NORTHERN IRELAND LEGAL QUARTERLY

Vol 55, No. 2 **Summer 2004**

CONTENTS

BOOK REVIEW

Published four times yearly by SLS Legal Publications (NI), School of Law, Queen's University Belfast, Belfast BT7 1NN, Northern Ireland.

ISSN 0029-3105

OFFICIAL OPENING OF THE BAR LIBRARY 21st NOVEMBER 2003

Peter Cush, Chairman of the Executive and Bar Council, welcomed guests to the official opening of the Bar Library on 21st November 2003. He paid tribute to the work of previous chairmen, namely, Richard McLaughlin, Eugene Grant, Brian Fee, the late John Cushinan, Eilis McDermott and Reg Weir for the energy and enthusiasm which they gave to this project. He also paid particular thanks to the Development Committee and its chairmen, John Gillen and Brian Fee, for their attention to detail as the project developed, and to the staff who achieved the major move to the new premises so efficiently.

The architects, Robinson McIlwaine, the builders, Gilbert-Ash and the furniture manufacturers, Calvert Morgan have provided the Bar with a building which is already recognised as having made a significant contribution to the skyline of Belfast and to the architecture of what is now becoming known as the Legal Quarter. The building, which has already received several awards, provides a working environment which fulfils the needs of a growing and modern Bar.

Thanks were also paid to Donnell Deeny and the Art Committee for the choice of works of art including two special commissions, i.e. a piece in the foyer entitled "The History of the Wig" by John Kindness and the bronze reliefs on the main doors depicting various images of law and justice which are the work of Carolyn Mulholland. The current issue of "Perspective", the magazine of the Royal Society of Ulster Architects, states:

> "This is an important building for Belfast. The Library's tone of openness establishes an optimistic and encouraging face for our legal justice system."

This is exactly the kind of image which members of the Bar wished to achieve. The building gives them a working environment with research and back-up facilities unmatched by anyone offering advocacy services in these Islands. The Northern Ireland Bar is a modern Bar ready to meet whatever challenge lies ahead and this building enables the Bar to offer the type of service now expected by its clients.

Peter Cush then invited the Nobel Laureate, Seamus Heaney, to address the guests and Professor Luzius Wildhaber, President of the European Court of Human Rights to perform the unveiling of the commemorative stone.

Seamus Heaney: Poet and Nobel Laureate

The first lawbook written in the west, the only lawbook with which I am in any way familiar, is the third party of Aeschylus's trilogy, *The Orestia*. The final play in that great group was performed in Athens in the fifth century BC and is generally known as *The Eumenides*.

But the play could equally well be known as *The Court of Athens* or *The Athens Truth and Reconciliation Commission*, because the story it tells is of the end of a world where the Furies were the dominant force and of the beginning of a new world where authority would henceforth be vested in a system of law. The Furies embodied the spirit of retribution, the need to have crime avenged, and, in particular, crimes of blood – avenged, if necessary, by the spilling of more blood. But the play shows how this ancient blood-for-blood ethic gives way to the word of the goddess Athena, goddess of wisdom, goddess of Athens, patron of the first court of twelve citizens, patron of a system of civil and administrative justice which she institutes and authorizes. The Furies become the Kindly Ones, the Eumenides of the title. They submit to what Athena calls Holy Persuasion and are welcomed into ground beneath the city, acknowledged as fundamental realities, their dark provenance the other side of the bright Athenian coin.

I bring all this up because at the opening of this magnificent new law library, it seems appropriate to remember how fundamental to civilized life is our agreed respect for the workings of the law and the courts, and how fragile. And indeed the people of Northern Ireland have a veteran awareness of these matters, a deeper than average experience of both the impulse towards furious retribution and the need for a reconciliation that is both tough minded and civilized. But I also bring up the memory of Athens and the matter of the law because the mighty doors to this building are now adorned with an image of the heroine of another great Greek tragedy – the image, that is, of Antigone, and Antigone, let us not forget, experienced what many on both sides of this society have also experienced: a deep conflict between the things decreed by government and the things decreed by their own deepest pieties and principles.

It so happened that when Carolyn Mulholland was starting on her commission to furnish these beautiful, burnished, biblio-epic doors, in consultation with the chairman of your Art Committee, Donnell Deeny, I was starting on a commission to translate *Antigone* for the Abbey Theatre's centenary in 2004. We both recognized that these were parallel projects with the result that I ended up almost as excited about Carolyn's work as she was. I know, ladies and gentlemen, that we are here to celebrate several other artists whose work adorns this place and many of them are friends of mine, but I hope they will forgive me for making special mention of the doors, because Carolyn has been a close friend of ours now for almost forty years. We kept on at any rate, free-associating about various law legends and law locations, about Brehons in Ireland and Vikings at the althing, about the tables of the law and the temples of the gods, about Portia, about the polis, and about images associated with all these things – those images, as Yeats calls them, "that yet Fresh images beget." Carolyn moreover, is doubly gifted as an artist since she believes in words as well as images, and it is one of the glories of these doors that she has been able to incorporate oracular words from so many different places and periods. Words like the original Irish copyright law, "To every cow its calf, to every book its copy" or the gnomic Icelandic maxim; "With law our land be built or with lawlessness laid waste" or the tragic recognition of the Chorus in *Antigone*: "Wise conduct is the key to happiness. Always rule by the gods and reverence them."

The words "law" and "library" are hallowed words. So is the word "art". They belong in that cluster of the humanist vocabulary that has to be made

credible and operative over and over again by jurists and artists and architects and all men and women of good will, all those who would do what Yeats, in another noble phrase, once called "the spiritual intellect's great work". The pictures on these walls remind us that the artists who have lived through dangerous times are not necessarily changed utterly, that they don't necessarily bring forth terrible beauty but rather counter the times with true and vivid forms; true temperaments as different as those of John Kindness, Felim Egan, Graham Gingles, Clement McAleer, Simon McWilliams, Jack Packenham, Martin Wedge and Paddy McCann. The images on the doors are memorable, bold and archetypal. The grand design that Carolyn has executed will stand for what it is, bronze cast in commanding forms to engross the eye and the mind. But it will stand also as a reminder of the absolute value and necessity of that ongoing work of spirit and intellect, of its power and indeed its glory.

Professor Luzius Wildhaber: President of the European Court of Human Rights

It is a great honour and privilege for me to be asked to take part in the opening ceremony of this wonderful new Bar Council Library Building. I am sure that all those who will spend their professional lives working here will find themselves inspired – as I have been – by the sense of light and openness to the community which graces this building. As we have discovered with our own relatively new building in Strasbourg, architecture can be a source of inspiration for busy professionals, though not always a source that is recognised with a unanimous voice. Building for lawyers is, I would venture to say, necessarily a contentious exercise. However, the opening of a building is always a fitting moment to reflect on the wider picture. Allow me to do so with reference to our common pursuit; the protection of human rights through the legal process.

One insight comes to mind on this occasion. James Madison – one of the founding fathers of the Constitution of the United States - has spoken eloquently of liberty and learning each "leaning on the other for their mutual and surest support". Working as a President of a chronically busy international tribunal which examines human rights complaints from 44 jurisdictions, I am struck by the aptness of this observation. There is an obvious inter-dependence between learning and the protection of human rights and maintenance of the rule of law. We rely on the knowledge and skills of advocates to assert and plead human rights issues before the national courts as an essential part of the process that leads to judicial recognition and enforcement of rights by the national courts. Learning equally informs the reasoned decision of the judges. We also rely on these skills when a case is pleaded before the Court in Strasbourg and I can assure you that the adjudicatory task is made easier – indeed greatly assisted - when the matter is artfully pleaded in a manner which encompasses the essence of the argument with the sharpness and clarity that we have come to expect from lawyers trained in the common law system.

But there is also a wider sense in which the observation is true which relates directly to the work of the European Court of Human Rights.

The Convention system is essentially a system of last resort which should only come into play when redress for the complaint has been first been sought before the local courts. In this sense it is often described as a system which is subsidiary to that of the national system - a system of outer protection, if you prefer. The underlying philosophy of the Convention system is that human rights should first be protected at home and that the national courts should be afforded the opportunity to apply the provisions of the Convention to the issues at hand, preferably (but not as a matter of obligation) against the background of Strasbourg case-law. It is only if this is not possible or if there is discord between the rules applied locally and Strasbourg jurisprudence, that the Court would step in. I would add, in parenthesis, that given the large number of cases brought every year to Strasbourg, the future of the system now depends on the effective protection of human rights at national level.

Of course, the Convention system works best in States where incorporation has taken place. I am well aware that there was a time when judges in Northern Ireland or in other parts of the United Kingdom were not receptive to Convention points being raised before them. There existed what could politely be called a "constitutional resistance" to national courts applying Convention standards or indeed even interpreting administrative law principles against the background of the Convention. But that belongs to the past. Convention law is now an integral part of your legal system and lawyers can now plead Strasbourg jurisprudence directly before the domestic courts. This in turn makes it easier for the Court in Strasbourg to adjudicate when it is confronted with a fully reasoned national judgment where the courts have sought to establish the relevant Strasbourg law and to apply it to the case under consideration. It also means that the national courts are in a position to contribute to the development of human rights law throughout Europe to the extent to which their judgments inform and influence the development of Strasbourg law by the European Court. The judgments of the United Kingdom courts in *Pretty***,** *Goodwin***,** *Stafford* and *Amin* are excellent examples of this. The poet's observation that "the law makes long spokes out of the short stakes of man" has never been truer.

This respectful exchange and dialogue with national courts on a continuous basis through the medium of decided cases not only aids the adjudicatory process but enlivens and enriches the quality of the Strasbourg Court's case law. It is based on a notion of partnership in the common task of ensuring the protection of the Convention's guarantees, a partnership which has become a practical necessity in a Convention community involving 44 Contracting States with a combined population of some 800 million Europeans.

Of course it depends heavily for its success on an active and informed legal profession as well as on the judges. It falls to lawyers to identify appropriate cases in which to raise a Convention issue and also to keep abreast of jurisprudential developments. As those of you who have been involved in human rights cases will know, this may be no easy task for it calls on a breadth of vision which goes beyond the provincial or indeed the national. It is not uncommon for the Court to be confronted, in important cases, with citations from the superior courts in the USA, Canada, South Africa, and now the House of Lords. Modern means of technology have promoted this development which, in my view, can only be beneficial since it taps into the

wisdom of other experiences and other jurisdictions. Exposure to alternative ways of analysing constitutional issues can only be seen as a healthy challenge to traditional habits of thought. The recent decision of the United States Supreme Court in *Lawrence* v *Texas* offers a recent example. The willingness of the Strasbourg Court to refer to decisions of both the US Supreme Court and the Inter-American Court of Human Rights is a further example. In this sense also, liberty and learning rely on each other for mutual sustenance.

Let me just add one final note on incorporation which places the emphasis more on practical experience than either liberty or learning. As lawyers from a jurisdiction which has given rise to some of the Court's leading cases, you will all be too well aware of how incorporation actually works in practice. I can only hope that you do not recognise yourselves too closely in the following advice given by a senior British counsel to his pupil. The counsel said: if you have the law on your side, you should argue the law. If you have the facts on your side, you should argue the facts. But, said the pupil, who obviously had a bright future, what if you have neither the law nor the facts on your side? Well then, came the reply, just tell the judge it's a human rights issue.

It is clear to me on the joyous occasion of the opening of this building – and judging from your response – that incorporation of the Convention into Northern Irish law has a great future ahead of it.

STATUTORY APPROVALS AND THE CONCEPT OF TITLE

Alan Dowling, School of Law, Queen's University Belfast

According to Godfrey JA in *Spark Rich (China) Ltd* v *Valrose Ltd*,[1] "a prudent vendor should always consider, before attempting to sell his property, whether his title to the property may be affected by some unauthorised building work. If so, he should refrain from entering into any contract for the sale of the property which does not contain (1) a full disclosure of the problem; and (2) an agreement on the part of the purchaser not to raise any requisition or take any objection to the title based upon the unauthorised work. Cases in which a purchaser of property may safely be advised that he can be sure he can safely disregard unauthorised building work are likely to be rare." Problems caused by unauthorised building work will be familiar to most conveyancers, but the suggestion that unauthorised work may affect the title to the property is something that has not been much explored in courts in the United Kingdom. The suggestion echoes the argument put forward by Professor Potter in a series of articles in the *Conveyancer and Property Lawyer*[2] and in the *Journal of Planning Law*,[3] as to the effect of the Town and Country Planning Act 1947. "Whether", he wrote, "failure to disclose [unauthorised] development would enable a purchaser to avoid the contract we must leave for fuller consideration to another article, but we think that it might. Failure to disclose in the conveyance might be a breach of the covenants for title."[4] Again, "today, the land, when conveyed, can only serve the "existing use" because uses for any other purpose can be stopped. Hence, the vendor only has "title" to convey "the existing use" and, consequently, all matters concerned with user are matters of title."[5]

Professor Potter's argument was described in 1962 as the most well-known argument town planning had produced. At the same time it was said to have been accepted by hardly any practitioners.[6] Not long afterwards, one practitioner described it as well-known but now ignored.[7] Fifty years on, the issues discussed in the articles regarding the impact of the planning legislation on conveyancing law and practice remain largely unexamined by courts in the UK. Whether or not the thesis that the Town and Country Planning Act 1947 effected the radical change in the nature of ownership of land which Professor Potter thought, is right, some of the practical questions raised in the articles require answers. If Professor Potter's argument was

---

1 [1999] HKCA 105.
2 (1947) 11 *Conv* (NS) 147; (1948) 13 *Conv* (NS) 36, 85, 110, 159.
3 [1948] *JPL* 48, 104, 188, 353, 426, 547; [1949] *JPL* 49, 91, 186, 458; [1950] *JPL* 80, 247, 331, 747, 801, 879.
4 Potter, "Dealings with land under the Planning Acts" [1948] *JPL* 48, p 51.
5 *Ibid*, 91, p 111. For another consideration of the question see Cobby, "Is the permitted use a matter of title?" (1949) 13 *Conv* (NS) 329.
6 Mellows, "The use and title" (1962) 26 *Conv* (NS) 269. See also (1951) 15 *Conv* (NS) 209.
7 Russell, "The principal covenants for title" (1970) 34 *Conv* (NS) 178, n 93.

considered by most members of the profession to be too academic,[8] the question put by Professor Mellows is certainly not. "Suppose", he said, "that X contracts to sell to Y a building which X has used as a factory and which Y also wishes to use as a factory. Suppose also that three years previously X had changed the use to that of a factory from that or a warehouse without permission. After contracts are exchanged Y discovers the true position and refuses to complete: will X succeed if he sues on the contract?"[9] Similar questions can arise also in the context of other regulatory controls imposed by Parliament over a landowner's right to carry out building work on his land or to put the land to a particular use. The need to obtain local authority approval under the Building Regulations is one example: if the purchaser discovers after entering the contract that the property has been built without approval under the Regulations, what is his position? In other instances the use of property for a particular purpose may require a licence or certificate from one authority or another, fire certificates and entertainments licences being examples.[10] The issue for consideration in this article is the effect of the absence of such approvals on a purchaser of the property. In wider terms, the question is what are the rights and obligations of the parties to a contract for the sale of land where the property lacks the approvals which should have been obtained, and in narrower terms, does the absence of such approvals constitute a defect in the title to the property?

TITLE AND QUALITY

The distinction between the *title to* property and the *quality of* the property in question lies at the root of the law as to contracts for the sale of land. The principle *caveat emptor* is the basis of the latter. It is up to the purchaser to satisfy himself as to the quality of the property he is buying. On the other hand, it is the responsibility of the vendor to deduce a good title to that property. Matters of quality exist for example where the property will require unforeseen repair, or where it floods in the winter, or where it is not capable of supporting loads likely to exist in the purchaser's use of the property.[11] In such cases the physical characteristics of the property are in some way defective. Defects in title exist where the ownership of the property is affected. The obvious case is where some third party has a right in the property, such as a covenant affecting the use of the property, or a right of way through the property, or there is a charge on the property subjecting the owner to a monetary liability. Here the physical characteristics of the property may be precisely those which the purchaser

---

[8] See Garner, [1953] *JPL* 460.

[9] Mellows, *op cit* p 284.

[10] For the requirement of planning permission and approval of the building authority see Planning (NI) Order 1991 and Building Regulations (NI) Order 1979. For fire certificates see Fire Services (NI) Order 1984. For the requirement of a licence or approval for particular uses see *eg* Local Government (Miscellaneous Provisions) (NI) Order 1985; Betting, Gaming Lotteries and Amusements (NI) Order 1985; Food Safety (NI) Order 1991; Licensing (NI) Order 1996.

[11] *Milne* v *Delta Foods Ltd* (1996) 61 ACWS (3d) 587. See also *Playboy Hairstyling Ltd* v *King & Tse Enterprises Ltd* (1995) 57 ACWS (3d) 495 (lessee incurring expenditure to comply with by-law applicable to property as a result of lessee's intended user).

thought he was acquiring, but the problem is that the enjoyment of the property is affected by the rights of a third party.

In some cases the question whether the problem which has arisen for the purchaser is one concerning the quality of the property or one going to the title of the property is not as straightforward to answer.[12] Cases where the vendor has carried out building operations on the land, or has changed the use of the property, without the approvals he should have obtained, fall into this category. If the property in sale lacks the appropriate approvals, is this a matter of title, or merely a matter of quality? And in any case, what difference does it make? The danger of course for the purchaser is that the absence of the appropriate approval may result in the authority whose approval should have been obtained taking enforcement action. In such circumstances the purchaser is likely at best to be involved in remedial work or expenditure, and at worst to find that he cannot use the property he has purchased. In such circumstances one might expect the law to provide redress. This note is intended to examine whether the lack of consent or the risk that enforcement action may be taken by the relevant authority is a matter affecting the purchaser's title to the land, so as to put the purchaser in the same position as he would have been in had he discovered for example that the property was affected by an easement or restrictive covenant of which the purchaser was unaware. There is an obvious analogy between the situation under discussion and that where property is affected by a restrictive covenant and consent of the covenantee has not been obtained. Covenants preventing building work or restricting user of the property are common and restrict a purchaser's enjoyment of the property in the same way as does the requirement of planning permission. There are of course differences in the consequences of failure to comply with the restrictions, but initially the owner of the position of the purchaser of property is much the same position whether his enjoyment is restricted by a covenant or by the need for planning permission. The existence of a covenant restricting user to that of a private dwelling house has been held to be a defect in title,[13] as has a statutory provision restricting the purchaser's right to build on the property,[14] and where the purchaser discovers a breach of a covenant restricting user of the property there is a defect in the title.[15] It could therefore be argued that the need for planning permission for building work and user of property without planning permission or whatever other statutory approvals are needed should be seen in the same way. The similarity is apparent also where the property is affected by a notice served by the relevant authority as a result of the absence of consent, such as an enforcement notice or a notice requiring remedial work to comply with building regulations. Notices served by landlords as a result of a breach of covenant are matters of title, and therefore

---

[12] According to Young J in *Pemberton Australia Pty Ltd* v *CPS Services Pty Ltd* 1990 NSW LEXIS 10619 there is a "fine line" between defects in title and defects in quality. Seven years later the distinction had become "very fine": see *Eighth SRJ Pty Ltd* v *Merity* 1997 NSW LEXIS 317.

[13] *Re Stone and Saville's Contract* [1963] 1 All ER 353.

[14] *In re Ponsford and Newport District School Board* [1894] 1 Ch 454.

[15] See *Re Martin* (1912) 106 LT 381; *In re Taunton and West of England Perpetual Benefit Building Society and Roberts' Contract* [1912] 2 Ch 381; *Becker* v *Partridge* [1966] 2 All ER 266; also *McAleer* v *Desjardine* [1948] OR 557.

must be disclosed.[16] The analogy between restrictive covenants and statutory approvals is not however perfect. Unlike the case of a restrictive covenant, the requirement of planning permission and the other approvals under consideration is imposed not by an instrument between private individuals but by a statute of general application.[17] Moreover, while a restrictive covenant creates an equitable interest in the land, the statutory provisions in question do not create in favour of the relevant authority any estate or interest, legal or equitable in the property,[18] so that the vendor remains able, notwithstanding the statutory obligations, to transfer legal and equitable ownership of the property.[19] The most significant difference for present purposes however may be the consequences which follow from breach of covenant and breach of the requirement of statutory approval. In the case of failure to obtain the consent of the lessor to building work or user which is prohibited by a covenant in the lease, the lessee may run the risk of forfeiture of his estate in the property. Where no possibility of forfeiture exists, it has been held in Ireland that a notice served by a lessor threatening action a result of a breach of a repairing covenant by the lessee is not a matter of title, Kingsmill Moore J saying that "[a] liability to ejectment for forfeiture, crystallised by service of a repairing notice by the landlord, is clearly a defect in title to which the vendor must call attention. Mere disrepair which may involve an action for breach of covenant, but which, in the absence of a proviso for re-entry, cannot be a ground of forfeiture, is not a defect of title, but is a defect in subject-matter."[20] In the case of failure to obtain planning permission or other approval for building works or use of the property, enforcement action is likely to take the form of orders requiring demolition or cessation of user, but the owner's estate in the property will remain intact. That may suggest the problem of activity for which statutory approval is not obtained is not one of title. The danger of forfeiture cannot however be the only criterion which makes the something a matter of title, as otherwise restrictive covenants and charges would not be matters of title.[21]

The consequences of the problem being identified as a matter of title are considered below. Before that however, two points may be made. First, the absence of statutory approvals will not render the contract invalid.[22] Discussion of the possibility that the agreement could be void for illegality

---

16 *Beyfus* v *Lodge* [1925] Ch 350.

17 *Dell* v *Beasley* [1959] NZLR 89, relying on *Manukau Beach Estates Ltd* v *Wathew* [1932] NZLR 146. See also *Re Mullin and Knowles* (1965) 53 DLR (2d) 680; *Royal Sidney Golf Club* v *Federal Commissioner of Taxation* (1955) 91 CLR 610 ("There is all the difference between a public law affecting the enjoyment of land and a restriction of title.") Note however *Moss* v *Perpetual Trustees Estate and Agency Co of New Zealand Ltd* [1923] NZLR 264 and *Schollum* v *Francis* [1930] NZLR 504 where the fact that a restriction was created by a statute did not prevent the court holding the purchaser entitled to rescind.

18 *Lunahome Ltd* v *London Yard Management Co Ltd* (1989) unrep; *Township of Trafalgar* v *Hamilton* [1954] OR 81; *Re Mullins and Knowles* (1965) 53 DLR (2d) 680; *Tabata* v *McWilliams* (1981) 33 OR (2d) 32.

19 *Harris* v *Weaver* [1980] 2 NZLR 437; *Sullivan* v *Dan* 1996 NSW LEXIS 3672; *Doolan* v *Murphy* (1993) unrep (RoI).

20 *In re Flynn & Newman's Contract* [1948] IR 104.

21 See further below p 112.

22 *EJH Holdings Ltd* v *Bougie* (1977) 7 AR 213.

has invariably taken place in the context of leases where the lessee has entered a covenant to use the property only for a particular purpose, and planning permission for such use has not been granted. The view of the courts is that unless the lease requires the use of the property without the necessary consent, or the lessor intended that the property would be used without consent, the lease is valid,[23] and mere absence of the relevant consent does not of itself vitiate the contract the parties have made.[24]

The second point is that the absence of statutory approvals or certificates for property bought by a purchaser may give rise to a number of causes of action which do not require consideration whether the problem involves a matter of title or not. Thus the purchaser may have remedies in contract or in tort if the vendor has made a fraudulent statement that such approvals exist. Equally, he may have remedies for negligent misstatement arising from a statement to that effect which is not fraudulent but is nonetheless wrong. The vendor may likewise be liable in negligence if his failure to point out the absence of such approvals or that there are restrictions on enjoyment of the property amounts to a breach of the duty of care he owes.[25] More interesting questions arise where the vendor has not made any statement that the property has the benefit of the relevant approvals, but the property in sale has been described in such a way that there is a representation that such approvals exist, or that enjoyment of the property is not subject to any restrictions.[26] More interesting still is the suggestion that the mere fact of a

---

[23] *Edler* v *Auerbach* [1949] 2 All ER 692; *Holidaywise Koala Pty Ltd* v *Queenslodge Pty Ltd* [1977] VR 164; *Bawofi Pty Ltd* v *Comrealty Ltd* 1992 NSW LEXIS 6795.

[24] *Best* v *Glenville* [1960] 3 All ER 478; *Laurence* v *Lexcourt Holdings Ltd* [1978] 2 All ER 810.

[25] For the possibility that a vendor owes a duty of care to the purchaser see *Esso Petroleum Co Ltd* v *Mardon* [1976] 2 All ER 3. See also *Greyhill Property Co Ltd* v *Whitechap Inn Ltd* (1993) unrep (RoI) (receiver of vendor company held to owe duty of care to purchaser). In *Doolan* v *Murray* (1993) unrep (RoI) Keane J considered that had the vendors been aware of a condition in a planning permission restricting the purchaser's ability to develop the land in sale they might have owed a duty of care to the purchaser since they might reasonably have assumed that the purchaser would rely on the vendors' silence as indicating there would be no problems in carrying out the work intended.

[26] See *Laurence* v *Lexcourt Holdings Ltd* [1978] 2 All ER 810 (lessee of premises let as offices able to rescind agreement where premises lacked planning permission for such use for more than two years of fifteen year tenancy); *Atlantic Estates plc* v *Ezekiel* [1991] 35 EG 118 (purchaser of premises described as wine-bar entitled to rescind where licence to sell alcohol had been forfeited); *Re Deighan* (1897) 31 ILTR 44 (misdescription where property described as "licensed premises" sold by vendor not having full licence); *Thompson* v *Vincent* [2001] 3 NZLR 355 (purchaser of building containing 24 motel units later discovering planning permission existed for only 12 units successful in action based on misrepresentation, the representation being that the property could be used as 24 units, and not merely that there were physically 24 units in the building). See also *Registered Holdings Ltd* v *Kadri* (1972) 222 EG 621 (misdescription where property said to include "accommodation" found to be subject to closing order, as description implied purchaser was entitled to occupy property without consent of third party); also *London Investment and Mortgage Co Ltd* v *Ember Estates Ltd* (1950) 1 P & CR 188; *Pierse* v *Allen and ors* (1993) unrep (RoI); *Barry Plant Real Estate (Regional) Pty Ltd* v *Canazi* 1994 VIC LEXIS 858; *Lash and Moneta Builders and Construction Co* v *Miller* (1956) 5 DLR (2d) 469. There may also be

landlord's showing premises to a tenant is in itself an implied representation by conduct that the premises in their physical configuration and construction were lawful.[27] The one argument that seems certain to fail however is that the vendor impliedly warrants that the property can be put to the use intended by the purchaser. No warranty is implied that the property is physically fit for the purpose intended by the purchaser, and the same applies where the property cannot be used in the way intended by the purchaser because such user would involve a breach of covenant.[28] By further extension, it seems that the same will be true where the restriction on user is statutory.[29]

Apart from remedies on the contract or in deceit or negligence, the possibility that the vendor's actions in building or using the property without the relevant approvals may afford the purchaser an action for breach of statutory duty needs to be considered. In *Watkin* v *Wilson*[30] Henry J thought the wilful construction of a building or part of a building without a permit and in breach of the standards required should found a cause of action at the instance of an owner of the building. In *Willis* v *Castelein*[31] however Williams J rejected such a possibility relying on a dictum of Cooke J in *Askin* v *Knox*[32] that "[n]egligence liability has itself been a difficult and in some respects controversial development in the building control field. . . A claim of liability without proof of negligence goes too far and must be rejected." Breach of planning controls confers no right of action on members of the public[33] and a purchaser is unlikely to be in any better position.

