied that the person was so addicted at that time and that the addiction was a substantial factor leading to the commission of the offence, may list the sentence for review after the expiry of not less than one-half of the period specified by the court under subsection (3B) of this section."

6 See *The People (D.P.P.) v. McGinty,* Court of Criminal Appeal, 3rd April, 2006.

whether the person convicted of the offence concerned was previously convicted in respect of a drug trafficking offence and whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence.

The term "drug trafficking offence" is defined in s. 3(1) of the Criminal Justice Act, 1994[7].

The aim of these amendments is to highlight the fact that previous convictions for drug trafficking offences are a factor to which the court may have regard. This fact may be considered by the court (a) when imposing sentence and (b) when deciding not to impose the minimum 10 year sentence.

In his speech to the Dail on 26th March, 2006, the Minister declared that the purpose of these amendments was:-

> "that, as against mitigating factors such as cooperation and a guilty plea, the court will also be required to take account of previous drug trafficking convictions ... [which] will be a counter balance to any reduction that may have been felt to be appropriate"[8].

It is impossible to know how these provisions will be interpreted by the courts. One possibility is that the courts will regard these provisions as indicating a legislative intent that those who have previous convictions for drugs trafficking offences should be punished more severely. In determining the sentence to be imposed, the courts may determine the gravity of the offence, decide on the appropriate penalty to be imposed, take away one third in light of a guilty plea, consider any other mitigating factors, but then increase the penalty in light of previous convictions. On the other hand, the courts may continue to take all the factors in the case into consideration and determine what is the appropriate sentence to impose in all the circumstances of the case, rather than engaging in the sort of mathematical equation envisaged by the Minister.

What is the "public interest"?

It is not clear whether the expression "the public interest in preventing drug trafficking" in subs. 3CC means either (a) the general deterrence factor a substantial prison sentence for drug trafficking offences would have on the community generally, or (b) the preventative effect a substantial prison sentence would have on the activities of an individual offender.

The jurisprudence of the Irish courts to date would seem to indicate certain difficulties in applying subs. 3CC. Since the provisions will have to be interpreted in harmony with the Constitution, it is worthwhile to review a number of judgments in the area.

The idea of imposing a long prison sentence to prevent the offender committing further offences was previously considered anathema by the courts.

In the case of *The People (D.P.P.) v. Carmody* [1988] I.L.R.M. 370 the Court of Criminal Appeal quashed a sentence of 6 years imposed on two offenders who pleaded guilty to charges of burglary. The Court of Criminal Appeal said the sentencing judge was attempting to procure reform by prevention but that, in the absence of statutory provisions, this was not acceptable.

As Walsh J. noted in the seminal case of *People (Attorney General) v. O' Callaghan* [1966] I.R. 501, 516-517:

> "... it would be quite wrong to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that."

The principles behind sentencing policy in this jurisdiction were eloquently expressed by Gannon J. in the case of *The State (Stanbridge) v. Mahon* [1979] I.R. 214. At p. 218, the learned judge offered the following explanation of the "public interest" in sentencing offenders:-

> "The first consideration in determining the sentence is the public interest, which is served not merely by punishing the offender and showing a deterrent to others but also by affording a compelling inducement and an opportunity to the offender to reform. The punishment should be appropriate not only to the offence committed but also to the particular offender".

The principle of proportionality has also been considered by the courts in a number of other sentencing cases[9].

In *The People (D.P.P.) v. Gilligan* [2004] 3 I.R. 87, for example, the Court of Criminal Appeal reduced a sentence of 28 years for possession to 20 years on the basis that the original sentence was disproportionate to the offence charged.

In that case, the issue was whether the sentencing judge could have regard to "the overall evidence of the activities of an accused in determining the gravity of the individual charges in respect of which he has been convicted"[10]. The court considered the judgment of the Court of Appeal in England in the case of *R. v. Kidd* [1998] 1 W.L.R. 604 where it was held that:-

> "A defendant is not to be convicted of any offence with which he is charged unless and until his guilt is proved. Such guilt may be proved by his own admission or (on indictment) by the verdict of a jury. He may be sentenced only for an offence proved against him (by admission or verdict) or which he has admitted and asked the court to take into consideration when passing sentence".

