The Bar Review

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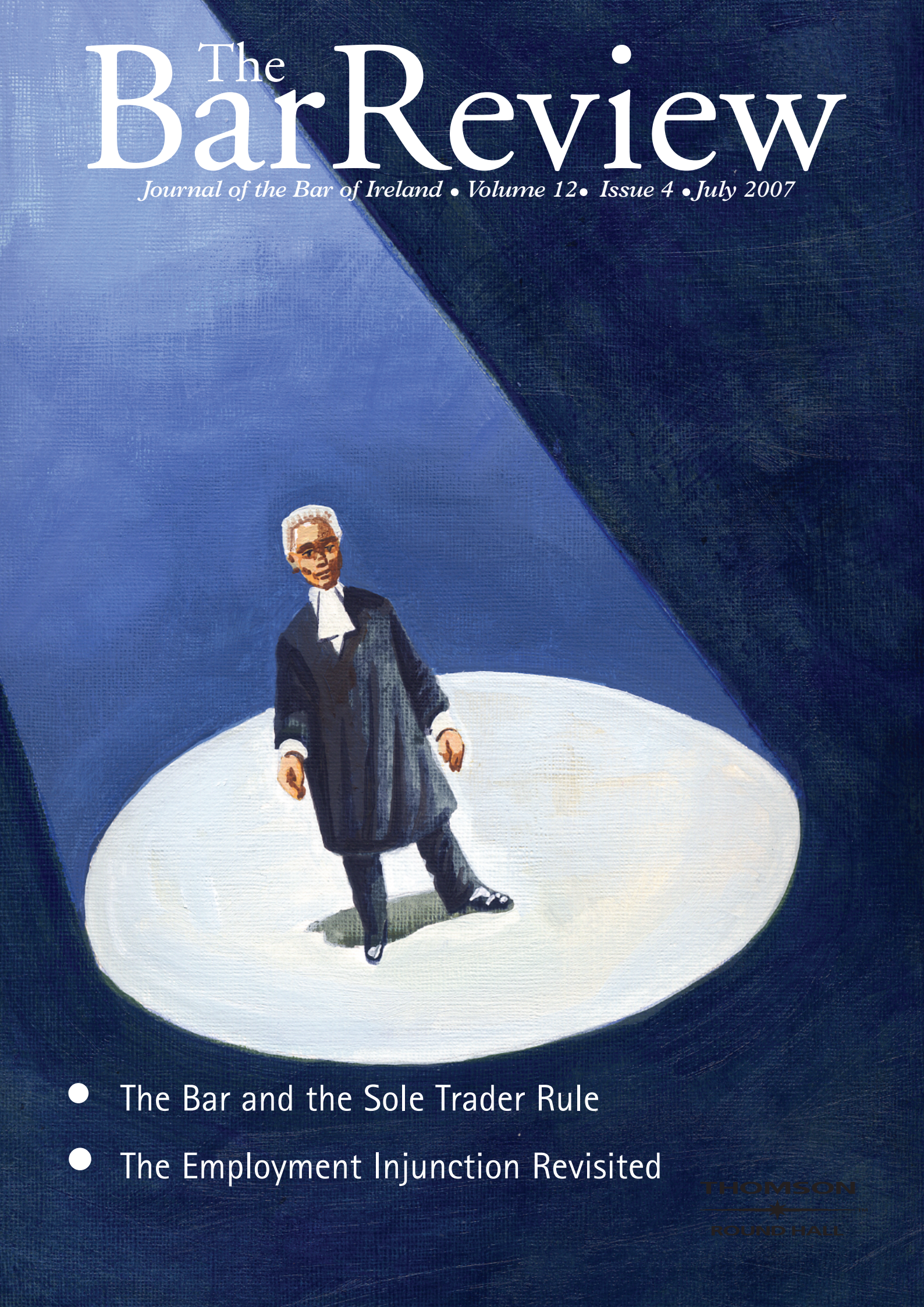

- The Bar and the Sole Trader Rule
- The Employment Injunction Revisited

THOMSON
ROUND HALL

The Bar Review

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THOMSON ROUND HALL

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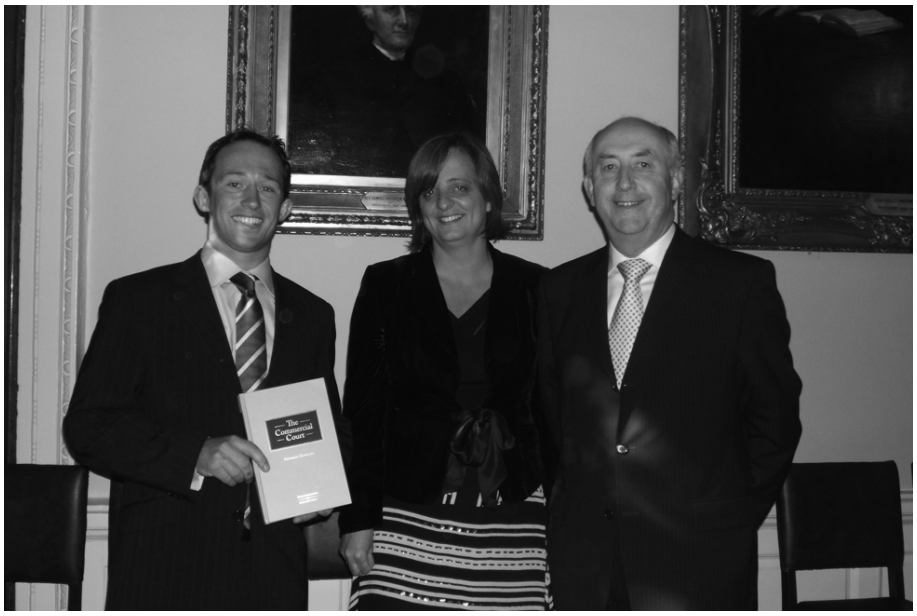
The Commercial Court



Pictured at the launch of the first legal text to publish on The Commercial Court L-R: Stephen Dowling BL, the author; Catherine Dolan, Commercial Manager, Thomson Round Hall; The Hon Mr Justice Peter Kelly, Head of The Commercial Court.

Donal O'Donnell launches book at Trinity College Law School

Pictured at the Launch of "Constitutional Rights of the Company" are (L-R): Catherine Dolan (Commercial Manager, Thomson Round Hall); Ailbhle O'Neill (the author); Donal O'Donnell SC; Hugh O'Neill; and Gerry Whyte, Head of Trinity College Law School.

Thanks to Outgoing Chairman.

Paul Gallagher, SC, the newly appointed Attorney General, served as Chairman of the Editorial Board of the Bar Review for the past six years. During those years, he worked tirelessly on behalf of the Review, giving freely of his time, his knowledge and his experience. His immense contribution cannot be overstated. The Editorial Board wishes to thank him for his unstinting hard work, his wisdom, his commonsense and above all, his courtesy. He will be sorely missed and will undoubtedly make the same outstanding contribution to public life.

Oifig an Ard-Aighne

THE OFFICE OF THE ATTORNEY GENERAL

GOVERNMENT OF IRELAND

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The Office, which is located in Government Buildings, Merrion Street, Dublin 2, has not been listed by the Government as part of its decentralisation programme. The Office has been adapted to facilitate access to persons with certain disabilities. Secondment to another Government Department or Office may be to a location outside Dublin.

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A panel may be established from which future vacancies may be filled. All the posts are permanent and pensionable.

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The above recruitment competition, including the closing date, will be advertised shortly. Full details will be available on the Office website at www.attorneygeneral.ie and will also be published in the national newspapers.

If you would like any additional information on these vacancies please feel free to contact the Human Resources Unit on (01) 6314000.

Frozen in time: a critique of the sole trader rule.

Mr William Prasifka, Chairman of the Competition Authority

Mr Prasifka has requested an opportunity to set out his views in the Bar Review on the operation of the sole trader rule in relation to barristers. The Bar Review is delighted to afford him this opportunity.

Introduction

The Competition Authority's study of the legal profession has been a comprehensive, detailed, and, eventually, fruitful process. The common objective of the authority's recommendations is to remove unnecessary and disproportionate restrictions so that consumers can benefit from greater competition in the provision of legal services.

The Competition Authority is not alone in promoting reform. There has been some significant progress in reforming the framework within which the legal profession operates in Ireland. For example:

- The Minister for Justice, Equality and Law Reform announced the creation of a Legal Services Ombudsman to improve transparency and public confidence in making complaints against members of the legal profession.
- The Legal Costs Working Group published recommendations for reform of how legal fees are determined – a number of which mirror proposals of the Competition Authority.
- Barristers have made a number of changes to their rules, some of which have addressed the Competition Authority's concerns about unnecessary restrictions on new barristers and on clients wishing to change their barrister.
- University College Cork began accepting students for the Law Society's solicitor training courses.
- The Law Society agreed to progress the Competition Authority's recommendations which directly pertained to solicitors, such as recommendations to provide information for consumers and to give solicitors greater ability to advertise their areas of specialist expertise.

These pro-consumer reforms are welcome and all steer the legal profession in one direction – towards a more modern, transparent and efficient profession. These changes also mirror, to some degree, pro-consumer reforms in other common-law jurisdictions.

Considerable scope remains for further reform. Many Competition Authority recommendations, some fundamental in nature, have yet to be taken on board and some have met with stern resistance. One significant set of recommendations,[1] and the focus of this article, advocates reform of the sole trader requirement for practising barristers, i.e. that:

- barristers sharing premises should be able to hold themselves out as practising as a group;
- barristers, subject to appropriate regulation, should be allowed to form partnerships with other barristers; and
- other structures, such as barrister-solicitor practices, multi-disciplinary practices, non-lawyer ownership of legal practices should be subject to review by an independent body - the proposed Legal Services Commission.

The Bar Council has resolutely defended the status quo arguing that the Competition Authority has "failed to appreciate the pro-competitive effects of the model."[2] In particular, the Bar Council states, in relation to competition, that:

- "[u]nder the current sole trader model a new barrister is enabled to commence practice by incurring relatively few costs. This assists entry to the profession and increases competition";
- "The Rules promotes equality amongst barristers and provides a level starting point which encourages and promotes competition. In contrast a system based upon partnerships or chambers will necessarily disadvantage the starting position of some barristers"; and
- "The partnership and chambers models lend themselves to concentration in the market with almost inevitable anti-competitive effects. In the small market that exists in Ireland barristers having a particular speciality will almost certainly congregate in a small number of partnerships or chambers. This will enable them to corner the market in a way that is less likely in the sole trader model given the absence of 'brand recognition'."[3]

The Bar Council argues that the sole trader rule is essential for other important reasons:

- "Barristers are individually and personally responsible for their own conduct and for their professional work and are required to exercise their own personal judgment in all their professional activities and to be absolutely independent and free from all other influence";[4] and
- "A core feature of the independent referral bar in Ireland is the obligation of each barrister to act as an independent sole trader. This obligation is a fundamental component of the administration of [the] justice system in the State and, in particular, it immeasurably underpins the State's constitutional obligation to ensure that all

1. Competition Authority "*Competition in Professional Services: Solicitors and Barristers*", December 2006, Recommendations 10, 11 and 12.
2. Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, page 50.
3. *ibid* page 50.
4. *ibid* page 23.

citizens have equal access to justice."[5]

Consequently it is no surprise that Rule 8.6 of the Code of Conduct of the Bar of Ireland states:

- "In the interest of maintaining an independent Bar, barristers shall not carry on their practices as partners or as a group or as professional associates or in such a way so as to lead solicitors or others to believe that they are partners or members of a group or associated in the conduct of their profession as barristers"[6]

There are no barrister firms, no barrister partnerships and no chambers. A further effect of requiring practising barristers to be sole traders is that employed barristers are precluded from representing their employer in Court.

In essence, the Bar Council, and others similarly minded, defend the sole trader requirement on the basis of three key propositions:

- The sole trader rule promotes competition:
  - by minimising concentration in the market to the lowest possible level; and
  - in the specific context of the Law Library by reducing the start-up costs for new barristers;
- The sole trader rule ensures equal access to justice; and
- The sole trader rule is essential for ethical practice of law and the administration of justice.

It is my contention that the strict sole trader requirement is an unnecessary requirement on practising barristers, which restricts competition and does not benefit consumers. Furthermore, it is also my contention that the sole trader rule is not required to ensure ethical behaviour, access to justice or the administration of justice. Competition, including competition in the choice of business structures, is not inimical to, but rather is supportive of, ethical behaviour, access to justice and the administration of justice.

I will discuss each of the three propositions in turn. I also make a number of additional remarks and observations regarding the Bar Council's defence of the sole trader rule. In brief, Rule 8.6 is a disproportionate and unnecessary restriction on competition in the provision of legal services. Of the three essential propositions above, proposition one is simply incorrect. The merits of propositions two and three are only marginally less clear cut: the sole trader rule is not essential to ensure access to justice, nor is a sole trader rule essential to ensure ethical behaviour and the administration of justice.

Proposition one: Sole trader rule promotes competition

Two distinct arguments have been presented in support of the proposition that the sole trader rule promotes competition. It is argued that atomistic competition, i.e. minimum possible concentration, in the market for barristers implies a competitive market. Included in this argument is a concern about concentration leading to cornering of markets. It is also argued that the sole trader rule, taken together with the existence of the Law Library, reduces the entry costs for new barristers.

Concentration and Competition

The argument has been consistently made by the Bar Council and those who argue on its behalf that atomistic competition, where each competing unit is the smallest possible, is desirable. For example, Paul Gallagher states the following. "The [Competition] Authority unrealistically believes that an effective independent Bar can co-exist with a system in which barristers would form partnerships, either amongst themselves or with others."[7]

He also argues that sole traders would be perceived as inferior relative to other barristers and this "would effectively mean that barristers would be pressurised into forming firms, thereby seriously damaging if not destroying the existing system, where there is dynamic competition between barristers, and which has worked so well over the years. Additionally it would significantly reduce the consumer's choice."[8]

So according to this argument, not only does the sole trader model benefit consumers, but the model, and presumably by extension consumers, must be protected from the harm that would ensue if greater concentration in the market was allowed through barrister partnerships, or other structures.

Before attempting to analyse the merits of the argument, one should pause, and consider whether this argument is advanced on behalf of any other market or any other profession? Would the retail sector be more competitive, and would consumers benefit, if every outlet was individually owned? Imagine if this was the case. There would be no chain stores. Each shop would have a single owner. It is unlikely that supermarkets or department stores would exist. Imagine also other professions; there would be no firms of accountants, no architect partnerships, no GP practices and even no solicitor firms.

From a competition policy perspective, the relevant issue is not simply the size of the business organisation, or the extent of concentration in the market, but whether efficiencies are passed through to consumers as part of the competitive process. Such efficiencies are not only monetary but include better quality of service and service delivery (e.g. timeliness).

The fallacy of arguing that a sole trader rule promotes competition lies in making the all-too-common confusion of competition with rivalry. It confuses competition with concentration, and particularly in this case with atomisation.

It is simply incorrect to suggest that a market is more competitive necessarily if it is reduced to its smallest business components. That is, it is not correct logically or empirically to argue that the most competitive market for barrister services is necessarily one where all suppliers are single person undertakings. In steadfastly adhering to this position, the Bar Council has set itself fore square against economic learning and the rise of modern business structures of the twentieth century.

Matching of buyers and sellers can be a complex process, the more so

5 *ibid* page 21.
6 Code of Conduct of the Bar of Ireland.
7 Paul Gallagher "*Can Ethics be Competitive?*", Bar Review, November 2005 page 149.
8 *ibid* page 149.

the complexity of the goods or services, and/or the requirements for intermediate goods or services in meeting the consumer's demands. The coordination of buyer(s) and seller(s) can be by "arms length" market transactions, or through more structured arrangements, including those structured within organisations or firms. Ronald Coase is one to have expressed this point, very early in his career in 1937[9] and on various other occasions, including in 1960:

> "In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up a contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on."[10]

Coase is, simply put, explaining a fundamental point of economic life for the past 100 years. A significant portion of modern business activity is organised in firms. Rather than being evidence of weak competition, firms arise, survive and prosper in circumstances where the costs of directing and coordinating transactions within the firm are lower than the cost of transactions outside the firm. The very size of the firm is a function of the respective coordination and transaction costs encountered. To quote Coase again in later life, "[t]he limit to the size of the firm is set where its costs of organising a transaction [internally] become equal to the cost of carrying it out through the market".[11]

If this were not the case, then firms would not exist in a competitive market as they would be unable to compete in the market against smaller business structures. Coase is not alone in making this point. It is echoed by Judge Easterbrook, an expert in antitrust law and a noted law and economics scholar, and who since 1985 has served on the US federal appellate court, as being particularly relevant in the application of competition rules. Easterbrook comments that:

> "The firm expands to include more and more such contractual arrangements until, at the margin, the costs of controlling additional production internally equal the costs of coordinating production through market or 'spot' transactions with 'outsiders'. The internal costs may include the difficulty of coordination, the difficulty of giving correct incentives to agents, and the loss of information that markets offer in the form of prices. The ways in which these costs compare with the costs of organizing and maintaining markets are not fixed. Thus, there is no "right" balance between inside and outside transactions. There is only an ever-shifting equilibrium, differing from firm to firm, product to product, and time to time, as the relative costs of internal and market operations change."[12]

Coase and Easterbrook do not argue that atomised markets are inefficient. Rather, they are saying that atomised markets (and sole traders are a particularly good example of atomised market structure), are not inherently efficient or necessarily better than other structures. The implication to be drawn is not that one is *per se* better than the other. The correct implication is pragmatic; there is no correct size to the firm, nor is there an inherent need for complex business structures. The optimal solution is a matter of experience, circumstance and trial and error, an "ever-shifting equilibrium" as described by Easterbrook above. Furthermore the optimum need not be set in stone but will more likely vary over time. That is why competition between market structures is an important dimension in delivering goods and services to consumers, and should be thought of in the same context as competition between products and services.