Even however if the purchaser fails in an action against the vendor, it should not be forgotten that the vendor may yet be unsuccessful in an action from specific performance, this being an equitable remedy and accordingly lying in the discretion of the court, which may refuse the remedy if the vendor's conduct is such that the court thinks the remedy would be unfair to the purchaser. It has been suggested on several occasions that the absence of statutory approvals would result in the refusal of specific performance at the suit of the vendor.[34] Nor should the possibility of an action against the purchaser's solicitor be overlooked. The cases in the UK courts in which the absence of necessary approvals has been the issue have involved actions by

---

an offence committed under the Property Misdescriptions Act 1991 if property is advertised for sale without the requisite consents: see *Enfield LBC* v *Castle Estate Agents Ltd* [1996] 36 EG 145, where however the prosecution was unsuccessful.

27 See *Nip Wun Lan* v *Chan Oi Ling* [1985] 2 HKC 105, where however the court was doubtful of the proposition.

28 *Hill* v *Harris* [1965] 2 All ER 358. See also *Stokes* v *Mixconcrete (Holdings) Ltd* (1978) 38 P & CR 488; *Molton Builders Ltd* v *City of Westminster LBC* (1975) 30 P & CR 182.

29 *Edler* v *Auerbach* [1949] 2 All ER 692; *Belcairn Guest House Ltd* v *Weir* [1963] NZLR 301.

30 [1985] 1 NZLR 666.

31 [1993] 3 NZLR 103.

32 [1989] 1 NZLR 248.

33 See *Mahon* v *Sharma* [1990] 2 NIJB 76 (market holder not entitled to maintain action to restrain user without planning permission by competitor).

34 *Dell* v *Beasley* [1959] NZLR 89; *Fletcher* v *Manton* (1940) 64 CLR 37; *Yammouni* v *Condidorio* [1959] VR 479. See also *Huang Ching Hwee* v *Heng Kay Pay* [1993] 1 SLR 100; *Tabata* v *McWilliams* (1981) 33 OR (2d) 32; *Pottinger* v *George* (1967) 116 CLR 328.

purchasers against their solicitors.[35] It may be that that is the easiest course for the purchaser to adopt, obviating the need to determine whether the matter is one of title or not. The question may be relevant however should the solicitor seek to avoid liability. In a number of cases in the UK and elsewhere defendant solicitors have sought to avoid liability to their clients on the basis that by the time the solicitors had been instructed, the clients had already committed themselves to purchasing the property, and that the absence of the relevant approval was a matter within the principle *caveat emptor*.[36]

A MATTER OF TITLE?

It is clear then that a purchaser who discovers that the property he has agreed to buy does not have the approvals for its construction or use which should have been obtained may not be without remedy. The burden of this article is however to examine whether, apart from the various causes of action which have already been noted, the absence of appropriate statutory approvals or certificates is a matter affecting the title of the property. The question is not one peculiar to the UK and Ireland. Courts in various common law jurisdictions have had to consider the issue. In Canada restrictions on use imposed by a zoning by-law do not, in the absence of an express provision of the contract,[37] constitute defects in title,[38] and the same is true for breaches of building control.[39] In Australia,[40] New Zealand[41] and Singapore[42] the position

---

[35] *Lake* v *Bushby* [1949] 2 All ER 964; *Cottingham* v *Attey Bower & Jones The Times* 19th April 2000; *Babicki* v *Rowlands* [2001] EWCA Civ 1720. See also *Ford* v *White & Co* [1964] 2 All ER 775; *Raintree* v *Holmes & Hills* (1984) 134 *NLJ* 522. In Ireland the purchase of licensed premises has given rise to similar problems: see *Taylor* v *Ryan & Jones* (1983) unrep; *Kelly* v *Crowley* [1985] IR 212; *Flannery* v *Houlihan* (1987) unrep; *Pierse* v *Allen & ors* (1993) unrep.

[36] *Lake* v *Bushby* [1949] 2 All ER 964; *Tabata* v *McWilliams* (1981) 33 OR (2d) 32. See also *Kolan* v *Solicitor* (1969) 7 DLR (3d) 481; *Sullivan* v *Dan* 1996 NSW LEXIS 3672.

[37] See *Tabata* v *McWilliams* (1981) 33 OR (2d) 32; *Palen* v *Millson* (1987) 65 OR (2d) 89; *Cinram Ltd* v *Armadale Enterprises Ltd* (1996) 31 OR (3d) 257. According to Lerner J in *Tabata* v *McWilliams*, "[t]he parties can, by contract, make a matter which is normally not one affecting title become one which does affect title. If the contract is silent, by-laws do not affect title. If the contract expressly so states, by-laws can affect title." What seems to be meant is that the remedies available to the purchaser where a vendor fails to deduce good title are available where there is a breach of planning control. Thus where a clause was held to have the effect of making breaches of planning by-laws a matter of title, the court considered the purchaser would have been entitled to avoid the contract where the vendor had failed to disclose breaches.

[38] See *Jackson* v *Nicholson* [1979] 3 ACWS 52; *Palen* v *Millson* (1987) 63 OR (2d) 89; *Gelakis* v *Giouroukos* (1991) 26 ACWS (3d) 1046.

[39] *Cinram Ltd* v *Armadale Enterprises Ltd* (1996) 31 OR (3d) 257.

[40] *McInnes* v *Edwards* [1986] VR 161; *Delbridge* v *Low* [1990] 2 Qd R 317; *Carpenter* v *McGrath* (1996) 40 NSWLR 39; *Falcone* v *Mentyn* [2003] TASSC 79. There are earlier authorities taking the view that the absence of approval under the building regulations amounts to a defect in title: see *Vukelic* v *Sadil-Quinlan* (1976) 13 ACTR 3; *Maxwell* v *Pinheiro* (1979) 46 LGRA 310; *Borthwick* v *Walsh* (1980) 41 LGRA 144. For an extensive review of the authorities see *Carpenter* v *McGrath*.

appears to be the same. In contrast, courts in Hong Kong have held that the absence of appropriate approvals can constitute a defect in title.[43] The reasons for the differing views are considered hereafter. To begin with we will look at the implications of the question. It has been pointed out that "title" may have different meanings according to the context in which the term is used.[44] It is therefore best perhaps to proceed by considering various possible consequences which may follow from saying that the absence of statutory approvals is a matter of title.

If the absence of planning permission or other statutory approvals *is* a matter of title, various consequences seem to follow.[45] (1) The vendor is said to be under a duty to disclose latent defects in title, so that failure to make the purchaser aware that there is no planning permission or other approval for the building on the land, or for the use of the property, will afford the remedies open as a consequence of non-disclosure. (2) Any approvals which should have been obtained are documents of title which should be abstracted to the purchaser to prove title. (3) If the matter is a matter of title, the vendor will fail to discharge his obligation to show a good title to the property if the property does not have the necessary approvals. (4) The purchaser may also have the right to repudiate the contract as soon as he discovers the absence of the relevant consent, on the basis that the purchaser has a right to repudiate the contract once he discovers that the vendor's title is defective. (5) If the absence of statutory approvals is a matter of title, it is something which can be raised by the purchaser in requisitions on title. Further, if the matter is not merely a matter of title, but something which goes to the root of the title,

---

[41] *Dell* v *Beasley* [1959] NZLR 89; *Harris* v *Weaver* [1980] 2 NZLR 437. See however *Watkin* v *Wilson* [1985] 1 NZLR 666 where the purchaser of property which had been built without the necessary building approval was successful in an action for damages to compensate for the cost of demolishing the structure in question on the ground *inter alia* that there was a latent defect in the title to the property on account of the possibility that the building authority could require demolition of the property. In *Willis* v *Castelein* [1993] 3 NZLR 103 the court distinguished *Watkin* v *Wilson* on the basis that in the earlier case a demolition order was in existence. In the most recent case, *Lawrence* v *Power* [1997] 3 NZLR 503, the court refused the vendor's application to strike out the purchaser's action on the ground that the claim was untenable in the light of the authorities, the court holding that the law was not sufficiently clearly against the action as to warrant such a course.

[42] *Huang Ching Hwee* v *Heng Kay Pay* [1993] 1 SLR 100.

[43] *Giant River Ltd* v *Asie Marketing Ltd* [1990] 1 HKLR 297.

[44] Mellows, "The use and title" (1962) 26 *Conv* (NS) 269; Rudden, "The terminology of title" (1964) 80 *LQR* 62. See also Cobby, "Is the permitted use a matter of title?" (1949) 13 *Conv* (NS) 329.

[45] What follows are the consequences where the contract is an open contract. It is of course possible for the parties to regulate their obligations expressly. In the Republic for example, the Law Society's General Conditions of Sale (2001 edn) contain a warranty on the part of the vendor that planning permission and building bye-law approvals have been obtained for any work carried out (condition 36). In Hong Kong, where the presence of unauthorised structures seems to have caused particular problems, clauses limiting the vendor's liability are common. Provided they give the purchaser sufficient indication of the risk he is taking the courts will uphold such clauses: see *Jumbo King Ltd* v *Faithful Properties Ltd* [1999] 4 HKC 707.

then the purchaser will be able to raise the issue of lack of approvals notwithstanding that the time for raising requisitions has passed. (6) If the purchaser brings an action as a result of the breach of contract, then if the absence of statutory approvals is a matter of title, the purchaser's damages will be limited by the rule in *Bain* v *Fothergill*. (7) If the purchaser raises a requisition concerning the absence of approvals, the court may resolve the matter on an application to it under the Vendor and Purchaser Act 1874 made by either party. (8) If the absence of statutory approvals does not come to light until after completion, the purchaser may have remedies under the covenants for title implied by section 7 of the Conveyancing Act 1881.

It will be convenient to deal with these questions chronologically, as concerning matters which arise before contract, or while the parties rights are governed by the contract, or lastly, as matters which depend on the rights of the parties after completion of the contract has taken place.

Before Contract

In contracts for the sale of land the vendor is under a duty of disclosure to the purchaser. Traditionally this duty has been said to be limited to disclosure of latent defects in title.[46] Unless the absence of statutory approvals is a latent defect in title, it would seem to follow that the vendor need not say anything about the absence of planning permission or other approvals. That is one reason why the discussion whether such matters are matters of title is necessary. Unfortunately the matter is complicated by two factors. First, it appears from some of the cases that failure by the vendor to state that such approvals are lacking may amount to a misrepresentation.[47] If the failure to point out to the purchaser that the property lacks the necessary approvals can amount to a misrepresentation, it might be argued that it matters not whether what is not disclosed is a matter of title or not. A problem may however arise if other elements required to ground an action for misrepresentation are not present, *eg*, that the misrepresentation did not induce the contract. It is therefore necessary still to distinguish between misrepresentation and non-disclosure, and accordingly to ask whether the absence planning permission or other approvals amounts to a matter of title so as to fall within the vendor's duty of disclosure. The need to determine whether something constitutes a matter of title or is simply a representation was noted also in *Aslan* v *Berkeley House Properties Ltd*[48] where Fox LJ said that he considered the purchaser's case "an attempt to introduce into the field of title matters which, if they are to be material at all, more properly belong to the field of representation. Mr Meehan knew that he was buying a risky title. If he wanted to assess further the chances of the trustees threatening to operate

---

[46] *Emmet and Farrand on Title* para 4.027; Farrand, *Contract and Conveyance* (4th edn, 1983) p 63; Megarry & Wade, *The Law of Real Property* (6th edn, 2000) para 12-068; Barnsley, *Conveyancing Law and Practice* (4th edn, 1996) p 153. For a full discussion of the vendor's duty of disclosure see Harpum, "Selling without title: a vendor's duty of disclosure?" (1992) 108 *LQR* 280.

[47] See *Dell* v *Beasley* [1959] NZLR 89; *Gosling* v *Anderson* (1972) 223 EG 1743; *Sinclair-Hill* v *Sothcott* (1973) 26 P & CR 490; *Thomas* v *Vincent* [2001] 3 NZLR 355; *Doolan* v *Murray* (1993) unrep (RoI); *Goldstein* v *Davison* (1994) 47 ACWS (3d) 1105.

[48] [1990] 37 EG 81.

the break clauses and thus forcing a surrender of the leases, he could have asked [the vendor] what his information was. If [the vendor] gave a misleading reply, [the purchaser] would then have had a remedy. What actually happened was that [the vendor] contracted to sell the very title that he owned. There was no defect latent or patent in that title."

The other factor complicating the issue whether the absence of statutory approvals is a matter of title is that in some cases[49] courts have stated the duty of the vendor in relation to disclosure in a manner which is more extensive than the traditional formulation that the duty is to disclose latent defects in title, so that non-disclosure of planning or other matters has been found to be a breach of the duty, in consequence of which the question whether the matters in question are matters of title or not is likewise avoided.[50]

Bearing such factors in mind, there is a clear statement that "the absence of planning permission is *not*[51] in itself a matter which affects the title in the land, nor is it in the absence of special circumstances a latent defect in the property as to which there is a duty on the vendor to speak" in the judgment of Graham J in *Gosling* v *Anderson.*[52] While the decision was reversed on appeal,[53] it appears that Lord Denning MR agreed with the view that there was no duty to disclose the absence of planning permission, though he went on to hold that failure to do so could amount to a misrepresentation. Relevant also to the need for disclosure is *Geryani* v *O'Callaghan*,[54] in which the purchaser of property used as a café discovered after the contract was made that the property was not registered with the health authority as required by the Food Hygiene Regulations, but was only provisionally registered, and could not be fully registered unless a number of conditions involving significant expense were complied with. Failure to comply with the conditions would result in continued operation of the café becoming illegal some three months later. The purchaser purported to rescind the contract pursuant to a clause in the contract providing that the purchaser would not be required to accept property differing substantially from the property agreed to be sold. Holding the purchaser justified in her action, Costello J said that the purchaser could reasonably assume that the property was one in which the business could lawfully be carried on, and that he had impliedly rejected the argument advanced for the vendor, based on the

---

[49] *Sidney* v *Buddery* (1949) 1 P & CR 34; *Sakkas* v *Donford Ltd* (1982) 46 P & CR 290.

[50] See *Carlish* v *Salt* [1906] 1 Ch 335, Joyce J considering that the vendor of real estate is required to disclose to the purchaser material defects in the title, or in the subject of the sale, which are in the vendor's exclusive knowledge and which the purchaser cannot be expected to discover with the care ordinarily used in such transactions. For criticism see *In re Flynn and Newman's Contract* [1948] IR 104. In *Citytowns Ltd* v *Bohemian Properties Ltd* [1986] 1 EGLR 258 failure to disclose a dangerous structure notice, the condition of the roof and a dispute with the tenant of the property in sale were considered to be matters of title, as the property was an investment and these would affect the purchaser's rights as landlord against the tenant.

[51] Emphasis added.

[52] (1971) 220 EG 1117.

[53] (1972) 223 EG 1743.

[54] (1995) unrep (RoI).

doctrine of *caveat emptor*, that there was no duty on the vendor to disclose the fact that the premises were only provisionally registered, and that the purchaser could have ascertained the position by pre-contract enquiries. After stating the rule to be that a vendor was required only to disclose latent defects in title, Costello J went on to say that the clause in the contract upon which the purchaser relied meant that "if a vendor has knowledge of facts where non-disclosure might confer contractual rescission rights . . . prudence would suggest either pre-contract disclosure or that they be made the subject of special contractual conditions."

Even however if the absence of planning permission or other approval were to be considered a matter of title, that would not be enough to require the vendor to disclose the fact. The vendor is required only to disclose *latent* defects in title. A defect will be latent where its existence is not apparent to the eye or is a necessary implication from something visible to the eye.[55] In *Billion Profit Enterprises Ltd* v *Rise Path Investments Ltd*[56] user of property as a karaoke bar where the occupation permit allowed use for offices was considered not to be a latent defect, the actual user being obvious for all to see, but the court held that in any event there had been sufficient disclosure in the terms of the agreement. It is not clear from the cases how buildings constructed without permission should be considered. On the one hand their existence is plain to see: the fact that they lack the appropriate consent however is not.[57] Assuming that the vendor is required or decides to disclose unlawful structures, according to *Billion Profit Enterprises* it is not the case that the vendor has to pinpoint precisely every illegal structure, as this would lead to dispute as to how far the vendor needs to disclose the precise nature of the illegal structure, its exact size, and in what ways the structure could create a risk or doubt on the title: where doctrines of equity were called on, said the court, it should be borne in mind that the purchaser can and should inspect the property before entering the contract, and if the contract contains clauses extinguishing or limiting the vendor's duty as to user and unauthorised structures, the purchaser cannot be heard to complain of non-disclosure.[58]

---

[55] *Yandle & Sons* v *Sutton* [1922] 2 Ch 199.

[56] [1999] HKCFI 858.

[57] See *Century Legend Ltd* v *Chu Chung Shing Development Co Ltd* [1999] HKCFI 853: "Knowledge of the existence of alterations was not to be equated with knowledge of the legal consequences of alterations." In *Brain Future Ltd* v *Century Crown Ltd* [1999] 589 HKCU 1 the court considered that the presence of unauthorised structures could not be considered a latent defect. See also *Kensel Ltd* v *Charmfast Investment Ltd* [2001] HKCFI 1006. Note also however *But Chung Yin* v *Billion Extension Development Ltd* [1997] 1 HKC 531 in which a purchaser who was aware of the existence of unauthorised structures was not precluded from raising requisitions as he was not aware that enforcement action had been taken by the building authority.

[58] See also *Profit Rich Enterprises Ltd* v *Sky Talent Properties Ltd* [2003] HKCFI 536.

Between Contract and Completion

Deduction of Title

One reason why it is necessary to determine whether the absence of statutory approvals is a matter of title or not is because of the vendor's obligation to show good title to the purchaser. It is not enough that the vendor has a good title: he must show that that is the case.[59] Professor Potter considered that the vendor would be required to abstract the history of the use of the property in the same way as he would have to abstract the history of ownership and dealings with the property.[60] If that is right, then grants of planning permission and presumably other statutory approvals are documents of title in the same way as conveyances, mortgages and other assurances of the property. There is authority in Hong Kong that such is the case: in *Lui Kwok Wai* v *Chan Yiu Hing*[61] the court held that an occupation permit was a necessary document to prove the vendor's title to the property.

Obligation to Show Good Title

The vendor must show good title to the property.[62] A good title means a title free from all incumbrances except those which are patent or are known to the purchaser at the time of contracting.[63] That the vendor's obligation comprises two elements, (1) that the vendor can show he is owner of the property he has agreed to sell, and (2) that he can transfer that property free from incumbrances, was pointed out in *Ng King Wai Terence* v *Qing Yuan Enterprises Ltd.*[64] The absence of statutory approvals does not affect ownership of the property, so unless the absence of the relevant permission means the property is subject to an incumbrance, such absence does not prevent the vendor from fulfilling his obligation.[65]

"Incumbrances" covers all subsisting third party rights and includes statutory liabilities, if they are not merely potential or imposed on property generally.[66] In *Re Allen & Driscoll's Contract*[67] the court rejected the argument that an inchoate incumbrance existed where a notice requiring work had been served by a local authority, holding that any charge arose only when the works were completed. Closer to the situation under discussion is *Re Forsey and Hollebrone's Contract*[68] where the court held that no incumbrance had been created where a resolution by a planning authority to prepare a town

---

[59] See *Active Keen Industries Ltd* v *Fok Chi Keung* [1994] 2 HKC 67 (described by counsel in *Summit Link Ltd* v *Sunlink Group (Hong Kong) Co Ltd* [1999] HKCFI 1448 as "the Bible for conveyancing lawyers").

[60] Potter, "Caveat emptor" 13 *Conv* (NS) 36, 42.

[61] [1995] 1 HKC 197.

[62] *Re Ossemley's Estates Ltd* [1937] 3 All ER 774; *Timmins* v *Moreland Street Properties Ltd* [1957] 3 All ER 265; *Leominster Properties Ltd* v *Broadway Finance Ltd* (1981) 42 P & CR 372.

[63] Megarry & Wade, *op cit*, para 12-080.

[64] [1998] 2213 HKCU 1. See also *Jumbo King Ltd* v *Faithful Properties Ltd* [1999] 4 HKC 707.

[65] See further *Summit Link Ltd* v *Sunlink Group (Hong Kong) Co Ltd* [1999] HKCFI 1448.

[66] Megarry & Wade, *op cit*, para 12-080.

[67] [1904] 2 Ch 226. See also *In re Farrer and Gilbert's Contract* [1914] 1 Ch 125.

[68] [1927] 2 Ch 379.

planning scheme existed at the time of the contract, Eve J, whose views were endorsed on appeal, saying that until approval for the scheme had been given by the Minister there was no scheme in existence which could affect the property: there was a potential interference with the enjoyment of the property, but until that potentiality had ripened into an actual interference, the property was not affected in the sense that there was no incumbrance imposed by the mere passing of the resolution.[69] Where property has been built or used without the necessary approvals, there is a risk that enforcement action will be taken by the relevant authority. The question is whether this risk means that an incumbrance exists.[70] In Hong Kong the view is that it can: whether or not it does is a question of degree.[71] In *Ng King Wai Terence* v *Qing Yuan Enterprises Ltd*[72] the court held that the risk of enforcement action for breach of the building regulations would mean that the vendor was unable to transfer the property free from incumbrances. Likewise, in *Wah Ying Properties Ltd* v *Sound Cash Ltd*[73] the court held that there was an incumbrance where remedial work had been carried out by the building authority and the potential risk existed that an order would be made requiring the repayment of the cost of such work by the owner, although the order was not made until after the purchaser acquired the property. In Australia however the risk of enforcement action has been held not to constitute an incumbrance.[74]

Requisitions and Objections

If the absence of planning permission or other statutory approvals is a matter of title, it would seem to follow that the purchaser is able to raise any problems in requisitions on title. Unless it *is* a matter of title, the vendor will be able to refuse to answer any questions.[75] Two decisions of the Irish courts are relevant to the question whether questions arising in connection with planning controls are matters of title. In *Meagher* v *Blount*[76] the purchaser had entered a contract containing a warranty by the vendor as to compliance with planning controls. The purchaser raised a requisition on title as to planning matters and the question was whether he was entitled to do so or had to rely merely on the warranty contained in the contract. The court held that the purchaser's requisition was valid. In *Doolan* v *Murray*[77] however Keane J considered that requisitions as to planning matters, though common, were not in the strict sense requisitions on title. As noted, courts in Hong Kong have considered the absence of approvals to be a matter of title: in

---

69 See also *A-G* v *Barnes Corpn* [1939] Ch 110.

70 Where enforcement action has already begun, it seems to be accepted that the vendor is unable to show good title: *But Chung Yiu* v *Bullion Extension Development Ltd* [1997] 1 HKC 531; *McInnes* v *Edwards* [1986] VR 161; *Huang Ching Hwee* v *Heng Kay Pay* [1993] 1 SLR 100.

71 *Jumbo King Ltd* v *Faithful Properties Ltd* [1999] 4 HKC 707 (Littton PJ). See below, p 114.

72 [1998] 2213 HKCU 1.

73 [1994] 1 HKC 786.

74 *McInnes* v *Edwards* [1986] VR 161. See further below p 112.

75 See Farrand, *op cit,* p 118; *Ridley* v *Oster* [1939] 1 All ER 618.

76 [1984] ILRM 671.

77 (1993) unrep (RoI).

Empire Trend Enterprises Ltd v *Double Mind Co Ltd*[78] the court considered there was "no doubt" that the presence of unauthorised structures would prevent the vendor from showing good title. It follows from such a view that the purchaser should be entitled to raise requisitions on the matter. It appears from the decisions in Hong Kong that not only will the purchaser be able to raise requisitions, but in some cases the absence of approvals may be a matter which goes to the root of the title, so that the purchaser may be able to raise the problem notwithstanding that the time for raising requisitions has gone by.[79]

Purchaser's Right to Repudiate

Although the presence of unauthorised buildings has been held in Hong Kong to mean that there is a defect in title, the courts have held also that the purchaser does not have the right to repudiate the contract prior to completion, as where a purchaser discovers the vendor's title is bad.[80] In *Ip Cho Sau* v *Leung Kai Cheong*[81] the court held that although the presence of unauthorised structures went to the root of the title, and consequently that the time limits for raising requisitions did not apply, the purchaser's action in repudiating the contract before completion had denied the vendor an opportunity of rectifying the position in order that good title could be shown on completion. The court considered the situation to be very different from cases where such a right of repudiation existed. One means of the vendor being able to rectifying the position would of course be to obtain approval from the building authority for the structures. The courts have however held that the vendor will show good title if he demolishes the unlawful structures before completion, so long as the purchaser will thereafter be getting substantially what he contracted for.[82] This doctrine of substantial completion was relied on by the vendor in *Link Harvest Ltd* v *Wayhang Development Ltd*[83] who argued that it was the purchaser's intention to redevelop the property so that any risk of enforcement action by the building authority would not adversely affect the purchaser. The court said it was prepared to accept that there would be substantial completion of the contract, and the purchaser would be wrong in failing to complete, if the purchaser's

---

[78] [2001] 1 HKC 302.

[79] *Giant River Ltd* v *Asie Marketing Ltd* [1990] 1 HKLR 297; see also *Ip Cho Sau* v *Leung Kai Cheong* [2000] HKCFI 118; *Brain Future Ltd* v *Century Crown Ltd* [1999] 589 HKCU 1; *Large Land Investments Ltd* v *Cheung Siu Kwai Pansy* [2002] HKCFI 63. It seems however that the absence of approvals will not necessarily be a matter going to the root of the title: see *Mexon Holdings Ltd* v *Silver Bay International Ltd* [1999] HKCA 333. An appeal from that decision was dismissed ([2000] 2 HKC 1), though the court expressed doubt as to whether there was a blot on the title in any case. See also *Big Foundation Development Ltd* v *Wong Shu Kei* [1998] 772 HKCU 1; *Woo Wai Man* v *Tang Ying Ming* [1999] HKCU 1.

[80] Emery, "A purchaser's right of repudiation" (1977) 41 *Conv* (NS) 18.

[81] [2000] HKCFI 118. See also *Great Billion Enterprises Ltd* v *Chan Lin Ying* [2003] HKCFI 123.

[82] *Goldful Way Development Ltd* v *Wellstable Development Ltd* [1998] 4 HKC 679; *Wide Link Ltd* v *Tam Sing Cheong* [2000] HKCA 29.