While the Court of Criminal Appeal accepted the reasoning in that case, it said that a sentencing judge cannot "act in blinkers". However, the court was adamant that the sentencing judge must "scrupulously respect" the "dividing line" between taking into account surrounding circumstances,

7 "drug trafficking offence" means any of the following-

(*a*) an offence under any regulations made under section 5 of the Misuse of Drugs Act, 1977, involving the manufacture, production, preparation, importation, exportation, supply, offering to supply, distribution or transportation of a controlled drug,

(*b*) an offence under section 15 of that Act of possession of a controlled drug for unlawful sale or supply,

(*bb*) an offence under section 15A of that Act,

(*c*) an offence under section 20 of that Act (assisting in or inducing the commission outside the State of an offence punishable under a corresponding law),

(*d*) an offence under the Customs Acts in relation to the importation or exportation of a controlled drug or in relation to the fraudulent evasion of any prohibition, restriction or obligation in relation to such importation or exportation,

(*e*) an offence under *section 31* of this Act in relation to the proceeds of drug trafficking,

(*f*) an offence under *section 33* or *34* of this Act, or

(*g*) an offence of aiding, abetting, counselling or procuring the commission of any of the offences mentioned in *paragraphs (a*) to (*f*)of this definition or of attempting or conspiring to commit any such offence or inciting another person to do so".

8 http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6NBN6D-en

9 *People (D.P.P.) v. Redmond* [2001] 3 I.R. 390; *People v. McCormack* [2000] 4 I.R. 356; *People v. Sheedy* [2000] 2 I.R. 184; *People (DPP) v. M.* [1994] 3 IR 306; *People (DPP) v. W.C.* [1994] 1 I.L.R.M. 321; *State (Healy) v. Donoghue* [1976] I.R. 325; *People (Attorney General) v. O'Driscoll* (1972) 1 Frewen 351.

10 [2004] 3 I.R. 87, 91

including evidence of other offences, and sentencing an accused for offences for which there has been no conviction[11].

It was also said in *Kidd* that to allow a sentencing judge to form his own judgment of the evidence he has heard would be to circumvent the right to trial by jury, which of course in Ireland is a constitutional right.

The Special Criminal Court in imposing sentence on Gilligan noted the "wretchedness" and the "haemorrhage of harm that is unlikely to heal even in a generation" which the accused was *presumed* to have caused. The Court of Criminal Appeal, however, said that this language "would certainly seem to imply that the court had overstepped the line between considering surrounding circumstances and in effect sentencing for criminal activities of which the applicant had not been convicted"[12].

In light of this strong line of authority requiring proportionality in sentencing, it would not appear that subs. 3CC will be capable of displacing that principle. Sentencing courts always consider previous convictions in any event. "The public interest in preventing drug trafficking" is, no doubt, also present in the minds of sentencing judges when they consider the appropriate and proportionate penalty to impose. As the Chief Justice noted in the recent case of *McGinty*[13]:-

> "There is no doubt that the possession of illegal drugs for the purpose of sale or supply, particularly in any significant quantity, is a very serious offence which of itself would normally warrant a custodial sentence ... a judge sentencing a person for such an offence should also have regard to the gravity attached to this by the Oireachtas in providing for a maximum sentence of life imprisonment and a minimum of 10 years imprisonment .... Thus, even in cases where a trial judge properly concludes that the subsection (3B) as regards the minimum term of imprisonment does not apply to the particular case before him or her, the appropriate sentence should normally involve a term of imprisonment, including, depending on the circumstances, a very substantial term of imprisonment."

There seems to be a common perception that the courts are disregarding the "minimum 10 year sentence" for s. 15A offences and that the legislative provisions are not operating as effectively as they should be. Certainly the Minister shares that perception. In his speech to the Dail on 24th May, 2006, the Minister appealed to the judiciary to fully implement the provisions of section 27. He also declared that he would not be happy until the specific derogations in the legislation are availed of "in only a minority of cases". However, research commissioned by the Department of Justice, Equality and Law Reform shows that in most cases, offenders are pleading guilty to s. 15A offences to avoid a lengthy prison sentence[14]. In the cases analysed in that research, only 1 offender did not plead guilty. There are specific provisions in s. 27 to encourage offenders to plead guilty and so avoid the minimum 10 year sentence. If large numbers of offenders are pleading guilty to s. 15A offences, then this indicates that the penalty provisions in s. 27 are having an effect. Furthermore, the judiciary are acting in a manner consistent with the legislation and cannot be accused of ignoring the law passed by the Oireachtas.