The Bar Council, and its advocates, sadly, miss this point entirely. Artificially restricting the size of a firm, to the maximum degree possible (i.e. the number of barristers is restricted to one), disallows the creation of savings that may be available by organising certain activities within the firm. Ultimately, the consumer is harmed because unrealised savings and efficiencies cannot be passed on.

A further argument made in support of the sole trader rule is that the Irish market is too small for barrister partnerships.[13] Essentially, the concern is that one firm will "corner" all the business, particularly in relation to specialty areas of law. Is this a realistic threat? Is it likely that all the competition lawyers would congregate into one practice? Of course not.

It has not been the case for solicitors, so why should it be this way for barristers? In the solicitors' branch, we see a variety of firm sizes. There are sole traders, small firms with a few partners and also the larger firms with many partners and in excess of 100 lawyers. Are solicitors less competitive because there are a small number of firms substantially larger than the others? No. Larger firms compete against each other as well as smaller firms. We don't see the cornering of the market – with all experts in one area gravitating towards a single firm. Rather, we can see the opposite – the attempt to achieve a cross-pollenisation of a number of areas of expertise under a single roof.

Proper ethical rules on conflicts within a firm would also militate against any attempt by a grouping of barristers to corner the market and be a more proportionate response. There are two sides to every case. If lawyers in a single area concentrate into the same firm, they will conflict themselves out of taking on new business, as they should not be allowed to represent different sides of the same dispute. This would leave their area of expertise highly attractive for other lawyers to enter.

Entry Costs and Barriers to Entry

The argument that the sole trader requirement reduces entry costs has some superficial attraction. A newly qualified barrister has ready at their disposal the Law Library which provides both a place to work, this reducing set up costs and a place to meet fellow barristers.[14] However, two objections immediately arise. First, focusing on Law Library membership costs to the new or aspiring barrister misses a more salient point. The costs, both in cash terms and in terms of time and possibly foregone income in completing the Barrister at Law (B.L.) degree from Kings Inns, are not trivial. A fuller examination of entry costs would include the costs of professional education.

Second, while the Law Library may provide low overhead and administration costs for a barrister starting out, this is only a minor

9 Ronald Coase *"The Nature of the Firm"*, Economica new series Volume 4, 1937.
10 Ronald Coase *"The Problem of Social Cost"*, Journal of Law and Economics 3 1960, reprinted in Ronald Coase *"The Firm, the Market and the Law"* 1988, page 114.
11 Ronald Coase *"The Firm, the Market and the Law"* 1988. page 7.
12 Frank Easterbrook *"The Limits of Antitrust"*, Texas Law Review, 63(1) 1984, page 2.
13 For example, the Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, pages 45 and 50.
14 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, page 128, which includes the statement: "*Far from creating or increasing barriers to entry, the uniform sole trading status of barristers clearly reduces such barriers.*" Ironically the basis for this statement is revealed as the benefits of membership of a (benevolent) monopoly: the Law Library.

compensation. The sole trader rule means that a new barrister must also bear the risk, personal professional and financial, of establishing their individual reputation. The absence of choice of business structures eliminates options other than the Law Library.

Success in the Bar, as in all professions, depends on reputation. Those failing to acquire a reputation are unlikely to be able to compete with leading barristers. The likelihood of failure and the lack of reputation are ameliorated for other professions by the ability to attach oneself (at the beginning of one's career) to a firm or to another professional that already has a strong reputation. Partnerships (or firms) would allow, as occurs in other professions, for barristers with established reputations (and therefore a steady stream of work) to reach down to recent law graduates who demonstrate potential.

Established barristers, as is the case in other professions, would benefit from the economies and multiple labour inputs that exist in all firms. Recent graduates would benefit from the reputation of the established professionals and the work experience ("on the job" training) essential to learning the skills of the profession.

In the absence of this option, the risk of failure is higher for the new entrant and consequently entry into the profession is less likely. In particular an individual is less likely to make the investment in education and training required to become a barrister if it is likely that such a career will ultimately not prove successful. Barristers provide a textbook example of a profession in which failure is a very real realistic possibility, particularly at the early stage of one's career.[15]

Imagine other professions having the same career structure as the Bar. Recently qualified accountants or architects could not work for an established firm. Recently qualified solicitors could not work in a firm – they could only make money by being retained directly by a client.

We do not know what other professions would look like in this scenario. But one thing is certain. Entry would be riskier. A potential client would not be keen to risk their house or property with such unseasoned professionals. The end result would be less entry, less competition, a less responsive profession, and increased cost to the consumer.

In referring to rules underpinning the independence of the Bar, Paul Gallagher has said that" "[t]hese are self-evidently rules which are not designed for the promotion of the financial self-interest of a barrister."[16] I cannot agree with this. In doing so, I am not saying that the Bar Council's rules are explained simply by a narrow self-interest. Rather, my concern is based on the potential for rules, however well-intentioned, to have negative consequences. In this context, the negative consequence of the sole trader rule is a restriction on competition which arises from making entry into the profession of barrister more difficult.

It is possible to consider realistic alternatives that might arise in the absence of the sole trader rule. Entry into a profession, via employment in a firm, is commonplace in other professions. It provides a less risky start to one's career at a time when it is difficult to establish an individual reputation. And reputation, frequently hard earned, is the most important asset for any professional.

Summary

The present rule requiring all barristers to be sole traders, besides being anachronistic, is completely disproportionate to what has in fact never been a problem to date – even on that side of the profession that does not place restrictions on firm size – excessive concentration in the market for legal services.

By adhering to the sole trader rule the Bar Council has established, and continues to advocate, a zero merger policy. This restricts established barristers and also impacts on entry as new barristers are required to carry greater financial and reputation risk than do new entrants to other professions. Furthermore the nil-merger policy is peculiar to barristers; other professions including solicitors are not merger precluded.

Why should a nil-merger policy apply to barristers? As it cannot be on the grounds of promoting competition, the policy can be justified only on other grounds. The Bar Council argues that the sole trader rule is essential for access to justice, for the ethical practice of law and for the administration of justice, propositions two and three as identified earlier. However, as with the first proposition, these do not provide a basis for requiring barristers to be sole traders.

Proposition two: Sole trader rule facilitates access to justice.

The Bar Council, and its advocates, argue that the sole trader rule promotes access to justice. The argument is that requiring barristers to be sole traders facilitates the cab rank rule and enhances access to justice. In essence, even the smallest and weakest litigant, or the litigant with an unpopular case, can get the best barrister. Paul Gallagher, for example, presents the argument as follows

.

> "Because barristers are independent and do not concentrate in partnerships, particularly speciality partnerships, the choice of advocate open to litigants is significantly greater than it otherwise would be; their independence is more assured; their capacity to do pro bono work and no foal/no fee cases is greater because it is not dependent on anybody else's approval."[17]

The Bar Council has argued that any accountability to others rather than to oneself will reduce the ability of barristers to take on unpopular cases, or cases which might displease powerful interests, and that this would impair the administration of justice.[18] In addition, the Bar Council has criticised the Competition Authority as being unconcerned with access to justice for "impecunious" clients and described the Authority as being "concerned with the demand from and needs of commercial users and is not concerned with consumers of low (or no) income."[19]

At least three arguments deny the plausibility of the claim that access to justice is dependent on the sole trader status of practising barristers.

First, the smallest litigant cannot approach any barrister in a contentious matter – they must first approach a solicitor.

15 This is illustrated by the attrition rate of barristers, approximately 15% of barristers leaving the Bar within five years of starting, as reported by the Bar Council to the Competition Authority. The Competition Authority, *"Competition in Professional Services: Solicitors and Barristers"*, December 2006, page 26.

16 Paul Gallagher "*Can Ethics be Competitive?*", Bar Review, November, 2005, page 144.

17 *ibid* page 145.

18 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, pages 23-24 and pages 51-52.

19 *ibid* page 54.

Second, while the cab rank rule suggests access to any barrister, in practice barrister availability is not constant over time. Barristers are not always available due to other commitments, and there is always the possibility of the barrister's fee being too expensive for the litigant.

Third, and most importantly, a sole trader may be less willing and able to accept a difficult case, even if he or she would like to, than a partnership. As illustrated below the reason is immediate; the risk of a negative outcome from the case, including the risk of non-payment, falls exclusively on one pair of shoulders.

Imagine, for example, a solicitor approaches a barrister saying they have a vital case where their client has suffered a grave injustice, a case that will certainly create legal precedent, and a case that will enhance the reputation of any legal representative who takes the case on. The barrister will recognise that the case presents an important career opportunity. But in addition imagine that the solicitor also advises that there is a significant downside risk that the client cannot afford to pay for legal representation and the opposing side is likely to fight the case vociferously. Some barristers may well be willing and able to take on such a case. But others, irrespective of their legal skills and motivation, may not be willing or able to individually absorb the financial risks.

In contrast, where options other than an individual bearing the entire risk exist the result may be quite different. Firms are better able to handle many forms of risk than sole traders simply by spreading risk across a broader and shared capital base, either via partnerships or shareholders, depending on the precise form of the firm. Consequently a firm of barristers will face less financial pressure to turn down a difficult case – as the risk may be spread over more than one set of shoulders.

A firm will be able to take a reasoned and rational decision to allow, or even encourage, a barrister to take on a difficult case with the understanding that, in the future, he or she in turn will shoulder part of the risk when other members of the firm takes on other difficult cases. In addition, from the firm's longer term perspective, taking on and winning difficult cases would see its reputation enhanced and therefore the firm would have every incentive to do so.

Of greater importance, and direct relevance to the proposition in question, is the impact on access to justice. Sharing of risks, including the downside risk of litigants of limited ability to pay, will increase, not decrease, access to justice for small, low-income or unpopular litigants. It is clearly possible that some barristers will be willing, and hopefully able, to carry the risks individually. But the existence of such well endowed individual barristers does not imply that access to justice, particularly for impecunious clients, is best served by a sole trader rule which requires the downside risks to be carried only by individual barristers.

Proposition three: Sole trader rule is essential for ethical practice of law and the administration of justice.

In supporting the Bar Council's argument, Paul Gallagher argues that "[a] practising barrister has an overriding duty to the Court to act with independence and to ensure in the public interest that the proper and efficient administration of justice is achieved and the [C]ourt is not deceived or knowingly or recklessly misled."[20] He goes on to state further that "[s]ubject only to his or her duty to the court, barristers must promote and protect fearlessly and by all proper and lawful means the best interests of their lay client and do it without regard to their own interest or to any consequences to themselves or to any other person."[21]

The argument can be separated into two parts. First, the administration of justice depends on ethical conduct and, second, the ethical requirements on those involved in administering justice can only be achieved by way of the sole trader requirement. This implies that a rule requiring organisational independence is a perfect, or at least a good, instrument to maintain the ethical behaviour required for the integrity of the administration of justice.

It is not in dispute that ethical behaviour is vital to the sound administration of justice. Furthermore, rejecting the merits of a sole trader requirement does not require rejecting the view that the sole trader business model can promote ethical behaviour. Rather, the argument against a sole trader requirement is more modest, and consequently stronger, i.e. the sole trader business model is not uniquely suited to the role of promoting ethical behaviour; other business structures are also compatible with ethical standards and the promotion of justice.

The proposition that the sole trader restriction promotes justice and ethical behaviour appears to rest on the idea that temptation and conflicts of interest exist only where a professional operates within a group. This does seem an extreme position and one at variance with modern life.

It is not correct to describe the sole trader business model as one free from "personal interest or external pressure". Any sole trader will tell you that he/she has a direct personal interest in the business. Indeed, for some sole traders, a single large matter may make or break them, particularly in the early stages of their career. A sole trader may also be more economically dependent on one client, from either the private or public sectors, or on one matter, than would be the case for other business structures.

The key issue is the relative incentives on barristers in different organisational settings and unfortunately the lacuna in the reasoning of the Bar Council argument is to not recognise the strength of the incentives for sole traders to take unethical shortcuts. The sole trader is more exposed to the risk of the business venture than in any other business structure. A larger firm is able by virtue of its size to absorb and spread risk. So a larger firm is able to take on riskier individual projects,

20 Paul Gallagher *"Can Ethics be Competitive?"*, Bar Review, November, 2005, page 144.
21 *ibid* page 144.

knowing that it is less exposed to the risk of failure than a smaller firm. Indeed, business structures other than the sole trader model evolved to facilitate high risk-high reward ventures. To protect those involved in these ventures, each business structure provides ways to manage potential conflicts of interest. For example, the modern corporation has developed in response to the need to provide a structure to protect the interests of passive investors in firms with substantial capital requirements. Of more immediate relevance to lawyers, firms with minimal capital needs and where the major input is labour, typically organise as partnerships.

Another strand to the pro-sole trader argument is that the individual barrister bears the entire cost of any sanction for a breach of the ethical rules. Paul Gallagher correctly observes that "[i]t is that shouldering of the individual responsibility, that individual answerability which helps ensure the ethical duties to the Court are discharged."[22] That the risk of sanction is not shared, not diluted, by others, is as much of a weakness as it is a strength.

To take the example of barrister partnerships: the entire partnership will suffer in the event of an ethical lapse. As the reputation of the firm is on the line, the partners have an interest in maintaining a high quality legal product. A partnership will thus have its own ethical rules as the partners know that they are all liable for the mistakes of any one of them. Therefore, the partnership business model may provide valuable ethical oversight for barristers, which is not a feature of the sole-trader business model.

In this context, I simply note that some ethical lapses, including but not limited to the solicitor profession, occur within the ranks of sole traders. To summarise this point, it is not the position of the Competition Authority that sole traders are more ethical or less ethical than other business forms, only that sole traders are not uniquely ethical.

Further observations: de-mystifying the bar

Richard Posner has compared craft guilds of medieval times and the US legal profession of fifty years ago. It is a comparison that still resonates in the Ireland of today. In describing the typical character of a medieval guild Posner observes:

> "The guild talks up pride in one's calling, the leading of a blameless life, loyalty to the guild, and equality among its members – seeks in other words to imbue its members with moral precepts and values communal rather than individualistic, calculated to reduce the likelihood that members will cheat on the restrictions the guild imposes on them. Tradition, not innovation; uniformity, not variety; emphasis on input rather than emphasis on output, hence emphasis on quality rather than on quantity and on doing one's own work rather than contracting it out or delegating it to employees – in short on making, on crafting, rather than on supervising the work of others – all are attitudes that the guild has been sedulous to cultivate."[23]

Posner goes on to argue:

> "In both forms of market organisation [the medieval guild and the American legal profession around 1960] cartelization is facilitated by the creation of an ideological community that genteelly resists the "commodification" of its output – resists, that is, the commercial values of competition, innovation, consumer sovereignty, and the deliberate pursuit of profit."[24]

We can observe echoes of these characteristics in Paul Gallagher's declaration that "Justice is not traded. It cannot be expressed in terms of output or price."[25] Similar sentiments are also expressed by John Cooke:

> "Clearly the formulation of competition policy for legal services involves the difficult task of balancing the public interest in procuring cost-effective availability of legal services …. against the social interest of retaining public trust in the quality and integrity of such services by not allowing the administration of justice to be governed by predominantly commercial criteria."[26]

In Posner's view gentility implies opacity, and an elevated status of the law beyond the immediate understanding of the public and in particular the client.

> "Law is an art, but also a mystery. Emphasis on formal education attracts intellectually agile aspirants whose forensic and analytic efforts intellectualize professional activity, making that activity increasingly impenetrable by the lay understanding. One is put in mind of the relation between the clerisy and the laity in the medieval Church."[27]

Posner further argues that there will be entry restrictions to at least reduce the flow of new entrants. He argues that "even if it is infeasible to fix the price of legal services – a further difficulty being the heterogeneous character of those services – or to limit the output of individual lawyers or law firms, as long as the number of lawyers is limited some lawyers will enjoy monopoly returns"[28]

To quote Posner again, this time specifically in relation to the development of the English bar (which is also relevant to the profession in Ireland), Posner observes:

> "To become a barrister an aspirant had to be 'called to the bar' after a period of residing and studying in an inn of court. Because such residence was costly and because a barrister could not work for another barrister but instead had to depend on cases referred to him by solicitors, who were naturally reluctant to refer cases to a beginner, the career of a barrister was largely limited to persons of independent means. As a result, the supply of barristers was restricted, and while many barristers had therefore very high incomes, those who lost out in the barrister lottery by failing to obtain cases from solicitors eked out a meagre living, often supplemented by moonlighting, for example as a journalist."[29]

22 *ibid* page 145.
23 Richard Posner *"Overcoming Law"* 1995 page 43.
24 *ibid* page 56.
25 Paul Gallagher *"Can Ethics be Competitive?"*, Bar Review, November 2005 page 146.
26 John Cooke *"Competition in the Cab-rank and the Challenge to the Independent Bar"*, Bar Review July 2003 page 149. Also quoted in Paul Gallagher op. cit.
27 Richard Posner *"Overcoming Law"*, 1995 pp. 57-58.
28 *ibid* page 51.
29 *ibid* page 47.