[83] [2001] 391 HKCU 1. See also *Perfect Manner Ltd* v *Bermuda Far East Properties Ltd* [2000] 690 HKCU 1; *Empire Trend Ltd* v *Double Mind Co Ltd* [2001] 1 HKC 302.

purpose in acquiring the property was immediate redevelopment. On the facts this was not the case, so that the vendor's argument failed.[84]

Vendor and Purchaser Summons

Section 9 of the Vendor and Purchaser Act 1874 provides a summary procedure allowing either party to a contract for the sale of land to seek the court's determination "in respect of any requisitions or objections . . . or any other question arising out of or connected with the contract". The summary procedure cannot be invoked however to determine questions as to the existence or validity of the contract. The effect of the provision is to put the parties in the same position as if an action for specific performance had been brought and a reference directed as to title.[85] Two decisions of the courts in Canada involving comparable legislative provisions exist to the effect that the summary procedure is not available to determine questions concerning planning matters, as these are not matters of title. In *Re Pongratz and Zubyk*[86] a purchaser of property used for industrial purposes raised a requisition that the property should be rezoned to allow such activity, it being discovered that the property was zoned for residential purposes. The vendor applied for a declaration that the purchaser's objection had been satisfactorily answered. The court held the application was not properly brought under the equivalent Canadian statutory provision for the reason *inter alia*, that the requisition did not deal with a requisition or objection to title, but only with an instrument (the zoning by-law) affecting the land. The same view was taken, albeit by a majority, in *Re Mullin and Knowles*,[87] Shroeder JA distinguishing between a restrictive covenant and a municipal zoning by-law on the ground that in the former there was a clear question affecting the title to land, whereas in the latter, the land was affected but the title was not, and saying that the subject-matter of the requisition upon which the court was asked to rule, not being a matter of title, did not come within the purview of the statutory provision.

The Rule In Bain v Fothergill

The rule in *Bain* v *Fothergill*[88] limits the amount of damages which a purchaser will receive where the vendor is in breach of contract and the cause of the breach is a defect in his title. If the absence of planning permission or other approvals is a matter of title, then the rule would seem applicable.[89] The question was raised but unanswered in *Homyip Investment Ltd* v *Chu Kang Ming Trade Development Co Ltd*,[90] but in *EJH Holdings Ltd* v *Bougie*[91] the court considered that the rule would not be applicable where

---

[84] See also *Max Smart Ltd* v *First Super Investment Ltd* [1998] HKCFI 691; *Summit Link Ltd* v *Sunlink Group (Hong Kong) Co Ltd* [2000] HKCA 305; *Grandco (Holdings) Ltd* v *Harbour Wealth Co Ltd* [2000] HKCFI 452.

[85] *Re Burroughs, Lynn & Sexton* (1877) 5 Ch D 601.

[86] [1955] 1 DLR 143.

[87] (1965) 53 DLR (2d) 680.

[88] (1874) LR 7 HL 158.

[89] The point is raised in Wylie, *Irish Conveyancing Law* (2nd edn, 1996) para 16.75.

[90] [1995] HKCFI 204. It has since been held that the rule is not applicable in Hong Kong: see *Grand Trade Development Ltd* v *Bonance International Ltd* [2001] HKCA 263.

[91] (1977) 7 AR 213.

the court was awarding damages in lieu of specific performance, as the vendor had failed to take steps to obtain planning permission. That view is in keeping with other decisions on the rule,[92] so that even if the absence of approvals is one of title, it is unlikely the courts will allow a vendor who has carried out work without seeking the relevant approval to rely on the rule.

After Completion

If the purchaser does not discover the problem until after completion the question will be whether he has a cause of action for breach of the covenants for title implied under section 7 of the Conveyancing Act 1881. Put in that way however the issue is misleading. Although section 7 speaks of *a* covenant, the section imports into conveyances by grantors who convey and are expressed to convey as beneficial owners more than one obligation. Contravention of planning controls has been considered to fall within the covenant by the vendor that the property will be enjoyed free from incumbrances, which includes "claims and demands."[93] Action by the planning or other authority in the absence of any contravention may not however result in liability, as the vendor is responsible only for acts and omissions of himself and certain other persons mentioned in section 7.

Decisions involving breaches of planning controls and the implied covenants for title are in short supply. Two may be mentioned. In *Doolan* v *Murray*[94] the property assured to the purchaser was affected by a condition in a planning permission requiring part of the property to be kept undeveloped in order to serve as a fire escape route for property nearby. On the refusal of the planning authority to grant permission for the purchaser to build over the area in question the purchaser sought damages from the vendor under the implied covenants. Keane J dismissed the claim saying there was no breach of the covenant that the vendors had full power to convey, the property having been vested in the purchaser in accordance with the contract. Nor was there any breach of the covenant for quiet enjoyment, the purchaser's situation not having been brought about by any act or omission of the vendors. The other is *Wah Ying Properties Ltd* v *Sound Cash Ltd*,[95] in which the purchaser was successful in recovering on the covenant that the property was free from incumbrances, where at the date of the assurance to the purchaser remedial work had been carried out by the Building Authority on failure of the vendor do comply with a notice requiring such work. The court held that the potential for a charge to be imposed to recover the cost of the work was an incumbrance, Cheung J saying: "As of 30 June 1992 [the date of the assurance], there was a risk that repayment of the cost of the remedial work might be demanded from the plaintiff. It was for the defendant to show a good title to the property free from that risk and without the possibility of litigation to the plaintiff. In my view, it had failed to do so."

---

92 *Cp Day* v *Singleton* [1899] 2 Ch 320; *Sharneyford Supplies Ltd* v *Edge* [1987] 1 All ER 588.
93 Farrand, *op cit*, 266; Russell, *op cit*, 190.
94 (1993) unrep (RoI).
95 [1994] 1 HKC 786.

BASES FOR THE DECISIONS

In considering whether or not the fact that property has been constructed or used without statutory approval constitutes a defect in title, a number of matters may be identified in the authorities.

Comparison With Restrictive Covenants

In some of the decisions the differences between the situation where carrying out building on land or the use to which land is put is controlled by a covenant and that where it is controlled by the statutory provisions under consideration have been emphasised. As noted earlier, a number of matters have been identified in the authorities as distinguishing the two situations: in the case of the approvals under consideration the restrictions arise under statutory provisions rather than private instruments; those provisions are of general applicability rather than being concerned only with the particular property of the vendor; they do not create any legal or equitable interest in the property in favour of the authority charged with enforcement; and accordingly the vendor remains able to transfer the estate he has contracted to sell.[96]

Passing of Risk

Some of the cases have relied on the rule that risk passes to the purchaser at the date of the contract for the view that the absence of statutory approvals is not a matter of title. *McInnes* v *Edwards*[97] is the decision upon which courts in Australia and elsewhere[98] have later relied for the view that the absence of statutory approvals does not amount to a defect in title. In it Kaye J held that "the material time for the purpose of conveyance for determination whether a defect in title exists is at the time when the parties entered into their contractual relationship. The existence of an order made or direction given in the exercise of a statutory power imposing a burden or charge on land or the improvements thereon constitutes a latent defect in title. However the mere existence of circumstances which create the possibility or probability or risk that the property will at a future date be subject to a statutory charge or burden does not constitute a latent defect in title." Kaye J went on to say that in the case before him "at the time of making the contract, alterations to the house had been made without the Council's approval. That state of affairs per se did not and does not create an incumbrance, charge or burden upon the property. It gives rise merely to a potential situation out of which a statutory liability might be created or imposed by the Council exercising its powers. . . But those powers, not having been exercised by the Council, there is not a latent defect in the title to the property agreed to be sold."

The views expressed in *McInnes* v *Edwards* were considered to be correct in *Carpenter* v *McGrath*,[99] albeit that Sheller JA pointed out that "in a sense there is a circularity in using the passing of risk at the date of contract which is dependent upon the subsequent making of good title, to justify a view that

---

96 Above, notes 18 and 19.
97 [1986] VR 161.
98 See *Huang Ching Hwee* v *Heng Kay Pay* [1993] 1 SLR 100.
99 (1996) 40 NSWLR 39.

the existence of the potentiality of adverse affectation between contract and completion negates the characterisation of that potentiality as a defect of title." Nonetheless, he continued, "it is the title which the vendor has contracted to convey which is established by the contract and thus it must be determined at the date of the contract. At that time a property may have the potentiality to be subjected to orders or charges pursuant to a number of local government, rating and other statutes, which potentiality may or may not in the future be realised. The passing of risk at the date of contract passes the risk of that potentiality. Thus, as it seems to me, it is correct in concept to hold that mere potentiality of affectation does not constitute a defect in title."[100] The obvious objection to determining the question on the basis that the risk passes to the purchaser on entering the contract is that the vendor may well be aware of the potential for such action whereas the purchaser may not. The same however applies where the vendor knows the propensity of the property to flood in bad weather, so that the vendor's knowledge cannot be a sufficient reason to refuse to base the decision on the rule as to risk. It is however possible to argue that the vendor should be under an obligation to disclose what he knows to the purchaser.[101] The view that the vendor should be under a duty to disclose this requires either that the duty be formulated in a way that is not limited to disclosure of matters concerning title, or that the potential for enforcement action by statutory authorities is a matter of title.

Not only have the courts rejected the vendor's knowledge that the property lacks statutory approvals as relevant, they have also dismissed the illegality of the vendor's actions as relevant to distinguishing the position from the general risk that property will become affected by some action on the part of a statutory authority. In *Delbridge* v *Low*[102] Derrington J said, "It is difficult to accept the proposition advanced for the plaintiffs that there is some relevant distinction in the case of a potential liability of the land to such a burden where on the one side it arises out of illegal conduct and on the other where it is simply the result of an action by an authority so empowered. There is a distinction certainly, but its relevance has never been acknowledged by the many authorities that have touched this and related topics." That view was endorsed by Sheller JA in *Carpenter* v *McGrath*.[103]

---

[100] See also *Huang Ching Hwee* v *Heng Kay Pay* [1993] 1 SLR 100, the court considering that "it would give rise to great uncertainty and unnecessary disputes in conveyancing practice if the mere potential of enforcement action by the authorities were to be treated as something going to title."

[101] See *Chi Kit Co Ltd* v *Lucky Health International Enterprise Ltd* [2000] 521 HKCU 1 ("The maxim [caveat emptor] should not be applied so that it leaves a purchaser exposed to a serious detriment the risk of which is solely within the knowledge or the means of knowledge of the vendor.") See also *Fletcher* v *Manton* [1940] 64 CLR 37, Dixon J suggesting that had the vendor known that the making of a demolition order was contemplated by the relevant authority and had failed to disclose this to the purchaser, the contract might have been voidable. That dictum was relied on by the trial judge in *Huang Ching Hwee* v *Heng Kay Pay* [1990] 1 SLR 1220 in deciding that the vendor should have disclosed unlawful alterations carried out by him. On appeal however [1993] 1 SLR 100 knowledge was seen as irrelevant to the vendor's liability.

[102] [1990] 2 Qd R 317.

[103] (1996) 40 NSWLR 39.

Yet the distinction is surely important: the illegality involved in carrying out building works or using the property without the relevant approvals gives rise to the potential for action to be taken to undo what has been done unlawfully, and such action can be taken whether or not the person whose act has given rise to the action remains the owner of the property. To that extent a purchaser of the property in effect suffers a sanction for the wrongdoing of the vendor. That is unlike the case where an authority carries out street works and imposes a charge on the property, or where an authority makes a demolition order because the property is dilapidated or where it decides to acquire the property. There is in such cases no wrongdoing by the vendor for which the purchaser incurs a sanction. The action taken by the authority has nothing to do with illegality, but arises because of the physical state of the property or because of some decision taken by the authority. That is simply a matter attributable to the purchaser's misfortune rather than the vendor's misconduct. If the distinction is therefore relevant, by holding the carrying out of the activity in question to be a matter of title the purchaser is given the opportunity of avoiding such loss through the unlawful acts of his predecessor.[104]

Quality of Title and Incumbrances

Risk of enforcement action has been dealt with differently by the courts in Hong Kong, leading to the opposite view, *viz*, that a defect in title exists. There appear to be two aspects to this: one is that the risk means that the title shown fails to reach the standard required for a good title; the other is that the risk means that there is an incumbrance so that the vendor is unable to convey the property free from incumbrances.

As to the first, some of the cases[105] proceed on the basis of authorities determining the standard which a title has to meet before it will be forced on an unwilling purchaser in an action brought by the vendor for specific performance.[106] The question for the court has therefore concerned the threshold for determining whether there is a sufficient risk of action being taken by the building authority for non-compliance with the building regulations so as to amount to a defect in title.[107] Unless it is clear beyond reasonable doubt that the purchaser's title will be secure from the danger of third parties asserting a claim successfully, the title does not meet that

---

[104] Note also the comments of Li Deputy J in *Summit Link Ltd* v *Sunlink Group (Hong Kong) Co Ltd* [1999] HKCFI 1448 that "[t]here are laws prohibiting illegal and unauthorised structures. Courts may be undermining laws passed by our legislature by giving recognition to illegal and unauthorised structures. . . . Perhaps, if the courts consistently hold that illegal structures (large or small and of whatever nature) are blots on title, owners would remove such structures before more funding can be found to re-double the sorely needed enforcement efforts by the Building Authority."

[105] See *Giant River Ltd* v *Asie Marketing Ltd* [1990] 1 HKLR 297; *Spark Rich (China) Ltd* v *Valrose Ltd* [1999] HKCA 105.

[106] See *MEPC Ltd* v *Christian-Edwards* [1979] 3 All ER 752.

[107] *Spark Rich (China) Ltd* v *Valrose Ltd* [1999] HKCA 105; *Nation Group Development Ltd* v *New Pacific Properties Ltd* [1999] 408 HKCU 1; *Jumbo Gold Investment Ltd* v *Warren Yuen Cheong Leung* [2000] 53 HKCU 1; *Queen Energy Ltd* v *Chan Shu Keung Raymond* [2000] HKCFI 543; *Great Billion Enterprises Ltd* v *Chan Lin Ying* [2003] HKCFI 123.

standard. The problem here however is that the courts have been concerned about the extent of the risk, not the nature of the claims by third parties. The decisions seem to proceed on the basis that any claim which affects enjoyment of the property is one affecting title.[108] In some of the cases the risk involved does mean the purchaser is in danger of losing his estate in the property.[109] In others it is not obvious whether the risk of enforcement action by the building authority is itself enough to result in a defect in title, or whether it is the possibility of forfeiture action on the part of the government as lessor which has this consequence.[110] It is clear however from *Link Harvest Ltd* v *Wayhang Development Ltd*[111] that the risk of enforcement action on the part of the building authority is itself sufficient to result in a defect of title. In that case a purchaser raised requisitions concerning the construction of the building in sale, seeking proof that the government had approved the building pursuant to the provisions of an agreement for a grant of the land by the government. The building was also subject to the provisions of the Buildings Ordinance. The court distinguished between the risk of action by the government as grantor and by the building authority. So far as the former was concerned, any breach of the terms of the agreement for the grant had been waived, so that there was no risk of action and consequently no defect in title. There was however a risk that action could be taken by the building authority so that the purchaser's requisition in that regard was valid and the vendor had failed to show good title.

As we have seen,[112] other cases have proceeded on the basis that the vendor fails in his obligation to transfer the property free of incumbrances because the risk of enforcement action constitutes an incumbrance. That view is however contrary to Williams' statement of the law,[113] based on authorities such as *Re Allen & Driscoll's Contract*[114] noted earlier, that statutory burdens which have not attached as charges or become actual liabilities at the date for completion are not incumbrances, even though the event which will ultimately cause the charge or liability to arise happened before the sale. Nonetheless it seems more attractive than equating the risk of enforcement action by a statutory authority to the risk of challenges to the vendor's ownership, as exist in the cases where the question has been whether the

---

[108] See *Link Harvest Ltd* v *Wayhang Development Ltd* [2001] 391 HKCU 1, the court considering that although enforcement action by the Buildings Department would not affect the leasehold estate to be sold, "it may affect title of the property to be sold because it may, in most cases where the subject matter of the sale was a building or a part of a building, affect the purchaser's enjoyment of the building or that part of the building agreed to be sold to him."

[109] See *eg Giant River Ltd* v *Asie Marketing Ltd* [1990] 1 HKLR 297 where the unauthorised work meant that there was a risk of litigation from three sources: by the Crown, by the Building Authority, and by neighbouring owners. Only the first of these carried the risk of forfeiture of the vendor's estate in the property.

[110] See *Big Foundation Development Ltd* v *Wong Shu Kei* [1998] 772 HKCU 1; *Chi Kit Co Ltd v Lucky Health International Enterprise Ltd* [2000] HKCU 1.

[111] [2001] 391 HKCU 1.

[112] Above, p 107.

[113] Williams, *A Treatise on the Law of Vendor and Purchaser* (3rd edn, 1922) vol 1 p 167.

[114] [1904] 2 Ch 226.

vendor has shown good title.[115] Ironically, the point that in circumstances where that is the question, the litigation must relate to title, is made in a case from Hong Kong. In *Ng King Wai Terence* v *Qing Yuan Enterprises Ltd*[116] it is said that "the "possibility of dispute or litigation" should not be taken out of context to mean any dispute or litigation. The litigation should be such as amounting to a challenge to title. If the title is defeasible at the challenge of another party, it is not good title. In this connection, it is important to note that "good" is used in contradistinction to "bad" or "doubtful" . . . An incumbrance, such as a restrictive covenant or a charge, does not render a title bad or doubtful; it is a burden on the property; hence the second limb of the common law duty or the contractual duty to convey property free from incumbrances."

There is of course a significant difference in the position of the parties according to whether the position should be analysed by the rule that risk passes to the purchaser at the making of the contract, or according to the obligation of the vendor to transfer the property to the purchaser free from incumbrances. The relevant date for determining whether the vendor is able to convey the property to the purchaser free of incumbrances is the date of completion,[117] so that if enforcement action is taken after the date of the contract but before completion is due, the result will be either that the purchaser must complete the contract (subject to any question of the court refusing specific performance in the exercise of its discretion) because the risk passed to him when the contract was made, or alternatively that the purchaser can be discharged from the contract because the vendor is unable to convey the property free from incumbrances at the date set for completion.

CHANGING TIMES?

If the prevalent view is that the absence of statutory approvals is not a matter of title, it may be asked whether it should be. In *Jackson* v *Nicholson*[118] it was argued by the purchaser that modern real property law requires that a marketable title includes not only the traditional chain of ownership but also current compliance with the use and occupation requirements contained in statutory by-laws and regulations. The court examined the authorities cited for that proposition, finding they did not assist in the circumstances of the present case, but made no comment on the validity of the proposition itself. Some support for the proposition may come from cases on the question whether a contract for the sale of land can be frustrated. In *Lim Kim Som* v *Sheriffa Tabah Bte Abdul Rahman*[119] the Court of Appeal in Singapore, relying on Lord Wilberforce's view in *National Carriers Ltd* v *Panalpina*

---

[115] See *Re Stirrup's Contract* [1961] 1 All ER 805: "the purchaser is entitled to be satisfied that his vendor is seized of the estate he is purporting to sell . . . and that he is in the position, without the possibility of dispute or litigation, to pass [that estate] to the purchaser."

[116] [1998] 2213 HKCU 1.

[117] *Kolan* v *Solicitor* (1969) 7 DLR (3d) 481: "it is trite law that any provision as to title being free from incumbrances speaks as of the date of closing."

[118] [1979] 3 ACWS 52.

[119] [1994] 1 SLR 393. See however *Hillingdon Estates Co* v *Stonefield Estates Ltd* [1952] 1 All ER 853.

(Northern) Ltd,[120] that the conferring of an estate is a subsidiary means to an end rather than an aim in itself, held that the reality of a contact for the sale of property was that the purchaser bargained not only for the legal estate but for the use of the property, and that, where proceedings for compulsory acquisition were started after contract, he would be getting an estate which was unusable and unsaleable. The same reasoning can be applied where a purchaser enters a contract for the purchase of buildings or land which is being used for a particular purpose which the purchaser intends to continue. If the appropriate approvals for the existence of the buildings or the continuance of the use do not exist, the purchaser has bought something which may be of no use to him.[121] True, that is the case where the property is physically defective, but the difference surely is that in the latter case the purchaser has the opportunity of ascertaining the position by physical inspection prior to the contract. The better analogy, it is suggested, is that the purchaser's position is the same as that which exists if he buys property which is affected by covenants against building or use.

---

[120] [1981] AC 875.

[121] See further *Pemberton Australia Pty Ltd* v *CPS Services Pty Ltd* 1990 NSW LEXIS 10619 and *Mulwala & District Services Club Ltd* v *The Owners – Strata Plan 37724* [2000] NSWSC 1040, Young J suggesting in the former that there will be a defect in title where the purchaser is deprived of a significant and substantial feature of the property, and in the latter where there is a substantial interference with the use to which the property can be put.

NATIONAL IRISH BANK v RTE AND FINDING THE BALANCE: BREACH OF CONFIDENCE, PRIVACY AND THE PUBLIC INTEREST TEST IN ENGLAND AND IRELAND

Helen Fenwick, Professor of Law and Gavin Phillipson, Lecturer in Law, Human Rights Centre, University of Durham.[1]

INTRODUCTION

It is now well known that the primary vehicle since the Human Rights Act 1998 for providing greater protection in England against invasion of the privacy by the media has been breach of confidence.[2] The doctrine of confidence, which had been used for some time in English law to deal with situations concerning the unauthorised use of commercial information, state secrets[3] and personal data,[4] is now becoming, under the impetus of the Human Rights Act (hereafter HRA), something close to a fully-fledged privacy law. No such development is apparent so far in Ireland. However, the introduction into Irish law of Article 8 (the right to respect for private life) of the European Convention on Human Rights via the European Convention on Human Rights Act 2003 (hereafter ECHRA) may also provide the impetus, as in England, for the development of breach of confidence into a *de facto* privacy remedy.

It is possible that the right to privacy, as one of the un-enumerated rights under Article 40.3.1 of the Irish Constitution, might be relied upon instead, rendering such a development unnecessary.[5] This might have been expected to be the case already, bearing in mind its direct horizontal effect. However, this is not a development that has occurred so far (although Article 8 under

---

1 A draft of this paper was originally delivered at a Symposium on Freedom of Expression, 5-6 December 2003, held at Trinity College, Dublin.

2 See *Venables and another* v *News Group Newspapers* [2001] 1 All ER 908; *Douglas and Zeta-Jones* v *Hello!* [2001] QB 967, at 997 (CA) (application for interim injunction to restrain surreptitiously taken photographs of a celebrity wedding); *Douglas and Zeta-Jones* v *Hello!* [2003] EWHC 786 (Ch) (final trial, hereafter, "*Douglas II*)"; *A* v *B plc* [2002] 3 WLR 542 (CA) (concerned with whether an injunction should be granted to restrain publication of details of premiership footballer's affair with a lap-dancer); *Campbell* v *MGN* [2003] 2 WLR 80 (CA) (action to restrain publication of details of the model's treatment at Narcotics Anonymous, including photographs of her outside the clinic); *Theakston* v *MGN* [2002] EMLR 22 (application to restrain detailed description and photographs of the TV presenter's visit to a brothel given to the *Sunday People* by a prostitute); *Mills* v *News Groups Newspapers* (injunction preventing publication of the applicant's address in *The Sun* refused); see *eg* R. Singh and T. Strachan, "The Right to Privacy in English Law" [2002] *EHRLR* 129; G. Phillipson, "Transforming Breach of Confidence? Towards a common law right of privacy under the Human Rights Act" [2003] 66(5) *MLR* 726.

3 *A-G* v *Guardian Newspapers* [1987] 3 All ER 316.

4 *Stephens* v *Avery* [1988] Ch 449; 2 All ER 477; 2 WLR 1280.

5 See *M* v *Drury* [1994] 2 IR 8.

the ECHRA might provide the guidelines for such a development) and therefore courts and potential litigants may prefer to rely on the doctrine of confidence, interpreted in line with Article 8 ECHR and the established English post-HRA case-law discussed in this article on confidence as a privacy remedy. In support of this point it may be noted that in *McDonnell* v *Ireland*[6] Barrington J said: "If the general law provides an adequate cause of action to vindicate a constitutional right it appears to me that the injured party cannot ask the court to devise a new and different cause of action." Arguably, the doctrine of confidence – if developed along the lines argued for in this article – already provides the means of vindicating the implied right of privacy under the Constitution at least in cases of unauthorised publication of personal information. In that context, the development of the public interest defence to the breach of confidence action in Irish law, as illustrated by the decision of the Supreme Court in *National Irish Bank* v *RTE*[7] (hereafter *NIB* v *RTE*), is particularly significant. This decision has received remarkably little academic attention and is surely now due for re-evaluation, given the further developments that may be expected in the public interest defence following the introduction of Article 10 of the Convention (the right to freedom of expression) into Irish law.[8] This paper is concerned primarily with the extent to which the Irish doctrine of confidence is ripe for development into a privacy law, and, in particular, the implications for the public interest defence of such a development.

It is necessary to begin, therefore, by examining the elements of breach of confidence, as interpreted by the Irish courts, in particular in the *NIB* v *RTE* case, and to compare the Irish approach with the more flexible one adopted by English courts, both before and after the HRA.

THE ELEMENTS OF BREACH OF CONFIDENCE

The Development Of The English Doctrine

The House of Lords in *Attorney General* v *Guardian Newspapers (No 2)*[9] found that the ruling in *Coco* v *AN Clark (Engineers) Limited*[10] conveniently summarised the three traditionally accepted key elements of the law of confidence:

> "First the information itself . . . must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of

---

6 [1998] 1 IR 141.

7 [1998] 2 IR 465.

8 See n 68 below for one of the few commentaries on *NIB* v *RTE*. The Irish Constitution, both explicitly in Art 40.6.1 and as one of the un-enumerated rights in Art 40.3.1, provides for a right to freedom of expression. In this paper, however, we concentrate upon the possible impact of Art 10 ECHR; O'Dell comments that Art 40.6.1 "has failed to develop any meaningful protection for speech" (Eoin O'Dell, "When two tribes go to war: Privacy Interests and Free Speech" in *Law and the Media: Views of Journalists and Lawyers* (Dublin: Sweet and Maxwell, 1997), at 241).

9 [1990] 1 AC 109.

10 [1969] RPC 41, at 47.

> that information to the detriment of the party communicating it."

For our purposes it is the second element that is of greatest interest, since it is in that element that the most radical developments have occurred in the English courts. Traditionally, this requirement founded liability on the basis that if information was accepted on the understanding that it would be kept secret, the recipient's conscience would be bound by that undertaking, and it would be unconscionable for him to break his duty of confidence by publishing the information to others.[11] It is accepted in both English and Irish courts that this second element will be present in the following situations: first, where a pre-existing relationship of trust and confidence exists between plaintiff and defendant;[12] second, where there has been an express agreement of confidentiality between the parties or promise to that effect by the defendant;[13] and third, where the defendant is a third party to such a relationship but has acquired confidential information communicated between the parties to that relationship. English law has recognised a fourth category of cases: those in which the confidential information in question is surreptitiously taken or acquired by the defendant. Each category successively widens the ambit of the action. The difference between the first three categories and the fourth is that in relation to the first three there must be a relationship of fidelity or express agreement of confidentiality; in the fourth, neither of these elements is needed; the defendant may indeed be a stranger to the plaintiff.