Moreover, there is also an incentive for offenders to materially assist the Gardai in their investigations. As Mr. McEvoy notes in his research:-

> "Indeed in all but a few cases, the accused provided some form of assistance to the gardai and even in cases where the accused provided little by way of co-operation in relation to his or her contacts or associates the court appeared to accept that the accused had a genuine fear for his own safety."[15]

The Minster claims that the minimum 10 year sentence is only being imposed in 21% of cases. It would be interesting to know in how many of the other 79% are offenders pleading guilty.

The Court of Criminal Appeal has consistently stressed the requirement for sentencing judges to carefully consider the minimum 10 year provisions in section 27. In the case of *The People (D.P.P.) v Renald*[16] the Court offered the following guidance on sentencing for this offence:-

> "Even where exceptional circumstances exist which would render the statutory minimum term of imprisonment unjust, there is no question of the minimum sentence being ignored. Perhaps the most important single factor in determining an appropriate sentence is the ascertainment of the gravity of the offence as determined by the Oireachtas. Frequently an indication as to the seriousness of the offence may be obtained from the maximum penalty imposed for its commission. ... What is even more instructive is legislation which, as in the present case, fixes a mandatory minimum sentence.
>
> Even though that sentence may not be applicable in a particular case the very existence of a lengthy mandatory minimum sentence is an important guide to the Courts in determining the gravity of the offence and the appropriate sentence to impose for its commission... If the Court is satisfied that factors exist which would render the mandatory minimum sentence unjust, then the Court is not required to impose it but the existence of such matters or circumstances does not reduce the inherent seriousness of the offence. It remains the task of the Court to impose a sentence which is appropriate having regard to the relevant circumstances and also the fundamental gravity of the offence as determined by the Oireachtas and reflected in the sentences which it has prescribed."[17]

Notwithstanding the provisions of s. 27, the courts have also recognised that in "wholly exceptional" cases a suspended sentence may be appropriate. A suspended sentence was upheld in the case of *The People (D.P.P.) v. Alexiou* [2003] 3 I.R. 513. In the recent case of *The People (D.P.P.) v. McGinty* (3rd April, 2006), the Court of Criminal Appeal again upheld a five year suspended sentence on an accused who had pleaded guilty and who had no previous convictions. The exceptional circumstance in this case justifying the suspension of the sentence was the offender's extraordinary successful participation in a programme at Coolmine drug treatment centre. In a passage where he referred to the "public interest", Murray C.J. said:-

> "In carrying out this difficult balance as to where the public interest best lay, the trial judge clearly decided that its interests were best served by permitting the respondent to see through his rehabilitation to a probably successful conclusion. Such rehabilitation was more likely to ensure that the respondent would be a law abiding citizen in the future than if his rehabilitation programme was terminated by a prison sentence."

This recent case indicates that the "public interest" can vary considerably from case to case. In this case, the public interest clearly lay with the offender being given a suspended sentence in order to support his efforts at rehabilitation. In a different case, one involving an experienced drug dealer working in the upper echelons of the drugs trade, for example, no doubt the public interest would include imposing a substantial sentence of up to life imprisonment.

Conclusion

The provisions in the forthcoming Criminal Justice Bill are unnecessary since the courts are keenly aware of the need to consider previous convictions and the public interest in dealing with drug offenders.

These provisions will result in nothing more than "window dressing" and will fail to deal with the underlying problem of drug trafficking in society. Instead of making unnecessary laws, more resources should be put into supporting treatment and rehabilitation programmes for drugs offenders. ●