The Bar Council and its advocates would undoubtedly counter this by arguing that there is no limit on the number of entrants into the Law Library and consequently monopoly profits cannot be traced back to any entry barriers. However, this misses the point; the sole trader requirement affects entry by increasing the risks to new and aspiring barristers, because the option of joining a firm is not available to them to ameliorate such risks.

John Cooke has described the challenge for the Bar as "having to get across a subtle, difficult and sophisticated argument which seeks to get away from defending the merits of each individual rule, by demonstrating that the rules as a whole form a coherent structure which defines the nature of the independent role of the practising barrister."[30]

The implication, but in my view not a strong one, is that the required ethical standards and the independence of the individual practising barrister are somehow tied to the sole trader rule.

But if the laity peers behind the subtlety and mystery of the Bar Council and others of a like mind, four observations can be made:

- Barristers are not as independent as they claim;
- There are potential benefits to barristers from modern business structures;
- Neither economic analysis in general, nor competition policy in particular, are antithetical to justice; and
- The future of the Law Library need not be threatened by modern business structures.

Barristers are not as independent as they claim

A barrister is not free from commercial interest, unless they have the happy distinction of owning sufficient wealth to not need further income. Barristers are paid by the case. Like the professional golfer, a barrister has to turn up and make the cut. Failure to do so leads to no reputation, no work, and ultimately no money. There are no partners or firm to provide an alternative source of revenue. There is no guaranteed income and no guaranteed pension. This is hardly a paradigm of independence, if by independence is meant freedom from personal interest or external pressure.

The incomplete independence of barristers can be illustrated by comparison to the judiciary and the contrast could not be greater. Judges are paid a salary and for good reasons a judge has no financial interest in the outcome of a case or the size of the award. Furthermore, a judges' salary is independent of the number of cases managed or decisions made.

Barristers' pay contrasts strongly with that of judges. A barrister is paid only for work done and the barrister also has a direct financial interest in the outcome. We have learned, from the Haran Report and from work undertaken for the Competition Authority,[31] that the largest determinant in the size of legal fees is the size of the award. We also know that barristers routinely mark fees after the conclusion of the case.

It could perhaps be tempting to jump to the conclusion that independence requires all the lawyers in a court to be paid salaries; tempting but incorrect. It should be remembered that the barrister and the judiciary perform different functions; the barrister advocates and the judge judges. While the links between barristers and the judiciary are historically strong, I would also note that this distinction is now stronger given the recent appointment of solicitors to the Bench. This also indicates inter alia that the position of judge is now not uniquely available to the career path of barristers.

Simply stated, barristers have a direct financial interest in increasing the size of awards – a far cry from the financial independence the current system is supposed to underpin. In these circumstances, I do not accept that ethical conduct and the administration of justice are necessarily best underpinned by the current system.

Potential benefits to barristers from modern business structures

The practice of law is not a uniquely solitary endeavour. Full knowledge of the law does not exist within a single human mind, no matter how learned or able. Neither can one individual be possessed of all relevant legal skills. The law is no different to other sectors in this regard. The difference is that other industries and professions allow greater flexibility and specialisation in how services are delivered.

The Bar Council, of course, recognises this. Barristers routinely work with each other and with solicitors. However, and this is the important point, the Bar Council insists that these arrangements are by temporary arrangement, and limited to each case/matter.

- "Effectively, the [solicitor] firm enters into an ad hoc joint venture with a barrister for a particular case and incurs no cost burdens for doing so other than those agreed with the individual barrister for the particular case."[32]

In this way, a barrister is said to be independent. On one matter, the barrister works with one set of barristers and/or solicitors. On another matter, they may work with another set of barristers and/or solicitors. Indeed, a barrister may, whether out of design, habit or accident, work with the same set of barristers and/or solicitors on all matters — provided that barristers do not hold themselves out as being a permanent group.

This ad hoc approach works well for some legal matters, maybe even most, given the current style of legal practice in Ireland. However, such arrangements are not necessarily the best means of organising the legal profession for all matters. Legal practice is not isolated from social and economic change, nor should it be. Supplying legal services is subject to the same economies of scale and scope, the same requirements to manage labour inputs and risk that are relevant to all markets – particularly ones in the service sector and in the professions.

Actual practice proves this to be the case. The sole trader rule does not

30 John Cooke *"Competition in the Cab-rank and the Challenge to the Independent Bar"*, Bar Review, July 2003, page 152.

31 Competition Authority *"Competition in Professional Services: Solicitors and Barristers"*, December 2006, pages 140-142.

32 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, page 21.

forbid a barrister from having employees – it simply forbids having employees who are members of the Law Library. We know that some barristers employ researchers and this implicitly acknowledges that some legal work is more efficiently coordinated within a firm – rather than at arms length via contractual arrangements with persons outside the firm. This is a perfect example of Coase's observation, mentioned earlier, concerning the choice of internal coordination versus external contracts.

The employment of researchers recognises the importance of delegating certain types of work to junior staff, who work under the supervision of a more senior professional. This is an important consideration in the management of every law firm, firms and organisations in other professions, and indeed businesses in all sectors of the economy.

Economic analysis and competition policy are not antithetical to justice

Not having grown up in the Irish legal system, I have often found it difficult to understand the opposition of the Bar to modern business structures. However, at the core of that opposition seems to be an idea that economics cannot be applied to the legal profession, that competition policy and legal services are incompatible, at least at some level. This can be seen, for example, in the comment of John Cooke:

> "Undoubtedly, if you start from the premise that the public interest in the provision of professional services is primarily an economic one – value for money – it can be difficult to justify many of the traditional practices of the profession including a ban on advertising and on one-stop-shop practices of mixed professions."[33]

The implied criticism of economics is misplaced. Economists have long been aware of the importance of justice, both to the welfare of citizens and to the operation of the economy. The division of labour and specialisation which Adam Smith described in his pin factory could not have existed, and no gains from trade, either domestically or internationally, would be possible in the absence of a legal system which clearly assigns rights of property. In the absence of a legal system, including a system for assigning property rights, settling civil disputes and administering criminal law, there can be no benefit from trade and consequently no increase in living standards.

Paul Gallagher also speaks for many when he states the following:

> "Barristers' services are an input into this system. Barristers undoubtedly render services to clients and like any other service providers, these services may vary in quality and price. … However, the product into which barristers' services are input is not an economic product. Justice is not traded." [34]

Indeed justice is not traded, and nor do I or the Competition Authority advocate this. The focus of the Competition Authority Study is not on the trading of justice, but rather on the trading of legal services, including barrister services.

In addition, the description of justice as a product is potentially misleading. If one is determined to use economic terminology, it would be better to describe justice as a public good; i.e. one which benefits the whole population[35] as well as creating private gains and losses for those involved in any particular case. If understood in this way, then two important characteristics are apparent. First, a system of justice is a prerequisite for the welfare of citizens. Second, and of particular relevance for the Bar, the public benefit of a good justice system is dependent on the actions not just of public bodies, in particular law makers in parliaments and courts, but also on the actions of private firms and individuals, including clients, solicitors and barristers.

Consequently, the importance of justice for the welfare of citizens, and the stability and development of society should not immunise the justice system or its components from economic analysis. On the contrary, economic analysis, including regulatory and competition policy, have important roles to play.

The enforcement of codes of ethics and safety regulations, including the Barrister's Professional Conduct Tribunal provide a level of protection for the public. At the same time, the market imposes a sanction immediately, through loss of reputation and ultimately business. Reputation is a valuable asset, indeed the most valuable asset for a professional. If a barrister has a history of being underhanded or omitting material facts or cases from the court, a purchaser of legal services will be less willing to retain such a barrister. Buyers will not return to unscrupulous or otherwise inferior suppliers. Buyers, who have limited time to search the market, will also place a value on brands, or other signals, which indicate quality and reliability. It is therefore no surprise that firms, including solicitor firms, invest resources in maintaining the integrity of their brand names.

Reputation and ethical issues are not, in fact, unique to the law. Nor are they unique to professional services. In real world markets, where there is imperfect information and where suppliers compete on quality as well as price, ethical conduct has a value that is recognised and can be safeguarded either by regulatory means or by the market. Behaviour in compliance with such ethical rules is not solely dependent on a particular business structure. In particular, the promotion of ethical conduct is not monopolised by sole traders. Furthermore, in some circumstances, the sole trader rule operates as a disincentive to compliance with the ethical rules.

The Future of the Law Library

At the heart of the opposition of the Bar Council to the Competition Authority's recommendation on business structures appears to be a fear that allowing other business structures will necessarily transform or possibly even abolish the Law Library.

Clearly, the alteration of the sole trader rule would lead to some changes in the way in which barristers offer legal services. Such changes would, on balance, lead to more competition in the market and benefit consumers of barrister services. However, I think it is important to place this impact in a proper context.

33 John Cooke *"Competition in the Cab-rank and the Challenge to the Independent Bar"* Bar Review, July 2003, page 150.

34 Paul Gallagher *"Can Ethics be Competitive?"*, Bar Review, November 2005 page 146.

35 Public goods are usually defined as having two characteristics: (i) non-rival, i.e. the benefit of one person does not diminish the benefit of another person, and (ii) non-excludable; i.e. the benefits are not limited to one person or persons within a population.

The current nature of the barrister profession is not driven solely by the Bar Council rules on business structures. The professional structure of barristers is also driven by the predominant style of practice before the courts. This is an oral practice, based on oral submissions and examination and cross-examination of witnesses. The Bar Council has commented as follows:

> "The adversarial trial system of the Irish common law jurisdiction, as compared with other trial systems, is characterised by a number of obvious features:
>
> (a) The necessity of proof based upon direct oral testimony of witnesses under cross-examination and the production of original documents in proper custody.
>
> (b) The oral presentation of legal argument as a matter of contradictory debate.
>
> (c) The concentration of judicial time in the court hearing and the subsequent writing of judgements and not in pre-trial investigation and management of the exchange of written pleadings.
>
> (d) The much greater role played in trials by the rules of procedure and rules of evidence.
>
> (e) The degree to which progress of the case is dependent upon the initiative of the parties rather than that of the court administration of a judge."[36]

The Bar Council concludes that:

> "Efficiency and delivery of advocacy services involves the use of the particular skills which the adversarial trial system requires. These are skills which benefit from daily practice and familiarity with what is required; a capacity to deliver same produces significant efficiencies and cost savings. …. If this efficient system is to continue to thrive, it is vital that barristers engage in a sufficiently high volume of work and not merely advocacy on an occasional or sporadic basis."[37]

Oral advocacy, arguably, benefits less from divisions of labour and delegation than other styles of legal practice, such as written advocacy. After all, only one person can speak at a time. Accordingly as long as the style of practice in the courts remains an oral one, it is likely that we will continue to see a Bar specialising in advocacy, with the sole trader as the dominant business form for barristers. We need only look to Australia and New Zealand, where lawyers are not forced to choose between being a solicitor or a barrister; in those jurisdictions, many lawyers choose to specialise in advocacy and the title 'barrister sole' is common.

As legal and other changes cause barristers to alter their style of practice, I would expect to see barristers embrace changes in their business structures as well. Complex commercial matters, such as those to be considered by the new Commercial Court, may be better set out in written as opposed to oral form. If that is to be the case, allowing barristers to adapt to these changes in an incremental and evolutionary manner will allow consumers and suppliers of services to find new ways of doing business, which are entirely compatible with the objectives of ethical conduct and access to and administration of justice.

Conclusion

The Bar Council defends the sole trader requirement in terms of three propositions:

- The sole trader rule promotes competition;
- The sole trader rule ensures equal access to justice; and
- The sole trader rule is essential for ethical practice of law and the administration of justice.

These propositions are however a weak basis to defend the status quo. Competition is about more than market structure; far from encouraging competition, the sole trader rule restricts competition by precluding the development of business structures such as barrister partnerships, or barrister/solicitor partnerships, or other business.

The assertion that the sole trader rule is essential to achieving equal access to justice, ethical practice by barristers and the administration of justice significantly overstates the case. Sole traders do not have a monopoly on the ethical behaviour required to promote sound administration of justice. Neither is it the case the sole traders are necessarily better able than firms of barristers to promote access to justice by taking on difficult cases.

If, as is likely, the sole trader model is a good model for some barristers and for some types of work, it can co-exist with other business forms. In this respect, Ireland should not differ from other relevant common-law jurisdictions located in the modern world.

It would be tempting to interpret the hitherto stout defence of the sole trader Law Library status quo in terms of Nobel Laureate John Hick's famous remark that the best monopoly profit is "a quiet life", i.e. uninterrupted by competition. It would also be tempting to interpret it in terms of the seal of the Honourable Society of Kings Inns "Nolumus Mutari"; tempting and hopefully wrong.

The Bar Council's position in defending the sole trader rule is misplaced. Rather than being wedded to a particular business form from another era, I would encourage the Bar Council to modernise its thinking, embrace greater flexibility and seek to ensure that ethical rules are observed by a variety of business forms. In this way, competition, ethical behaviour, and access to and administration of justice will be safeguarded, to the benefit of clients, the profession and society. ●

36 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, pp 26-27.

37 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, page 27.

Oifig an Ard-Aighne

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A response to the Competition Authority's recommendation that the sole trader rule be abolished

Paul Gallagher SC.

This paper was delivered at the Bar of Ireland Conference held in Madrid on the 25th to the 26th May, 2007. It was prepared in response to a paper, "Implementing the Recommendations of the Competition Authority", delivered by the Chairman of the Competition Authority, William Prasifka, to a conference at the Irish Centre for European Law on the 24th April, 2007. The views expressed in this article are the personal views of Mr Gallagher. The paper was prepared and delivered prior to his appointment as Attorney General.

Introduction

In this paper I would like to address the recommendation of the Competition Authority ("the Authority") in its December 2006 Report ("Report") that the Bar should permit partnerships amongst barristers and/or a chamber system similar to that in England and Wales. This is a very far reaching recommendation. It does not involve the abolition of sole trader status as such but rather involves the co-existence of sole trader status with these new forms of organisation. It is nevertheless a very far reaching recommendation with very considerable and serious implications for the Bar's present organisational model based on sole trader status.

As the recommendation emanates from the Authority, it is entitled to and ought to be given serious consideration and it is vital that if the recommendation be rejected that it should be rejected for good and substantiated reasons. The Bar has very carefully considered this recommendation which was (in substance) made initially in the Authority's preliminary report[1] and believes that there is no valid legal or economic basis for the Authority's conclusion that the existing sole trader organisational model is anti-competitive. This paper will attempt to identify the reasons for that conclusion.

At the outset it is important to emphasise that the Bar's rejection of this recommendation is not based, as the Authority has suggested, on some naïve misunderstanding of the relevant economic principles. The Authority has publicly stated that the Bar has a naïve and incorrect view of competition and in particular, that it has mistaken rivalry for true competition in an economic sense. That criticism has recently been repeated by the Authority's Chairman in a paper discussed more fully below.[2] That criticism is unfair and is not justified by anything in the Bar's very detailed submissions which were made to the Authority in July 2005 ("the Bar's Response") and in particular in the detailed arguments and analysis contained in Chapter 4 of those submissions. Given the Authority's status it is important that it should neither misunderstand nor misstate the basis for the Bar's objections to its recommendation. It may well be that this misunderstanding by the Authority of the Bar's submissions is one of the reasons why the Authority has erred so fundamentally on this issue.

Before analysing the Authority's recommendations on the grounds advanced to justify the same, it is worth noting that the Bar has, in general, welcomed the Authority's report and has accepted those of its recommendations which it believes to be justified. Many of those recommendations were already in the course of implementation by the Bar, prior to the publication of the Authority's Report.

The Competition Authority Investigation

The Authority's investigation began in December 2001. In March 2003 the consultants appointed by the Authority, Indecon London Economics, published a report on the barristers' profession as part of the consultative process. The Bar responded to various criticisms made of it by Indecon. In the Authority's Preliminary Report which took two further years to complete, it was apparent that the Authority, without explanation or advance notice, had jettisoned many of Indecon's views and decided to adopt a new and different approach on a number of issues. The Bar felt that this Preliminary Report had not taken into account many of the points made by the Bar Council in its response.

Accordingly in July 2005, the Bar's Response was delivered to the Authority. It took the Authority a further 17 months to complete its study. Having taken this long to investigate the legal profession one would expect that the Report would contain a detailed analysis of the economic issues and a fully reasoned justification for the Authority's recommendations. Sadly this was not the case despite the extent of the deficiencies in this regard being pointed out to the Authority in the Bar's Response.