This fourth category does not appear to have been clearly recognised in Ireland although there are many pre-HRA English cases on surreptitious takings of information. As early as 1913, it was said:

> "The principle upon which the Court of Chancery has acted for many years has been to restrain the publication of confidential information surreptitiously obtained or of information imparted in confidence which ought not to be divulged."[14]

There have been numerous cases since illustrating that an obligation of confidence may be imposed in such circumstances,[15] as well as dicta to this effect at the highest level.[16] Thus English decisions moved the doctrine to the

---

[11] As stated, for example, in *Stephens* v *Avery* [1988] Ch 449.

[12] See *eg W* v *Edgell* [1990] Ch 59 (doctor-patient); X v Y [1988] 2 All ER 650 and *Attorney General* v *Guardian Newspapers* [1987] 1 WLR 1248 (both employer-employee).

[13] Law Commission, Breach of Confidence (Law Com No 110), at para 6.11.

[14] *Ashburton* v *Pape* [1913] 2 Ch 419.

[15] See *eg Francome* v *Mirror Group Newspapers* [1984] 1 WLR 892 (information obtained through the use of an unlawful telephone tap); *Shelley Films* v *Rex Features Limited* [1994] EMLR 134 (injunction granted to prevent the use of a photograph taken surreptitiously on the film set of Frankenstein); *Creation Records Ltd* v *News Groups Newspapers Ltd* [1997] EMLR 444 (injunction granted to prevent publication of a photograph of an album cover design taken surreptitiously on the set).

[16] Lord Goff suggested in *A-G* v *Guardian Newspapers* (No 2) [1990] 1 AC 109, at 281, that an obligation could be imposed where ". . . an obviously confidential document is wafted by an electric fan out of the window into a crowded street, or

point at which the obligation of confidence could be imposed unilaterally; it was no longer founded on the express or implied agreement of the parties that the communication would be confidential. This approach had in fact already been indicated in *Coco* v *A N Clark (Engineers) Limited*: it was said that the obligation would be imposed if ". . . the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was given to him in confidence . . . "[17] The test appears to be wholly objective – actual appreciation by the defendant that an obligation has been imposed seems to be unnecessary. These developments, as the authors argued before the HRA came into force,[18] rendered the doctrine useable as "a privacy law in all but name."[19] If all that was necessary to impose an obligation of confidentiality was the application of a reasonable man test, then not only did any need for pre-existing relationships or express agreements of confidentiality fall away: in addition, there needed to be nothing recognisable as a "communication" from the plaintiff to any other person for the duty to arise. Therefore the doctrine offered the potential to be used against journalists seeking to publish material obtained surreptitiously from the defendant through, for example, photography using long-range lenses, or bugging devices, since in such cases it would be possible for the plaintiff to argue that, where the information obtained was clearly private in character, a reasonable man would have understood that s/he was obliged to treat it as confidential.[20] This, we suggest, *could* come about entirely as a result of the nature of the information in question, coupled sometimes with the fact that the defendant had to resort to surreptitious means to acquire it. Post-HRA cases have clearly confirmed this development. Thus in *A* v *B plc* the Court of Appeal observed:

> "The need for the existence of a confidential relationship should not give rise to problems as to the law . . . A duty of confidence will arise whenever the party subject to the duty is in a situation *where he either knows or ought to know that the other person can reasonably expect his privacy to be protected*."[21]

There are a number of cases under the HRA in which a *prima facie* obligation has been imposed upon journalists obtaining personal information surreptitiously in this way.[22] The key point for present purposes is that the

---

when an obviously confidential document . . . is dropped in a public place and is then picked up by a passer-by . . . "

17 n 10 above, at 48.

18 See G. Phillipson and H. Fenwick, "Confidence and Privacy: a Re-examination" [1996] 55 *CLJ* 447; "Breach of Confidence as a Privacy Remedy in the Human Rights Act Era" [2000] 63(5) *MLR* 660.

19 *Ibid* (*MLR*), at 693.

20 Problems remain over the issue of information that is arguably "private" in character but which can only with difficulty be characterized as "confidential," because, for example, it consists of a photograph taken of the plaintiff in a public place such as a park, beach or restaurant. On this, however, see now *Peck* v *UK* (2003) 36 EHRR 41 and the analysis thereof in Phillipson, n 2 above, at 738-740.

21 n 2 above, at 551B (emphasis added).

22 These include *Theakston* (n 2 above) in relation to the photographs surreptitiously taken of Theakston in the brothel; *Venables and Thompson* (n 2 above) (since the injunctions applied regardless of how the information – as to the identity and

foundations for this radical development were laid, as noted above, long before the HRA: they relied upon replacing the notion of a relationship or agreement of confidentiality (whether express or implied) as the necessary element in imposing an obligation of confidentiality, with the notion of the imposition of such an obligation through an objective "reasonable man" test. Cases since the HRA have simply structured the "reasonable man" test by reference to the notion of a reasonable expectation of privacy, arising because of the nature of the information and the circumstances in which it was obtained. It is also, of course, the case that developing confidence in this way allows much more comprehensive protection to be given to trade secrets and the like than would have been the case if the restrictive conditions traditionally surrounding the doctrine had continued to be strictly enforced: indeed, one of the main sources of impetus behind the English development of the doctrine was the very injustice that would have arisen if a defendant who surreptitiously and unconscionably obtained clearly confidential information and then used it for his own benefit could have escaped liability for breach of confidence simply because of the absence of a pre-existing relationship with the plaintiff or a promise of confidentiality. As Browne-Wilkinson VC observed in *English and American Insurance Co Ltd* v *Herbert Smith*:

> "If somebody is handed a letter [addressed] to another marked "Private and Confidential", that letter having been handed to him in error, and he chooses to read it notwithstanding that it is marked "Private and Confidential" and as a result acquires the information contained in the letter, I find it difficult to say that he is not implicated in the leakage of confidential information so contained in the letter."[23]

Many of the older general formulations of the doctrine are not in fact prescriptive as to the circumstances needed to impose an obligation of confidentiality. As Lord Greene MR put it in *Saltman Engineering Co Ltd* v *Campbell Engineering Co. Ltd*:

> "If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied of the plaintiff, he will be guilty of an infringement of the plaintiff's rights."[24]

It may be noted that this formulation simply omits the second limb of breach of confidence set out in *Coco Engineering*, implying perhaps that, whilst the *Coco* formulation is generally seen as authoritative, it is not to be compared to a statutory definition: the common law retains its inherent flexibility and formulations such as that in *Saltman* indicate that the second limb – at least as traditionally understood – is by no means sacrosanct.

---

whereabouts of the boys – was obtained in principle) and *Campbell*, (n 2 above) in which it was accepted that an obligation could in principle be imposed in relation to photographs surreptitiously taken of Campbell outside Narcotics Anonymous although the action failed on other grounds. For discussion, see Phillipson, n 2 above, at 744-748.

[23] [1988] FSR 232, at 238.

[24] [1963] 3 All ER 413.

Breach of Confidence in Irish Courts

Such broad formulations of the doctrine are not, indeed, confined to English authorities, and nor was there any particular reason why they should be, given the heavy dependence of Irish law in this area on English case-law. For example, Lavery, in a leading work on breach of confidence in Ireland, summarises the position thus:

> "any situation that involves the misappropriation of information by a person, in circumstances where that person either knows or ought to know that the information should be kept confidential, will be caught by the action."[25]

Keane, similarly, took the view, in a leading Irish work on Equity and Trusts published in 1998, that the action covered surreptitious takings of confidential information.[26]

When we turn to the leading Irish Supreme Court authorities, however, we see, in the main, only quite narrow and restrictive formulations of the doctrine of confidence. *House of Spring Gardens* v *Point Blank*[27] concerned a situation in which relations between parties to an agreement to develop and market a bullet-proof vest had broken down, and the defendants subsequently exploited the plaintiff's ideas for their own financial gain. The circumstances were not therefore such as to induce the court to break new ground on the question of the circumstances needed to impose the obligation of confidentiality, since there was clearly both an existing relationship between the parties and a promise (express or implied) of confidentiality. But the formulations of the court contain no dicta suggesting sympathy with a more flexible view of the doctrine. Whilst O'Higgins CJ did describe the quote from *Saltman*[28] as "stat[ing] the law in one succinct sentence,"[29] he went on expressly to approve[30] the approach of Costello J, who stated: "It must firstly be decided whether there exists *from the relationship between the parties* an obligation of confidence."[31] This suggests not only the need for circumstances imposing such an obligation, but suggests that those circumstances can only be present where there is "a relationship between the parties," a highly restrictive view of the action.

In *NIB* v *RTE*, the facts fell within our third category above, where the defendant acquires information communicated in a relationship of confidence between the plaintiff and another. The plaintiffs operated an investment scheme that appeared to facilitate tax evasion. In excess of 150 customers of the plaintiffs accepted an invitation to participate in the scheme. RTE obtained information about the scheme and about the customers from

---

[25] P. Lavery, *Commercial Secrets: The Action for Breach of Confidence in Ireland* (Round Hall, 1996), at 109.

[26] *Equity and the Law of Trusts in the Republic of Ireland* (1988) at 349, para 30.05; cited in O'Dell, n 8 above, at 204.

[27] [1984] IR 611.

[28] That breach of confidence would be made out where "A defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without . . . consent . . ." (*Saltman*, n 24 above).

[29] n 7 above, at 695.

[30] *Ibid*, at 696.

[31] *Ibid*, at 663 (emphasis added).

various sources, including, apparently, certain customers and employees of NIB, which it wished to broadcast. The plaintiffs did not claim to be entitled to an injunction restraining the defendant from broadcasting allegations against them that they had been operating a scheme facilitating tax evasion. They sought an injunction preventing the disclosure (including transmission to the world at large) of the names of their customers and the details of their accounts and transactions entered into by them. They claimed that that would constitute a breach of the confidential relationship between the plaintiffs and their customers that would cause them irreparable damage. The defendant accepted that the dissemination of the information would amount to a breach of the confidential relationship in question, but it argued that the breach would be justified by the overriding requirements of the public interest: it submitted that the evidence adduced by it to the High Court provided a strongly arguable case for holding that the public interest in the investigation and exposure of wrongdoing outweighed the requirements of confidentiality. The Supreme Court found that the information concerned a matter of serious public interest due to the wrong-doing revealed and that the interest in publication therefore outweighed the interest in confidentiality. By a 3:2 majority the Court found that the information should be revealed to the public at large.

NIB v *RTE* thus adds little to the current understanding in Ireland of the elements of breach of confidence, and in particular of the scope of the duty of confidence, since both sides accepted that the material in question was confidential and that an obligation of confidentiality existed (the information acquired had been communicated between two parties in a relationship of fidelity – that between a bank and its customers). Consequently, Lynch J for the majority did not find it necessary to consider the circumstances in which an obligation of confidence may be imposed in general. He simply observed:

> "There is no doubt but that there exists a duty and a right of confidentiality between banker and customer as also exists in many other relationships such as for example doctor and patient and lawyer and client. This duty of confidentiality extends to third parties into whose hands confidential information may come and such third parties can be injuncted to prohibit the disclosure of such confidential information."[32]

These two decisions, therefore, do nothing to confirm that the developments that have taken place in English law, facilitating the use of confidence as a privacy remedy, will take root in Ireland. As we have seen, the facts provided no opportunity to do so; however, the formulations accepted in *House of Spring Gardens* in particular are very conservative. Nevertheless, they do not wholly rule out the possibility of such developments in the future. The courts could be viewed in both instances as merely preferring to decide no more than they had to on the basis of the facts before them.

Breach Of Confidence As A Privacy Remedy In Irish Courts?

Of course, there are noteworthy arguments *against* the use of breach of confidence as a privacy remedy, in particular the artificiality of the reasoning

---

[32] n 7 above, at 494.

that must be employed and the fact that such use distorts an action originally developed to uphold the confidentiality of certain socially or professionally important relationships and to allow those who have expended labour, time and skill the exclusive right to exploit commercially valuable information obtained thereby.[33] There are also, of course, crucial differences between the concepts of "confidential" (essentially meaning inaccessible) information and information relating to private life. These issues are already causing difficulties for the English courts.[34] It is not the purpose of this paper to seek to refute these arguments or even to suggest partial solutions to them.[35] Its much more limited purpose is merely to point out, in pragmatic vein, that flawed as breach of confidence is as a tool for protecting privacy, the reality is that Ireland, like England, has no tort of invasion of privacy. The likely consequence is therefore that the courts will find themselves urged by litigants to develop breach of confidence so as to provide greater protection for privacy since the ECHRA has introduced Article 8 (as an interpretive principle) into Irish law. Whilst, as indicated in the introduction, it is possible that the implied constitutional right to privacy may provide protection against un-authorised use of personal information in some circumstances, in particular in relation to interception of private communications,[36] it has not been developed so far to provide comprehensive protection against intrusive publications in the media. There is, however, a reasonably persuasive case to be made out that Strasbourg case-law and the general principles it has developed under Article 8 *do* suggest the need for such a remedy.[37] Now that the ECHRA is in force therefore, it is quite possible that Irish courts, like their English counterparts, and influenced perhaps by the English case law under the HRA referred to above, will start to develop breach of confidence to fill this lacuna. If this indeed occurs, the focus will be thrown much more sharply than hitherto upon the public interest defence. Before turning to explore this matter, however, it is worth

---

[33] See O'Dell, n 8 above, at 213: "In summary . . . the essence of the action of breach of confidence is that it allows the commercial exploitation of information; and, as an incident, may keep information secret. Though there have been extensions (for example to cover domestic or Government confidences) they have been just that, extensions; they do not define the essence of the action, rather the commercial essence of the action conditions these extension." See also *ibid*, at 211-18.

[34] See n 20 above and, generally, Phillipson, n 2 above.

[35] It may be argued, however, that the basis of the action for confidence and that of privacy are perhaps not quite so far apart conceptually as O'Dell suggests. O'Dell (n 8 above) accepts, as the best available, Westin's definition of privacy: "the claims of individuals, groups or institutions to determine for themselves when, now and to what extent information about them is communicated to others" (from *Privacy and Freedom* (New York: Athenaeum, 1967); if this is accepted, then privacy and confidence have a common conceptual basis: both found upon the basic principle of control over information, whether that information is sensitive because personal, or because commercially valuable.

[36] *Kennedy* v *Ireland* [1987] IR 687 held that an un-authorised telephone tap "was a deliberate, conscious and unjustifiable breach of the applicant's right to privacy" as an implied right under the Irish Constitution (O'Dell, note 8 above, at 229); see also *Desmond* v *Glackin (No 2)* [1993] IR 67, at 98, in which Hanlon J referred to a "right to privacy in communications." See also text to n 5 and 6.

[37] See Fenwick and Phillipson, n 18 above (*MLR*), at 664-667. The main decision indicating this is the Commission's admissibility decision in *Earl Spencer* v *United Kingdom* (1998) 25 EHRR CD 105.

taking a closer look at the ECHRA, in order to determine just how much influence the Convention is likely to have post – "incorporation".

THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003: A LIMITED INSTRUMENT?

The main issue with which this paper is concerned is the impact of the ECHRA upon the action for confidence. The ECHRA will clearly affect the common law,[38] but it should be noted that it appears to impose significantly weaker obligations upon Irish courts to change the common law than does the HRA in the UK context. Section 2(1) enjoins Irish courts that when "interpreting and applying any statutory provision or rule of law" they should do so, "so far as is possible . . . in a manner compatible with the state's obligations under the Convention provisions." This is a very similar provision to section 3(1) HRA.[39] However, there are two critical differences between the two Acts concerning the courts' duties in relation to the common law. Whilst the ECHRA does at least clarify that the "rules of law" that the courts must interpret compatibly with the Convention if possible include "common law",[40] the provision in section 5 for making a declaration of incompatibility if the court finds that a given law is incompatible with the Convention, applies not only to statutes (as with the HRA) *but also the common law*.[41] In contrast, the judges' duty in section 6(1) HRA to act compatibly with the Convention – something which it now seems reasonably certain includes their function in developing and applying the common law[42] – is limited only by incompatible primary legislation[43] *not* by incompatible common law rules. Therefore an Irish judge, it appears, is required only to seek to develop the common law compatibly with the Convention; if she finds that she cannot, she can only issue a declaration of incompatibility. In contrast, an English judge appears – although this is not yet free from doubt[44]

---

[38] An immediate issue arises as to whether the phrase "common law" used in the Act will actually include breach of confidence. Many scholars and judges would still view it as an equitable doctrine, although it may be noted that Shanley J referred to it in *NIB* v *RTE* as "the tort of breach of confidence" (at 474). However it is possible that rules of equity are covered by the Act: the ECHRA uses the phrase "rule of law"; this is explicitly stated to include the common law in s 1(1) but may be read to include equitable actions also. There would seem to be no sensible reason to exclude them.

[39] s 3(1) HRA reads: "So far as is possible to do so, primary and secondary legislation must be read and given effect in a way that is compatible with the Convention rights". This of course is subject to the proviso in s 3(2) that incompatible legislation remains valid and of full effect and enforceability.

[40] s 1(1).

[41] This is because s 5 includes within it a reference to a "rule of law" that is incompatible with the Convention, and, as noted in the text, the expression "rule of law" is defined in s 1(1) to include the "common law."

[42] See eg *A* v *B plc* (n 2 above), at 546: "Under section 6 of the [HRA], the court, as a public authority, is required not to act 'in a way which is incompatible with a Convention right.' The court is able to achieve this by absorbing the rights which Arts 8 and 10 protect into the long-established action for breach of confidence."

[43] s 6(2).

[44] See the differing views expressed as the scope of horizontal effect on the common law in *Venables and Thompson* (n 2 above) at 917, *Douglas,* (n 2 above) at 993-4,

– to be obliged to make *whatever changes to the common law are necessary* to achieve compatibility, given that the HRA does not limit the section 6(1) duty by reference to existing incompatible common law.[45]

Furthermore, the interpretative obligation in section 2(1) ECHRA is itself less strong than that contained in section 3(1) HRA: the duty is expressed to be "subject to rules of law relating to such interpretation and application" – a phrase that appears to make that obligation subject to existing restraints upon how far the judges may develop the common law. In other words, the interpretative obligation in section 2(1) does not, as the duty in section 3(1) HRA does, *replace* existing rules of interpretation; rather, it takes effect "subject to" them. Thus the obligation on Irish judges to interpret common law compatibly with the Convention is significantly weaker than that lying upon their English counterparts.

There is a further, perhaps even more noteworthy feature of the ECHRA in relation to this point: the deliberate omission of "courts" from those organs of the state obligated to act compatibly with the Convention by section 3(1).[46] This weakens the duty on Irish courts further, in comparison to English courts, which, per section 6(3), are explicitly included within the definition of public authorities bound to act compatibly with the Convention rights under section 6(1) HRA. In particular, this omission would *appear* to suggest that the exercise of judicial discretion in relation, for example, to exclusion of evidence and – significantly for our purposes – the granting of remedies, is *not* caught by the ECHRA. Thus, in deciding whether, for example, to grant an injunction restraining publication of confidential information, a judge *may* not be strictly bound by the ECHRA to act compatibly with the Convention. Thus, whilst it may confidently be predicted that the ECHRA will *increase* the Convention's impact on Irish common law, that impact will be not only indirect, but appears likely to take the form of a general radiating influence rather than strong interpretative effect.

We turn now to the main concern of this article, the public interest defence in Irish law, and the possible future impact of Article 10 ECHR upon it.

1002, 1112, *A* v *B* (n 2 above) at 546 and *Campbell* (n 2 above) at 658. For discussion see Phillipson, n 2 above, at 729-32.

[45] This is indeed the view of Murray Hunt: "The Horizontal Effect of the Human Rights Act" (1998) *PL* 423. His view is one with which a number of others, including Lester and Pannick ("The Impact of the Human Rights Act on Private Law: The Knight's Move" (2000) 116 *LQR* 380); and J. Beatson and S. Grosz: ("Horizontality: A Footnote" (2000) 116 *LQR* 385) appear broadly to sympathise. H.W.R. Wade, as is well known, sees an even more expansive role for the court under s 6(1): "Horizons of Horizontality" (2000) 116 *LQR* 217.

[46] See the definition of "organs of the state" in s 1(1). This omission is criticised by, *eg* R. Murphy, "The Incorporation of the ECHR Into Irish Domestic Law" [2001] 6 *EHRLR* 640, at 655.

THE PUBLIC INTEREST DEFENCE IN THE IRISH LAW OF BREACH OF CONFIDENCE

The Public Interest Test – Introduction

NIB v *RTE* is now the leading Irish decision on the public interest defence in breach of confidence. A significant concern relating to the development of the doctrine of confidence in its own right and in future as a remedy for invasion of privacy, is the fear that the action will pose an unacceptable restraint on media freedom since it prevents the disclosure of truthful facts. The main insurance against this possibility rests with the public interest defence, whereby disclosure of admittedly private or confidential information is permitted if this would serve the public interest. It is necessary first to consider the competing formulations of the public interest/no confidence in iniquity test, and their resolution by the Supreme Court in *NIB* v *RTE*.

Non-Iniquity As A Definitional Element Of Confidence?

Although it has been pointed out above that the decision in *NIB* v *RTE* added little to understandings as to the scope and nature of the duty of confidence, it did clarify the duty in one important sense. The traditional approach to this matter is encapsulated in the maxim that that there is no confidence in iniquity and this point was touched on by Keane J in *NIB* v *RTE*: it can be taken to mean that the plaintiff cannot pray in aid the equitable jurisdiction of the court to conceal his or her own wrong-doing.[47] This means that any public interest in disclosure does *not* operate as a defence; rather, where iniquity is shown, the information does not have the quality of confidentiality (partly on the ground that it is not in the public interest for such wrong-doing to be concealed). Judges sometimes do not acknowledge the implications of relying on the "no confidence in iniquity rule": taken literally it precludes the exercise of balancing the interest in confidentiality against the public interest in disclosure, since if there is no confidentiality in the first place (due to iniquity) then clearly the court would never reach the stage of considering any arguments *against* keeping the material confidential. Thus to talk of the rule as the basis of the public interest test, as Keane J did in *NIB* v *RTE*, is to create doctrinal confusion. The other, more prevalent, view is that the public interest *justifies* a disclosure that would otherwise be a breach of confidence. Following the first view, the non-iniquitous nature of the information would be a necessary element in demonstrating that the ingredients of breach of confidence were present. The judgments in *NIB* v *RTE* appear to proceed on the basis of the second view and it can be assumed therefore that it will continue to prevail. For the reasons given in the next section, it is submitted that this view is the more satisfactory one, in readily allowing for a balancing act to take place between different public interests, which also allows for the influence of constitutional and ECHR guarantees of freedom of expression.

---

[47] See *eg Gartside* v *Outram* (1856) 26 LJ Ch 113, at 114; and in relation to copyright, *Glyn* v *Weston Feature Film* Co [1916] 1 Ch 261.

The Value Of The Balancing Exercise

Keane J (speaking for the minority, but in this case in a passage which was in harmony with the approach of the majority) found:

> "The English authorities indicated that the appropriate approach was for the courts to engage in a balancing exercise, described as follows by Goff LJ in *AG* v *Guardian Newspapers (No 2)* [1990] 1 A.C. 109 at p 282: '. . . although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure . . . It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.' "[48]

Keane J concluded: "it can be said with confidence that the 'balancing' approach suggested by the English authorities can be adopted in this jurisdiction in a case such as the present." Lynch J also accepted implicitly that the exercise to be engaged in one of balancing: "the public interest in such publication [relating to wrong-doing] may outweigh the public interest in the maintenance of confidentiality."[49]

In terms of the possibility that the doctrine of confidence will broaden in Ireland under the impact of the ECHRA 2003 in order to become something closer to a privacy remedy, the "balancing exercise" formulation, as opposed to a formulation within which "non-iniquity" becomes an aspect of the definitional elements of confidence, is to be preferred. The exercise provides greater flexibility for taking account of the weight of free speech interests, and for balancing them against any privacy interests raised. A formulation in which "non-iniquity" became a definitional element of confidence could invite paternalistic determinations of the court as to the morality of the plaintiff's conduct, without affording him or her a full opportunity to put forward argument as to the weight of the privacy interest involved. For example, a particularly intrusive method of obtaining the information could be taken into account (as in *Francome* v *MGN*, which concerned an illegal telephone tap)[50] or the particularly intimate nature of the information revealed. Definitional balancing on the American model has some superficial attractions in relation to conflicts between privacy and free speech, but the methods of balancing the two rights put forward by commentators in relation to Articles 8 and 10[51] (discussed below), and by

---

[48] n 7 above, at 482.
[49] *Ibid*, at para 44.
[50] [1984] 1 WLR 892, at 898.
[51] See Phillipson and Fenwick, n 18 above (*MLR*), at 683-91; H. Rogers and H. Tomlinson QC, "Privacy and Expression: Convention Rights and Interim Injunctions" [2003] *EHRLR* 37-54.

some judges in the UK[52] provide, we will argue, a more subtle and nuanced method of weighing up the two interests against each other.

The definitive adoption of the "balancing exercise" approach in *NIB* v *RTE* has in this sense opened the door to the movement from confidence towards privacy and from a narrowly drawn notion of "public interest" towards a recognition of the importance of freedom of expression – a movement which has already occurred in English law, largely under the impetus of the HRA. A different or narrower formulation of the exercise would have been likely to stifle that movement. Further, while the notion of "balance" does not provide much guidance as to the method of carrying out the exercise and may appear to be ". . . an invitation to judicial idiosyncrasy" as Gummow J has put it,[53] the development of that exercise which can now occur, especially under the impetus of the ECHRA, provides criteria which can be used in determining the issues without resorting to judicial commonsense or "adhocery", a matter discussed further below.

The Scope And Content Of The Public Interest Defence After *NIB* v *RTE*

Article 10 of the ECHR had little influence upon the public interest defence in English law prior to the inception of the HRA,[54] but this has changed markedly in the post-HRA era. The defence as considered in *NIB* v *RTE* is still quite narrow. It is possible that the impact of Article 10 in this context under the ECHRA 2003 will in time follow a similar pattern, although, as discussed above, the influence of Article 10 is likely to be significantly weaker in Irish than in English law, given the weaker form of "incorporation" opted for by the Irish Parliament. However, it is important to point out that the post-HRA authorities in the UK, such as *Douglas* v *Hello!*[55] and *A* v *B plc*,[56] will *themselves* be likely to influence the development of the doctrine of confidence in Ireland. Thus the doctrine in Irish law will come under pressure to respond to Article 10 from two directions.

(a) The coverage of the defence: dependency on wrong-doing?

In English law, the "public interest defence" moved away from the limitation imposed by the link to iniquity: in other words, it allowed a broader range of factors than merely the revelation of misconduct to be taken into account. The House of Lords found *obiter* in *British Steel Corporation* v *Granada Television*[57] that publication of confidential information could legitimately be

---

[52] See, for example, *Re S (a child)* [2003] 2 FCR 577; *Douglas II* (n 2 above), both discussed below.

[53] *Smith Kline & French Laboratories Ltd* v *Department of Community Services* [1990] FSR 617.