11 [2004] 3 I.R. 87, 91
12 [2004] 3 I.R. 87, 91
13 Court of Criminal Appeal, 3rd April, 2006
14 See research carried out by Mr Patrick McEvoy B.L., (15th February, 2005). Available at http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ69MGLT-en/$File/Research.pdf. Of 55 cases analysed by Mr. McEvoy only one offender did not plead guilty. These cases covered the period between 1999, when the provisions were introduced, and 2001.
15 See research carried out by Mr Patrick McEvoy B.L., (15th February, 2005). Available at http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ69MGLT-en/$File/Research.pdf.
16 Court of Criminal Appeal, 23rd November, 2001.
17 In another case, *The People (D.P.P.) v. Hogarty* (21st, November, 2001) the Court of Criminal Appeal said that where it is appropriate to depart from the minimum 10 year sentence the sentencing judge should assess the overall gravity of the offence, determine the appropriate sentence and then make whatever discounts are appropriate. It is not permissible however, to "count down" from the 10 year sentence as if that were the presumptive sentence to be imposed in every case since in some cases a more severe penalty may be required, bearing in mind the maximum sentence is life imprisonment.

Lawyers in Afghanistan

Jeanne McDonagh

Action Aid is trying to develop a program of pro bono legal assistance for women in Afghanistan to support their basic human rights. In this, it is looking to the Irish legal system and the Government, to support their aim. It is hoped to bring a fact-finding team of Irish lawyers and journalists to see the situation on the ground for themselves. With this knowledge, they will report back and assist in raising funds from the legal sector to support this worthy scheme.

It is hoped that several fund raising schemes could be planned throughout the next legal year, with the support of the members of the Bar, under the chairmanship of Hugh Mohan SC. Ercus Stewart SC has agreed to head the fundraising initiative. It is hoped that members will become involved in helping to raise the significant amount necessary to get this project working.

This project has four objectives:

1) To provide legal support to women in Afghan jails.
2) To provide legal support to women experiencing legal proceedings within Afghanistan.
3) To provide legal support to female victims of domestic violence and abuse.
4) To support women's NGOs to provide legal support to their beneficiaries.

Background

The status of women is lower in Afghanistan than perhaps any other country in the world. The rule of the Taliban, which ended in 2002, brought about the almost total withdrawal of basic rights from women. Denied the right to work or attend any form of formal education, the vast majority of women in Afghanistan were left housebound with no role to play in decision-making or resource allocation. Fifty seven percent of women in Afghanistan were married before the age of 16 despite it being illegal under Afghan law.

In such a patriarchal environment, issues such as legal rights or domestic violence and abuse against women are considered taboo and there is little or no current platform in Afghanistan to discuss these issues.

Slowly this is beginning to change and there are now limited avenues for these issues to be brought out into the open and support to be offered to victims. The new Afghan Constitution specifically refers to the rights of women in this area and the Ministry of Women's Affairs is very active in trying to bring about positive change; they receive twenty enquiries a day from women running from abusive marriages and family violence.

During a fact-finding visit to Pule e Charkhi, the sole women-only jail in Kabul, the resounding message from the inmates was the lack of any legal support. Some of the imprisoned women had never seen a lawyer or received any legal representation and there are around 200 women who are not receiving any legal representation whatsoever at present. Perhaps even more pressing, there were women in the jail who had finished their sentences but had not been released because the legal support needed to process their case had not been provided.

Meanwhile, very few ways out are available to women fleeing domestic violence. It is intended that the legal team also specialise in supporting the female victims of domestic violence and abuse. During the time of Taliban rule, women convicted of leaving their family home for any reason could be imprisoned for up to five years. While the new Afghan Constitution explicitly gives rights for women, the mentality of punishing a woman fleeing domestic violence still remains.

This proposal represents a very real opportunity to respond to the chronic needs of the hundreds and thousands of women in Afghanistan who have been abandoned by both their communities. It also has the potential to set far-reaching legal precedents for women from all over Afghanistan to achieve their basic legal and human rights.

Objectives

The overall objective is to develop a team of lawyers to respond to the chronic lack of legal practitioners, especially women, able to provide pro bono legal support to Afghan women experiencing domestic violence and abuse of their rights as outlined in the Afghan Constitution. Specifically:

- To recruit, train and develop a team of ten female lawyers to support women achieve their basic legal and human rights;
- To provide full legal support to all the women in Pule e Charkhi jail so that they may achieve their legal rights;
- To receive referrals of women needing legal support from the 70 women's NGOs in Afghanistan and the Ministry of Women's Affairs;
- To take on at least 300 cases in the two-year duration of the project;
- To lobby the judiciary and the Ministry of Justice of Afghanistan to ensure greater support for women interacting with the Afghan legal system.