The Economic Analysis

The Authority's present approach is all the more surprising in the light of the criticism of this approach by Judge John D. Cooke of the Court of First Instance in his address to the ABA Conference on the 30th June 2005 which was subsequently published in the Bar Review. In that address, Judge Cooke,[3] referring to the Authority's rejection of the Bar Council's opposition to partnerships, asked whether the Authority had understood the Bar or the economics. He went on to say:

> "One would normally expect such a report to start with a definition of the precise nature and scope of the market under examination, and a detailed economic appraisal of the way in which it is actually operating. The unusual thing about this report [4] is that it appears, at least to me, to be surprisingly light on detailed economic investigation and appraisal. It is as though the authors began with a preconceived idea as to the correct economic model for a system of administration of justice, identified structures and practices in the Irish system which were incompatible with this model and then set about finding a rationale with which to dismiss the status quo."

Regrettably, the Authority's Report suffers from the same defects. The approach of the Authority seems to be that because different structures

1. Published 24th February 2005
2. Implementing the Recommendations of the Competition Authority" Paper delivered by Mr. William Prasifka at the Irish Centre for European Laws Conference "Competition and the Legal Profession" 24th April 2007.
3. See page 4
4. The Draft Report February 2000.

and models for the legal profession operate in other legal systems and those structures and models appear to offer more choice; it therefore follows that the sole trader structure operated in Ireland is anti-competitive.

This approach suffers not only from the absence of any detailed economic analysis but also from a fundamental failure to appreciate the diversity in legal systems throughout the European Union and in particular those features of the Irish legal system and Irish marketplace which are unique. Structures and systems that operate successfully in other countries cannot automatically be assumed to be appropriate for this jurisdiction. That is not to say that they are necessarily inappropriate. One is entitled however to expect that a body with the Authority's status and experience would not approach the matter on the basis of *a priori* beliefs and assumptions but rather on the basis of a rigorous and reasoned economic and legal analysis designed to ascertain whether the sole trader organisational model actually operating in Ireland is anti-competitive. I have made reference to the *"Sole Trader Organisational Model"* because while barristers are obliged to operate as sole traders, they are entitled to avail of certain sharing arrangements which provide significant savings and efficiencies which are not suggested by the *"Sole Trader"* designation simpliciter. However for ease of exposition, I will refer hereinafter to the sole trader but it should be understood in the sense explained above.

In a study of the legal profession which recommends changes with very far reaching consequences, not only for the profession but for consumers of legal services and for the system of administration of justice itself, it is to be expected that the Authority would at the outset identify the relevant services market in which the alleged anti-competitive effect is taking place. The striking feature of the Authority's report however is that it does no such thing. It satisfies itself with acknowledging that the legal profession has two types of lawyers, solicitors and barristers and stating:

> "Though it is possible that their services constitute separate relevant markets, and solicitors and barristers may be considered to be two separate professions, the close relationship between the services of solicitor and barrister necessitates that they be examined together. In this context, it is appropriate to refer to the market for legal services provided by both solicitors and barristers"[5]

It is an elementary requirement of any investigation of rules or arrangements which are suspected of having anti-competitive effects that the relevant product/services market be identified so that the investigating authority can establish by reference to the relevant market whether any anti-competitive effects actually exist.[6]

The Authority does not endeavour to explain how in the absence of the appropriate analysis it is entitled to make a formal recommendation suggesting that the exclusive sole trader status in the Irish Bar is anti-competitive. In so doing, it has not only ignored fundamental economic principles but it has also ignored the specific legal obligation laid down by the European Court of Justice *("ECJ") in Commission of the European Communities v Tetra Laval BV*[7]. It has done this notwithstanding that the existence of the decision was specifically drawn to the Authority's attention in the Bar's Response.[8] In that case, the ECJ pointed out that notwithstanding that the European Commission had a margin of discretion with regard to economic matters, the courts were required to establish whether the evidence relied on by the Commission was factually accurate, reliable and consistent and also whether that evidence contained all the information which must be taken into account in order to assess a complex situation and whether it was capable of substantiating the conclusions drawn from it[9]. The ECJ pointed out that such a review is all the more necessary in the case of the prospective analysis required when examining a planned merger with conglomerate effect. The ECJ went on to point out at paragraph 41:

> "Although the Court of First Instance stated, in paragraph 155, that proof of anti-competitive conglomerate effects of a merger of the kind notified calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects, it by no means added a condition relating to the requisite standard of proof but merely drew attention to the essential function of evidence, which is to establish convincingly the merits of an argument or, as in the present case of a decision on a merger."

Not only in the present case has the Authority failed to identify the relevant services market and to carry out the relevant market analysis but it explicitly acknowledges in its Report[10] that it does not know what is the most efficient method for organising barristers even though it has concluded that the mandatory sole trader rule is anti-competitive. The Authority states at paragraph 5.91:

> "Allowing alternative business structures to exist <u>does not imply that they are better models</u>[11] only that barristers should be free to choose the model which best serves their clients."

It also states at paragraph 5.106:

> "Allowing partnerships does not mean restricting sole traders, barristers would be free to choose whatever alternative suits them and <u>it will be for the market which will determine the most efficient method</u>."

If the Authority must await a future determination of the market to determine whether partnerships are a more efficient method of organisation than the existing sole trader system, then as a matter of logic, not to mind law, it cannot conclude that the present system is anti-competitive. This fundamental principle is entirely overlooked by the Authority and the reason why this is so is not difficult to detect.

An Alternative Business Structure?

The introduction to this particular section of the Authority's Report[12] identifies several possible business structures for delivering goods and services. It goes on to note that barristers are not allowed to form partnerships amongst barristers or to hold themselves out as practising as a group and then asserts at paragraph 5.57:

> "The restrictions deny lawyers in the State the freedom available to nearly all firms in nearly all other sectors to choose the way in which they operate. The effect of these restrictions is that lawyers are unable to organise themselves in ways which could be more efficient. Furthermore, the restrictions on business structures limit the availability of lawyers to offer consumers alternative ways of delivering legal services. The proceeding [sic] sections discuss these restrictions and their effects in more detail."

It is therefore obvious that the Authority's analysis commences with the a priori premise that the existing system is anti-competitive. It proceeds on the basis that its role is then confined to determining whether the justifications advanced by the Bar satisfy the criteria of necessity and proportionality. This approach would be wrong in the investigation of any economic sector. In the case of the legal profession, the approach flies in the face of two other decisions of the ECJ which specifically deal with issues of competition in the provision of legal services namely the *Wouters* and *Arduino* decisions[13].

The *Wouters* decision

In *Wouters*, the ECJ ruled on a regulation *("the MDP Regulation")*[14] of a professional association (the Dutch National Bar Association) which prohibited Dutch Bar members from engaging in multi disciplinary partnerships. The proceedings before the ECJ arose from disciplinary proceedings which the Dutch Bar, on account of the alleged transgression

5. Paragraph 1.16
6. Opus cit *Technique Miniere v Machinenbau Ulm* 1966 ECR 235 Case 56/65
7. Unreported 15th February 2005 Case C – 12/03
8. See paragraph 4.5.
9. Paragraph 39 of the Judgment
10. Paragraph 5.106
11. Emphasis added.
12 See paragraph 5.54 and following
13 2002 ECR1-1577 and 2000 ECR 1-1529
14 Multi Disciplinary Practice Regulation

of the MDP regulation, had taken against two Bar members who were deemed to have engaged in unauthorised professional co-operation with accountants belonging to Arthur Andersen and PWC member firms.

Wouters has been described as a remarkable judgment in that the reason given by the court in the first part of the judgment to confirm that the MPD regulation was adopted by an association of undertakings and accordingly was subject to Article 81 EC was apparently discarded in the second part which determined that competition rules do not apply to restrictive effects that are inherent in rules that have been adopted to ensure the proper practice of the profession.

There are many different views on the ramifications of *Wouters.* It is generally recognised however that the decision creates a subject matter exception to Article 81(1)EC which benefits certain professional conduct rules. Provided such rules aim at securing compliance with certain *"fundamental principles"* of the profession e.g. independence or professional secrecy, that reflect the *"prevailing conceptions"* of the professions, in the member state at issue and provided the restrictive effects inherent in such rules do not go beyond what is necessary to ensure compliance with the profession's principles, then the professional conduct rules will escape the application of Article 81 EC altogether. The ECJ, having considered the ban on MDPs and its justification, concluded at paragraph 110:

> "Having regard to all the forgoing considerations, the answer to be given to the second question must be that a national regulation such as the 1993 regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85 (1)[15] of the Treaty since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the member state concerned."

It follows that any conclusion that a rule of the Bar constitutes an unlawful restriction of competition within the meaning of Article 81(1) necessarily involves a consideration of the justification for the rules and in particular whether the Bar could reasonably have considered that such rule is necessary for the proper practice of the barrister's profession. This was not the approach taken by the Authority.

Existing Arrangements Work Well

A further and very revealing insight into the Authority's approach to its investigation has emerged from a recent paper delivered by Mr. William Prasifka, the Authority's Chairman on the 24th April 2007 to the Irish Centre for European Law, speaking in his capacity as chairman.

In that paper Mr. Prasifka re-iterates views expressed by the Authority in its Report that the present rule requiring all barristers to be sole traders is:

> "Completely disproportionate to what has in fact never been a problem to date – even on that side of the profession that does not face restrictions in firm size – excessive concentration on the market for legal services."

This statement as to the complete disproportionality of the rule is of course entirely inconsistent with the following remarkable concession made by Mr. Prasifka in this recent paper (hereinafter, the views expressed in that paper will be referred to as those of the Authority). With regard to the Bar's existing arrangements:

> "I have no doubt that such arrangements work well for many legal matters. I also have no doubt that for <u>some</u>[16] legal matters, <u>maybe even most</u>[17] (given the current style of legal practice in Ireland) that such arrangements may be the best and most efficient means of organising the legal profession. However there is also something else over which I have no doubt, which is that such arrangements are not the best means of organising the legal profession for <u>all</u>[18] matters. They cannot be. Legal practice is not isolated from social and economic change, nor should it be. Supplying legal services is subject to the same economies of scale and scope the same requirements to manage labour inputs and risks that are relevant to all markets – particularly ones in the services sector and in the professions."[19]

There are a number of comments to be made on this. In the first instance while purporting to comment on barristers the paragraph refers to the organisation of the legal profession. One must assume therefore that the Authority is talking about the legal profession in general and not just barristers particularly when as we know, the Authority regards them as operating in one market. The reality is that many services provided by the legal profession are provided through firms. The Bars position is that a sub-set of those legal services, namely advocacy services, are best provided by sole traders. The evidence provided by barristers suggest that the sole trader method in this jurisdiction achieves enormous economies of scale while being best suited to the discharge of the particular and unique ethical obligations imposed on advocates.

Secondly, the Authority acknowledges that given the current style of legal practice in Ireland, such sole trader arrangements may be the best and most efficient means of organisation. If that is so, what conceivable justification could there be for undermining that system.

The Law Library and Economies of Scale

Leaving those matters aside however, I intend to look at some of the matters disclosed by the Authority in the April paper as justifying its criticisms of the sole trader model. In this regard, it should be noted that the Report and the paper asserts that the "restraint"

> "Prevents barristers from organising the supply of their services in <u>possibly</u>[20] more efficient ways and from realising potential economies of scale. It is stated that the restriction prevents barristers practising as a group of sole traders and as such prevents barrister's ability to exploit the potential efficiencies that can arise from being able to build a shared reputation and from the economies of scale that would flow from group advertising. The restriction further prevents barristers and consumers from reaping the benefits of barristers' partnerships – increased pool of knowledge, reduction in transaction costs, new ways of doing business, sharing of risk and the ability to adapt to meet clients' needs. It is also suggested that this organisational method acts as a barrier to entry."

These criticisms of the sole trader rule mirror the criticisms made by the Authority in its preliminary report in February 2005. In the Bar's response, it pointed out that the Authority's criticisms took no account of the enormous economies of scale which the present sole trader status generated.

The Bar Council pointed out a critical element of the existing sole trader system which had not been understood by the Authority or taken into account by them, namely the fact that barristers were permitted to avail of all of the economies of scale that might be available to partnerships or to barristers operating in chambers. This is because the number of barristers contributing to the operation of the Bar Library system enables economies of scale to be achieved that are significantly greater than can be achieved by much smaller partnerships or chambers. It said that barristers, in addition to the possibility of practising exclusively from their home, exclusively from the Law Library or exclusively from an office which they

15 Now Article 81(1)
16 The Authority's emphasis
17 My emphasis
18 The Authority's emphasis
19 Page 8 of the Paper
20 Emphasis added

Continued on page 151

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A directory of legislation, articles and acquisitions received in the Law Library from the 23rd of May 2007 up to 20th June 2007.
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Abbreviations

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Law Society of Ireland
IBLQ = Irish Business Law Quarterly
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal

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operated on their own could:

(a) take up a tenancy in one of the premises owned and operated by the Bar Council in Church Street;
(b) take up a tenancy in other offices in which circumstances there is no restriction on the number of barristers who may choose to gather together as co-tenants;
(c) purchase office premises on their own and again there is no restriction on the number of barristers who might gather together to purchase and conduct their business from private office space.

It was pointed out that in each of the situations outlined above, barristers were permitted to and did share the costs of office space, reception and secretarial costs, rates and insurance (other than professional indemnity insurance), library and database costs and service charges and maintenance fees. It now appears that the Authority's investigation proceeded at least to the stage of the Preliminary Report on the basis that barristers operating as sole traders had no possibility of achieving efficiencies or savings through sharing arrangements. This misunderstanding of the true nature of the sole trader status was of course of crucial importance.

In its Report, the Authority then ignored the fact which had been clearly explained by the Bar that this sharing of costs was permitted and had been permitted for some time. Instead it chose to characterise this information as representing a *"recent relaxation"* in the rules.[21] Such a characterisation might appear to excuse the fact that the Authority in over two years of investigations had not identified this crucial fact which was centrally relevant to any estimation of the comparative costs and efficiencies associated with the existing sole trader system and that associated with the alternative systems suggested by the Authority.

One would have thought that having obtained this important information the Authority would have sought details with regard to the sharing of costs and consequent efficiencies and would then have reconsidered the recommendations contained in its Preliminary Report. This the Authority did not do but instead asserted that this was "*at best a limited relaxation on the freedom of barristers to choose their organisational form*"[22] and then rather surprisingly concluded that these facts not only did not assist the Bar's defence of the sole trader system but had the quite, in so far as the Bar was concerned, unintended effect of undermining that justification. The Authority stated at paragraph 5.76 of its Report:

> "In the light of the new rule, most of the Bar Councils arguments in opposition to barristers practising or holding themselves out as a group cease to have any real merit."

The Authority does not appear to have understood that this information meant that up until then, its analysis had proceeded on an entirely wrong premise. Furthermore, that without knowing the extent of savings and efficiencies generated by these sharing arrangements, it could not possibly conclude that the alternative form of sharing suggested by it, namely of partnership or chambers, which would normally if not inevitably involve a sharing over a much smaller grouping of people, could achieve greater cost savings and efficiencies. It is difficult to understand how the Authority can have taken the view that evidence which objectively supported the Bar's position with regard to existing efficiencies in fact undermined the merits of that position.

The Lack of Cost Analysis

Having so concluded, it is not surprising that the Authority maintained its position that the system of chambers operating in England and Wales and legal partnerships operating in other jurisdictions presented a more competitive model of organisation. That conclusion implied that the Authority had carried out a detailed study of those alternative forms of organisation, had reviewed the efficiencies and cost savings generated thereby and were in a position to demonstrate the superiority in competition/efficiency terms of such alternative methods of organisation. Regrettably however this is not the case. Following the publication of the Preliminary Report, Mr. Jerry Carroll on behalf of the Bar Council, in a letter of the 22nd March 2005, asked the Authority to identify what information they possessed in relation to:

(a) The operating costs of chambers generally,
(b) The operating costs for first year barristers in chambers;
(c) The operating cost for barristers of two to ten years standing in chambers;
(d) Access to chambers by prospective barristers and in particular how such access is determined and by whom;
(e) The extent to which chambers tend to specialise in particular areas of practice.

In a reply of the 6th April 2005, Mr Dermot Nolan, who managed the Authority's study of the Professions, pointed out that the Preliminary Report was:

> "To provide the Authority's initial views on the legal profession, and to elicit responses from interested parties. The Authority has not sought to undertake a detailed cost analysis of different models of organisational form. It has analysed the restrictions on competition within the legal professions and is interested in any further justification you have for such restrictions. If you disagree with any of the analysis or proposals I would encourage you to specify why in any submissions you make."

In a letter of the 11th April 2005, Mr Carroll wrote and said:

> "that any cost analyses or raw data which [you] may have in relation to that model [i.e. the chamber system] or to the other sections of the Preliminary Report and which you would be prepared to share with us, would greatly assist the Bar Council in drafting its detailed submission to the Authority's Report generally."

Mr Carroll sent a reminder on the 9th May 2005 but never received any response from the Authority. The reason is plain. No such analysis was available. None is included in the Report.