[54] See *eg* Jacob J's pre-HRA judgment in *Michael Barrymore* [1997] FSR 600 which, in a case relating to the unauthorised disclosure of personal information and thus clearly raising both privacy and speech issues, did not once advert to the Convention.

[55] [2001] QB 967, at 997.

[56] [2002] 3 WLR 542.

[57] [1981] AC 1096; [1981] 1 All ER 417 (HL).

undertaken only where there was misconduct,[58] but in *Lion Laboratories* v *Evans*[59] Stephenson LJ said that he would reject the "no iniquity, no public interest rule," agreeing with Lord Denning's statement in *Fraser* v *Evans*[60] to the effect that "some things are required to be disclosed in the public interest in which case no confidence can be prayed in aid to keep them secret and [iniquity] is merely an instance of just cause and excuse for breaking confidence." *W* v *Egdell*[61] and *Hellewell*[62] also indicate that the defence continued to broaden its focus of concern with the result that the strength of the public interest in question rather than the individual wrongdoing of the plaintiff became the determining factor. In *W* v *Egdell*, no wrongdoing was relied upon in finding that the medical report relating to the plaintiff's condition should be placed before the appropriate authorities where it was in the public interest to do so. It should be pointed out that there may in certain circumstances be further *competing* public interests. In *X* v *Y*[63] there was found to be a further specific public interest in maintaining confidentiality. A newspaper wished to publish information deriving from confidential hospital records which showed that certain practicing doctors were suffering from the AIDS virus. In granting an injunction preventing publication, Rose J took into account the public interest in disclosure, but weighed it against the private interest in confidentiality and the public interest in encouraging AIDS patients to seek help from hospitals, which would not be served if it was thought that confidentiality might not be maintained. It may be concluded that these rulings accepted the possibility of the existence of a broadly-based public interest defence, not based on iniquity or indeed on any form of wrong-doing by the plaintiff.

In *NIB* v *RTE* at first instance, Shanley J found that it would be unwise to define the boundaries of the public interest exception, but held that "misdeeds of a serious nature and importance to the country will justify disclosure."[64] But he also went on to offer a more expansive approach to the defence, commenting that, "the countervailing public interest is that of the public being kept informed on matters which are of real public concern." He added: "A further public interest, of course, is the public interest in preserving freedom of expression, which . . . is enshrined in Article 40.6.1 of [the Irish Constitution]." On the facts he found that disclosure was justified.

In the Supreme Court the minority and majority judges agreed that there should be disclosure where there has been wrong-doing, although they disagreed as to whether that disclosure should be only to the proper authorities (as the minority held) or should extend to publication to the public at large. Lynch J in the majority said: "There is also a public interest

---

58 See further: Cripps (1984) 4 *OJLS* 184 on the public interest defence.
59 [1985] QB 526, at 537.
60 [1969] 1 QB 349, at 362.
61 [1990] Ch 359; see also *X* v *Y* [1988] 2 All ER 658, and *dicta* of Lord Goff in *AG* v *Guardian Newspapers (No 2)*, n 9 above, at 659. *Egdell* concerned a decision to breach confidence by placing details of the plaintiff's mental disorder before the appropriate authorities because it was thought that he constituted a risk to the public.
62 [1995] 1 WLR 804.
63 [1988] 2 All ER 648.
64 n 7 above, at 475.

in defeating wrong-doing and [this] . . . may outweigh the public interest in the maintenance of confidentiality." "Wrong-doing" is a broad term but it appears to take the *British Steel Corporation* v *Granada Television* rather than the *Lion Laboratories* line. Thus is it is quite a narrow formulation of the defence compared to that accepted in English law even pre-HRA.

Lynch J appeared to introduce a further qualification: at one point in the judgment he said:

> "There is also a public interest in defeating wrong doing *and where the publication of confidential information may be of assistance in defeating wrong-doing* then the public interest in such publication may outweigh the public interest in the maintenance of confidentiality."[65]

But when he came actually to decide the case before him, the judge relied upon a much more general formulation:

> "I certainly agree that the defendant should furnish its information to [the proper] authorities and especially if it is asked for such information by such authorities, but the allegation which it makes is of serious tax evasion and this is a matter of genuine interest and importance to the general public and especially the vast majority who are law abiding tax payers and I am satisfied that it is in the public interest that the general public should be given this information."[66]

The italicized qualifying words used in his first formulation of the defence went largely to its scope; the second formulation could be viewed as relating to the *extent* of the disclosure. If his first formulation were to be relied upon as delimiting the scope of the defence it would narrow the defence quite considerably. It appears to allow publication only where that would assist in defeating wrong-doing, and since publication of matter relating to wrong-doing is usually likely to have quite a tenuous connection with defeating it, this formulation would severely restrict the circumstances in which publication of confidential material may be permissible in the public interest. However, although Lynch J's formulations of the defence are not free from ambiguity, it is arguable that his second formulation could be read as relating to both scope and extent and therefore as indicating that a broad formulation – based on wrong-doing but also on the strength of the public interest – would support publication to the public at large, where those tests were satisfied.

Keane J in the minority appeared at one point in his judgment to adopt a broader formulation of the defence. Having reviewed the English authorities, he noted that, following the more recent ones, in particular *Lion Laboratories* (concerning disclosure of information about the inaccuracy of the Intoximeter used to test for drink driving), the public interest defence could reach beyond misconduct and cover information disclosing a "danger to the public". The term "danger" is ambiguous – related to *Lion Laboratories* it could be viewed as covering the danger of a miscarriage of

---

[65] *Ibid*, at 494 (emphasis added).
[66] *Ibid*, at 495.

justice, since drivers could be convicted of drink-driving offences on the basis of inaccurate readings of the level of alcohol in their bloodstream. But in its natural meaning the term has an exclusionary tendency since it could be viewed as connoting some sort of physical danger. However, since Keane J relied on *Lion Laboratories* it may be suggested that he was referring to matters of strong public interest where sections of the public at large or most of the public could be endangered or placed at risk in some way by the activity revealed by the information in question. (On one view, of course, *Lion Laboratories* could be seen as referring narrowly to physical danger since had a driver been stopped but found wrongly to be under the limit an accident could subsequently have occurred. However, this is not the view that is taken of its ratio in England, as the discussion above demonstrates.) In his conclusion, Keane J, referring to the authorities that "should be followed in this jurisdiction," reverted to a narrower formulation of the defence: "the authorities . . . make it clear that where someone is in possession of confidential information establishing that serious misconduct has taken place or is contemplated, the courts should not prevent disclosure . . ."[67] Thus his earlier finding was not reflected in his conclusion. However, the former dicta suggested some sympathy with the broader formulation of the defence. A leading commentary on the decision viewed these tentative pointers towards such a formulation as of particular significance, remarking: "it is to be hoped that an Irish court, when asked to address the issue squarely, will follow his dictum."[68]

If this broader formulation of the defence is accepted in future in the Irish courts it would accord with *Lion Laboratories* and with the later English authorities, but not with the majority view in *NIB* v *RTE* as expressed by Lynch J – even if one omits the limiting words referring to publication as having to be of "assistance" in defeating wrong-doing. However, Lynch J did not need to advert to the wider view of the defence on the facts before him – since wrong-doing had clearly occurred–and therefore the way is still open to develop it on these broader lines. We would suggest that this wider formulation is to be preferred, since it is more consistent with the principles one would expect to be at stake in a test based on the "public interest." The most compelling matter under such a test would be expected to be the depth of that interest – in the sense that the information conveys serious and weighty matters of legitimate concern to the public, rather than the degree of culpability of the plaintiff. Clearly also, a broader formulation of the test tends to afford greater weight to the freedom of the media as watchdog bodies with a duty to inform the public of matters of public interest; since Article 10 is now afforded further effect in Irish law under the ECHRA, adoption of a test which is Article 10-friendly is a step in the direction of ensuring greater harmony between this area of the law and the Convention – as required by section 2 ECHRA. Such a stance would also accord with the

---

[67] *Ibid* at 487. The full quotation is: "The authorities to which I have already referred and which, I am satisfied, should be followed in this jurisdiction, make it clear that where someone is in possession of confidential information establishing that serious misconduct has taken place or is contemplated, the courts should not prevent disclosure to persons who have a proper interest in receiving information."

[68] See P. Lavery, "*National Irish Bank* v *RTE* – the Defence of Public Interest in Irish Law" (1998) *CLP* 111, at 114.

preservation of freedom of expression in accordance with Article 40.6 of the Constitution.

(b) The impact of Article 10 – moving towards even broader formulations of the Irish public interest test?

A number of Strasbourg decisions could be cited to illustrate the likely impact of Article 10 on the public interest defence, but the decision in *Fressoz and Roire* v *France*,[69] illustrates the point particularly clearly, in part because of the similarity of the facts of the case to those of *NIB* v *RTE*.

The applicants in *Fressoz* were journalists. During a period of industrial unrest within the Peugeot motor car company, caused by the refusal of the management, led by M. Calvet, to award pay increases to the workforce, they published an article revealing the very large pay rises awarded during that period to M. Calvet himself. They proved the truth of this story by quoting figures from, and reproducing part of, M. Calvet's tax return, which had been sent to them anonymously. A criminal investigation relating to the theft of the tax returns by employees at the tax office was launched, but no-one there was charged. The applicants, however, were convicted of the offence of handling confidential information obtained through a breach of professional confidence by an unidentified tax official and of handling stolen photocopies of M. Calvet's tax assessment; they were fined around £1,000 and £500 respectively. They applied to Strasbourg, alleging a breach of Article 10 ECHR.

The key issue under Article 10 was whether, as the applicants claimed, the article revealed matters of serious public interest. The Court found that it did:

> "The article was published during an industrial dispute – widely reported in the press – at one of the major French car manufacturers . . . The article showed that the company chairman had received large pay increases during the period under consideration while at the same time opposing his employees' claims for a rise. By making such a comparison against that background, the article . . . was not intended to damage Mr Calvet's reputation but to contribute to the more general debate on a topic that interested the public (see, for example, *Thorgeir Thorgeirson* v *Iceland* (1992) A 239, page 28)."[70]

The Court continued:

> "Not only does the press have the task of imparting information and ideas on matters of public interest: the public also has a right to receive them . . . That is particularly true in the instant case, as issues concerning employment and pay generally attract considerable attention. Consequently, an interference with the exercise of press freedom cannot be

---

[69] (2001) 31 EHRR 2.
[70] *Ibid*, at para 50.

> compatible with Article 10 of the Convention *unless it is justified by an overriding requirement in the public interest*."[71]

In this case, far from there being such an overriding interest, there were particular reasons why the arguments against disclosure were weak: the information was not strictly confidential, since it was available on public record;[72] it did not, moreover, fall within M Calvet's private life;[73] thus Article 8 was not engaged as a countervailing consideration to the applicant's claim under Article 10. However, the case remains illuminating as a contrast to the decision in *NIB* v *RTE*. First of all it clearly illustrates (although this barely needs re-affirming) that in considering restrictions on speech, a court applying Article 10 *must* go beyond considering whether the publication in question discloses serious wrong-doing which the public interest would benefit from having revealed. It is clear that in this case there was no "wrong-doing" (except perhaps in a political sense) to be revealed: there was no fraud, crime or anti-social behaviour in question. The information was important, however, insofar as it contributed to a serious public debate as to the management of Peugeot and, in particular, alleged unfairness and greed on the part of the management. A court applying a narrow public interest test which insisted that there must be a public interest served by the revelation of serious wrong-doing would therefore have presumably come to the conclusion that in this case publication should *not* be permitted – the reverse of the conclusion unanimously reached by the European Court of Human Rights. *Fressoz* thus establishes in the clearest possible way that the requirement of serious wrong-doing, as an essential element to the public interest test, or even that of a "danger" to the public should be dropped by the Irish Courts if they are inclined to use section 2 ECHRA to bring Irish law fully into line with the demands of Article 10, as interpreted in *Fressoz*.

It may be therefore said that three possible formulations of the defence are now evident: first, that based on the plaintiff's culpability in relation to matters of serious public concern; second that based on revealing a "danger" to the public; finally, that based on matters of serious public concern where no such danger is evident – as in *Fressoz*. Obviously the final one is by far the broadest and encompasses the other two. The jurisprudence of the English courts demonstrates that they have moved through all three formulations and at present adhere to the third. Indeed, as discussed below, they have, post-HRA, arguably moved beyond the third towards embracing publication on extremely flimsy public interest grounds. The Irish courts, as *NIB* v *RTE* confirms, adhere at present to the first, although they show a tentative receptivity towards the second.

(c) Extent of the disclosure

Fressoz also illustrates, we would suggest, that Article 10 requires a much more generous attitude towards the circumstances in which disclosure may be made in the press, as opposed merely to the proper authorities; again this

---

[71] *Ibid*, at para 51 (emphasis added).
[72] *Ibid*, at para 53.
[73] *Ibid*, at para 50. This was because it concerned the financial affairs of a public figure.

is a matter from which Irish courts may also draw guidance from English decisions, including those made prior to the HRA.

In *W* v *Egdell*[74] the notion of wrongdoing was not relied upon in finding that the medical report relating to the plaintiff's condition should be placed before the appropriate authorities where it was in the public interest to do so. But it should be noted that this decision placed some limitations on the ability of the public interest defence to afford protection to press freedom: it was found that it might sometimes be appropriate to pass information to a particular body rather than disclosing it to the public at large.[75] In *NIB* v *RTE* the minority judges considered that disclosure should be limited to the revenue authorities, and that in terms of the two interest involved there was no need for disclosure to the public at large: in other words, the public interest in confidentiality outweighed that in relation to wrong-doing as far as wider disclosure went. But the majority, weighing up the two interests, favoured wider disclosure on the basis of the seriousness of the behaviour, taking into account the fact that the public as a whole has an interest in tax evasion.

It is worth noting, under the minority view as to the extent of the disclosure, that if permissible disclosure in such instances was to be confined to particular bodies – usually state regulators – then investigative journalism would tend to be stifled since the media would have little interest in acting – in effect – as the unpaid investigative arm of the state. Clearly, it is the function of the media to root out abuses, but it is a more important function, as the European Court of Human Rights pointed out in *Fressoz* and on numerous other occasions, to inform the public. Thus it could be argued that there is a public interest in allowing wider disclosure (although clearly it would not prevail in every instance) for this reason in itself. The impact of the ECHRA may tend to broaden the thinking of Irish judges in cases of this nature in terms of acceptance of a human rights culture. Although the *outcome* in *NIB* v *RTE* was a media-friendly one, the reasoning is not: the judges of the Supreme Court did not at any point advert to the value of freedom of expression or to the significance of the media in terms of rooting out abuses of power or corruption as in the instance under consideration. Lynch J seemed concerned merely with the culpability of the plaintiff and its clients, not with the importance of free expression more generally. Ironically, although Keane J's judgment appeared to take some account of free expression values in the sense that his formulation of the public interest test was the broader one, he then formulated a test *for the extent of disclosure* which was very narrow and which would tend, as pointed out above, to discourage investigative journalism.

---

[74] [1990] Ch 59.

[75] Where disclosure has been said to be in the public interest because it exposes particular criminal or anti-social behaviour or reveals some specific risk to public health, it has been held that this will not always justify disclosing the matter in the press: see *Francome* [1984] 1 WLR 892; *Initial Services Ltd* v *Putterill* [1968] 1 QB 396, at 405–06, *per* Lord Denning; *AG* v *Guardian Newspapers (No 2)* [1990] 1 AC 109, at 269, *per* Lord Griffiths; *ibid*, at 282, *per* Lord Goff; *ibid*, at 177, *per* Sir John Donaldson in the Court of Appeal.

WEIGHING UP MEDIA FREEDOM AGAINST CONFIDENTIALITY/PRIVACY – HOW TO CONDUCT THE BALANCING EXERCISE

It is of interest to ask by what reasoning process in their decision in *NIB* v *RTE*, the Supreme Court determined (a), that the public interest in knowing of the tax evasion scheme and those involved in it outweighed the interest in confidentiality; and (b), that disclosure should be to the public at large. As regards (a), Lynch J said: "the allegation which it makes is of serious tax evasion and this is a matter of genuine interest and importance to the general public and especially the vast majority who are law abiding tax payers." He also found:

> ". . . greater consideration must be given to the publication of the names of and related information about customers and their accounts. [The evidence – the affidavit] establishes a strong *prima facie* case that at least the greater number of the Clerical Medical Insurance Company Limited policy investors were doing so for the purposes of tax evasion . . ."

– and held that no injunction should be issued to protect their identities. As regards (b), Lynch J agreed that the information should be given by the defendants to the Inland Revenue, but also said: "I am satisfied that it is in the public interest that the general public should be given this information."

Arguably, this *conclusion* was quite clearly justified here, since the case concerned criminal activity. However, the *reasoning* affords no indications as to how to conduct the balancing exercise in less clear-cut cases. If the public interest defence continues to broaden in Ireland as it has done in England, methods of balancing the interests in question sensitively against each other in the hard cases will have to be developed. However, the precise methodology to be used will vary, depending upon the nature of the interest in preventing disclosure in the particular case.

At present, once the applicant has established a prima facie breach of confidence, the onus switches to the defendant to establish that there is a sufficiently strong public interest to override the duty of confidentiality and allow publication. This was precisely the approach taken in *NIB* v *RTE*. The court took confidentiality as its starting point and viewed freedom of expression as – in effect – an exception to it, under the rubric of the public interest test. The words "in effect" are used advisedly: none of the judges in the Supreme Court expressly adverted to the effects of Article 10 of the Convention or to Article 40.6 of the Constitution, and this in spite of the fact that the remedy sought by the plaintiff amounted to prior restraint of the media. Now that Article 10 has been afforded further effect under the ECHRA 2003, the structure of this reasoning ought to change, but we would suggest that precisely *how* it will change will depend upon whether the court is engaged in weighing up *confidentiality* or *privacy* rights against freedom of expression.

Cases Concerning Confidentiality Versus Freedom Of Expression

If what is in issue is confidentiality but *not* privacy interests (for example in a case concerning commercial secrets) the onus will lie on the applicant to show that confidentiality, admittedly a legitimate aim under paragraph 2 of

Article 10, justifies restricting expression. Thus confidentiality would be viewed as an exception – to be "narrowly interpreted"[76] – to the primary guarantee of freedom of expression. To make out an exception, as is well known, it must be shown that there is a pressing social need to restrain publication and that the measures taken are proportionate to the legitimate aim of maintaining confidentiality. The latter factor will demand that particularly close attention be paid to the question whether an injunction – representing a far more serious restriction on speech – should be granted, or whether the plaintiff should be left to his or her remedy in damages and or/an account of profits. As is well known, the European Court of Human Rights has found that prior restraint demands the "most careful scrutiny."[77] The term "public interest" *defence* would no longer appear to be appropriate – unless the courts took the view that issues of public interest could be viewed separately from those of freedom of expression – since, as seen in the judgment of in *Fressoz*, confidentiality becomes a defence to the media's claim of freedom of expression, rather than the other way around.

The Irish Courts in some cases have indeed already arrived at a position similar to that just described. For example, in *Attorney General for England and Wales* v *Brandon Books*,[78] Caroll J held: "in my opinion there is *prima facie* a constitutional right to publish information and the onus rests on the plaintiff to establish in the context of an interlocutory application that the constitutional right of the defendant should not be exercised." What was "at stake [was] the very important constitutional right to communicate *now* and not in a year or more."

As O'Dell puts it, O'Hanlon J in *Maguire* v *Drury*[79] "all but announced a rule against prior restraint":[80]

> "It appears to me that the balance of convenience [in deciding whether to grant an injunction] should also take into account the general undesirability of holding up – perhaps for years – the publication of material when the ultimate decision is likely to be that it was quite lawful to publish. Otherwise the interlocutory injunction could be used effectively to encroach in a significant manner on the freedom of the press."[81]

However, it is clear that such an approach was not even adverted to in *NIB* v *RTE*, despite the fact that the case clearly raised the issue of media freedom. It is therefore by no means firmly established in Irish law.

Cases Concerning Privacy Versus Freedom Of Expression

If instead, the information, as well as being confidential, *also* relates to private life under Article 8, then it is clear that a different approach from that seen in cases such as *NIB* v *RTE* should be followed under the ECHRA in

---

[76] *Sunday Times* v *UK* (1979-80) 2 EHRR 245.
[77] See *Observer and Guardian* v *UK* (1991) 14 EHRR 153, at para 60.
[78] [1986] IR 597.
[79] [1995] ILRM 108.
[80] O'Dell, n 8 above, at 211.
[81] *Ibid*, at 116.

order to avoid denying privacy its status as a Convention right.[82] This can be briefly illustrated by examples from post-HRA English decisions in which the courts have grappled with the issue of how to deal with cases that raise issues under both Articles 8 and 10.[83]

In *Venables and Thompson*, counsel representing the press argued:

> "There was a presumption in favour of freedom of expression, which was a primary right in a democracy. It was not a question of a balancing exercise by the court. A balancing exercise would presume that the scales started in equal balance. That was not the correct approach."[84]

In *Theakston*, Counsel similarly submitted that:

> ". . . the court should follow the approach set out in *Sunday Times* v *UK* (1979) . . . in which the [European Court of Human Rights] said that the Court in deciding whether a given interference with free expression was necessary in a democratic society 'is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted."[85]

Such propositions can indeed apparently be found in numerous English dicta of the highest authority. In *Reynolds* v *Times Newspapers*[86] for example, Lord Steyn pronounced:

> "The starting point, is now the right of freedom of expression, a right based on a . . . higher legal order foundation. Exceptions . . . must be justified as being necessary in a democracy. In other words, freedom of expression is the rule, and regulation of speech is the exception requiring justification."

The difficulty here is that in following the common law right to freedom of expression established in *Reynolds*, *Derbyshire*[87] and *Simms*,[88] which, even before incorporation, had raised freedom of expression to the status of a genuine constitutional right, rather than merely a residual liberty, the courts have failed to appreciate a key point. These cases were not decided in the context of the conflict of freedom of expression *with another fundamental right*; thus they cannot be applied *simpliciter* to circumstances in which such a clash is the very issue that the court must resolve. As the authors pointed out, before the coming into force of the HRA:

---

[82] Such an approach would also take account of the impact of the English post-HRA case-law.

[83] For a full account, see Phillipson, n 2 above, at 748-58. We draw on this material in the section that follows.

[84] n 2 above, at 913.

[85] n 2 above, at 31.

[86] [1999] 4 All ER 609, at 629.

[87] *Derbyshire County Council* v *Times Newspapers* [1993] AC 534.

[88] *R* v *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115.

> "If [*The Sunday Times* case] approach were to be applied in domestic privacy cases, the result would be that privacy would lose its Convention status as a fully-fledged right, becoming instead merely a narrowly interpreted exception to the right of freedom of expression. Such an approach, we would argue, could not be right. It would introduce a striking asymmetry whereby the protection of the right to privacy would have to be justified as necessary in a democratic society, while the claims of free speech would be simply assumed. While the European Court has not addressed the matter explicitly, it must be the case that where a restriction on a Convention right is justified not as serving one of the societal interests the Convention enumerates, such as economic well-being or protection of morals, but in order to protect another primary Convention right, a different approach should be followed."[89]

To put it in another way, to treat privacy rights under Article 8 in the same way as the societal interests enumerated in Article 10(2), simply collapses the basic scheme of the Convention which, as a human rights treaty is, axiomatically, to afford human rights a special status over other interests. Arguably, the post-HRA decisions in *A* v *B*,[90] *Theakston MGN*[91] and *Mills* v *News Group Newspapers*[92] all fell into this trap,[93] but the problem is most clearly illustrated by the approach the court took in the well-known decision of *Venables and Thompson*, which concerned an application for an injunction *contra omnes* to prevent publication of the details of the identity and whereabouts of the two juvenile killers of Jamie Bulger. Butler Sloss P stated:

> "The onus of proving the case that freedom of expression must be restricted is firmly upon the applicant seeking the relief. The restrictions sought must . . . be shown to be . . . justifiable as necessary to satisfy a strong and pressing social need, convincingly demonstrated, to restrain the Press . . . and proportionate to the legitimate aim pursued."[94]

Her Ladyship went on:

> "I am satisfied that I can only restrict the freedom of the media to publish if the need for those restrictions can be shown to fall within the exceptions set out in Article 10(2). In considering the limits to the law of confidence, and whether a remedy is available to the claimants within those limits, *I must interpret narrowly those exceptions*."[95]

---

89 Phillipson and Fenwick, n 18 above (*MLR*), at 686.

90 n 2 above. While certain general passages in the judgment suggest a more balanced approach, the way that the conflict between the two rights was resolved in the particular case did indeed exemplify this tendency.

91 n 2 above.

92 n 2 above.

93 See Phillipson, n 2 above, at 751-52.

94 n 2 above, at 921.

95 *Ibid*, at 931 (emphasis added).

The point missed here, however, is that the relevant exceptions here were *other Convention rights* – the rights to life, to freedom from torture or inhuman treatment and to privacy. In other words, the judge regarded herself as being bound to make sure that Convention rights other than Article 10 were "narrowly interpreted" and, crucially, that claimants wishing to enjoy those other Convention rights should only lawfully be allowed to do so if they could show that this was "necessary." The judgment takes us to the bizarre situation in which a claim of Article 10 automatically relegates all other Convention rights – including the right to life and to freedom from torture – to the status of narrowly construed exceptions. Such an approach, giving freedom of expression presumptive priority over all other Convention rights, amounts to a radical distortion of the basic Convention scheme.

However, the need for a different approach has started to find acknowledgment both in the courts and by other academic commentators on the HRA. In *Douglas*, the argument as to the structural priority to be given to freedom of expression was evidently put to the court and – in perhaps the most important aspect of the judgments – it was rejected. This is in spite of the fact that section 12(4) HRA instructs the courts, *inter alia*, to have "particular regard" to freedom of expression. But Sedley LJ's reasoning on this point was emphatic:

> "The European Court has always recognised the high importance of free media of communication in a democracy, but its jurisprudence does not – and could not consistently with the Convention itself – give Article 10(1) the presumptive priority which is given, for example, to the First Amendment in the . . . United States. Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court."[96]

Some support has very recently been given to this view in the judgment of Simon Brown LJ in *Cream Holdings Ltd* v *Bannerjee*:[97]

> "It is one thing to say . . . that the media's right to freedom of expression, particularly in the field of political discussion "is of a higher order" than "the right of an individual to his good reputation"; it is, however, another thing to rank it higher than competing basic rights."

Or, as Lindsay J put it in *Douglas II*, "there is no 'presumptive priority' given to freedom of expression when it is in conflict with another Convention right."[98]

What, therefore, would be the better approach? We have argued previously that, instead of treating Article 8 merely as an exception to Article 10, requiring the applicant to show that interferences with the latter were necessary and proportionate, the court, having undertaken that inquiry,

---

[96] n 2 above, at 1004.

[97] [2003] EWCA Civ 103, at para 54. The case concerned an application for an interim injunction to restrain commercially confidential material and in particular the construction of s 12(3) HRA, which sets out a new test for the grant of relief that affects freedom of expression.