This presents a real opportunity for the legal profession to help establish law and human rights in a developing country. All are encouraged to participate. For further information, please contact Jeanne McDonagh tel: 817 5014 or jmcdonagh@lawlibrary.ie

The Constitution and Marriage; The Scope of Protection

John Eardly BL

Introduction

The case of *Zappone and Gilligan v. The Revenue Commissioners, Ireland and the Attorney General*[1] is due for hearing before the High Court later this year. The case raises some of the most profound moral and legal issues in a generation of constitutional jurisprudence. The case concerns two women, Katherine Zappone and Ann Louise Gilligan who were lawfully married in Canada in September 2003. On their return to Ireland, their marriage has been and continues to be refused legal recognition notwithstanding the fact that an opposite sex couple, married under precisely the same Canadian law in accordance with precisely the same conditions, would have had their marriage recognised in Ireland. On the 8th September 2004, the couple successfully obtained leave to challenge the decision of the Inspector of Taxes not to recognise their marriage. If the applicants' are to be successful, one of the assertions upon which they must succeed is that there is no impediment in the Constitution itself to the recognition of same sex marriage in Ireland.

In this article, I will explore a number of issues that may be considered around the merits of this particular assertion. I will also submit, on the basis of existing legal and constitutional authority, that while the Constitution does indeed encompass a traditional, Christian (and/or common law) notion of marriage, it is also not limited by this notion. On the contrary, I will submit that the special protection afforded to marriage in the Constitution along with other constitutional protections does not impede, and indeed may require, the inclusion of same sex unions of the type enjoyed by Ms Zappone and Ms Gilligan to be included within its protection.

Definition of Marriage

The first practical problem to face is that, while the Constitution sets out a meaning for the institution of the "Family", it tells us nothing about what the institution of "Marriage" itself may mean. On the contrary, a definition of "Marriage" is not enshrined in our Constitution at all.

Instead, Article 41 of the Constitution simply provides that:

> "1.1 The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law...
>
> 3.1 The State pledges itself to guard with special care the institution of Marriage, on which the family is founded, and to protect it against attack."

Moreover, while the institution of marriage is specially protected by the Constitution, the text does not expressly provide for *a right* to marry. This is the case for both heterosexual and homosexual couples. Instead, the Supreme Court has found that, insofar as heterosexual couples are concerned, such a right is implicity protected.[2]

The definition of civil marriage is now set out in section 2(2)(e) of the Civil Registration Act 2004. This specifically precludes the entering into of civil marriage in Ireland by two persons of the same gender. In doing so, this statutory exclusion is not surprising since it does nothing more than reflect earlier judgments and pre-existing common law on this point.

For example, in *Hyde v. Hyde*[3], Lord Penzance set out the classic definition of marriage at common law. He held that it is:

> "...the voluntary and permanent union of one man and one woman to the exclusion of all others for life."[4]

Moreover, in *DT v. CT*,[5] Murray J (as he then was) set out the following as a definition of marriage:

> "A solemn contract of partnership entered into between a man and a woman with a special status recognised by the Constitution."

From these decisions, one might simply presuppose that marriage is not open to persons of the same sex. Indeed, this conclusion may well be in keeping with conventional social, political and religious understandings of marriage. However, as far as the Constitution is concerned, the proposition that civil marriage is *exclusively* a heterosexual union has not yet been convincingly established. In considering whether this might not be the case and that civil marriage for same sex couples is indeed constitutionally permissible, I will assess this issue from four differing perspectives:

- The flexibility of the definition of civil marriage;
- The persuasiveness of the legal reasoning on the issue to date;
- The civil nature of the marriage contract;
- The Common Good.

1 No. 2004/19616P.
2 *McGee v. Attorney General [1974] IR 284.*
3 [1861-73] All ER Rep 176.
4 This definition was essentially endorsed in Ireland in *B v. R* [1995] 1 ILRM 491 (HC).
5 [2003] 1 ILRM 321.