It is apparent from Mr Nolan's letter of the 6th April that the Authority did not undertake a detailed cost analysis of different models of organisational form but nevertheless proceeded, without even understanding how the sole trader system actually operated in practice, to conclude the system was anti-competitive. Mr Nolan's letter is very revealing in stating that the Authority has *"analysed the restrictions on competition within the legal professions"* and wished to obtain any further justification which existed for such restrictions. This meant that the Authority, without doing the necessary economic analysis, had concluded that restrictions existed. This is not the appropriate approach which it was required as a matter of law to take. Secondly, the Authority had arrived at the conclusion in its Preliminary Report without ever obtaining or considering the detailed submissions on this issue from the Bar. In other words, the Authority was not, as had appeared to be the case, seeking the Bar's submissions as to whether or not restrictions on competition existed but only sought the Bar's views on whether these restrictions could be justified.

It was surprising that the Authority had reached preliminary conclusions without this information concerning the costings and efficiencies of the alternative models in other jurisdictions which it was recommending. The Authority's failure to obtain this information before preparing its Report over

21 Paragraph 5.59 of the Report.
22 Paragraph 5.59

eighteen months later is inexplicable.

The Coase Theory

It now appears from the April paper delivered by its chairman, that the Authority's assumptions with regard to inefficiencies and higher costs resulting from the inability to work as a group or in a partnership, is based at least in part on the theory of the firm as explained by Professor Ronald Coase, Nobel Laureate. The paper refers to an unexceptional general comment by Professor Coase which is described in the paper as a fairly simple and obvious observation, namely:

> "the limit to the size of the firm is set where its costs of organising a transaction [internally] become equal to the cost of carrying it out in the market."[23]

The Authority then goes on to say:

> "Artificially restricting the size of a firm through rules such as the sole trader requirement (i.e. the number of barristers if restricted to one) disallows the creation of savings that may be available by organising certain activities within the firm. Ultimately, the consumer is harmed because unrealised savings and efficiencies cannot be passed on." [24]

Having established this slender edifice on which to base the far-reaching conclusion of anti-competitiveness, the paper explores no further any issue of costs or savings but instead purports to address the Bar Council's justification for the sole trader requirement, having dispensed with the necessity of establishing any material restriction on competition resulting from that requirement.

The economic edifice on which the Authority's conclusion is based merely suggests that in the context of the barristers' profession, the creation of firms may make available certain savings which can be passed on to the consumers. This acknowledgement of course ignores a fundamental requirement of competition law, namely that the intervention by a regulatory authority is only justified where it is established as a matter of probability and not merely possibility that there is a material anti-competitive effect and that there are savings or benefits not passed on to consumers. If all the Authority can say is that savings *"may"* be available, this cannot justify a finding of anti-competitiveness. Professor Coase never intended that his general observation should replace the necessity of analysing in any given circumstance by reference to the features of the relevant market what efficiencies exist and are being passed through to consumers. Professor Coase has frequently made clear his dissatisfaction with how basic economic theory itself is used and in particular with the failure to consider the realities when applying the theory. In *"The New Institution of Economics"*[25] he said:

> "This dissatisfaction is not with the basic economic theory itself but with how it is used. The objection essentially is that the theory floats in the air. It is as if one studied the circulation of a blood without having a body."

This reliance by the Authority on this particular aspect of Professor Coase's writings ignores other important contributions made by Professor Coase in the context of regulation generally which are particularly apposite in the present case. Professor Coase in an interview published in Reason magazine provided a warning as to the dangers of regulation in graphic terms.

> "I do not say that regulation will be bad. Let's see, what we discover is that most regulation does produce or has produced in recent times, a worse result. But I would not like to say that all regulation would have this effect because one can think of circumstances in which it doesn't."

Reason:

> "Can you give us an example of what you consider to be a good regulation and then an example of what you consider to be a not-so-good regulation?

Coase:

> "This is a very interesting question because one can't give an answer to it. When I was editor of the Journal of Law and Economics, we published a whole series of study of regulation and its effects. Almost all the studies – perhaps all the studies – suggested that the result of regulation had been bad, that the prices were higher, that the product was worse adapted to the needs of consumers, then it otherwise would have been. I was not willing to accept the view that all regulation was bound to produce these results. Therefore, what is my explanation for the results we had? I argued that the most probable explanation was that government now operates on such a massive scale that it had reached the stage of what economists call "negative marginal returns". Anything additional it does, it messes up. But that doesn't mean that if we reduce the size of government considerably, we wouldn't find then that there were some activities it did well. Until we reduce the size of government, we don't know what they are."

Reason:

"What's an example of bad regulation?

Coase:

> "I can't remember one that is good. Regulation of transport, regulation of agriculture – agriculture is A zoning is Z. You know you go from A to Z they are all bad. There were so many studies and the results were quite universal: the effects were bad."

It is reasonable to assume that Professor Coase's warnings against inappropriate regulation would be all the more stark if it transpired that the body recommending a new regulation for how barristers should organise had not carried out the necessary analysis before making its recommendation.

The Most Efficient Business Structure?

Perhaps the real explanation for this omission on the part of the Authority is the acknowledgement made by it on page 13 of the April paper under the heading *"The Sanctity of the Law Library"*. In that section, the Authority says:

> "The current nature of the barrister's profession is not driven solely by the Bar Council Rules and business structures. The professional structure of barristers is also driven by the predominant style of practice before the courts. This is an oral practice, based on oral submissions and examination and cross-examination of witnesses. The centrality of oral advocacy skills has been well described by the Bar Council…..
>
> Oral advocacy, arguably, benefits less from divisions of labour and delegation than other styles of legal practice, such as written advocacy. After all, only one person can speak at a time. Accordingly, as long as the style of practice in the courts remains an oral one, it is likely that we will continue to see a bar specialising in advocacy with the sole trader as the dominant form for barristers…..
>
> As legal and other changes cause barristers to alter their styles of practice, I would expect to see barristers embrace changes in their business structures as well. Complex commercial matters such as those to be considered by the new Commercial Court, may be better set out in written as opposed to oral form. If that is to be the case, allowing barristers to adapt to these changes in an incremental and evolutionary manner will allow consumers and suppliers of services to

23. Ronald Coase "The Firm, The Market and The Law" 1998 Page 7

24. Emphasis added.

25. 140 Journal of Institutional and Theoretical Economics 229 Act 230(1984)

find new ways of doing business. This is what the Competition Authority is advocating."

This statement if of course a reiteration of the earlier statement that the sole trader model is the best and the most efficient means of organising the legal profession for some, maybe even most legal matters.[26]

It is now apparent therefore that the Authority's recommendation of alternative forms of organisation is not based on an analysis which demonstrates the superiority in the context of the provision of advocacy services of such alternative forms of organisation. Much less is it based on a justifiable finding that the sole trader system is anti-competitive.

The difficulties with the Authority's approach are compounded by the fact that the April paper again misinterprets the Bar's position. The Authority says[27]:

"At the core of [the Bar's] opposition seems to be an idea that economics cannot be applied to the legal profession, that competition policy in legal services are incompatible, at least at some level."

Not only is this not the case but it is apparent from what I have explained above that the Authority has not applied the necessary economic analysis but rather has relied on assumption and assertion.

The Experience in Other Jurisdictions

The Bar's Response had in fact explained in some detail to the Authority why co-existing models did not work in economic terms and why consequently the Authority's recommendation was not justified in economic terms quite apart from any ethical considerations. The Bar stated:

"4.11 Elsewhere in this response, the Bar Council has highlighted methodological errors and omissions in the Competition Authority's analysis. However, in the present context, the Competition Authority has advanced the radical proposition that various forms of business structure should be permitted to co-exist without analysing any jurisdictions in the world in which such a system of co-existing structures has been seen to operate successfully for any length of time. This is so notwithstanding the fact that the Competition Authority draws regularly upon experience in other jurisdictions to support other propositions.The Competition Authority has based recommendations on the co-existence of these models without adducing any evidence of such co-existence and without making any attempt to take account of the significant differences between the market for advocacy services in this and other jurisdictions and also the significant differences in the whole system of administration of justice.

4.12 The Competition Authority has also ignored the evidence in the neighbouring jurisdiction of England and Wales. There, the Chamber system is long established, one of the difficulties associated with that system concerns people who have qualified but who cannot obtain access or entry to chambers. Such barristers are effectively precluded from practice without any opportunity to even begin to practice and clearly such a scheme may operate in an anti-competitive fashion, and has been criticised for being elitist. In the late 1980's, the English Bar Council, with a view to addressing this problem sought to introduce a Bar Library similar to our own Law Library from which barristers could operate as sole traders. The project failed very quickly because the English Bar Library was perceived by the market (and indeed many service providers) as being the refuge of barristers who were not good enough for Chambers.

4.13 The Competition Authority failed to take account of the significant differences of the distribution in size of solicitors' firms in this jurisdiction compared with England and Wales. The fact so many solicitors' firms comprise one man operations[28] makes it vital the full range of barristers services be available to that solicitor on a case by case basis. This not only enables the solicitor to engage the most suitable barrister for a case but to engage an entirely different barrister who may be more suitable for a different case. The fact that a solicitor has a full choice amongst a pool of 1,540 barristers[29] for each individual case results in significant cost savings as well as maintaining the highest quality standards. The network of small rural solicitor practices provides an important facility to the community and ensures access to justice and legal advice. In addition, it provides a cost efficient local competition to large urban based firms. The existing network of small solicitor practices is a positive feature of Ireland's legal market and a benefit to citizens. Notwithstanding the foregoing, the Competition Authority appears to be less than supportive of small local practices. At paragraph 5.52[30] the Competition Authority expresses its view that:

"It is unlikely that top advocates would base themselves on small rural firms. Where the Authority does not see any reason for protecting small firms from competition, it accepts that a wide spread of firms facilitates access to justice and local competition."

The Authority's response to these submissions is contained in 5.83 of the Report where it states:

"The Bar Council states that the Competition Authority has failed to examine any other jurisdiction where various business structures have been shown to co-exist successfully. Most jurisdictions that allow a number of alternative business structures to co-exist do not distinguish rigidly between solicitors and barristers for example the United States and New Zealand and thus are not directly comparable. No jurisdiction with barristers as a separate branch to solicitors allows barrister partnerships. With regard to co-existing models of sole traders only (no partnerships): some Australian states have both chambers and a Law Library and the two models co-exist – the barristers and the Law Library forming the minority. This may simply suggest that the Chambers model is a better model for the delivery of barrister services in most cases. The experience of England and Wales – where an attempt to introduce a Law Library model alongside Chambers failed – must be recognised in the context of a long established history of Chambers. In Ireland the Law Library model is the business structure with the long established history and thus likely to be retained."

In other words, the Authority is prepared to recommend a new form of organisational structure notwithstanding that it has no evidence that this will enable the sole trader model to survive. Also, no comparison has been made between the efficiencies generated by the Chambers system as compared with the sole trader which might justify the Authority's conclusion on the comparative advantage of one form of organisational method over the other.

Parallel Business Structures

The confidence of the Authority that both systems can survive is not based on evidence but on an expression that the sole trader system is likely to be retained because it has a long established history. The Authority does not explain how that long established history makes the sole trader system likely to be retained in any meaningful sense nor does the Authority provide any indication as to the form in which the sole trader system will be retained. It offers no assurance that the barristers who remain part of the Law Library system will not be regarded as inferior to barristers engaged in Chambers or partnerships, which is one of the Bar's main concerns. If they are, then of course the acknowledged advantages of the existing sole

26. See page 8 of the paper.
27. At page 10
28. 46%
29. Now 1868 barristers
30. The Authority's Preliminary Report

trader system will be lost forever. Furthermore, the Authority does not give any indication that it has studied the reasons why the attempt to introduce a Law Library in England and Wales failed. Rather it is satisfied to dismiss that evidence solely on the basis of a remark that the failure must be *"recognised"*, not explained, in the context of a long established history of Chambers.

Neither does the Authority address the Bar's submission that if a Chambers system or partnership system were allowed to operate in addition to the sole trader system, this would have significant cost implications. The Bar had explained:

> 4.25 "If a barrister does not wish to incur the expense of renting premises from the Bar Council or provide alternative office accommodation, he or she is provided with facilities in the Law Library which enable that person to practice as a barrister. In addition to the physical facilities, each barrister has access to every Act, instrument, judicial decision, from Ireland, the UK and other common law jurisdictions as well as learned text books and articles and to the Law Library staff that can find such resources quickly. These are the raw material of any barrister's practice. The costs associated with the library are borne collectively and provide a facility which no individual or partnership could reasonably hope to duplicate (and such duplication would be an inefficiency in itself).
>
> 4.26 It is absolutely clear therefore, that the rule does not operate to prevent economies of scale and cannot be said to result in any unnecessary increase in fees. If barristers were allowed form partnerships those in partnership would not contribute and subsidise the Law Library system, thus decreasing the economies of scale available in the current system and increasing costs for those participating in that system to the overall detriment of clients."

The Authority suggests that these concerns can be overcome by the Bar Council requiring devilling to be completed in the Law Library and continuing to subsidise this through the fees charged for the regulation of the profession i.e. Law Library subscriptions. This would seem to fundamentally ignore the difficulty in charging Law Library subscriptions to Chambers or partnerships which make no use of Law Library facilities. To overcome this difficulty, the Authority seems to be recommending that membership of the Law Library be made mandatory notwithstanding that no benefits are to be derived therefrom. At paragraph 5.93 the Authority states:

> "As mentioned earlier at present each barrister gives an undertaking to the Chief Justice that if he/she intends to practice, he/she will become a member of the Law Library. There is no reason why this position should change, a barrister could be a member of both the Law Library and a partnership."

This is an extraordinary statement. The rationale for forming partnerships was to generate efficiencies and cost savings. In order however to preserve the efficiencies and cost savings which the Law Library can generate for other barristers not members of the partnership, the partnership is to be obliged to contribute to the Law Library and subsidise its competitors. This is contrary to the most fundamental principles of competition. There is no basis in competition economics or law for requiring one competitor to subsidise another in that way. Furthermore, quite how it is envisaged that significant cost savings and efficiencies can be generated by requiring those who are members of partnerships to continue to subsidise the Law Library is not explained. It is perhaps difficult to envisage a better example of Professor Coase's concerns about bad regulation.

More fundamentally, this statement is an implicit acknowledgement that the sole trader system cannot survive in the market on its own if Chambers or partnerships are allowed. It must be subsidised. In other words, the advantages of the sole trader system will be lost unless the Bar is forced to subsidise it.

Notwithstanding the absence of adequate analysis, the Authority dismiss outright the Bar's concerns that allowing barristers to form partnerships or chambers will reduce choice for the consumer of barrister's services. In general terms, it is said that this does not happen in England but this of course ignores the quite different legal market operating in England including the fact that large numbers of practitioners are to be found in all areas of specialisation. Contrary to what the Authority says however, even in England, barristers in the same or similar areas of specialisation do form chambers together.

In the April paper, the Bar's arguments are dismissed on the grounds that the *"retail sector"* would not be more competitive if every outlet was individually owned and if that were the case, there would be no chain stores and it would be unlikely that supermarkets or department stores would exist. Quite what the retail sector has to do with the organisation of the barristers' profession is not explained. The Authority then goes on to imagine what other professions would be like in such circumstances and says:

> "There would be no firms of accountants, no architect partnerships, no GP practices and even no solicitor firms. The argument that the sole trader rule promotes competition is contrary to all that we have learned about modern business structures."

These extraordinary assertions are clearly intended to overcome the lack of analysis. The Authority seems to ignore the fact that we do have solicitor firms and that any analysis of the sole trader status must take account of that fact.

The Authority makes these assertions[31] before proceeding in the same paper[32] to recognise that the present sole trader arrangements may be the best and most efficient means of organising the legal profession in some, maybe even most, legal matters. The Authority, however, does not seem to appreciate the significance of this later finding for the earlier criticisms.

A Greater Choice of Barristers

The Authority also ignores the fact that the sole trader status greatly facilitates the ability of small solicitors firms (which on average comprise 3 solicitors) to compete with the larger firms through retaining counsel of their choice and not having that choice restricted by the existence of partnerships. As Judge Cooke pointed out in his Paper to the ABA, the Competition Authority in its Preliminary Report said:

> "If all the most successful barristers or a number of barristers who specialise in a specific area formed a partnership, they might be able to raise fees. It is unlikely this would happen in practice. The two-sided nature of litigation ensures that one partnership could not take all high profiled cases, the plaintiff and defendant could not be represented by the same partnership. There will always be strong incentives for talented partners to break away from a partnership that had market power to take up work that the "dominant" partnership could not take up due to conflict. This potential anti-competitive effect might be more serious in a chamber system, as barristers from the same chambers can act on either side of the same case. This is an advantage of the partnership system over chambers."

Judge Cooke commented:

> "It is not immediately clear to me whether this potential anti-competitive effect is the creation of partnerships or their tendency to break up. Nor is it clear why the ability of a partnership to act on both sides of the same case should be regarded as affording a competitive advantage as compared with chambers of sole practitioners. If the briefing of one of five partners for the plaintiff has the effect of depriving the defendant of access to the remaining four, why should

31 At pages 4 and 5

32 At page 8

this be less anti-competitive than briefing one of five barristers in a chambers where there will be no such foreclosure effect."

The Authority's answer to this is that if lawyers in a single area concentrate into the same firm, they will conflict themselves out of taking on new business and this would *"leave their area of expertise highly attractive for other lawyers to enter"*. This is an extraordinary proposition. It seems to be suggesting that the more barristers that are restricted from taking a particular case because they are all part of the same partnership, the greater the incentive for new barristers to enter into that area of expertise and ultimately acquire the necessary expertise to rival the existing experts. What clients will do in the meantime while these new entrants acquire the necessary expertise is not explained. Nor is it explained how it could be in the interests of the consumer or represent any form of allocative inefficiency that those who already have the necessary expertise cannot compete with each other because of the business structure adopted.