[98] n 2 above, at para 185(v).

should then go on to a further stage with the rights reversed in position. At this point:

> "the speech interest [would be] treated as an exception to the primary right to respect for privacy under Article 8; the same enquiries as to necessity and proportionality could then be made from this opposing perspective. In this way, useful insights could be gleaned by asking, for example, both whether the publication in question was more intrusive than was necessary to its legitimate aim of provoking discussion on matters of public interest . . . and, conversely, whether the remedy sought by the plaintiff went further than was necessary in order to protect the legitimate privacy interest. The claims of both parties would thus be subject to a searching, but balanced examination."[99]

Such an approach has recently been endorsed by leading media law practitioners Hugh Tomlinson QC and Heather Rogers, who argue that the approach of the courts to date neglects the need to conduct such a "parallel analysis" into the necessity of infringing the claimant's Article 8 right.[100] It has also received some judicial endorsement: Sedley LJ remarked in Douglas that both Articles (8 and 10) were qualified by each other and that when balancing the two against each other, "the outcome . . . is to be determined principally by considerations of proportionality."[101] In *Harris* v *Harris*,[102] although there was no detailed consideration of the balancing exercise between Articles 10 and 8, Munby J accepted that the approach adopted by Sedley LJ should be followed.[103]

Further very significant support for this approach may be found in the approach of Lady Justice Hale in the Court of Appeal in *Re S*,[104] in a case concerning the question of imposing reporting restrictions under the inherent jurisdiction of the court in order to protect the privacy of a child. Lady Justice Hale, who gave the leading judgment, found that the lower court had adopted the wrong approach. In that court it had been assumed that press freedom would be afforded primacy and that the Article 8 rights of the child would figure merely as exceptions under Article 10(2). Having repudiated that approach, Lady Justice Hale then went on to consider the proportionality of the proposed interference with freedom of expression. She had to consider under Article 10(2) what restriction, if any, was needed to meet the legitimate aim of protecting the rights of the child. If prohibiting publication of the family name and photographs was needed, the court had to consider how great an impact that would in fact have upon the freedom protected by Article 10 in the particular circumstances of the case. She then went on to consider the matter from the perspective of the child's Article 8 rights, media

---

99 Fenwick and Phillipson, n 18 above (*MLR*), at 687.
100 n 51 above, at 50-52.
101 n 2 above, at 1005 (emphasis added).
102 [2001] 2 FLR 895.
103 *Ibid*, at para 384.
104 [2003] 2 FCR 577; (2003) 147 SJLB 873. The case concerning the possibility of restraining media reports which would have identified the child's mother, who was standing trial for the murder of his brother. It was thought that the publicity would lead to the creation of greater distress for an already very vulnerable child.

freedom figuring this time as an exception to them under Article 8(2). In considering the proportionality of the proposed interference with the right of the child to respect for his private and family life, the judge had to take account of the magnitude of the interference proposed. Lady Justice Hale came to the conclusion that since the first instance judge had not considered each Article independently, and so had not conducted the difficult balancing exercise required by the Convention, the appeal should be allowed, in order that the exercise could be properly carried out by the first instance Family Division court. The two judges in the majority disagreed, finding that although the balancing exercise outlined by Lady Justice Hale should have been carried out, the result reached at first instance – that the restraining order preventing publication should be discharged – would have been reached even if it had been properly carried out. They considered that the first instance judge had not carried out the exercise correctly, but had had factors relevant to the question of proportionality under Article 8 sufficiently in mind.

The detailed practical consequences of such a reasoning process in privacy cases are explored elsewhere[105] and need not be repeated here. What is perhaps more important to note is that this notion of balancing constitutional rights on a case-by-case basis, using proportionality as the key tool in so doing, has already been arrived at independently by academic commentators upon the Irish constitution. O'Dell sees such a process at work in, for example, *Magee* v *O'Dea*[106] and *Burke* v *Central Independent Television*,[107] in which he suggests that O'Flaherty CJ saw the issue as one of balancing. In *Shaw*,[108] a contrary approach, of assigning rights to an a priori hierarchy, was seemingly suggested:

> "If possible, fundamental rights under a Constitution should be given a mutually harmonious application, but when that is not possible, the hierarchy or priority of the conflicting rights must be examined both as between themselves and in relation to the general welfare of society. This may involve toning down or even putting into temporary abeyance a particular guaranteed right so that, in a fair and objective, way, the more pertinent important right in a given set of circumstances may be preferred and given application."

However, as O'Dell points out, although the language of hierarchy is used, in reality the question is one of balancing: "it is not the mechanical ascription of immutable precedence of one right over the other," but instead an assessment "in a given set of circumstances" of which of the conflicting rights must be put "into temporary abeyance." Under this approach "the precedence of the rights changes according to the circumstances, which means that it is not a hierarchy at all, but rather the result of an individuated balancing process."[109] Thus he cites McCarthy J in *Attorney General* v *X*:[110]

---

[105] See Phillipson, n 2 above, 753-59.
[106] 1 IR 500.
[107] [1994] 2 IR 61.
[108] [1982] IR 1.
[109] n 8 above, at 252-53.
[110] [1992] 1 IR 1.

> "I would prefer to seek harmony between the various rights guaranteed and to reconcile them to each other rather than rank one higher than another."

O'Dell then arrives at the very same conclusion as that suggested above in the context of balancing Articles 8 and 10: "Presumably, the doctrine of harmonious interpretation further requires that the exercise of each right restrict the other as little as possible: this is the doctrine of proportionality."[111] He suggests that this approach was seen in *Heaney* v *Ireland*,[112] and summarises it thus:

> "The doctrine, by requiring that the least restrictive invasion of any given right be adopted so as to respect the other, would therefore ensure that any precedence which is to be given to one right over the other as a consequence of balancing is only so much as is strictly necessary in the circumstances."[113]

Thus the correct approach towards the resolution of conflicts between Articles 8 and 10 ECHR is already indicated in previous Irish authority, English decisions and academic commentary in both jurisdictions. It is to be hoped that this approach will therefore be followed by Irish courts should the development of breach of confidence in Ireland throw up conflicts between speech and privacy interests, as this paper has suggested is highly likely, or indeed, if any other common law or interpretative constitutional developments give rise to a workable privacy action.

The Public Interest Test And Article 10: Related Or Separate Enquiries?

There remains the issue of how the Irish courts are to weave Article 10 into their existing consideration of the public interest in publication.[114] It should be noted at the outset that introducing Article 10 into the equation, as a counterpoint to Article 8, complicates the issue on the theoretical level. Whereas the public interest defence is by its nature wholly consequentialist (looking to the benefits of disclosure – or the harm to be averted by it), a freedom of expression argument relies at least in part upon the inherent right of the individual to communicate, *regardless* of circumstances. For this reason, it raises a conflict with privacy – another inherent right – in a far more acute form. At its crudest, the court is confronted by a position in which one party is simply *entitled* to his privacy, and the other is simply *entitled* to invade it, by exercising his right to freedom of expression. The solution to this problem, we suggest, lies in recognition of the fact that the Convention rights in fact exhibit what Mullender has termed "qualified

---

111 n 8 above, at 252.
112 [1994] 3 IR 593.
113 n 8 above, at 254.
114 This issue is explored further in G. Phillipson, "Judicial Reasoning in Breach of Confidence cases under the Human Rights Act: Not Taking Privacy Seriously?" [2003] *EHRLR* (Privacy Special) 54, at 60-72. We draw on material from this article in what follows.

deontology":[115] whilst they purport to uphold a set of human rights established regardless of consequences, they allow for their restriction by reference to consequentialist considerations, in pursuance of a legitimate aim and in a manner proportionate in the circumstances. Moreover, since Articles 10 and 8 are both qualified in favour of each other[116] (both recognise "the rights of others" as a legitimate aim for limiting the primary right), they also provide a method of resolving competing individual *rights*. As we have previously argued, such resolution may be found through recognition of the rights' mutual supportiveness as upholding certain, more basic values,[117] and then through giving consideration to which of those values are more strongly engaged by which right in the particular case. Again, this point has already been taken in relation to balancing constitutional rights in Ireland. O'Dell suggests that, when conducting a balancing exercise between privacy and speech, "the courts should have regard to the justifications for each of the rights, and the weight each carries in the constitutional order."[118]

There is a persuasive case to be made out at the theoretical level that speech consisting of reportage of the personal lives of celebrities receives little or no support from any of the values underlying freedom of expression.[119] It is unrelated to the self-government rationale,[120] cannot generally further the search for truth[121] and runs directly counter to the arguments from autonomy[122] and self-development:[123] in being calculated to deter those in the

---

[115] See R. Mullender, "Theorising the Third Way: Qualified Consequentialism, the Proportionality Principle and the New Social Democracy" (2000) 27(4) *Journal of Law and Society* 493.

[116] As Sedley LJ remarked in *Douglas*, n 2 above, at 1005.

[117] These include autonomy and self-development, both of which are recognized as underlying justifications for both freedom of expression and privacy; moreover, the right to privacy to develop one's thoughts can be seen as an essential precursor to free expression; on this, see E. Bloustein, "Privacy as an Aspect of Human Behaviour: an answer to Dean Prosser" (1964) 39 *NUULR* 962; A. Westin, *Privacy and Freedom* (Atheneum: New York, 1970), at 34. For further discussion, see Fenwick and Phillipson, n 18 above (*MLR*), at 682-91.

[118] n 8 above, at 255.

[119] For the full argument, see Phillipson and Fenwick, n 18 above (*MLR*), at 680-85, 689-70. See also E. Barendt, *Freedom of Speech* (Oxford: Clarendon, 1985), at 191. We draw on Phillipson (n 2 above) in this section.

[120] That is, the argument that since citizens cannot participate meaningfully in a democracy unless they have a reasonable understanding of political issues, open debate on such matters is essential to such a state. See *eg* A. Meiklejohn, "The First Amendment is an Absolute" (1961) *Sup Ct Rev* 245 and *Political Freedom* (1960), at 115-24. Privacy-invading speech may draw something from this argument in areas where it provokes debate on matters of public concern (*eg* through "outing"). However, such an argument was not raised in any of the cases considered.

[121] For the classical argument on truth, see J. S. Mill's *On Liberty* in M. Cowling (ed), *Selected Writings of John Stuart Mill* (Cambridge: Cambridge University Press, 1968), at 121; for commentary, see K. Greenwalt, "Free Speech Justifications" (1989) 89 *Columbia Law Review* 119, at 130-41.

[122] That is, the argument that freedom of speech is an essential aspect of the individual's right to moral autonomy: see generally R. Dworkin, "Do we have a right to pornography?" in *A Matter of Principle* (Cambridge, Mass: Harvard University Press, 1985); T. Scanlon, "A Theory of Freedom of Expression" (1972) 1 *Philosophy and Public Affairs* 216.

public eye from making controversial choices about their personal life by forcing them, in effect, to live in a goldfish bowl, it attacks both their autonomy[124] and their ability to flourish as individuals.[125]

Within the Convention system, it is elementary that Article 10, based as it is upon the essentiality of speech to the "development of everyone"[126] and, above all, to the furtherance of a democratic society,[127]one of the Convention's basic aims, will be much more strongly engaged by some types of speech than others. Specifically, political speech[128] – which most directly engages the self-government rationale[129] – is given higher levels of protection at Strasbourg than artistic speech,[130] with commercial speech

---

123 That is, the view that the ability to engage in the free expression and reception of ideas and opinions in various media is essential to human flourishing. For general discussion, see C. Emerson, "Towards a General Theory of the First Amendment" (1963) 72 *Yale LJ* 877, at 879-80; M. Redish, *Freedom of Expression* (Indianapolis: Michie Co, 1984), at 20-30; K. Greenwalt (n 121 above), at 143-45; J. Raz, "Free Expression and Personal Identification" (1991) 11(3) *OJLS* 303.

124 As a number of commentators have pointed out, intrusive publications, as well as directly assailing informational autonomy, also indirectly threaten the ability of humans to develop freely in substantive ways: "If people are able to release [private] information with impunity, it might have the effect of illegitimately constraining a person's choices as to his or her private behaviour, interfering in a major way with his or her autonomy" (D. Feldman, "Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty" 47(2) *CLP* 42, at 54); see also: C. Fried, "Privacy" (1968) 77 *Yale LJ* 475, at 483; J Rachels, "Why Privacy is Important" (1975) 4 *Philosophy and Public Affairs* 323; E. F. Paul, F. D. Miller and J. Paul, *The Right to Privacy* (Cambridge University Press, 2000), at 34-42.

125 As Fried notes, privacy is essential for "respect, love, friendship and trust" – "without it they are simply inconceivable" (n 124 above, at 483). Invasion of privacy therefore threatens these essential aspects of human self-expression and development.

126 The ECtHR has often referred to freedom of expression as one of the "essential foundations for the development of everyone": see *eg Otto-Preminger* v *Austria* (1994) 19 EHRR 34, at para 49.

127 The ECtHR has repeatedly asserted that freedom of expression "constitutes one of the essential foundations of a democratic society": see *eg Observer and Guardian* v *UK*, n 77 above, at para 59; it has spoken of the press's vital role of "public watchdog" in which guise it has a duty "to impart information and ideas on matters of public interest" which the public "has a right to receive" (*Castells* v *Spain* (1992) 14 EHRR 445, at para 43).

128 Albeit, the notion of "political" should be broadly defined to go well beyond speech directly relating to governmental activities.

129 The argument for speech from democracy has been described by Barendt as "the most influential theory in the development of twentieth century free speech law," n 119 above, at 68.

130 See D. J. Harris, M. O'Boyle and C. Warbrick, Law of the European Convention on Human Rights (Butterworths: London, 1995) at 397 and 414. *Cf*, for example, the decisions in the following cases, which broadly involve artistic speech: *Muller* v *Switzerland* (1991) 13 EHRR 212; *Gibson* v *UK* (Appl. No. 17634); *Handyside* v *UK*, A 24 (1976); *Otto-Preminger Institute* v *Austria* (1994) 19 EHRR 34; *Gay News* v *UK* (1989) 12 EHRR 123; *Wingrove* v *UK* (1997) 24 EHRR 1, esp. at para 58 with the following 'political speech cases': *Sunday Times* v *UK* (1979-80) 2 EHRR 245; *Jersild* v *Denmark* (1994) 19 EHRR 1; *Lingens* v *Austria* (1986) 8 EHRR 407; *Thorgeirson* v *Iceland* (1992) 14 EHRR 843; *Bladet Tromso* v

coming a poor third. This has been recognised, in other contexts, by the UK courts.[131] The disclosure of private facts about celebrities by definition concerns the personal, not the public, sphere and will in general scarcely engage the media's right under Article 10 to impart "information on matters of serious public concern"[132] or more general Convention values such as the furtherance of a democratic society.

This point has not, however, been appreciated in a number of English decisions under the HRA. In particular, in some decisions, the courts have chosen to treat the public interest in a story as wholly separate from the issue of the application of Article 10, taking the view that the latter is fully engaged even where the former is wholly absent,[133] surely a perverse stance, given the European Court's repeated and clear invocations of the vital role of the press in informing the public on matters of serious public concern,[134] and decisions of the Court which clearly indicate that privacy-invading speech is afforded a very low weight in the Convention system.[135] A better approach, we argue, would be to treat considerations of public interest *not* as distinct from the issue of freedom of expression, but as going to the *weight* of that claim, when it is balanced against privacy. Such an approach has indeed been approved of by *dicta* in *Douglas* – cited with approval in *A* v *B plc* – although we argue below that it was not *applied* in those decisions. In *Douglas*, Brooke LJ remarked:

> "In the absence of any public interest [in the story] the Court is especially bound to pay particular regard to the [Press Complaints Commission Code] and a newspaper which flouts the Code may have its claim to freedom of expression trumped by Article 10(2) considerations of privacy."[136]

Such an approach was applied in *Douglas II*: no public interest was claimed in the publication of the photographs and, given the obvious commercial

---

Norway (1999) 29 EHRR 125; *News Verlags GmbH & CoKG* v *Austria* (2001) 31 EHRR 8.

131 See recently, *Pro-Life Alliance* v *BBC* [2002] 3 WLR 1080 (CA).

132 *Bladet Tromso*, n 130 above, at para 59.

133 In *A* v *B Plc*, Lord Woolf CJ said: "Any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society. This is the position *irrespective of whether a particular publication is desirable in the public interest*" (n 2 above, at 549E, emphasis added). In *Theakston*, the judge said: "I can see no public interest in the publication of the details of the [sexual] activity" (n 2 above, at para 75); he nevertheless found that: "the freedom of expression of the *Sunday People* and of the prostitute would be given greater weight than the extra degree of intrusion into the claimant's privacy" (*ibid*, at para 76).

134 See *eg Thorgeir Thorgeirson* v *Iceland* (1992) 14 EHRR 843, at para 50.

135 See *N* v *Portugal*, app no. 20683/92 (1995) and *Tammer* v *Estonia* (2003) 37 EHRR 43. In the former, a publisher was fined and imprisoned for *15 months*, a drastic penalty by any standards, for publishing photographs of a well-known businessman *in flagrante* with a number of young women. The publisher's application under Art 10 was dismissed as manifestly ill-founded: the penalty was found to be a proportionate response to the legitimate aim of protecting the "rights of others", *viz* the business man's right to privacy and reputation. The latter decision is discussed below.

136 n 2 above, at 994; approved in *A* v *B plc*, n 2 above, at 554C.

cynicism of *Hello!*'s actions, the judge found that the clear breaches of the Press Complaints Commission Code through the use of surreptitious photography were such as to tip the balance against freedom of expression.[137] This, however, is something of an isolated example in the reported cases.[138]

In *Douglas*, the speech in question – details of a celebrity wedding – was surely a paradigmatic case of low value, non-political speech, satisfying nothing other than a desire for celebrity gossip. It clearly was of substantially less public interest than, say, the speech in question in *Tammer* v *Estonia*.[139] In that case, the criminal conviction of a journalist in respect of an article he had written was found not to violate Article 10. In the article, the journalist alleged that a former political aide of the Prime Minister had deserted her children and broken up the marriage of the Prime Minister by having an affair with him – clearly somewhat more weighty matters, touching directly on the Prime Minister of the day, than the proposed story and pictures in *Hello!*. However, the European Court of Human Rights found that because the speech concerned the private life of the political aide, it lacked, for that reason, any substantial public interest and therefore did not constitute a justification for the intrusion into her private life. The court in *Douglas*, in contrast, appeared to pay no heed to the manifest weakness of the expression claim in Convention terms, while at the same time making a shrewd analysis of the weakness of the privacy interests involved: as Sedley LJ put it, "The first two claimants had sold most of the privacy they now seek to protect to the third claimant for a handsome sum".[140]

The same phenomena appears in both *A* v *B Plc* and *Theakston*. Both these decisions concerned low-value, non-political speech, closer to soft pornography[141] than serious journalism. Moreover, the speech in question, in holding up to public gaze intimate details of the sexual lives of its subjects, was of a type that is arguably actually *hostile* to core values underlying freedom of expression: such intrusive stories directly attack the value of human development without outside interference from others,[142] and, through their possible deterrent effect in threatening the humiliating exposure of sexual irregularities, indirectly threaten substantive autonomy.[143] Again, however, the court, while showing no awareness of these clear weaknesses in the speech claim, went to some lengths to point out the relative poverty – as the judges saw it – of the privacy case. Indeed the court in *A* v *B* laid down guidance to the effect that it may not even be necessary to determine the *existence* of weaker privacy claims, so likely were they to be outweighed by the claims of freedom of expression:

---

137 n 2 above, 204-05.

138 Expression rights did not succeed in the *Venables and Thompson* case (n 2 above): however, it is important to point out that in that case the boys' right to life was engaged as a countervailing consideration.

139 See n 135 above.

140 n 2 above, at 1006, *per* Sedley LJ.

141 Sedley LJ has described it as "mildly pornographic" material: *Cream Holdings*, n 97 above, at 88.

142 See n 123 and 126 above. For the facts of these cases, see n 2 above.

143 For the argument that freedom of expression can best be justified by an argument based on moral autonomy, see the works cited in n 122 above.

> ". . . usually the answer to the question whether there exists a private interest worthy of protection will be obvious. In those cases in which the answer is not obvious, an answer will often be unnecessary. This is because the weaker the claim for privacy, the more likely that the claim for privacy will be outweighed by the claim based on freedom of expression."[144]

This reasoning is revealing: it shows no recognition of the proposition that whether the privacy interest is likely to be outweighed by the speech interest *depends upon the nature of the speech in question*. It thus neatly encapsulates the unbalanced approach to the two Convention rights described above.

The courts in both cases then went on to apply this approach, examining at some length the weaknesses of the privacy interest, while disregarding the nature of the speech. Given the transitory nature of the intimate relationships in question and the fact that the other parties to them did not wish to keep them private any longer, the Court in *A* v *B Plc* concluded: "In our view, to grant an injunction would be an unjustified interference with the freedom of the press."[145] In *Theakston,* the conclusion, reached specifically on the right of the newspaper to convey intimate and prurient detail of the precise sexual acts that took place between Theakston and the prostitutes was even clearer:

> "I do not consider that the confidentiality or privacy case in relation to the details of the sexual activity is *nearly strong enough* to warrant the degree of restriction involved."[146]

This was said despite the fact that the judge openly conceded that conveying such details to the public had no public interest value.[147] We would argue that the opposite was the case in both instances: the speech in question – conveying explicit details of the sexual activity of a celebrity – was surely of the lowest value in Convention terms; conversely, the invasion of privacy, entailing as it did a gross intrusion into one of the most intimate aspects of private life – sexuality – was surely of a very grave degree. Such cases therefore can quite straightforwardly be resolved in favour of the privacy interest at the level of principle. But as long as the courts continue to perceive Article 10 as engaging a one-size-fits-all weight, such a resolution will not present itself.

The "Public Interest" In English Privacy Cases: A Development Too Far?

The courts' particular finding on what the public interest specifically demanded are equally of interest. In *A* v *B plc*, Lord Woolf CJ laid down as general guidance the following:

> "Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. In many of these situations it would be overstating the position to say

---

144 n 2 above, at 550C.
145 *Ibid*, at 561.
146 n 2 above, at para 76 (emphasis added).
147 "I can see no public interest in the publication of the details of the [sexual] activity" (n 2 above, at 75).

> that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a court when deciding on which side of the line a case falls."[148]

One of the authors has criticised this reasoning extensively elsewhere.[149] Only two points need be made here: first, it collapses the distinction, carefully maintained in successive previous judgments of the Court of Appeal, between "the public interest" as a legal term of art on the one hand, and what is interesting to the public on the other.[150] Second, it takes no heed of the fact that Strasbourg, in a number of cases, has treated publications that invade private life as *lacking*, for that reason, a public interest, such that even very draconian penalties in relation to them have readily been found to be justified as a proportionate means of protecting private life under Article 8. As a leading work on privacy puts it:[151]

> "Where the content [of the relevant publications] amounts to a gross invasion of privacy the Commission has had no difficulty in considering severe penalties (including imprisonment) for the publisher concerned to be a proportionate interference with his right to freedom of expression.[152] Such publications are considered to have little or no informational value worth protecting."

The other strand of argument that the courts used to support the right to publish in both *A* v *B* and *Theakston* was the proposition that the figures in question, while not politicians, were role models of a sort and that it is important for the public not to be misled about such people. This notion, while it appears in the Press Complaints Commission Code to which the courts must have regard,[153] is one which surely must be approached with caution in principle, and was in any event pressed into action in these cases in a way that was thoroughly muddled. In *A* v *B*, the court laid down the general guideline that:

> "[A] public figure may hold a position where higher standards of conduct can be rightly expected by the public. [He] may be a role model whose conduct could well be emulated by others. He may set the fashion."[154]

Applying this to the facts before it, Lord Woolf CJ found:

---

148 n 2 above, at 552.
149 Phillipson, n 114 above.
150 See eg *Lion Laboratories* [1985] QB 526, at 537; *Francome* [1984] 1 WLR 892, at 898; *LRT* v *Major of London* [2003] EMLR 40.
151 M. Tugendhat QC and I. Christie, *The Law of Privacy and the Media* (Oxford University Press, 2002), at 420-21.
152 Here the authors cite *N* v *Portugal*, app no. 20683/92 (1995) and *Tammer* v *Estonia*, (2003) 37 EHRR 43.
153 Under s 12 HRA.
154 n 2 above, at para 11(xiii).

> ". . . it is not self-evident that how a well-known premiership football player [Gary Flitcroft] chooses to spend his time off the football field does not have a modicum of public interest. Footballers are role models for young people and undesirable behaviour on their part can set an unfortunate example."[155]

It is interesting to compare this passage with the reasoning of the Supreme Court in *NIB v RTE* in addressing the issue of the public interest defence; it vividly illustrates how far the English courts have taken the defence of public interest from the notion of protecting the public from serious harm. Ironically, perhaps, in this case an old-fashioned "no-confidence-in-iniquity" defence could have been used, since adultery is certainly "immoral" in the traditional sense. But instead, as seen above, the judge focused upon the supposed benefit to the public in knowing the information concerned. In particular, the Court of Appeal judgment in *A* v *B* suggests that the interests of young men, who may be influenced by footballers, in being informed of the true state of their sexual behaviour, outweighs the right not to have intimate details of one's sexual life publicised to the world at large. The contrast with *NIB* v *RTE*, in which the Supreme Court agonised over how far the revelation of widespread, criminal tax evasion was in the public interest, could not be stronger. The Court of Appeal moreover seems somewhat confused as to what benefit the young men supposedly influenced by the behaviour of Gary Flitcroft would receive from having immoral behaviour on his part publicised. The reference to the fact that such behaviour may "set an unfortunate example" indeed suggests that they may be *harmed* by finding out such matters. Yet this was somehow seen as a sufficiently weighty public interest to outweigh what, in Strasbourg terms, was undoubtedly a serious invasion of private life.

CONCLUSIONS

In conclusion, then, whilst the Irish courts are only very slowly and tentatively expanding the boundaries of the public interest defence beyond the revelation of serious wrong-doing, the English courts, in one case at least, have stretched it to include the public's desire to receive gossip that may affect their opinion of the sexual continence of premiership footballers. By so doing, English judges are allowing Article 10 to cast a protective mantle around speech that holds up the personal life of celebrities for public entertainment, and in so doing assaults human dignity, personal autonomy, and what Strasbourg[156] has referred to as the value in the "development, *without outside interference*, of the personality of each individual in his relations with other human beings."[157] The latter value has, indeed, been frequently recognised by the Strasbourg Court as one underlying the right of free expression;[158] it is ironic therefore to see Article 10, intended in part to *enhance* the self-development of the individual, being pressed into service to justify speech that assaults and impedes that freedom.

---

[155] *Ibid*, at para 45.
[156] In *Botta* v *Italy* (1998) 26 EHRR 241.
[157] See n 124 above.
[158] The ECtHR has repeatedly asserted that freedom of expression is one of the "essential foundations for the development of everyone" (*Otto Preminger Institute* v *Austria* (1994) EHRR 34, at para 49).