Flexibility

Since the Family Law (Divorce) Act 1996, the nature of civil marriage has changed fundamentally in Ireland and has acquired a new existence separate from its original religious and common law definitions.[6]

However, even before the Fifteenth Amendment to The Constitution Act 1995, the Supreme Court had recognised that civil marriage, as understood by the Constitution, is not necessarily limited by its traditional roots. In *TF v. Ireland*[7], the Supreme Court referred to the following definition of marriage:

> "...the Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of partnership based on irrevocable personal consent, given by both spouses which establishes a unique and very special life-long relationship. According to this concept, the procreation and education of children by the spouses is especially ordained."[8]

Having referred to the above passage, Hamilton CJ, in dealing with the constitutionality of judicial separation, then went on to hold:

> "One of the reciprocating rights and duties [of marriage] is obviously that of cohabitation. It is an important element in marriage that the spouses live together. The unique and special lifelong relationship referred to by Costello J. could not be developed otherwise. However, in many cases, the common good will require that spouses should be separated notwithstanding the nature of the indissoluble bond of marriage between them...Cohabitation can no longer be enforced or made obligatory and must be based on consent. If one spouse withdraws consent then cohabitation cannot be enforced even if such spouse withdraws consent for selfish or irrational reasons. An important ingredient of the normal marital relationship has been removed though the bond remains the same."[9]

Civil marriage is no longer considered a lifelong dissoluble partnership or union.[10] In *DT v. CT*,[11] Murray J (as he then was) pointedly affirmed that the marriage relationship now:

> "is one which is entered into in principle for life. It is not entered into for a determinate period."

The Constitution may indeed ultimately be found to reserve civil marriage to heterosexual couples on the basis that this is a fundamental and traditional characteristic of that institution. However, if the Constitution is ultimately interpreted by the Supreme Court in *Zappone* as being limited in this way, a clear and unequivocal reasoning derived from the Constitution itself will have to be set out as to why one criterion of the traditional definition of marriage (a gender based definition) is immutable and crucial to civil marriage when other equally traditional criteria (cohabitation and permanent union) have already been fundamentally circumscribed.

To date, such detailed, convincing reasoning is notable for its absence.

Legal Reasoning

An outstanding exception to the absence of considered legal reasoning in this area is the complex case of *Foy v. An t-Ard Claraitheoir (Register of Births, Deaths and Marriages) et al*[12]. One of the issues sought to be addressed was the precise point of whether there was a constitutional right of two biological males to marry. In his detailed and extensive judgment, McKechnie J held as follows on this point:

> "It seems to me that marriage as understood by the Constitution, by statute and by case law refers to the union of a biological man with a biological woman. Re-echoing *Hyde v. Hyde*...Mr Justice Costello in *B v R*... defined marriage as "...the voluntary and permanent union of one man and one woman to the exclusion of all others for life." As a result of the Fifteenth Amendment of the Constitution Act 1995 and the Family Law (Divorce) Act 1996, the permanency aspect of marriage no longer applies...In this and in the neighbouring jurisdiction, it is crucial for legal purposes that the parties should be of the opposite biological sex."

As such, he concluded that:

> "...there is no sustainable basis for the applicant's submission that the existing law, which carries the impugned provision which prohibits the applicant from marrying a party who is of the same biological sex as herself, is a violation of her constitutional right to marry."

While this judgment is remarkable for the breadth and detail of its analysis, it is humbly submitted that it appears to be very close to concluding that the Constitution cannot contain the right to civil marriage for same sex couples simply because the common law and statute have never done so. However, this arguably sidesteps the very argument made by the applicant in *Foy*, namely that this common law and statutory regime, insofar as it does not recognise this right, is itself unconstitutional. Moreover, in the passage from the judgment cited above, McKechnie J does not set out the grounds for the proposition that marriage "*as understood by the Constitution*" refers to the union of a biological man and woman. In effect, one might discern a type of circular argument being adopted where, rather curiously, the primary status of the Constitution is being made to fit or reflect the common law and statute rather than the other way around. However, what cannot be overlooked is that, unlike statute or the common law, the Constitution expressly does not limit itself to a gender based definition of marriage.

6 This separate existence is further emphasised recently by the regulatory nature of the Civil Registration Act 2004.
7 [1995] 1 IR 321 (SC).
8 This definition was set out by Costello J in *Murray v. Ireland* [1985] IR 532.
9 [1995] 1 IR 321 at 375.
10 Enacted pursuant to Article 41.3.2 of the Constitution.
11 [2003] 1 ILRM 321.
12 [2002] IEHC 116 (9th July 2002).