The Authority says the present rule requiring all barristers to be sole traders is completely disproportionate to what has in fact never been a problem to date – even on that side of the profession that does not place restrictions on firm size – excessive concentration of the market for legal services. This assertion of course ignores one of the fundamental reasons why this is so. The existence of an independent referral Bar enables the smaller firms to avail on an ad hoc / contract basis of specialist legal services for any client thus enabling those small firms to compete with the larger firms. By ignoring this fundamental fact, the Authority has arrived at a conclusion of disproportionality which is wholly untenable.

Northern Ireland and "the Bain Report"

The unstated implication of the Authority's report that its suggested forms of alternative organisation can intuitively be said to promote competition and therefore not to require any analysis, is undermined by the findings of Professor George Bain in his recent report on legal services in Northern Ireland ("the Bain Report"). In that report, Professor Sir George Bain recognised the importance of the sole trader system in the much smaller market for legal services which exists in Northern Ireland compared to England. His comments are of obvious application and relevance to this jurisdiction. On the issue of associations between barristers he concludes as follows:[33]

> "Barristers in the Northern Ireland Bar Library operate as sole traders selling a single product (advocacy services) in the market for legal services. On the supply side, membership of the Bar Library is available to all those who qualify as barristers. On the demand side, advocacy services are demanded by a large number of solicitors, many of whom are sole practitioners. Hence the market for advocacy services in Northern Ireland is "competitive" in the economists' sense of that term: a large number of sellers (barristers) offer, without any collusion between them, a relatively homogenous product (advocacy service) to a large number of buyers (solicitors).
>
> Allowing barristers to form associations would, by bringing them together in larger units, be a move away from the competitive model described above. Barristers specialise in certain aspects of law, in which there are a limited number of suppliers in Northern Ireland, could group together to form a local monopoly. By doing so they would be able to raise prices, engage in price discrimination, or even deny supply to certain customers. Hence we conclude that the current prohibition on association between barristers in Northern Ireland should be viewed as a pro rather than an anti-competitive restriction.
>
> This is our main argument in favour of maintaining the prohibition on barristers forming associations with other barristers. We have listened to the alternative view that if the Bar Library is as good as people say, that it should withstand competition from alternative models. If the prohibition were removed, we might see no significant change from the present structure with barristers continuing to act as sole traders. But we doubt if such a move would carry with it enough benefits to outweigh the risk of a reduction in competition. Indeed, we see a real risk that the choice consumers currently have of engaging the barrister of their choice would be limited by the introduction of associations between barristers.
>
> We also consider that the Bar Library offers benefits to consumers through providing barristers with economies of scale. It is highly unlikely that these economies would be matched if barristers formed chambers and had to provide their own accommodation and services. And those remaining in the Bar Library would undoubtedly have to pay more for the privilege with the inevitable outcome that these additional costs would be passed to the consumer.
>
> In summary, we consider that the current model of the independent referral Bar Library is one that works well in Northern Ireland and which offers consumers access to a wide choice of high quality, independent legal representation and advice. In our opinion, consumers have more to gain than to lose from retaining the prohibition on barristers forming partnerships."

The Bain Report demonstrates the dangers in making assumptions with regard to the advantages to be obtained by having a choice of organisational structure rather than the mandatory sole trader status. Professor George Bain found that the reasons (which were in substance identical to those advanced by the Bar in this jurisdiction) for retaining the sole trader system in the one legal jurisdiction with the closest and greatest similarities to this jurisdiction were valid. It is noteworthy that he did not dismiss this reasoning on the grounds that it confused rivalry with competition. Instead he identified the very pro-competitive features which the Bar Council had identified for the Authority but which the latter had ignored.

Barriers to Entry

The other argument advanced by the Authority to justify its recommendation is that the Sole Trader Rule makes entry into the profession more difficult.

Again no evidence is adduced for this proposition. The substantial increase in the numbers of barristers in the last decade belies this contention. The contention also ignores the fact of the substantial voluntary subsidisation of new barristers by existing barristers through the Law Library system and the minimal (in relevant terms) start up costs which barristers have to incur as sole traders as opposed to any other profession. It also ignores the changes in the Bar Council rules which remove any restrictions on solicitors transferring to the Bar. This ease of transfer provided not only another means of entry into the profession for aspiring barristers but affords them, if they are so inclined, the opportunity of building up experience and contacts through working in solicitors firms prior to entry into the Bar. The King's Inns is presently reviewing its educational rules to assist further those wishing to transfer from one branch of the legal profession to the other.

The Competition Authority states that the attrition rate of barristers *"15% as reported by the Bar Council to the Competition Authority last year"* is a testament to this barrier to entry. This is simply not so. In 2005, the numbers entering the Bar were enormous. A higher attrition rate was therefore to be expected. More particularly, this high attrition rate is consistent with easy entry. If entry is as easy as the Bar contends, then it is not surprising that many who enter find that they are not best suited to the Bar. Furthermore, many who enter do so for the purpose of gaining experience for a number of years and then moving on to some other legal occupation, whether as a solicitor or as an in-house lawyer. It is the very ease of entry into the Bar that enables them to do this. Most fundamental of all of course is the absence of any evidence to suggest that there are an insufficient number of barristers providing legal services. In order to draw a conclusion that the attrition rate provides evidence of barriers to entry, some estimation must be made of the extent to which the existing supply

33 See paragraphs 6.39 to 6.43 of *"Legal Services in Northern Ireland: Complaints, Regulation and Competition"*.

of barristers fail to meet existing demand. If, as the Bar believes, the supply exceeds the demand. then it is inevitable in the normal competitive working of the market that individual competitors will fail. This is the very essence of competition. If on the other hand, barristers were protected from competition and were acting in an anti-competitive way, then one would expect the attrition rate to be much smaller. The Authority offers no figures to support its contention that the supply of barristers is inadequate in this jurisdiction. It does mention that the number of barristers per head of population is less in this jurisdiction than other countries but it is clearly not possible to draw from that bare fact a conclusion that the existing supply does not meet the existing demand because the extent of that demand has just not been measured.

The Posner Analysis

In the April paper, the Authority implicitly admits that the necessary analysis has not been done to establish this proposition because its contention that sole trader rule creates barriers to entry is not a *"purely theoretical or economic argument"*. As support for this proposition the Authority quotes Judge Richard Posner stating that he recognised *"that the rule requiring sole trading was a restriction on entry"* and also refers to Posner's description in "*Overcoming Law*" [34] of the development of the English Bar. The Authority quotes Posner as saying:

> "To become a barrister an aspirant had to be "called to the Bar" after a period of residing and studying in an Inn of Court. Because such residence was costly and because the barrister could not work for another barrister but instead had to depend on cases referred to him by solicitors, who are naturally reluctant to refer cases to a beginner, the career of a barrister was largely limited to persons of independent means. As a result, the supply of barristers was restricted and while many barristers had therefore very high incomes, those who lost out in a barrister lottery by failing to obtain cases from solicitors eked out a meagre living, often supplemented by moonlighting, for example as a journalist."

What the Authority failed to mention is that this quote is preceded by the following words:

> "By the end of the 13th century a distinct legal profession had emerged in England that had definite affinities to a craft guild on the one hand and to the modern English legal profession, and by the time of our Revolution the English legal profession had assumed something remarkably like its present form. It was decided by court room lawyers (the barristers) and office lawyers (the solicitors) to become a barrister ……"

Posner then goes on after the Authority's quote to say:

> "The successful barristers and the Royal judges (who were former barristers) formed a small, cosy, homogenous community. The common law is the expression of the values of this community. The lack of a felt need to systematize the common law by reducing it to a code is a reflection of the community's homogeneity. Its members had no more need for a code than the native speakers in a language community need a grammar book to know how to speak.
>
> To become a solicitor in 18th century England one had to serve a period of years as a articled clerk, that is, as a solicitor's apprentice, so entry into the solicitor's branch of the profession was controlled too. Solicitors were allowed only one articled clerk at a time, which limited the growth of the profession."

It is a matter of serious regret that the Authority should in criticising the Irish Bar's present structures rely on the description provided by a U.S. judge and economist of the operation of the barrister's profession in England between the 13th and 17th century. If this is indicative of the economic data and analysis which underpins the Authority's conclusions, it is not surprising that those conclusions are fundamentally wrong.

What is even more disappointing is that the Authority fails to understand the significance of even that historical description for the present system of organisation in Ireland. It is precisely because in Ireland we have set our face against a Chambers system and the limitations on entry which such a system necessarily involves that we have adopted instead a Bar Library system of sole traders where the suggested advantages of a partnership or chambers in terms of sharing costs and achieving economies of scale are obtained to a far greater degree. The present system at the same time guarantees entry to the profession to anybody who possesses a barrister-at-law degree unlike the position which prevails in England.

Changes to the Bar Rules

Both the Authority's report and the April paper also approach the issue of alleged restrictions associated with the mandatory sole trader status in an incorrect context. In particular, the criticism made of that status does not take account of the very significant changes which the Bar has introduced. These changes significantly alter the economic context of the market being studied and cannot be ignored. The principle changes of relevance are the abolition of any restrictions in the Bar Rules relating to the transfer from the solicitors profession to the Bar and vice versa. As the barristers and solicitors operate in the one market (albeit different sub-markets), barristers who want to work in partnerships can switch to being solicitors and there is no restriction on their acting as advocates. Similarly, aspiring barristers have the opportunity of gaining experience and skills by working as a solicitor or in a solicitors firm prior to joining the Bar.

The restriction on barristers engaging other barristers on an ad hoc basis has been removed. This is a very significant change that directly addresses particular concerns highlighted by the Authority. If there are as suggested by the Authority efficiencies to be gained by engaging another barrister to do particular work on a case, it is possible to achieve this result by engaging a barrister on an ad hoc basis without incurring the inevitable additional costs associated with operating a partnership or chamber system.

Secondly, this system enables young barristers to acquire experience and enhance their reputations in the process. It also provides young barristers with another potential source of income at an early stage in their careers.

The Bar Council has also greatly relaxed its rules on advertising and has introduced far greater transparency into barristers' fees.

Finally, in this context, the rules have been altered to greatly enhance the entitlement of barristers to engage in other work while practising at the Bar thereby affording barristers the opportunity of another source of income should they desire to avail of the same.

Having concluded that the sole trader rule is anti-competitive the Report and the April paper contend that barrister's ethical concerns can all be addressed in the new suggested organisational systems and that maintenance of the sole trader status is neither necessary nor proportionate for that purpose. The Bar disagrees with this analysis but of course this analysis only becomes relevant if there is a basis for suggesting that the existing sole trader requirement is anti-competitive. For the reasons set out above, this has not been established. It is not therefore intended to address in any detail the manner in which the Authority has dealt with the ethical concerns. It is however appropriate to point out that there appears to be a fundamental confusion in the Authority's analysis in this regard which is exemplified in its April paper.

Ethics and the Bar

The point made by the Bar's Response is that having regard to the very particular ethical obligations imposed on barristers comprising the overriding duty to the Court to ensure in the public interest that the proper

34. Richard A. Posner

and efficient administration of justice is achieved, the obligation to assist the Court in the administration of justice, as well as the obligation to promote and protect fiercely and by all proper and lawful means their client's best interests and to do so without regard to their own interest or to any consequences for themselves or any other person, including fellow members of the legal profession, the sole trader status is best suited to the achievement of those objectives.

The Bar's position is that independence of barristers from each other and from solicitors and from other professional partners promotes the ability of the barrister to

(a) avoid risk of conflict of interest;

(b) offer independent advice to clients unaffected by consideration of how such advice might impact upon the partnership or chambers of which the barrister is a member;

(c) discharge his or her obligations to the Court to apprise the Court of all relevant facts and issues of law;

(d) act on behalf of any client who requests his or her services subject only to the requirement that the barrister is available to act and has the necessary expertise to act;

(e) take on pro bono work unaffected by considerations as to whether his or her partner (which must necessarily bear some of the costs) approves of either the practice or the extent of taking on such work.[35]

The Bar's Response goes on to say:

> "In particular, the ability of a barrister to take on the cause of what may be an unpopular client and to present his or her case fearlessly and in a manner which may displease powerful interests, other potential clients or in a manner which may bring the barrister personal, professional unpopularity is necessarily lessened by the extent to which the barrister's is accountable to others. Under the present structure the barrister is accountable only to the court and to his client. If their accountability is extended to partners, of whatever type, the scope for inhibiting the barrister in the discharge of his professional obligations is increased and the administration of justice thereby suffers."[36]

The Authority seeks to a avoid addressing this matter by saying it is

> "not the position of the Competition Authority that sole traders are more ethical or less ethical than other business forms, only that sole traders are not uniquely ethical."[37]

It is difficult to know what is meant by this statement. Nobody, not least the Bar Council, ever said that sole traders are uniquely ethical. Rather the contention was that the sole trader status better enabled barristers to discharge the various ethical obligations imposed on them in the interests of the administration of justice. The Authority, without making any assessment of the standards achieved by barristers operating as the sole traders, effectively takes those standards for granted and hypothesises that other business forms will necessarily maintain those standards. The Authority ignores the fact that if a particular individual, is individually identifiable and individually answerable for unethical conduct, this provides a more powerful incentive to ensure that the highest ethical standards are achieved. Because the proper discharge of these ethical obligations is critical to the administration of justice and because of the difficulty in detecting breaches of these obligations it is vital that the system which provides the best incentive for compliance is maintained. It is therefore not an answer to suggest that other systems for organisation have incentives for compliance if those incentives are less compelling.

The Authority's main response is that partnership spreads the risk and may provide valuable ethical oversight for barristers which is not a feature of the sole trader business model. It is of course the very inability of individual barristers to "spread the risk" by shedding or allocating responsibility to somebody else which provides the most powerful incentive for compliance with the ethical obligations. While in theory, the partnership could provide further oversight with regard to ethical behaviour, this is not inherently likely but more significantly, it is vital that the ethical obligations are not diluted by considerations of the interests of other persons in the partnership.

The Authority says that competition policy is not antithetical to justice. This is so. The Bar makes a different point. It points out the necessity for competition policy to take into account issues relating to the administration of justice and the rationale for the rules of the profession designed to assist in the administration of justice when applying competition principles. This is the very exercise that the ECJ, in *Wouters* insisted must be done before concluding that a particular rule is anti-competitive.

The Authority's failure to understand what is involved in these ethical issues and the difficulties in ensuring their maintenance is demonstrated by the Authority in the April paper. It says[38]:

> "The notion that Competition policy is only about material prosperity and that it places no value on ethics or justice (or is more crudely but commonly stated "economics is only about money") is incorrect. Bread is important but man cannot live by bread alone. Competition policy is concerned with overall consumer welfare, a distinct concept.
>
> Let me illustrate with the example of the market for flight instruction. Competition between flight schools not only drives down the price of lessons but increases quality of instruction. I want a good price for lessons but I also want to survive the lessons. While safety is not obviously "traded" it nonetheless has a value. A school with a cheap price but no investment in safety represents a false saving. You will be familiar with the old sayings of "you get what you pay for", "pay less buy twice" or "if you pay peanuts you get monkeys". These sayings are illustrative of the way markets work and how consumers weight up price and quality."

These assertions imply that competition policy is designed to automatically capture and protect the ethical issues which arise for an advocate on a frequent basis. This is not so. The textbook model of perfect competition does not contain any coefficient for valuing the proper discharge by a barrister of his or her ethical obligations to the court.

The Authority's failure to understand this fundamental issue is made manifest by the reasoning as set out in the previous paragraphs. It points out that in the market for flight instruction, flight safety is important and customers will be influenced not only by price but also considerations of safety. What this quite has to do with the administration of justice is unclear. It would seem self-evident that so far as the customer for flight instruction is concerned, safety is an important if not the most important component of the service/product being traded and accordingly a customer will obviously pay for safety.

Justice is not Traded

On the other hand, the administration of justice is not a product which is traded at all. So far as an individual client is concerned, the client wants to pay for the expertise of the barrister in the hope that the greater expertise will bring about the desired result. There is no incentive for a client to pay a price for ensuring that the administration of justice is maximised. The client wants to win his case. He or she is not concerned about whether justice in an objective sense is served. A client hardly wants to pay for a

35. Par. 4.33 of the Bar's Response
36. Par. 4.34 of the Bar's Response
37. Page 3 of Mr. Prasifka's Paper
38. At page 11

barrister disclosing to the Court authorities against the client's interest and which may result in the client losing the case.

The market therefore will not protect these core ethical issues. You cannot leave those issues out of the equation and look at the structures in isolation from them. You cannot automatically assume that a structure which best promotes competition also best promotes or even protects these values. In methodological terms, before arriving at such a conclusion, one would have expected that the Authority would have spoken to those centrally involved in the administration of justice who are likely to best understand the issues which arise, the difficulty in promoting compliance with ethical standards and their fundamental importance to the administration of justice, namely the Judges. There is no evidence that the Authority has taken this fundamental step. Rather it has assumed that because other structures exist elsewhere, those structures protected these core ethical values. This is not the case and there is no basis for assuming it to be the case.