This paper has argued that the public interest test in the Irish law of confidence needs to be developed substantially beyond its current state in order fully to reflect the demands of Article 10, but that the English line of case law post-HRA on the public interest defence in personal information cases serves as a clear warning that such development needs to be firmly grounded in the values underlying freedom of expression itself. Thus the class of tabloid speech about the sexual lives of celebrities, which has no part to play in informing public debate on matters of public concern, and which tends to run counter to the values of human autonomy and human flourishing, should emphatically *not* be seen as serving any public interest, when that notion is configured *not* merely as judicial intuition as to what is desirable for society generally, but as one structured by the principles underpinning the right to free expression itself. If such a course is followed, Irish courts could not only markedly enhance Irish law's recognition of the importance of freedom of expression in a democratic society, but also avoid the abuse of that concept in the service of gutter journalism that degrades both individuals and our public culture. The Irish courts should enhance their role as guardians of fundamental rights and the public interest properly so-called, *not* become the guardians of the gutter press.

POSTCRIPT

As this article was going to press, the House of Lords decision in *Campbell* v *MGN* [2004] UKHL 22 was handed down. In a lengthy judgment of over 60 pages, their Lordships decided by three to two that the publication of the details of Naomi Campbell's treatment at Narcotics Anonymous and of photographs of her leaving a particular meeting with other patients amounted to a breach of confidence that could not be justified in the public interest and/or under Article 10 ECHR, thus overturning the Court of Appeal decision. This judgment, one of the most important in terms of media freedom since the HRA came into force, is also of tremendous significance for the area of law with which this article is concerned. In particular, their Lordships unanimously confirmed that the correct approach to balancing speech and privacy interests is that outlined by the authors above and used in *Re S* (see note 104 above) – that is, the dual use of proportionality: see in particular the speech of Lord Hoffman at paragraph 55, of Lord Hope at paragraph 113 and Lady Hale at paragraph 140-141. Their Lordships also set the most authoritative possible seal on the use of a radically modified form of breach of confidence to protect privacy: it not only clearly discards any need for a prior relationship between the parties, but also sets breach of confidence in a new conceptual framework. As Lord Nicholls summed it up: "The essence of the tort is better encapsulated now as misuse of private information" (at paragraph 41). Finally, the speech of Lady Hale in particular showed a clear recognition of the need, expressed above in this article, to approach the public interest test by reference to the values underpinning Article 10 ECHR and in particular the notion that different categories of speech have different levels of importance under that Article (see paragraph 148) with reportage of celebrity gossip coming low down in the scale. As her Ladyship put it, "The political and social life of the community, and the intellectual, artistic or personal development of

individuals, are not obviously assisted by pouring over the intimate details of a fashion model's private life." (at paragraph 149; see also the speech of Lord Hope, at paragraph 117). Thus the judgment also appears likely to inhibit future judicial acceptance of the kind of flimsy public interest arguments that this article has criticized.

DRUGS COURT OF NEW SOUTH WALES AT PARRAMATTA

His Honour Judge David Smyth

INTRODUCTION

The irony was not missed on at least one of the members of the interviewing panel of the Winston Churchill Memorial Trust. Could it be that one of those countries whose forefathers had been sent to Botany Bay could learn from the penal experience of New South Wales?[1]

It was on January 26th, 1788 that Captain Philip and the First British Fleet held an official ceremony founding the British Colony at Port Jackson in New Holland. It had only been 18 years before, in 1770, that Captain Cook had landed at Botany Bay on his trip of exploration up the East coast of *Terra Australis* or New Holland and, whilst the idea of penal colonies was probably not unique to the British at the end of the eighteenth century, it is now hard to conceive just how audacious and innovative this social and geo-political experiment was. The fleet which arrived and entered one of the World's greatest natural harbours in Sydney Cove comprised soldiers, freemen and convicts.[2]

Those who landed did not know how far west the land that they called New South Wales extended. They also suspected, erroneously, that New Holland was divided by a stretch of water from the Gulf of Carpentaria to the north to the Pacific in the south, called Williamson's Strait. Until the start of the 19th Century little attempt had been made by Western explorers to circumnavigate Australia. Charts were virtually nonexistent. That this was audacious is beyond doubt. That it also had a huge influence on the future of the continent is now also certain. At the time it was not at all certain that this would succeed. Convict labour, cruelly treated even by contemporary standards, created roads, built buildings and carved out pastures in the swampy fields of this enclave, which was some three months by sea from the British Isles. It must have been "a strange Kafkaesque world, run by the notorious and corrupt Rum Corps."[3]

The idea for this social experiment with its strong geo-political overtones may actually have initially been French but, whatever its genesis, the equivalent of today's Lord Chancellor's Department lost little time in marrying two ideas. Penal reform and colonisation. Deportation, often for offences regarded nowadays as being less serious, is a cruel and inhumane penal tool. Though it has to be remembered that transportation to Australia (as it was to become commonly known some years later) was looked upon as

---

[1] This article resulted from a Fellowship from the Winston Churchill Memorial Trust to study the pilot Drugs Court of New South Wales in 2002. I gratefully acknowledge the assistance given to me by the Trust.

[2] There are many accounts of the initial founding of the colony but I am greatly indebted and also greatly enjoyed Klaus Toft's, *The Navigators* which is an account of the initial efforts to circumnavigate and chart Australia.

[3] Above, p 8.

a lesser sentence than what so often was the alternative, death by hanging.[4] Presumably, this social experiment found its basis in the initiative of Government and in Statute.

Now, only 214 years since the arrival of the First Fleet in what was to become Sydney Harbour, Australia, and Sydney in particular, is a multi-cultural society. Of its population of just under 20 million over 4 million live in the area of greater Sydney and, of these, 1.4 million live in Western Sydney with their health looked after by three Health Boards. It is in this area, in Parramatta, that the New South Wales Government began its pilot Drugs Court in 1999 with its basis firmly in statute, the Drugs Court Act 1998. In this sense, as in many others, this pilot project differs from the multiplicity of Drugs Courts elsewhere including those being piloted in the British Isles (in Wakefield, Dublin and, now, in Glasgow).

It was my intention to complete a study of the concept of the Drugs Court, compare the court at Paramatta with those examples in the United Kingdom and, if possible, relate this to our own experience locally in Northern Ireland. This was too ambitious. Others had already assessed the concept of the Drugs Court. The extent of my ignorance, both of the pharmacological and social effects of different illicit drugs and of the treatment regimes and resources available, was considerable. I now know more but it is still not enough.

The scope and the variety of Drugs Courts (there are now approximately 900 operating in the United States alone) and the extent and the breadth of the issues involved are so considerable that I am satisfied my initial objective had to be scaled down. The issues range through all those aspects of criminal justice, including both the principles of sentencing and procedural matters. Also, since what underpins the concept of the Drugs Court is the idea of therapy or treatment under some element of coercion, the issues cover the interests of health clinicians and all those involved in the health system. Finally, and most importantly, what are at stake are the safety of the community and the health of the individual.

The American Drugs Courts are now not only well established but they have been hailed by their proponents as constituting a revolution in criminal justice. The concept originating in Florida really encompasses "court supervised treatment" but with a twist. It attempts to marry treatment and coercion and to link health and justice in a unique way. The advocates of Drugs Courts claim that they "constitute a new kind of community (judges, prosecutors and defence attorneys, supervision and correction officers, treatment and rehabilitation providers) to restore our cities and our people to health."[5] Essential to the operation of this "stick and carrot" approach is the central role of the judge as arbitrator, facilitator and mentor. The Australian variation in New South Wales has, however, its differences.

---

[4] On the 11th June 1800 Mary West had, with her mother, faced a committal hearing. She was charged with the theft of 46 yards of calico prints worth $25. Aged 14, unrepresented, she was convicted and sentenced to death by hanging. Her sentence was commuted to transportation and she was sent to port Jackson. Nadine Wilson, *The Adelaide Advertiser*, June 23rd 2001.

[5] Judge Jeffrey Tauber, Director of the National Drugs Court Institute.

I have attempted to achieve a less ambitious objective in this article than a study of the concept of the Drugs Court. I am also only too aware of the fact that this may contain errors and inadequacies. I hope however that whatever its inadequacies it may lead others to directions in which their own researches determine whether the concept of a Drugs Court and this linking of therapeutic services with those of criminal justice have any relevance for the future of health and of sentencing in Northern Ireland.

I have divided what follows into four sections. The first is a description of the history and structure of the pilot New South Wales Court at Parramatta. It includes an account as to how it appears to an outside judge who has spent some four weeks observing it in action and an overview of the evaluations carried out on behalf of the Government of New South Wales together with some of the perceptions of those most closely involved in the operation of the court. The second section considers the Drug Courts currently being piloted in Glasgow and Dublin. The third section is an inadequate attempt to describe the present situation in Northern Ireland. It will be inadequate for a number of reasons; the scope of the subject, the lack of relevant research coming to my attention (in what is a small jurisdiction) and also the fact that the local drugs "scene" is constantly changing. This requires a degree of knowledge that is beyond my capacity. I have therefore tended to confine myself to what is very much an overview of one particular aspect of illicit local drug culture i.e. the abuse of opiates, a class A drug, and our response to it.

Finally, I give some of my own very general conclusions. I do so cautiously. One of the dangers faced by any judge is that, perhaps because of the nature of his job which can require him to assimilate things about which he knows very little, he falls into the trap of assuming that he knows more than he does and that he dabbles where he perhaps should not. This I hope to avoid.

The Drugs Court of New South Wales at Parramatta.

Parramatta, a city in its own right, is west of Sydney. It was one of the first settlements made outside Port Jackson and its history closely succeeds that of the first settlers. The courthouse, where the Drugs Court is located, is Parramatta's third. The tower of the second courthouse with its familiar crest of "*Dieu et mon Droit*" is incorporated into the functional, modern designed courthouse. The wall of the first can still be seen just across the road. A building housing a nursing museum dates from 1826 also faces it. I suppose Parramatta has something of the relationship which, for example, Lisburn has to Belfast. Parramatta is bigger and the social problems of the surrounding area, one of considerable urban sprawl, are greater. It lies on the route of the Great Western Highway, which, originally and literally, was hewn out by conscript convicts, often at the cost of their lives.

The Drugs Court has been allocated one of the medium sized courts and is recognizably similar to a UK or Irish court. It has however an area where the participant speaks which is not the witness box and which has a microphone. Everyone in court can see and hear what is going on and, as will be seen, that is an important part of the process.

The Drugs Court Act 1998 (referred to as the Act) and the Drug Court Regulations 1999 took effect on 5 February 1999 with the first matter being

heard on 9 February 1999. The Drugs Court of New South Wales has the criminal jurisdiction of the District (our Crown Court) and Local Courts (our Magistrates Court) vested in it by the Act, which is not bound by the rules of evidence.[6] For much of this description of the Drugs Court of NSW I am grateful to its first judge, Her Honour Judge Gay Murrell QC, who retired as the senior Drugs Court judge in 2002 and to her successor, Judge Milson.[7]

It is sufficient for immediate purposes to state, very simply, the nature of the concept underlying the Drugs Court of New South Wales. Its genesis was in the Drugs Courts originating in the United States but it has a very local flavour. As in America the court represents a partnership between the criminal justice system and the health system in which criminal justice plays a major, and probably the major, role. It accepts that drug dependency is a treatable condition. It also accepts that treatment, and consequently public safety, can be advanced under court supervision and coercion. Both these concepts are not free from controversy.[8]

The objectives of the Court are enshrined in the Act. It is to reduce the level of criminal activity that results from drug dependency. The Act has been amended by the Drugs Court Amendment Act 2002. These amendments are the result of the fruits of three years' operation and some are of considerable importance. To the objectives of reducing drug dependency (a health aim) and thereby reduce the level of drug-related offending (a criminal justice aim) has been added a further objective of promoting the re-integration of such drug dependant persons into the community (a social aim that, despite its nebulous quality, allows the Court to seek to achieve a wider object that will have both health and criminal justice benefits).[9] The resolution of drug dependency, which is, obviously, a health problem, is the means by which the end of reducing offending is to be achieved.

Originally the Act restricted those eligible to non-violent offenders. This has now been modified and the Court now has a discretion that would allow certain offenders charged with "violent" offences to be eligible.[10] Given that New South Wales is currently going through what appears to be an attempt to impose minimum sentences for a wide variety of offences this seems clearly to be a recognition by the Executive of the possible benefits to the community of such an extension of the powers of the court. With this

---

[6] (s 24(1) and s 26(3).

[7] I am entirely in the debt of Judge Murrell and Judge Milson for the friendship, hospitality and assistance they provided me. It is not easy for a judge to sit with a colleague on his left hand side as Judge Milson did for four weeks. I simply record here my thanks to them and to the many others who not only made my work easier but had already done much of it and who are clearly so committed to what they are doing.

[8] For a comprehensive treatment of Drugs Courts including the concept of therapeutic Jurisprudence see Hora, Schma and Rosenthal, *Notre Dame Law Review* 1999 (74/2). For a devastating, if polemic, critique of these concepts I am indebted to Judge Hoffman of the Denver District Court, Colorado.

[9] S 3(1) as amended.

[10] S 7(2)(b) "that, on the balance of probabilities and having regard to the matters referred to is subsection (2A), any propensity to violence that the person may have would not pose an unacceptable risk to the community or treatment providers if the person were at liberty to participate in a program under this Act. . . ".

scheme Local Courts and District Courts in Greater Western Sydney[11] must refer willing and eligible offenders to the Drugs Court. Eligibility is determined once an offender pleads guilty, is "highly likely" to receive a sentence of actual imprisonment, is assessed as dependant on illicit drugs and is a person in respect of whom a suitable program and facilities exist. Subject to the recent amendment violent and sexual offenders are excluded from participation.[12] Potential success on a Drug Court program is not an eligibility criterion. However, the policy of the Court, which must have a "treatment plan", is that the Drug Court team will support a treatment plan only if it considers that plan as "suitable". This gives some scope to exclude prospective participants whose prospects of success are very low.

Participation in the program can be terminated if the Court is of the view that "no useful purpose" will be served by the offender continuing to participate. Interestingly there is no appeal against the determination of the Court in this regard. The decision is also to be made on "the balance of probabilities". Substantial amendments have now been made to those sections dealing with termination. These had not come into effect when I last viewed a "no useful purpose" hearing in 2002 but such a hearing reverts to the greater formality and more obvious adversarial quality of a court.[13]

The Court is very much a last stop. It is not diversionary in any sense, unlike some programs based on restorative justice and other disposals outside the court system. There are also other, less intensely supervised, systems that deal with drug addicted offenders such as the merit system operated in Melbourne, Victoria. Here in New South Wales, typically, offenders have a substantial criminal record, are referred for several offences of dishonesty (to the offences of burglary, receiving, taking and driving away and theft are

---

[11] The catchment population is approximately 1.4 million, covered by three health boards and having a strongly urban and commuter base.

[12] That NSW has a serious opiate problem is not in doubt. The doubts arise as to how that problem should be best dealt with. I give here some figures that can be contrasted with what (limited) figures appear later in this article in relation to Northern Ireland. In 1998 it was estimated that 24,000 people in NSW had used heroin in the preceding 12 months (*NSW Bureau of Crime Statistic; Progress of the National Drug Strategy)*. The Bureau advises that burglars using heroin commit a median of 13 burglaries a month, generating a weekly income of $3,000 *(The Stolen Goods Market in NSW, BOCSAR 1998,* Stevenson and Forsyth.*)*.
The NSW Department of Corrections estimates that 60% of the male intake into prison receives medication for drug or alcohol withdrawal. It is estimated that in any one year 40% of injecting drug users pass through prison. Up to 80% of the inmate population is received into custody in relation to drug related matters (including alcohol) *(Dept Of Correctional Services 1997-1998 Annual Report).* The figure for women is expected to be higher. In a recent reply to a NSW Parliamentary estimates question, Michael Richards, the Corrections minister, indicated that the figure of those receiving treatment for withdrawal in prison was rising steadily and each year. Those leaving treatment had also largely left prison.

[13] Sections 10 and 11 cover the imposing of sanctions and terminating. "No useful purpose" has been replaced by "unlikely to make any further progress" and "further participation on the program poses an unacceptable risk to the community that the offender will re-offend". Because of a perception that the original wording of the Act had set too high a standard "successfully completes the program" has been replaced by "has substantially complied with the program".

now likely to added some offences of robbery involving minimal violence) and are likely to have a history of heroin dependency.

The abuse of both amphetamine and benzodiazepam is also present as is cannabis and some ecstasy but these drugs are more to be encountered in combination with opiates. There are other ways of dealing with the problems presented by the abuse of "recreational" drugs like ecstasy and cannabis. The profile of a typical offender will include social, personality, mental health and educational problems. Many have been known to the welfare and health services for some time. A surprising number, however, present all or some of these problems and have been picked up by the relevant agencies for the first time in the Drugs Court.

If a "suitable" treatment programme can be devised for an eligible offender, the Court passes an initial sentence, which is one of imprisonment, and it suspends operation of the sentence for the duration of the offender's Drug Court program. Initially, since most offenders come to the Court in custody, the Court remands the offender for two weeks to detoxify and for the preparation of the appropriate reports in the remand centre at Silverwater Prison, Auburn.[14] The connection between custody, detoxification and the "crisis point" which this creates in an offender's life therefore appears crucial to this type of intervention. Every Drug Court program involves treatment for drug dependency (counselling, and, most frequently, the prescription of alternative drugs such as methadone, naltrexone and buprenorphine).

An offender once accepted into the programme can self-terminate at any time. Participation is therefore voluntary at all stages. Since there are concerns in relation to the manner of imposition of sanctions, the sub-rogation of the rules of evidence and to both a judge and defence advocate, but not the offender, being present at a "case conference" consent is seen as being vitally important.

The offender has a counsellor (health) and there is an assigned case manager to the offender who is a probation officer. Emphasis is clearly therapeutic and assistance can be made with accommodation, education and employment through the Probation and Parole Service whose staff appear to take a robust view of their duties.

However, central to the whole concept of the Court and its theme of therapeutic intervention and treatment under a form of coercion, are regular, supervised, urinalysis and regular reporting back to the court. The NSW Drugs Court, whilst it follows the example of those courts in America, is developing its own ethos, less based on zero-tolerance or total abstinence. In part this is because it deals with the most intractable problem of illicit drug abuse- those who are problem heroin users. It is therefore a pilot scheme that

---

[14] This has a drugs free wing that is not wholly dedicated to those on remand to the Drugs Court. Nursing and health care staff this along with correctional Department employees (our Prison warders). It has to house other inmates and, although both staff are dedicated and the wing is drug free, conditions are far from ideal. Women are remanded to Malawa, the women's correctional facility, which I did not visit but anecdotal accounts suggest that conditions are poor. There is certainly little opportunity to do anything other than "dry out" offenders at Silverwater.

is both based on statute and is highly focused on opiate abuse. It does not rely to the same extent on the involvement of communities as the Drugs Courts in the United States and has, to a certain extent, refined for itself the 10 key components of Drugs Courts which have been established by the American system.[15]

The Court sits at Parramatta, where its registry takes most of the supervised urine samples.[16] It sits Monday to Thursday with Friday being used for a review meeting on overall progress and policy. Two judges have been appointed. Consistency of judge (and indeed consistency of approach by that judge) is all-important. The Court accepts referrals from District and Local Courts in greater western Sydney (Auburn, Cambpelltown and Penrith). When an offender is charged before a District Court or Local Court with an offence, it is the duty of that court to ascertain whether the offender appears to be an "eligible person" and whether the offender is willing to be referred to the Drugs Court to be dealt with for the offence.[17] If so, the District or Local Court must refer the person to the Drugs Court. Unlike Glasgow and Dublin, where there has been a slow take up, the pilot Drugs Court of NSW has had no difficulty in getting referrals. The places are limited.

Two things seem reasonably clear. The first is that since the offender is "highly likely" to receive a prison sentence in the referring court he has an incentive to consent. The second is that it may well appear to an offender that participation on a Drugs Court program may be a less onerous option than imprisonment. It also has to be recognised that the pool from which eligible offenders are likely to come will include amongst its number a reasonable proportion who either think the system can be manipulated or who would wish to put off the evil day. The degree of supervision (which comes essentially from four angles; court, counsellor, case Manager and

---

[15] *National Association of Drugs Courts adopted by the UN International Drug Control Program Expert Working Group, Vienna, December 1999*. These are the integration of treatment into the criminal justice system; prosecution and defence lawyers work together as part of a Drugs Court team; participants have access to a continuum of quality treatment and rehabilitation services which meet their health needs; participants are frequently monitored for drug use; any non-compliance by a participant results in a swift and certain sanction by the court; there is ongoing judicial supervision and regular judicial interaction with each participant; there is evaluation of the rehabilitation outcomes achieved through the drug court; the team and others associated with the court receive ongoing inter-disciplinary education; networks are forged with other Drugs Courts, law enforcement authorities , public bodies, treatment providers and the community.

[16] The Court Registrar, John Castellan, has constantly improved and improvised on a system for taking such samples, a necessary part of the whole concept of the Drugs Court. Since the first court was established in 1989 in Dade County, Florida there is now a considerable literature devoted to the way in which such samples should be taken, a compromise between reducing scope for fraud with as little impact as possible on dignity. There is also an illicit literature based mainly on the internet which centres on how both to give false samples and to obtain the means of doing so. The program participants visit the registry by means of an entrance at the rear of the Courthouse. This means they avoid going through the atrium of the courts but also means that they share an entrance used by the jury panel.

[17] S 6.

urinalysis) is sufficiently close and intensive that manipulation is, in the long term, difficult. The price usually is paid in terms of failure, termination and in final sentence.

Initial referral is by telephone. When a referring court makes a telephone inquiry of the Court registry, the Drugs Court team checks for outstanding charges in order to avoid the unnecessary transfer of an offender who is not an eligible person. If the offender appears to be eligible, the matter is listed before the Court the next day if there is room in the list. The program can take many months. Prior[18] to an offender's first appearance the Nurse Manager on the Drugs Court team arranges a preliminary assessment of the offender's drug dependency. Each offender who does not have private representation consults the legal aid solicitor attached to the Drugs Court team and is advised about the Court's programs and the option of returning (at any stage) to the referring court to be sentenced in the usual way.

The accommodation of offenders is restricted. At the remand centre, MRRC, Silverwater (for men)[19] the Court has six beds dedicated for occupation by offenders who, following their first appearance before the Court, opt to pursue their application for admission to a Drugs Court program and undergo detoxification and comprehensive assessment in the prison hospital over a period of one to two weeks. For women two beds are available at Mulawa Correctional Centre. Following this period the offender returns to the Drugs Court and, if a suitable treatment program is available for the offender and he accepts the conditions of his proposed court program, then the Court proceeds to formally convict and pass the initial sentence. A plea in mitigation is heard. This is a formal hearing and, like all appearances before the Court, is taped. Both police or prosecuting lawyer and defence are heard. The sentence is suspended for the duration of the Drugs Court program and, upon sentencing of the offender, the Court imposes the conditions which constitute the offender's Drug Court program.

A program lasts, on average, about 14 months. It falls into three phases with the first naturally involving the closest supervision and scrutiny. Phase one, where the average time spent is three months, is a stabilisation period. It involves urinalysis at least twice a week, most frequently three times at the start. It also involves attendance at the Court twice or at least once a week. Once it is realised that the judge rarely changes and that a close inquiry is made of progress, regression and major relevant events by this judge of the participant the difference between this Court and a court as the Common Law would understand it becomes obvious. The second, consolidation, phase again lasts on average three months. Attendance at Court would,

---

[18] The NSW system of Legal Aid depends on salaried lawyers. Advocates are solicitors who are assigned specifically to the Court by the Legal Aid Department. As such they are clearly familiar with the workings of the Court and are in agreement with its ethos, which is largely non-adversarial since the object is therapeutic for the offender. It has to be recognised though that there is a possibility of this system operating somewhat differently if lawyers were paid a fee for individual items of work. There is some literature elsewhere about the risks of "strategic billing" but that is a different subject!

[19] For all of this I must acknowledge my indebtedness to Her Honour Judge Gay Murrell, without whose assistance and papers this would have been impossible to complete.

typically, be once a fortnight. Urinalysis is done twice a week. The final, reintegration, phase sees the frequency of court attendance drop to once a month and also sees the frequency of urinalysis drop.

It is hard to convey here, particularly to Common Lawyers used to adversarial and to formal courts, the extent of the differences that exist and also the culture shock that a visit to such a court entails. Certain aspects have been directly imported from the American experience where the enthusiasm for the benefits of the Drugs Court concept is almost evangelical. A judge is not a social worker. That sentiment has been expressed and is one with which I agree. That is not the nature of our job. Do Drugs Courts and judges play this central role because of the intractability of the problems and because other agencies whose job is health and welfare find it difficult to cooperate in an effective way together? Do the merits of this system depend in part upon the novelty of a judge playing this role? Is this why this system has become so popular, the existence of a form of coercion both on the agencies and upon the subject?

For four weeks I observed the Drugs Court at Parramatta. I sat though case conferences where (in his absence) the history of an offender appearing that day in court was discussed. I also sat and listened to the direct dialogue with the judge as each person approached the microphone. My experience did not prepare me for the first occasion when applause broke out in court. The system not only operates on the imposition and immediacy of sanctions but also of rewards. Upon graduation from phase to phase, upon final successful termination and even just where someone has done well against the odds, (like the first clean weekend) applause is used. Describing it thus suggests there is something of the Oprah Winfrey Show about it. The role of public applause in both reinforcing and also in rewarding the individual is seen as vital by the court psychiatrist, Dr Paul Read. It is seen and is participated in by all in court. Those who have done well are taken first. Continued progress is rewarded by the removal or remission of sanctions.

The progress of participants is monitored by the judge of the Drug Court and by the Drug Court team which consists of prosecution and defence solicitors (usually legal aid salaried advocates), a police inspector, a senior nurse manager who coordinates health and a probation officer (all assigned to the Court). There is a "case conference" which precedes the open hearing of the Court and which lasts from 9.30am until 11.00am. Needless to say it is always under pressure of time. Lists may be as long as 45, including some matters for initial appearance, some for initiation unto the program and first sentence, some for "no useful purpose" hearings and the reporting back of participants. Each of these cases is considered at the case meeting. Brief reports are led by the health coordinator and by the probation officer as to progress and any developments. The Clerk to the Court (who, interestingly, is, in New South Wales, assigned to the judge as his associate and not to the court) reads out the urinalysis reports from the Court Registry. The absence of the accused (despite the presence of a salaried lawyer acting on his behalf) and the presence of the judge who not only presides but also discusses his attitude with the other participants is, for Common Lawyers, something of a

shock. Information is shared, opinions are offered and any appropriate sanction or reward is openly discussed, all under pressure of time.[20]

At the hearing the offender reporting back comes forward as soon as his name is called. He is aware that the judge already knows something about his or her progress over the intervening period (which, typically, can vary from two days to a month). After this discussion, which is informal and which is listened to intently by all those in Court, the Court may administer sanctions (up to fourteen days' imprisonment) or confer rewards. These include the remission of "suspended" sanctions of imprisonment. Recently the Court had established a new policy as regards the sanction to be imposed for the use of an illicit drug.[21] A drug use, if admitted promptly, was treated less seriously. Since the Court is not bound by the rules of evidence it may inform itself in any way it considers appropriate. Its decisions on these matters are not the subject of any appeal to another court.[22]

The treatment available, both in terms of medication, availability of courses and of residences, is from our perspective in Northern Ireland both generous and varied – at least in Northern Ireland health terms.[23] There are available at least 13 hostel or residential homes, many religious based. The five main treatment streams are; residential based abstinence, community based abstinence, substitute prescribing (methadone naltrexone and bupanorphrine, residential or community based).[24] The participant, if based in the community, receives two home visits a week and support services are provided in the form of assistance with housing, life skills, vocational training, employment, family support and literacy skills. Many participants

---

[20] Behaviour which gives rise to sanctions includes: testing positive for a prohibited drug (alcohol can be expressly ordered by the court to the list), failing to provide a urine sample, failing to punctually attend a court sitting or a counselling appointment without reasonable excuse. Different courts have different approaches to the use of sanctions and some are used more widely than others. Judge Milson swiftly imposed custodial days that could be suspended to a stage that required them to be served. Not only did this tend to encourage compliance, it also permitted the use of remission of some or all of these days as a reward.