The *Zappone* proceedings are to be welcomed inasmuch as they now offer, at the very least, an opportunity for the High Court to move beyond presenting the exclusive heterosexual nature of civil marriage to be so self-evident that it requires no precedent or precise constitutional foundation.

Civil Contract

The Constitution is concerned with civil marriage only[13]. In *N v. K*[14], McCarthy J in the Supreme Court held:

> "Marriage is a civil contract which creates recriprocating rights and duties between the parties but, further, establishes a status which affects both the parties to the contract and the community as a whole. The contract is unique in that it enjoys, as an institution, a pledge by the State to guard it with special care and to protect it against attack..."

In *TF v Ireland*[15], Murphy J (then in the High Court), in vindicating that protection, was clear to avoid against the conflation of the religious and civil understanding of marriage and rejected as inadmissible the evidence of moral theologians as to the meaning of civil marriage. He held:

> "It may well be that 'marriage' as referred to in our Constitution derives from the Christian concept of marriage. However, whatever its origin, the obligations of the State and the rights of the parties in relation to marriage are now contained in the Constitution and our laws..."

The reasoning of this judgment is strongly based and supported by the Supreme Court in the seminal case of *McGee v. Attorney General*[16]. In his leading judgment in that case, Walsh J affirmed that:

> "[w]hile we are a religious people, we also live in a pluralist society from the religious point of view...In a pluralist society such as ours, the courts cannot as a matter of constitutional law be asked to choose between differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature and extent of these natural rights as they are to be found in natural law. The same considerations apply also to the question of ascertaining the nature and extent of the duties which flow from natural law."

The Common Good

Of those reasons that are advanced for the self-evident conclusion that marriage is the union exclusively of a heterosexual couple, two are particularly unconvincing:

Firstly, an argument often cited is the unique ability of heterosexual couples to procreate as a valid reason for this exclusion.

In Ireland, quite apart from the scientific advances in human artificial insemination both currently and into the future, this argument is already redundant.

Under Irish law, while a marriage may be annulled for a lack of consummation[17], it cannot be annulled for the infertility of either party[18].

A marriage can also not be annulled simply on the grounds that the parties do not wish to bear children.[19]

While some importance can be placed on the use of the word "mother" in Article 41.2(2) of the Constitution as implicitly recognising that marriage is an institution of procreation and child-rearing, this does not act as a bar to civil marriage in practice as many lesbian couples, in particular, are already or may become mothers.

In England, the House of Lords has also specifically rejected this line of reasoning as a basis to differentiate between homosexual and heterosexual relationships. In particular, they rejected an argument that, simply because the couple are unable to have children who are the genetic offspring of them both, same sex relationships are not in the same situation as heterosexual ones.[20]

In Canada, the Supreme Court has equally rejected this principle. In *Mossop v. Mossop*[21], L'Heureux-Dube J. held as follows:

> "The argument is that procreation is somehow necessary to the concept of family and that same sex couples cannot be families as they are incapable of procreation. Though there is undeniable value in procreation, the [trial judge] could not have accepted that the capacity to procreate limits the boundaries of family. If this were so, childless couples...would not constitute families. Further, this logic suggests that adoptive families are not desirable as natural families. The flaws in this position must have been self-evident. Though procreation is an element in many families, placing the ability to procreate as the inalterable basis of family could result in an impoverished rather than an enriched version."

In South Africa, in *Fourie and Bonthuys v. Minister for Home Affairs and Director General of Home Affairs* [22], the Supreme Court of Appeal strongly endorsed this principle. In his judgment, Sachs J. confirmed that:

> "From a legal and constitutional point of view, procreative potential is not a deeply defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such a relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at any age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with

13 In the Canadian Supreme Court case of *re Same Sex Marriage [2004] SCR 698*, the Court found that the guarantee of religious freedom was broad enough to protect religious officials from being compelled by the State to perform civil or religious same sex marriages that are contrary to their religious beliefs.

14 [1985] IR 733.

15 [1995] 1 IR 321 at 333.

16 [1974] IR 284.