The Authority also says that barristers are not as independent as they claim because of course they must survive financially and make a profit. It is hard to deny the reality of the market place but it is difficult to understand the relevance of this. It is surely a fundamental of the economics of competition that those engaged in competition are not independent of the market and of the financial realities associated with the market. The whole purpose of competition is to ensure that this is the case. The point made by the Bar is a different one. It is that the sole trader model maximises the prospects of a barrister being able to discharge his obligations to the court and to the administration of justice generally, notwithstanding the realities of the market place.

In rejecting the Bar's ethical justifications because barristers are not independent of the market and that this somehow undermines the Bar's ethical arguments reveals a lack of appreciation of what is at issue and surely represents a threadbare response to those arguments.

Duties to the Court and the System of Justice

The ethical issues raised by the Bar are of fundamental importance. They are core to the administration of justice as we know it in this country. The preservation of these core ethical principles is not only important but is increasingly difficult in a world which values such principles less and less. These principles are not impervious to attack and we cannot assume their continued existence, much less implementation.

The Harvard Law Professor Mary Ann Glendon had identified some of the ethical problems facing lawyers in the United States.[39] Her comments have a clear relevance for this jurisdiction. She says the old moralistic codes of ethics were often cynically derided in the Academy as self-serving attempts to fend off tighter regulation. But if mixed motives condemn reform movements, few human efforts to improve our collective condition could pass the test. She says it is precisely because most of us need lots of help and support in finding an upright path, that the exercise of stating professional ideals serves an important function. Retelling the old stories and exploring their implications for new circumstances helps to orient and reinforce each lawyers quest for a morally coherent professional life. That is why, as Archibald Cox has pointed out, even much maligned ethical codes are not completely useless. We need them he says:

"both to express our moral sense and sharpen our awareness of its applications…".[40]

She goes on to say that today's lawyers wander in an increasingly impersonalised bureaucratized legal world, where neither honesty based nor loyalty based systems seem to be operating very well. Families, communities, neighbourhoods and schools that once served as seedbeds and anchors for personal and professional virtues are themselves in considerable disarray. The legal ethos that is emerging is very different from a world in which most lawyers were at least oriented towards versions of lawyering that demanded a considerable degree of self-subordination, whether of the guardian or trader variety. She points out that:

> "Lawyers' self interest [is] apt to run amok when anyone who places Court and Client above profit is branded a hypocrite or a chump. Moreover a lawyer who takes his duties to the Court and the legal system seriously will often be at a disadvantage against the less scrupulous adversary. Many lawyers are fearful that in today's competitive environment, contrary to what Lincoln said, good ethics may not make for good business."

She concludes by saying that many lawyers have concluded that the best survival strategy is ethical agility. Ethical agility means the lawyers are more divorced from the system of administration of justice. She concludes by saying:-

> "They can no longer make sense of their lives. The stories they heard in law school about independence, public service and professionalism don't match up with their everyday experiences. Many are dispirited. Some of the most affluent and successful lawyers feel bad when they should be feeling good. Others, caught up in one form of misfortune or another, inexplicably feel good when they should be feeling bad"[41]

The core ethical issues are so fundamental that we should not experiment with their preservation. Nothing should be done that imperils them. Certainly nothing should be done by way of experimental changes, as advocated by the Authority, by reference to some selected principles of economic theory divorced from the realities of the market in which those ethical principles must struggle to survive. ●

39. See *"A Nation Under Lawyers"* Mary Ann Glendon. Pages 82 and 83.

40. Archibald Cox *" Ethics in Government; The Cornerstone of Public Trust"* 94 West Virginia Law Review 281300

41. Page 84 Op Cit.

The Employment Injunction revisited

Stephen O'Sullivan BL

There has been much written about developments in relation to the availability of the employment injunction as a relief in wrongful dismissal[1]. In *Sheehy v. Ryan*[2] the High Court (Carroll J.) refused to make an order restraining a dismissal and stated that:- " The position at common law is that an employer is entitled to dismiss an employee for any reason or no reason, on giving reasonable notice". This was followed by the same learned judge in *Orr v. Zomax*[3]. In an article by this author in 2004, I outlined in full these cases to conclude that "plaintiffs should be cautious before issuing proceedings for interlocutory injunctions as part of wrongful dismissal proceedings in cases where the employer does not allege misconduct". I also concluded that there may be an argument for injunction in dismissals for other than misconduct, where the contract provides for a specific procedure which is not fulfilled. I also suggested it may be advisable to bring a pre-dismissal injunction to escape the wide ranging dicta of *[Sheehy v. Ryan and Orr v. Zomax*]"

In an article by Roddy Horan S.C. in 2005, the argument is made that the idea that injunctions are only available in dismissals for misconduct is an oversimplification and he cites [4] instances where an injunction may be available – a. termination in breach of contract, b. where the dismissal is *ultra vires,* c. a termination in breach of fair procedures, d. where the employee is asserting that there was an absence of grounds justifying the dismissal and e. a dismissal in breach of constitutional rights eg. the right to dissociation.

The area has been qualified and clarified by more recent High Court decisions. This article outlines those decisions and assesses the implications for the future. This article will also assess the approach of the courts in relation to an application for an injunction prior to dismissal.

Injunction to restrain a dismissal

Generally an employee will seek an order in the terms of that granted in *Fennelly v. Assicurazoni Generali SPA*[4] , that being an order to continue to pay the employees salary pending the trial of the action, with no duty on the employer to provide work during this period.

In *Hennessy v. St. Gerard School Trust*[5] the plaintiff was dismissed while serving a one year probationary period as teacher in a secondary school. She had been informed that there were complaints in relation to her teaching. The court refused to grant an interlocutory injunction on the basis that she was under probation.

In *Gannon v The Minister for Defence*,[6] the plaintiff was discharged under Regulation 58(r) of the Defence Forces Regulations which provided that his discharge was clearly desirable in the interests of the service and that no other reason for discharge was applicable. The plaintiff argued that if he was to be discharged, it was for illness and not under that regulation.

The High Court granted an interlocutory injunction restraining the purported discharge of the plaintiff from the Defence Forces pending the determination of the proceedings because he had been discharged under the wrong section. The court further held that although damages were normally an adequate remedy, the plaintiff was in a perilous position pending the determination of the proceedings in that he was not in receipt of a salary and the balance of convenience lay in favour of the plaintiff.

In *Maha Lingham v. Health Service Executive*[7], the plaintiff had applied to the High Court for an interlocutory injunction restraining the defendant from dismissing him with 3 months notice from his post as a temporary surgeon at a hospital. He sought inter alia an order that the defendant pay to the plaintiff all salary to include arrears of salary and all other emoluments as same fell due.

The plaintiff had been employed by way of successive temporary appointments for 7 years and thereafter, he applied for a position as a permanent surgeon but was unsuccessful. He continued in the employment of the defendant's predecessor until 2005, in a

1 Tom Mallon & Marguerite Bolger *Injuncting the Contract of Employment* (1997) 3 (3) BR 113
Donal O'Sullivan *Developments in the Employment Injunction* (2002) 7 (6) BR 303
Stephen O'Sullivan *Wrongful dismissal:* Recent Developments (2004) 1(4) IELJ 116
Horan *Employment Injunction : Current status and future development* 2005 Employment Law Review 8
Hilary Delany *Employment Injunctions: the Role of Mutual Trust and Confidence Equity* (2006) 28 DULJ 363
Stephen O'Sullivan *Commentary on the availability of the employment injunction* 2006 IBLQ 12
2 [2004] ELR 87
3 [2004] 1 IR 486
4 (Unreported Ex tempore, (Costello P.) 13th August, 1997)
5 [2004] 15 E.L.R. 230
6 (Unreported, High Court, Peart J. , 15th August 2005)
7 [2006] 17 E.L.R. 137

temporary consultant post. He was given three months' notice that his employment would terminate. It was contended by the defendant that they gave the applicant notice as they were unable to obtain approval for his continued employment in a temporary post. The plaintiff submitted that his fellow surgeons were prejudiced against him and had brought pressure to bear on the defendant to the extent that it overbore the independent decision-making power and will of the executive and for that reason his dismissal was wrongful. The plaintiff also argued that under the Protection of Employees (Fixed-Term Work) Act 2003, he was entitled to a contract of indefinite duration and that the termination of such was unlawful.
The Supreme Court dismissed the appeal and held *inter alia* that:-

(1) The plaintiff had not shown that he had a strong case and was likely to succeed at the hearing of the action and, for those reasons, it was not necessary to consider the balance of convenience.

In this respect the court stated:-

"[I]t is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has *a strong case that he is likely to succeed at the hearing of the action*. So it is not sufficient for him simply to show a prima facie case, and in particular the courts have been slow to grant interlocutory injunctions to enforce contracts of employment."

(2) The principle that there is an implied term of mutual trust and good faith in contracts of employment did not extend so as to prevent the employer terminating a contract of employment by giving proper notice and it is not contested that the proper period of notice was given in this case.

(3) The plaintiff did not make out the type of case that would have shown that the contract of employment had been undermined to such an extent, by the employer, so as to deprive them of the right to give a proper period of notice of termination.

(4) The Act of 2003 did not confer independent rights at common law or modify in general the terms of contract of employment to be enforced by the common law courts. The ordinary rights and obligation of the employer to terminate the contract on the giving of reasonable notice was not interfered with.

In Naujoks v. National Institute of Bioprocessing and Medical Research,[8] the plaintiff was employed by the defendant as CEO for less than nine months. The terms of employment included *inter alia* :-

- Clause 2.3 provided that the Service Agreement should continue in force for a term of five years, unless terminated earlier by either party in accordance with the provisions of Clause 13 or unless extended by mutual agreement in writing of the parties.
- Clause 13 provided for both termination on notice and summary termination. In relation to termination on notice, Clause 13.1 provided that either party might terminate by giving to the other no less then six months' prior written notice in accordance with the provisions of Clause 15.6 Clause 15.6 dealt with the mode of service of notices. Clause 13.2 provided that the Service Agreement might be terminated forthwith by the defendant by written notice to the CEO in the event of any of the nine circumstances outlined having arisen. Those circumstances encompassed breach of the plaintiff's obligations under the Agreement, failure to discharge his duties properly, incapacity, dishonesty and so forth.
- Clause 2.5 provided that on notice being served for any reason by any party to terminate, the defendant should be entitled to make payment to the plaintiff in lieu of notice, in which case the plaintiff's employment would terminate with immediate effect.

The plaintiffs employment was terminated unilaterally and without a hearing in a board meeting on 12th October 2006. The plaintiff sought an injunction restraining the dismissal. The plaintiff argued that he had been dismissed for misconduct and was entitled to fair procedures. The court granted a *Fennelly* type order.

The defendants had sought to argue that the dismissal was not for misconduct and therefore they were entitled to dismiss with notice. The court applied *Maha Lingham v. Health Service Executive* and held there was a strong case that the plaintiff was likely to succeed at the hearing of the action in proving that the defendant unlawfully terminated the contract of employment. The court pointed to the following:-

(1) There was a strong case that dismissal was for misconduct. The defendant had not exhibited the minutes of the relevant board meeting. The reason given in the affidavit was that the Board had lost confidence in his ability to manage the Institute. The respondent averred that the plaintiff's management style and his manner of communication with members of the research team led to "serious human resources issues" arising. This was arguably an allegation of gross misconduct.

(2) The plaintiff averred that it was at all times represented to him that the Institute would be under his stewardship for a period of at least five years and that he was told by the solicitors for the defendant, and relied on their advice to him, that the contract was for five years and could only be terminated if any of the events provided for in Clause 13.2 occurred.

(3) There was a strong case based on ultra vires . Under the articles of association, it was to be assumed, in the absence of evidence to the contrary, that the power to dismiss could only be decided on by the board acting in accordance with the articles of association. On the evidence, the decision to dismiss was not made in compliance with the requirements of the articles of association in relation to notice of the business to be transacted.

(4) There was a strong case based on clause 13.2 in that the defendant had not furnished written notice to the plaintiff.

In *Cahill v. Dublin City University* (Unreported High Court 9th

8 (Unreported, High Court, Laffoy J., 14th November 2006)

February 2007), the plaintiff was associate professor in the respondent university and was dismissed on 14th June 2006, unilaterally without a procedure being followed and for no stated reason, with 3 months notice in circumstances where the plaintiff had indicated he might leave to take a position up with NUI Galway. The court held the dismissal was unlawful.

The court held the dismissal was contrary to s.25.6 University Act 1997 in that the statute required a procedure to be followed before dismissal which was not done. Also the Act gave the plaintiff the benefit of tenure which meant he could not be dismissed with the same ease that an employee without tenure could be dismissed.

The court also held the plaintiff was entitled to fair procedures prior to dismissal even though the dismissal was not for misconduct and stated:-

> "[H]e would also be entitled to a determination from this court to the effect that his contract of employment was not validly determined on the basis of a failure to at least give him some opportunity to make representations as to why his contract of employment should not have been determined."

The court made clear that the effect of such a determination meant that the employer was obliged to do more than merely keep the plaintiff on the books from that point on and stated:-

> "It does seem to me that it follows from that declaration that DCU is obliged to take reasonable steps to ensure that appropriate academic duties are given to Professor Cahill."

Cases where the plaintiff has been dismissed, but an appeal is pending

In *Carroll v Dublin Bus*,[9] the plaintiff was employed as a bus driver by the defendant. At a disciplinary hearing, the defendant proceeded in the plaintiff's absence and concluded, *inter alia*, that because he had involved himself in union activities at a time when he was certified as unfit for work, he should be dismissed. The plaintiff subsequently appealed that decision to an appeals board.

The court refused to restrain the dismissal at interlocutory hearing on 27th January 2005 but made certain orders to be complied with before the disciplinary hearing took place. Between that interlocutory hearing and the full hearing, the defendant had complied with those orders and an appeal panel had been set up under the defendant's procedures.

At full hearing on the 4th August 2005, and with the benefit of all the oral evidence, the High Court made a declaration that the dismissal was void The court held further than in circumstances where an employee had, in effect, no real first instance hearing at the initial stage of the disciplinary procedure, that the determination should be treated as a nullity. It held that it would be unfair to require him to have the first substantive hearing at the appeal stage, no matter how fairly that appeal hearing might be conducted.

Even in this case, the court refused to grant more than a declaration that the defendant continued to be in breach of contract and refused to make orders which would require the defendant to physically provide the plaintiff with work. The court stated:-

> "I have been referred to some limited number of authorities which suggest that, in certain limited circumstances, the courts have, notwithstanding the general policy to the contrary, granted injunctive relief which has the effect of requiring that an employee be actually permitted to work…The extent to which there may be, notwithstanding the general policy of the courts to the contrary, a jurisdiction to make a mandatory order which would have the effect of entitling an employee to return actively to work after appropriate findings at a plenary hearing is, therefore, open to significant doubt. Even if such a jurisdiction exists, it seems to me that it could, in principle, only arise in circumstances where it was clear that no other difficulties could reasonably be expected to arise by virtue of the making of an order…In the circumstances it seems to me that I should confine myself …to making a declaratory order to the effect that Dublin Bus are in continuing breach of contract with Mr. Carroll by continuing to fail to provide him with suitable rehabilitative duties."

In *Mc Evoy v Bank of Ireland*,[10] the plaintiff was suspended from duties pending the outcome of disciplinary procedures. She sought an interlocutory injunction restraining the defendant from purporting to dismiss her, or from proceeding with an appeal against a decision to dismiss her reached in the first stages of the disciplinary proceedings. She contended that the disciplinary process to date had not accorded with fair procedures and that the appeal would be a foregone conclusion. The defendant contended that the High Court proceedings were premature.

The High Court held, in refusing the relief's sought, that the plaintiff had not established that there was a fair issue to be tried that the process was so flawed that it would be appropriate for the court to prohibit the disciplinary process continuing. The plaintiff's application was also premature in that she had two further appeals under the disciplinary process.

In M*cElhinney v. Southern and Eastern Regional Assembly,*[11] the plaintiff had undergone an investigative and disciplinary process as a result of which a recommendation had been made for dismissal (the recommendation). The plaintiff was awaiting a final determination by a director of the defendant (the adjudicator), which was an appeal-like process. The plaintiff argued that the procedures adopted to date were in breach of fair procedures and that the adjudicator was biased. The allegation was *inter alia* that the plaintiff had been engaged in misuse of company time by spending excessive time on personal calls.

The court refused the injunction and found *inter alia* as follows:-

9 [2005] IR 184
10 (Unreported, High Court Ms Justice Laffoy 26/1/2006)
11 (*ex tempore*, High Court (Clarke J.), 14th February 2007)

- The plaintiff had not made out an arguable case that he was not afforded detail of the allegations prior to the recommendation. Many of the allegations had been accepted by the plaintiff but he sought mitigation
- The adjudicator was not engaged in a fact finding role. Allegations of breach of fair procedures by the adjudicator in relation to other matters in the past did not give rise to a reasonable apprehension of bias in relation to the current events.

The court stated

- "There is a significant difference in the balance of convenience to stop a disciplinary process mid-stream rather than at the end situation when it is easier for a plaintiff to make out the balance of convenience"

The court directed an early trial on the plenary summons.