17 For example, *S v. S* [1976-1977] ILRM 156 and *A. O'H v. F* [1986] ILRM 489.

18 *MM (orse G) v. PM* [1986] ILRM 515.

19 *Baxter v. Baxter* [1947] 2 All ER 886 at 890 *per* Jowitt LJC. However, a unilateral decision on the part of one party not to procreate, which is not communicated to the other party prior to the marriage, may result in voidness due to misprepresentation: see S v S [1976-1977] ILRM 156 per Kenny J.

20 See *Ghaidan v. Godin-Mendoza* [2004] UKHL 38 EHRR 24. This was a case relating to paragraph 2 schedule 1 of the Rent Act 1977 in England. This provided for the surviving spouse of an original Rent Act tenant, if residing with him immediately before he died, the right to succeed to a statutory tenancy. This right was also extended to co-habiting heterosexual couples but not homosexual couples.

21 [1993] 100 DLR (4th) 658.

22 Case 232/2003, 30th November 2004.

procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy."

Secondly, the argument is advanced that the inclusion of same sex relationships within the definition of civil marriage would undermine the institution of civil marriage.

In Ireland, this argument may also be framed in terms of the common good.

This is seen from the judgment of McKechnie J. in *Foy* (above) wherein he held that while there may be a right to marry, this was not an absolute right. He held that this right would have to be weighed against

"several other rights including the rights of society."[23]

However, these other rights or how they might limit the right to marry were not expressly set out.

One way of expeditiously dealing with this point was set out in *Egan v. Canada*[24] wherein Iacobucci J. of the Supreme Court of Canada stated bluntly:

"It eludes me how according same sex couples the benefits flowing to opposite sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions. Where is the threat?"

Moreover, in *Goodridge v. Department of Public Health*, Marshall CJ of the Massachusetts Supreme Court of Jurisdiction held:

"Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions or of any other gate keeping provisions of the marriage licensing law. Recognising the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite sex marriage, any more than recognising the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same sex couples reinforces the importance of marriage to individuals and communities. That same sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit."[25]

Conclusion

One of the charges often levelled at non-marital couples seeking some form of legal recognition for their relationship is that they generally have a choice as to whether to marry or not. Having decided not to accept the obligations of marriage, such persons cannot complain of unequal treatment. There is some merit in this argument since couples who do not marry have chosen not to do so and should thus be taken not to have accepted legal recognition or regulation of their union. However, this "freedom of choice" argument is deficient in one fundament respect, namely, where there is no choice to marry in the first place. In a society where the cohabitation rate is increasing and the marriage rate is falling, one must wonder at how the practice of this State guards with special care the institution of marriage when it denies to loving and committed couples the entitlement to enter into civil marriage or have that marriage recognised. This is all the more invidious when Ireland, with its pioneering and extensive prohibition against sexual orientation discrimination, is now refusing to recognise a lawfully entered into civil marriage on this very ground. In this Article, I have not been able to deal with the more complex equality, dignity and privacy arguments surrounding this issue. However, in *Fourie and Bonthuys v. Minister for Home Affairs and Director General of Home Affairs* [26], Cameron J. for the Supreme Court of Appeal of South Africa, when finally recognising the right of same sex couples to enter into civil marriage there, succinctly summarised what is at stake for Ireland now at this turning point. He held:

"At issue is access to an institution that all agree is vital to society and central to social life and human relationships. More than this, marriage and the capacity to get married remain central to our self-definition as humans…[N]ot everyone may choose to get married: but heterosexual couples have the choice. The capacity to choose to get married enhances the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic obligations. It offers a social and legal shrine for love and for commitment and for a future shared with another human being for the exclusion of all others.

"The current common law definition of marriage deprives committed same sex couples of this choice. In this, our common law denies gays and lesbians who wish to solemnize their union, a host of benefits, protections and duties…More deeply, the exclusionary definition of marriage injures gays and lesbians because it implies a judgment on them. It suggest not only that their relationships and commitments and loving bonds are inferior but that they themselves can never be part of the community of moral equals that the Constitution promises to create for all." ●

23 See citation above fn 12.

24 [1995] 2 SCR 513 at 616.

25 440 Mass 309, 798 NE ZD 941 para 63.

26 November 2004.