Injunction to restrain or compel some action prior to dismissal

(i) Injunction to restrain disciplinary process from continuing

In *Maher v. Irish Permanent*,[12] the plaintiff was notified that a decision to dismiss him for sexual harassment was warranted, but such decision would not be finalised for one week to allow the plaintiff to make representations. The plaintiff was granted an interlocutory injunction to restrain the dismissal where he had not been furnished with statements prior to the disciplinary hearing on 27th September 1996 and had not been assured of his right to legal representation at that meeting until the morning of that meeting. This was despite the fact that the plaintiff still had one week to make representations in relation to the decision to dismiss.

In *Foley v. Aer Lingus*[13] the plaintiff, the CEO of the defendant company, was accused of sexual harassment by a fellow director in February 2001. An investigative committee found that the defendant's conduct amounted to sexual harassment. The company then appointed a second committee, whose task it was to decide what, if any disciplinary action was warranted. The plaintiff was suspended with pay pending the outcome of the disciplinary process. The plaintiff sought to appeal the findings of the first committee. The defendants argued that the question of an appeal did not arise at this time. The plaintiff then sought interlocutory injunctions restraining the defendant from i*nter alia* taking any further step in the disciplinary process against the plaintiff.

Carroll J. refused the relief on the basis that the traditional relief at common law for unfair dismissal was a claim for damages. Damage to reputation could be compensated by damages. Therefore, damages were an adequate remedy. Also the damage to a company left without a CEO indefinitely would far outweigh the potential damage to an employee. The balance of convenience lay in favour of refusing the relief sought.

In *O'Brien v. AON Insurance Managers*,[14] the plaintiff was MD of the defendant for about 8 years. In 2004, investigations were launched into forged signatures on company documents as a result of which a specific investigation into the activities of the plaintiff was recommended. The investigators issued a report on the Managing Directors involvement and recommended that the company's disciplinary procedure be invoked against him. The disciplinary procedures had not yet commenced when the plaintiff sought an injunction to put him back into his position of MD. The plaintiff argued that he was not given a fair hearing at the investigation stage such that the disciplinary procedures should not go ahead.

The court applied *Morgan v. Trinity College*[15] and held that since the investigators report did not amount to a sanction so that fair procedures were not required up to that stage – they were required only at the disciplinary stage which had not happened yet.

In *Carroll v Dublin Bus*,[16] the plaintiff had applied for an interlocutory injunction by hearing 27th January 2005. The plaintiff was employed by the defendant as a bus driver. Disciplinary proceedings were instituted against him. The disciplinary process related to two complaints. The first concerned the plaintiff in his representative capacity as a union acitivist on behalf of fellow employees at a time when he had been certified as medically unfit to work. The second concerned the plaintiff's alleged involvement in a protest which may have damaged the good name of the employer, and other associated alleged breaches of the employer's rule book and/or legislation.

The plaintiff sought interlocutory orders seeking *inter alia* the payment of salary and orders connected with the dismissal process which had been commenced. The High Court refused the former order but granted the latter. In granting orders in relation to the disciplinary process then in being the court stated:-

> "Where an employer has, in clear and unequivocal terms, indicated that procedures will be followed which would be manifestly unfair there may be circumstances where it is appropriate for the court to intervene at that stage. This will be so, in particular, in cases where the degree of prejudice which the employee concerned would suffer in the event of an adverse finding at the particular stage in the process in respect of which complaint is made would be great and unlikely to be substantially reversed by a finding of a court made after the process had come to an end."

The court made an order that the disciplinary procedures could not continue until the defendant furnished to the plaintiff particulars of the allegations against him as requested by his solicitor and on condition that the plaintiff was allowed call relevant witnesses at the disciplinary hearing.

12 [1998] ELR 77
13 [2001] ELR 193
14 (Unreported, High Court (Clarke J.), 14th January 2004)
15 [2003] 3 IR 157
16 [2005] IR 184

In *Becker v Board of Management of St. Dominic's Secondary School*,[17] the plaintiff contended that there was a conspiracy on the part of her employers to deprive her of fair procedures in relation to disciplinary procedures which were brought against her. She applied for an interlocutory injunction restraining any further progress in the disciplinary proceedings which had been commenced.

The court held, in refusing the application for interlocutory relief, that it was appropriate to allow the disciplinary process to proceed. The court noted:-

> "Firstly, it is my view that a court should only intervene in the course of an uncompleted disciplinary process in a clear case….In general terms it seems to me that the circumstances in which the court should intervene is where a step, or steps, or an act, has been taken in the process which cannot be cured and which is manifestly at variance with the entitlement to fair procedures."

In *O'Sullivan v. Mercy Hospital Cork Limited*[18] the plaintiff sought a variety of interlocutory orders designed to restrain the defendants from progressing with enquires and procedures relating to her employment. Following a report by a Doctor Browne, the plaintiff was found to have engaged in bullying and an enquiry was set up for the matter to be investigated by a barrister, Ann O'Brien BL. The plaintiff argued that that report upon which the enquiry would rely, was concluded in breach of fair procedures in that when she was asked to become involved in the Brown enquiry, she herself asked whether she should be represented by her trade union but was informed that she was simply a witness. At no stage in the course of the enquiry was she ever informed that the situation had changed and that Mr. Brown was now considering making adverse findings in relation to her.

The hospital argued that no reliance of any sort could be placed upon the Brown Reports insofar as they affected the plaintiff. It was suggested that the barrister would be asked to look again at all of the matters which had been enquired into by Mr. Brown insofar as relevant to the plaintiff and should do so afresh.

The Court granted an interlocutory injunction restraining the conduct of the O'Brien Inquiry as then constituted.

> "[T]here could be no objection to the conduct of such an enquiry provided that its terms of reference were altered in such a way that either removed all reference to the Report of Mr. Brown (though not necessarily to the content of any evidence which may have been given to Mr. Brown) or alternatively made it absolutely clear that no reliance of any sort could be placed upon any conclusions reached by Mr. Brown."

In *Garvey v. The Minister for Justice, Equality and Law Reform*,[19] the applicant was a prison officer suspended following a prison riot at which it was alleged he assaulted another prisoner. The applicant was later tried on criminal charges of assault and was eventually acquitted. The respondent sought to proceed with an internal disciplinary hearing in relation to the matter. The applicant sought to injunct this. The Supreme Court overturned the order of the High Court (O'Caoimh J.) and granted the injunction and held that it would be unfair and oppressive to conduct a disciplinary inquiry into the same issues, in respect of which there has been an acquittal on the merits at a criminal trial, but this depended on the particulars surrounding the acquittal and the cumulative effect of having disciplinary proceedings following criminal proceedings.

The court stated, in distinguishing *Mooney v. An Post*[20]:-

> "Effectively, An Post laid a trap for the applicant which in their belief he had fallen into and the criminal charges were based on that. They were not based on the original complaint. In those circumstances, the acquittal necessarily gave rise to a reasonable requirement on the part of the employer that the employee answer certain questions. There was a simple issue of whether he was suitable to be retained as a postman. It was an obvious example in my opinion where an acquittal could not per se prevent further inquiries."

The court stated:-

> "By now every aspect of the case must have been discussed within the prison service whether at Governor level or prison officer level. It is impossible to imagine that such a lengthy trial leading to an acquittal did not give rise to a flow of arguments and opinions throughout the prison. In this claustrophobic atmosphere, I believe that to use the expression of Finlay C.J. in *McGrath,* it would be a 'basically unfair procedure' to conduct a disciplinary inquiry on what in effect are identical allegations to the criminal charges based on essentially the same evidence and the same witnesses."

In *Conway v. Ireland,*[21] disciplinary proceedings were in being such that the plaintiff was at risk of being transferred from the office of secretary to the president to another government department. A decision was made against the plaintiff and was overturned on the internal appeal on the basis that a matter was taken into consideration by the preliminary investigator that was not known to the plaintiff. The plaintiff tried to injunct the re-investigation on the grounds *inter alia* that the manner in which the disciplinary process had operated to date demonstrated a disregard for natural justice such that the court should intervene.

The court refused the injunction and stated:-

> "Taking the process as a whole from inception to date, in my view the plaintiff has not established that there is a fair issue to be tried, that the process is flawed to the extent that it would be inappropriate for the court to intervene and prohibit the disciplinary process continuing…[I]t is my view that the plaintiff's application herein is premature"

In *Minnock v. Irish Casing Company Ltd* (The Irish Times 11th June

17 [2005] 1 IR 561
18 (Unreported High Court Clarke J. 3rd June, 2005)
19 [2006] 1 IR 548
20 [1998] 4 I.R. 288
21 (Unreported High Court Feeney J. 12th April 2006)

2007), the High Court (Clarke J.) granted an injunction to restrain an investigation into disciplinary matters from proceeding. The defendant argued that any interlocutory application was premature at this stage and placed reliance on a contention that the only matter being conducted by the second named defendant was an investigation which would be followed by a full disciplinary hearing should that arise as a result of the investigation.

The court held that the court would not intervene in the course of a disciplinary process unless a clear case has been made out that there is a serious risk that the process is sufficiently flawed and that irreparable harm to the plaintiff would result if the process was permitted to continue. The court held that the second named defendant had purported to make findings and had therefore not confined himself to collecting evidence and determining whether there was a case to answer to warrant formal disciplinary proceedings. The court held there was some obligation on the defendants to *set out* the process that they intended to pursue and particularly, when asked to do so in advance. The defendant had breached this obligation when it had failed to set out in clear terms in advance that the investigtion was merely an evidence gathering exercise. The plaintiff had sought an adjournment of the investigation on the basis that these matters were not set out but was refused the adjournment. Further, the plaintiff only received a detailed account of the financial allegations being made against him 3 days before the investigation. The court held there was a strong arguable case on the part of the plaintiff that the hearing was a nullity and that the process being conducted by the second named defendant was one which could not be legally permitted. The court held the balance of convenience favoured the restraint of any continuing investigation being conducted by the defendant. The court made clear that if the defendant wanted to commence a finding inquiry conducted by some other person other than the second defendant, they were free to do so.

(ii) Injunctions in other miscellaneous circumstances prior to dismissal to compel or restrain some action of the employer

The instances in which an injunction might be sought during the employment relationship are too large to enumerate here. The principles will most likely be determined according to whether there is a breach of contract and then on ordinary injunction tests. Examples where such injunctions have been applied include the following.

In *Deegan v. Minister for Finance*[22] and *McNamara v. South Western Area Health Board*,[23] the court lifted a suspension of the plaintiffs based on the gravity of the reasons for the suspension, the implications for the person concerned and the likely consequences following suspension.

In *Mullarkey v. the Irish National Stud Companay Ltd.,*[24] plaintiff got an interlocutory injunction to compel the employer to pay sick pay where there was a fair issue to be tried as to whether there was an implied term of the contract for sick pay for a period of time.

In *Evans v IRFB Services (Ireland) Ltd*.,[25] the plaintiff got an interlocutory injunction preventing the defendant from making an appointment to a new position pending the trial of the action on the basis that there was an arguable case of a sufficiently radical alteration in the duties and responsibilities of an employee that might amount to a breach of contract.

In *Yap v Children's University Hospital Temple Street Ltd,.*[26] the plaintiff worked in a hospital and refused to return to work on the basis of the conditions of employment offered by the employer and issued plenary proceedings to determine the conditions of work she argued for. The plaintiff sought an interlocutory injunction directing the defendant to pay salary and associated benefits to the plaintiff pending the trial of the action and also make relevant contributions into the plaintiff's pension.

The Court refused the application since so long as the controversy remained between the parties, it was not possible for the court to make an order requiring the plaintiff to return to work and consequently it was not possible to direct the defendant to pay the plaintiff's salary in the intervening period.

Conclusion

The question of whether *Orr v. Zomax and Sheehy v. Ryan* would be followed by the Supreme Court has been answered somewhat by the dictum outlined in *Maha Lingham v. Health Service Executive.* Again, since *Orr v. Zomax* distinguished F*ennelly v. Assicurazioni Generali, Hill v. Parsons* and *Harte v. Kelly*, it would seem that interlocutory injunctive relief may be available in cases on all fours with those cases. Indeed in Maha Lingham, the Supreme Court distinguished *Fennelly v. Assicurazioni Generali,* and *Shortt v. Data Packaging Ltd* indicating that cases on those lines may succeed.

It appears it is an oversimplification to state that injunctions are only available in dismissal for misconduct and this would seem to be backed up by recent caselaw. *Gannon v The Minister for Defence* is a case where an injunction was granted where effectively the dismissal was *ultra vires*. In *Naujoks v. National Institute of Bioprocessing and Medical Research*, the court granted an interlocutory injunction based on the ground that the dismissal was for misconduct, was ultra vires and in breach of the contract.

22 [2000] ELR 190
23 [2001] 12 ELR 317
24 (Unreported, High Court, Kelly J., 30th June 2004)
25 [2005] 2 ILRM 358
26 (Unreported, High Court, Clarke J. 06/01/2006)

Following *Maha Lingham*, it seems the test for interlocutory relief where the injunction sought is mandatory in nature, which is a *Fennelly* type order, is not the test in *Campus Oil v. Minister for Industry (No. 2)*[27]. Put simply, the test is not whether there is a fair question concerning the existence of the right which the plaintiff seeks to protect or enforce by the injunction. Rather, the test is whether there is a strong case that he plaintiff is likely to succeed at the hearing of the action. Given that most injunctions in the employment context will be mandatory in nature, this raises the bar for interlocutory applications.

In relation to cases where the plaintiff has been dismissed but an appeal is pending, *Carroll v Dublin Bus* is authority that the existence of an appeal will not tie the courts hands in granting an injunction. However that was a full hearing and the court was appraised of all the facts that occurred up to the decision to dismiss. The court was satisfied that in those circumstances, the employee had, in effect, no real first instance hearing and therefore, that the determination should be treated as a nullity. In this respect, it can be contrasted with *Mc Evoy v Bank of Ireland,* which was an interlocutory hearing and where there was no such evidence of a patently flawed initial disciplinary hearing.

In relation to an injunction to restrain disciplinary process from continuing, the position of the High Court is firm that the court will not intervene unless a step, or steps, or an act, has been taken in the process which cannot be cured and which is manifestly at variance with the entitlement to fair procedures. Even then, the court has chosen in a number of cases to make orders in relation to how the disciplinary procedures should proceed rather than stop them completely *(Carroll v Dublin Bus and O'Sullivan v. Mercy Hospital Cork Limited).*

In relation to bringing an injunction and invoking statutory rights, *Maha Lingham* is clear in stating that where legislation designates the venue for bringing a claim, then that is where the matter is to be litigated. ●

27 1983 1 IR 88

The Dentist of Seville (The Bar Soccer trip)

Conor Bowman BL

Spain is an extraordinary country. On one single street you may encounter orange trees, confectionary shops and dentists. We landed in Seville on Tuesday morning oblivious to the fate which awaited us. Our hotel loomed up from the pavement like a collossus adorned with piano bars, but sadly no pianos. In a touch of bronzing irony, the roof-top swimming pool was on the third floor of this fourteen-story edifice, which meant that at least some of the group were actually closer to the sun when asleep in their rooms.

The party who travelled were a mixed bunch. They resembled in some ways the cast of a film version of a Graham Greene novel, with their carefully defined characters embossed on the braille version of the original first-edition second printing. On the walk-ways of the 2nd and 3rd floors in the early hours of the morning, all manner of drama was played out to the barely audible strains of the theme music to The Third Man. In the tapas bars of Seville, there were more reunions and break-ups than you'd find in the average chick-lit chapter. And all the while (well during the day anyway), the sun shone down relentlessly.

After dark, the chameleon-like transformation of these travellers was amazing. The placid became predators, the reticent exuded regality and those who had performed badly in Equity or Evidence found themselves the subject of passionate injunctions from complete strangers who refused to leave fingerprints. In the confines of nightclubs, the whole world was reduced to microcosm. A visitor from Iowa put her finger on it when remarking that sometimes people were so similar that the only way to tell them apart was by their dental records.

The game itself, when it finally came around, was in many ways a rewarding experience. Free from the fetters of sponsorship deals and the glare of the international media, some players expressed themselves freely for the first time in years. If scorelines are a measure of success then it's a pretty poor gauge of anything unless you win. This wasn't about money, or television rights, it was about the age old traditional talking points in international matches played under floodlight; the referee and the fact that we were robbed.

There is a cathedral in Seville. It was built centuries ago at vast expense and with the labour of hundreds over many thousands of days. Perhaps that is where the soccer games of the soul are played, under miles of scaffolding surrounded by tons of silver candlesticks. Perhaps it is there, in the shadow of Renaissance depictions of the Apocalypse, that the strikers, keepers and defenders of the modern age are moulded and cast. Perhaps the Trinity one Devil suggested actually exists but more probably perhaps when the paint is chipped away, the remnants do not merit even a second glance, much less an application to join a Third Party.

Laden with mantillas, fans and ornately-mosaiced souvenir bulls, we left on Saturday.
Our flight back to the rain was delayed and while the dust settled on our tans, we could contemplate the half-week-plus spent where oranges are not the only fruit and dentists do not grow on trees. ●

Bar Soccer Fans in Seville