[21] A drug use admitted speedily to the appropriate counsellor, case manager and to the Registry would receive a day's sanction in custody. An unadmitted use would receive three days. The object is to encourage honesty.

[22] Though I suppose in a litigious society where legal aid is available there is always scope for judicial review. It does not appear to have happened.

[23] The process by which a participant is placed on a treatment plan is governed by the Court's treatment plan policy, which has been constantly refined as a result of the experience over the past three years and is also available, along with much other useful information, on the Court's website, <www.lawlink.nsw.gov.au/drugscrt>.

[24] Naltrexone is an opiate antagonist that blocks the craving for heroin. I believe it also has been used to treat alcoholism. Surprisingly, according to Judge Murrell, 40% of offenders entering a Drug Court program have had no significant prior treatment. According to the present Drugs Court Judge, Neil Milson, a very high proportion of offenders have thrown up mental health and literacy problems that have neither been treated nor properly addressed. By the Drugs Court Regulations 1999 a person is not eligible if "suffering from any mental condition that could prevent or restrict the person's active participation in a program under the Act". Reg 5(b). What mischief this was aimed at preventing is not entirely clear but it is interpreted in a way that has provided no problems.

either completed their schooling in the juvenile justice system or left school at the first opportunity without visible benefit. It is this failure, if failure it is, on the part of the educational system and other responsible agencies that could possibly lie at the heart of the Drugs Court concept. At a very late stage, and in court, all these agencies are at last required to work (effectively?) together under the structure of an Act of Parliament and supervised by a judge.

A Drugs Court program lasts a minimum of twelve months. Unsuccessful participation results in termination and the imposition of a final sentence, which is usually a sentence of a significant length in prison but which cannot exceed the initial sentence imposed by the Drugs Court on admission to the program. Successful participation results in graduation from the Drugs Court program (this, and progression from each phase, is rewarded by a certificate) and the imposition of a final sentence, usually a good behaviour bond.[25]

The typical profile of a participant has been subject to research by the NSW Bureau of Criminal Statistics and Research (BOCSAR). He, generally, will be male (85%), be referred for 7 offences, mostly of dishonesty, face on average a sentence of 9-10 months imprisonment,[26] and be heroin dependent (83%). His dependency is likely to have commenced in his teens (which appears to be earlier than available data suggest to be the case in Northern Ireland) and he certainly will have been to prison before. He is also likely to have a background which includes a background of parental drug or alcohol abuse, family conflict, childhood abuse and, of particular relevance in Sydney, refugee dislocation. He is likely to still be young (50% are aged between 18 and 25) and, (and this is, perhaps surprising) to have had little by way of prior treatment.

The Role of the Judge and of the Team.

Earlier in this article I described the "culture shock" that a visit to the court induced in a Common Lawyer accustomed to the adversarial approach of an ordinary criminal court. It certainly is clear that the Drugs Court concept generally and the Drugs Court at Parramatta in particular represent a new direction within the traditional Common Law system, both in formal structure and in the approach to sentencing. It is not concerned with findings of guilt since offenders will all have pleaded guilty but there are occasions on which the Court has to make findings and apply rules to facts that are in dispute.

---

[25] Diversion schemes which seek to achieve the rehabilitation of drug dependent offenders by diverting them into treatment are by no means new and there are many and varied examples. The attachment of "fourth conditions" on Probation Orders made by the Court under the Criminal Justice Order (NI) 1996 requiring the offender to take treatment, the deferral of sentence by a court to allow an offender time to embark on treatment which he says he needs is used in Northern Ireland and Scotland. The "Griffith's remand" (adjourning a matter to allow treatment to take place) has now been formalised in NSW by section 11 of the Crimes (Sentencing Procedure) Act 1999 (NSW). Bail diversion schemes exist in many jurisdictions and form a large part of the basis for those examples of Drugs Courts in the British Isles.

[26] Though the cases I observed all had initial sentences imposed that were well in excess of these figures.

For example "no useful purpose" hearings can be contentious matters upon which the judge has to exercise his powers of judgement. There also are frequent occasions when facts are disputed. An example is when a participant disputes what appears to be the result of a laboratory test of his urine. The court applies a test based on the balance of probabilities. A judge has to make quick and accurate decisions that may be informed by urinalysis results, the participant's physical appearance, opinions (given in court) of the health manager and probation coordinator, and the reports of treatment providers and case managers. What the participant says in court and his responses to direct, and often confrontational, questions put, not by the prosecution but by the judge, also inform this decision. In the view of Judge Murrell there is little scope for mistake. Drug Court participants are highly practised in deception, having honed their skills on family and friends over the years. However, she concedes that on occasions there is scope for uncertainty and that mistakes no doubt have occurred. It is her view that the need for quick and fair decisions on program breaches is paramount and that participants are quite capable of understanding, and of accepting what underlies a decision made "on the balance of probabilities".

What makes for this difference? Is it beneficial? The judge has a central and pivotal role in this system. There is a real case to be made that this structure has grown up in its various different forms because of the failures of other agencies to target intractable problems at a sufficiently early stage. These problems can be in welfare, housing, education or mental health. Quite apart from the "working with" difficulties that all agencies seem to encounter there also is the reluctance, real or apparent, on the part of the patient/client to seek out help or to be motivated to be helped. By whatever route the offender arrives in the court is it proper to regard his addiction as a treatable disease? If the answer to this is yes, then is it a short step to link the possibility of a reduction in offending with the rehabilitation of the offender? That is easier to state than to achieve and it also begs the question of individual responsibility. One of the notable aspects of all these schemes is that mental illness excludes participation.

There are difficult matters of medical and legal ethics and also of private rights. A court of law should not be a court of morals. Nor is a judge a social or a health worker. Likewise a clinician does not want to be a policeman. Yet, to some extent once the disease model of drug dependency capable of treatment is accepted, as it now appears to be, both by health professionals and by lawyers involved in the Drug Court concept, a complex mix of elements is unavoidable. The former presiding judge of the New South Wales Court, Her Honour Judge Murrell QC, said:

> "The moral component is particularly significant because the Court deals with offenders whose drug dependency has led to criminal behaviour. Such behaviour has a social impact and cost extending well beyond the offender's personal and domestic situation. The requirement that drug dependent offenders accept personal responsibility for their behaviour and its social consequences and maintain accountability to the

> criminal justice system is at the core of case management of participants by the Drug Court."[27]

The theory is that the Drug Court participant comes before the court at a real crisis in his or her life. It may well be that they have been to prison before and accept that as being inevitable. Prison has not discouraged them so far from committing offences and neither has it encouraged them to benefit from treatment. They, however, still face significant incarceration with all the cost to themselves and to their families which that entails. It is this crisis in their lives which may provide an impetus for potential change. The question is whether the court can capitalise on that possibility for change, and if so to what extent?[28]

Because of the nature of the Court and the belief that addiction is both capable of being treated and that this can be encouraged by supervision and by a degree of coercion, the normal adversarial nature of a court sentencing an offender is altered. To some extent rehabilitation displaces punishment and deterrence. This alters fundamentally the perception of the prosecution (and police) on the one side and the defence on the other. Normally the prosecution would emphasise the objective facts which make the crime serious and the defence the offender's unfortunate subjective circumstances. The judge, normally, listens to both (with a minimum degree of intervention) and then decides on penalty having weighed up the competing aspects, punishment and deterrence emphasised by the prosecutor, rehabilitation emphasised by the defence.

Because of the stress on rehabilitation, and the importance in relation to that of the offender's personal circumstances, a remarkable consensus frequently emerges. This is not only encouraged by the objectives of the Court but also by very way in which those who comprise the team can address their work. It is comparatively rare that the case meeting held before the start of the public hearing in court does not reach a consensus on both what is happening and what should happen to an offender. Desirable outcomes seem to emerge. Everyone appears to be singing from the same hymn sheet. This meeting is presided over by the judge who, as team leader, clearly tries to achieve a consensus where possible. Although this meeting always appears to be under pressure of time it makes what happens in court much shorter.

Given the nature of the role assumed by the judge who presides over a Drugs Court there are demands made of him that are not normally expected of a conventionally trained and experienced judge. Apart from the extended

---

[27] Her Honour Judge Murrell QC, *Australian Law Reform Commission Journal*, 2002. This personal acceptance no doubt underlies the recently introduced policy of the Court in imposing harsher sanctions for unadmitted use of illicit drugs than for admitted use. The need is not just to encourage and reward honesty to the Court but to oneself.

[28] "Therapeutic Jurisprudence" is a term that, like so many other concepts in this area, originated in the US. It is an approach that acknowledges that, regardless of the outcome of legislation, the litigation process may be therapeutic or anti-therapeutic. The court may choose to capitalise on the opportunity for change presented by this crisis in a litigant's life, or may unwittingly reinforce negative attitudes and anti-social conduct. Peggy F Hora and William G Schma, *Judicature*, (82) 1.

nature of the work and the obvious need for consistency of handling of cases there are additional requirements for him or her both to lead the "case work" team and also to assume a role in court that is unique to any Common Law jurisdiction. This has wide implications, not least for the type of selection and training which could help to equip judges to play this role.

The Drugs Court team brings different disciplines together. It develops its own working ethos. The members meet every day. Initial antagonisms, largely due to a lack of knowledge and understanding, between health and law have disappeared. Both the prosecution and police members of the team on the one hand, and the salaried defence lawyers on the other, so clearly believe in what they want to achieve that, whatever their initial conceptions were, they can now be regarded as converts to the new structure.

When the New South Wales Drugs Court commenced, there were, according to Judge Murrell, frequent and significant differences of opinion between health professionals providing treatment to participants and the Drugs Court team. That seems to be a distant memory. There still are differences between the team and treatment providers but that could be expected and, in any event, some disagreement is healthy. The Court's approach is, as it has to be, that rehabilitation from drug dependency (and from associated criminal conduct) is ultimately an exercise of free will. I have referred to treatment "under coercion" but a participant is only in the Court because he has committed a crime. He may be there because that crime has been influenced by his drug dependency but it his offending which has put him there and for which he is accountable. Since he is also on the program because of his initial consent his participation is ultimately voluntary. He can walk away by self-terminating at any time.

Does Treatment Under Coercion Work?

This is a question to which we would all like to know the answer. If there is an answer I am quite satisfied we will not easily find it. Is an addiction to a drug a disease? If so, is that disease capable of being treated? Is treatment more likely to be successful if the patient is a free agent or under some form of compulsion? The evaluators of the NSW Drugs Court understandably avoided such a philosophical question. They, however, comprehensively evaluated the court in three separate studies.[29]

Perhaps of most interest, from the point of view of this article, is the study of cost-effectiveness. This assessed the cost of the scheme and its effectiveness in reducing recidivism amongst participants with the cost of conventional treatment (read imprisonment) and its effectiveness in reducing re-offending after release. Unlike many of the American studies the evaluators were able to use a randomised control group who had also been deemed eligible for the Drugs Court scheme but, due to a shortage of places, were sentenced to prison.[30] It was this that perhaps made this evaluation uniquely valuable.

---

[29] *The New South Wales Drugs Court Evaluation: Cost-effectiveness: A Process Evaluation and Health, Well-being and Participant Satisfaction.* All were published in February 2002. NSW Bureau of Crime Statistics and Research.

[30] This study has what appears to be a comprehensive and valuable précis of previous research, pp 1-6.

Despite the constraints imposed by the time period being studied some interesting conclusions emerged. While Drug Court participants had lower rates of offending than the members of the control group the differences were statistically significant only for a limited number of offences, namely those connected with drug use. However, when those whose participation in the Drugs Court scheme had been terminated were excluded from the equation, the lower rates of offending (whether measured in terms of "free time" to a first offence or by frequency of offending) became significant. This, in itself, does not point to very much beyond suggesting that for some the scheme appears to work well and, again for some, achieves its objective in reducing offending, and incidentally is as "cost effective" when set against traditional measures like imprisonment. In a way, that is to be expected. Where the scheme works it works well.

In relation to cost, the estimated cost per day of the scheme was not much less than that of prison and conventional disposals ($144 as opposed to $151) and not really significant though there may have been longer-term benefits and savings that are difficult to assess.

Some measures were highlighted whch might improve the situation: the ability of the system to better identify those whose chances of success were more favourable, the earlier termination of those who were unresponsive and the relaxation of the stringent "graduation" criteria. The imposition of over-frequent custodial sentences resulting in a return to prison which disrupted treatment programmes was already being dealt with by the introduction of the idea of suspending sanctions (which could also be remitted). Whilst these would reduce costs they would not overall affect re-offending rates.

The picture was much brighter when other aspects were looked at. Strong support was found for improvements in health, social functioning, in well-being and in reduced drug use sustained over a twelve month follow up period. In particular illicit drug use was significantly reduced throughout participation on the programme. Median spending on drugs, used as a proxy measure for drug use, fell from $1,000 a week to $175 per week after four months on the programme. While there remain caveats about these matters the improvement was not only significant but was also maintained in an environment where participants were in the community and had access to those markets they were involved with prior to commencing the programme.[31]

There are so many issues involved. One of those of particular difficulty for those most closely concerned in the operation of Drugs Courts, lawyers and clinicians, is that the difference in our respective professional ethos makes us approach the issue in different ways. The doctor/patient relationship is bound to be different from that of litigant/lawyer or of the policeman/legislator. On a less "philosophical" note than whether treatment under coercion has advantages there are practical arguments from clinicians about the fast tracking of unrewarding patients by courts and probation, issues of confidentiality and problems as to who provides the funding. None of these problems are insuperable. A lot of them arise because of lack of

---

[31] *Op cit* p 40.

understanding and ignorance. This is as much on the part of judges and those in the criminal justice system as it is amongst health workers.

A much more important problem is the clinical one, does treatment under coercion as opposed to free will work or, at least, has it advantages which are so significant that it is worth trying?

Drugs Courts Glasgow

This started in the Glasgow Sheriffs' Court in October 2001 and is quite a contrast to the Drugs Court in Parramatta. Like New South Wales it owes much to the American concept of Drugs Courts.[32] Again like Parramatta, it has given a local flavour to the way in which and to the extent to which it has accommodated that concept. The inauguration of the Court in October 2001 followed the report of a working group established by the then deputy Minister for Justice in the Scottish Executive, Mr Iain Gray MSP.[33] The brief of the group was not to study the feasibility of such a project in Glasgow but rather to have such a Court up and running in Glasgow by the autumn of 2001. It was therefore accepted that the concept was worth trying and this was an implementation group. The report drew heavily on the experience of Drugs Courts in America, Canada and Australia. It also considered what had been happening for some time in Wakefield and what was about to happen in Dublin, which was about to set up its own pilot.

The objectives of the Court (and what the Court will be evaluated upon) are threefold: the reduction of the level of drug related offending behaviour, the reduction or elimination of an offender's dependence upon drugs and the examination of the viability of a Drugs Court scheme in the rest of Scotland. Unlike the elaborate statutory authority of the enabling Act of the New South Wales Drugs Court[34] the Glasgow pilot court has to demonstrate such viability "using existing legislation". It can however suggest "legislative and practical improvements which might be appropriate". Formal evaluation is to be completed at the end of 2003.

The scheme was simple and naturally reflects naturally the central role of the Procurator Fiscal in the Scottish criminal justice framework. Offenders admitted to the Court must be over 21. There has to be an established link between the offender's serious drug misuse and the offending behaviour. Mentally ill offenders are excluded from the scheme. The original system of referral was envisaged as being by an initial sift of cases by the Strathclyde Police with the Fiscal then screening and deciding which cases were suitable

---

[32] See the Ten Principles of Drugs Courts at above.

[33] *Report of a Working Group for Piloting a Drug Court in Glasgow*. Scottish Executive, 1st May 2001. The 11 members of this group reflected its brief, which was very much court orientated. Of its member only one could be considered as coming from health (addictions). The rest were Shrieval, courts service and criminal justice. The nature of the group's brief and speed with which the court was set up may reflect the severity of the drug problems in Scotland's major cities, the link that has been established between that and acquisitive crime and the arrival of the relatively new Scottish Executive keen to do something about what was perceived as the "revolving door" of offenders spending frequent periods in prison with little or no reduction in their offending behaviour.

[34] The Drugs Court Act 1998, as amended.

for consideration. Admissions of guilt and consent are required. Social work and the views of the defence advocate are provided for. A screening group headed by the Fiscal and including police, social worker and the Defence Advocate would decide what cases should be referred to the Sheriff in the Drugs Court who would then remand on bail for four weeks for appropriate reports to be sought.[35]

Two Sheriffs staff the Court, which sits four days a week. Each Sheriff sits on alternate weeks in the Drugs Court and in the other week does other work. The pivotal role of the judge as the team leader is recognised. Cases are reviewed by a group, which is chaired by the judge, in the courtroom on the morning before the offender appears in court. This review group consists of the Fiscal, the social worker, the addictions counsellor and the Defence Advocate, if he appears. The offender is not present although reports, test results and views of his progress are considered. He appears in court in the afternoon and his views are canvassed but possible decisions may well have been discussed that morning. The same judge hears a case from its start to its conclusion. The Drugs Court team has accommodation close to the court where the urine tests are carried out.

The perceived benefits of frequent supervision and of monitoring behaviour are recognised by regular appearances in court[36] and by the frequency of urine testing, which is done at the separate but adjacent building that houses the health teams. Some recognition is given to the importance of the imposition of sanctions and the issuing of rewards but this is limited by the restrictions inherent in the scheme and is also considerably circumscribed by the court being confined to the use of existing powers.

Unlike America, Paramatta and Dublin there is no "graduation" between different stages. Sanctions are extremely limited. They include increasing the frequency of appearances at court, the frequency of testing and of counselling.[37] "Rewards" include praise given in court and the easing of these requirements. The "direct dialogue" between judge and offender is evident. In a quiet court where, although the public are admitted they rarely come, offenders see their own progress discussed and also that of others. Formal breach proceedings are provided for. These have occurred but on relatively few occasions and can result in the Order being terminated and in immediate sentence. The Drugs Court has the powers of a normal Sheriff's court.

An initial interim evaluation was carried out after six months.[38] Clearly an evaluation carried out at this early stage has to be severely limited. Certain deductions could be made from statistics, from the evaluation of court records and from the perceptions of those involved. No helpful outcome results could be expected. This year a more detailed evaluation is anticipated

---

[35] A target not always met despite this being regarded as a "fast tracking" process.

[36] This varies from fortnightly appearances to monthly and so on.

[37] This was one the recommendations made by Sheriffs to the evaluators. The Deputy Minister for Justice, Hugh Henry MSP, in the Scottish Assembly debate indicated that the Criminal Justice (Scotland) Bill will contain powers enabling the court to impose a range of interim sanctions.

[38] *The Glasgow Drugs Court: the First Six Months*. Scottish Executive Social Research 2002.

though even then its ability to assess outcomes will be limited by the time scale involved. A period of two years will tell something, though perhaps not a lot, about recidivism, the reduction of drug consumption and, perhaps of less prominence given the objectives of the pilot, of improvements in health and lifestyle.

Certain matters that are no doubt capable of being addressed were thrown up by this preliminary evaluation. The number of police referrals was well below the level expected, whether due to police ignorance of the scheme or to reluctance on their part to use it. The Sheriffs felt the lack of a more sophisticated system that enabled them to impose sanctions and rewards. Interestingly, given the increased degree of supervision and monitoring introduced by the scheme, they felt that a "mentoring" system would also have benefits. Otherwise the picture was one of the scheme working albeit at a lower take-up rate than had been anticipated. Sheriffs were understandably keen to increase numbers. Medical and social workers clearly felt the pressure of court demands and workloads. Sheriffs in particular felt they had benefited not just from the knowledge they acquired through hearings but from frequent, more comprehensive and more focused reports when ultimately sentencing offenders.

Pre-court reviews held in the absence of the offender and court reviews held in open court were felt by all participants to be beneficial although some "clients" expressed a desire to be present at the former.

At the very core of this scheme in Glasgow is substitute prescribing and, in particular, of methadone. This is of importance for anyone in Northern Ireland considering the merits of a Drugs Court system. The Drugs Court team and external providers deliver counselling, prescribing, access to day programmes and to primary medical care. Various issues were identified in this preliminary evaluation: issues of a medical nature (relating to the prescription of methadone), of the scope and nature of services provided and of both a practical and ethical nature in relation to urine testing. These were not, however, the kind of issues that would be difficult to tackle.[39]

Of more questionable value were the reports of reduced drug consumption and of a reduction in offending behaviour. Quite apart from the short time span involved two things make the value of any deductions about success based upon this questionable. These assessments were largely based upon self-reports, albeit backed up by drug tests. Secondly, the intensity of court supervision, counselling and monitoring by tests would provide a strong short-term incentive, no doubt at considerable cost, to both reduce consumption and avoid offending. However this is also the case in relation to Drug Treatment and Testing Orders (DTTOs). The arrival of this sentencing "tool" coincided with the launch of the Pilot Glasgow Drugs Court. The evaluation of these, which were being piloted in Glasgow, was published in October 2002. Weekly expenditure on drugs had gone down from £490 to £57 after six months. There was also some evidence of a reduction in drug related crime in Glasgow. The cost of one DTTO was estimated at £7,992. This is replicated by the finding of evaluators of

---

[39] See the executive summary of the First Six Months pp i-iv.

DTTOs in England and Wales.[40] There is little doubt that the measures competed with each other. I come back to this issue in my conclusions.

There has to be an additional caveat. It is impossible, or at the very least difficult, not to be impressed by the sincerity, dedication and altruism of all those types of professionals involved in Drugs Court schemes. This applied in Paramatta, Glasgow and in Dublin. Perhaps a good indication of this was on the occasion of the first "graduation" from the Dublin pilot court held at the Richmond Centre, appropriately a former converted hospital. The "psycho-drama" of hearing two former drug addicts address the court in the presence of a Supreme Court Judge, Mrs Justice Denham, and the presiding District judge, Judge Haughton, was, quite simply, very moving. It so moved members of the press and media who made up a sizeable part of the audience that they joined in the applause, along with relatives, court personnel and other participants in the Drug Court scheme.

This is described as one of the central and beneficial aspects of the ethos of Drugs Courts but the "feel good factor" can be capable of misleading. Everyone wants the scheme and the individual to succeed. Even professional evaluators cannot be regarded as totally immune to this feeling especially when there must be so many ways of assessing outcomes. Improvements in health and in life styles are difficult, though not impossible, to quantify. Recidivism is capable of being statistically measured but that takes time. Perhaps the one thing that is most easily capable of assessment is the cost of resources and of time upon which figures can be put. Improvements in procedures, in processing, the benefit to court and health clinicians' time are also quantifiable.

Outcome results however take time. It is only right that a broader view than that based on mere rates of recidivism be taken. If improvements to an individual's health and in his life style are factored in then, there are going to be consequential benefits to health, education and to public expenditure. The trouble is that everyone involved wants this to work and few start from either a sceptical or neutral viewpoint. That has to be borne in mind when assessing evaluations and their methodology.

The conclusions of the evaluators in October 2002 were:

> "The formative and process evaluation of the first six months of the pilot Drugs Court in action suggest that the initiative has largely been a success, with the role of the Drugs Court Sheriffs having been critical in this respect. Certain issues have been identified that will require particular attention in the next phase of the pilot. These include the police contribution to the referral process, the multi-disciplinary team-working, the workload of different professionals involved in the operation of the Drugs Court and the availability of a wider range of sanctions and rewards for, respectively, non-compliance and progress. Overall, however, the Glasgow Drug Court was perceived to be very effective in providing a resource for drug using offenders. The dedicated team and

---

[40] *Drug Treatment and Testing Orders: Final Evaluation report*, Home Office Research Study 212 October 2000, pp vii-viii.

> resources were viewed as a positive contribution to the reduction of drug-related offences in Glasgow."41

The Dublin Pilot Court at the Richmond Courthouse

The Republic of Ireland's Working Group on a Court commission was requested by the Minister for Justice, Equality and Law Reform, John O'Donoghue,TD, to advise on the establishment of a Drugs Court system in 1997. This was against a background of both a serious hard drug problem in Dublin and an established link between drug abuse and other crime.[42]

> "19,046 indictable crimes were detected in the Dublin Metropolitan area during the time under review. 7,757 individuals were apprehended for these crimes. Of the individual offenders apprehended 3,365 or 43% were identified as known hard drug users. These drug users were responsible for 12,583 crimes or 66% of all detected crime in the Dublin Metropolitan Area. Based on detections, drug users commit approximately three crimes for each one committed by non drug users."[43]

In short the Working Group considered a Drug Court and how such a scheme could be fitted into existing legislative arrangements. It also surveyed existing health resources in both the public and voluntary sector including those available to the Probation service. It recommended the setting up of a Drugs Court Planning Committee, the appointment of a Drugs Court coordinator and the establishment of a Drugs Court concentrating on opiate abusing offenders. Whilst it envisaged the use of existing legislation it recommended the provision by statute of a new Drugs Court order. It also suggested a period of three years for the scheme to be assessed.[44]

The Drugs Court Planning Committee reported in August 1999.[45] Its brief was to establish and monitor a pilot Drug Court programme. It considered available resources and procedural matters and set a target date of early 2000 for the court to be up and running, selecting Dublin's North Inner city as the catchment area.

The Court actually opened its doors on 9th January 2001, the understandable delay being due to a concern to have all the necessary resources in place. The catchment area was the North Inner City of Dublin and the pilot was to initially run for 18 months. It would take those over 17 years of age who both consented and pleaded guilty. After acceptance by the Court the

---

41 *The First Six Months*, p v.

42 The Eastern Health Board estimated that there were approximately 10,000 heroin users in the Dublin area. I assume this to mean "problem users". It is a high number. The estimate made by Karen McElrath was of 1,000 in Northern Ireland see NIO Research 2002.

43 *Illicit Dug Use and Related Criminal Activity*, Eamon Keogh, Garda Reserch Unit, Dublin 1997.

44 *Report of the Working Group on a Court Commission, Drugs Courts*, February 1998, Dublin.

45 *First report of the Drug Court planning Committee*, August 1999. While the membership of the Committee was largely criminal justice – based at least six members came from heath and areas outside criminal justice.

requirements of attendance at court were incorporated in a bail bond, which provided for the suspension of bail for up to eight days in the event of failure to comply with either the conditions of bail or the requirements of the Drug Court treatment programme. Unlike the Glasgow Pilot there was, inbuilt to the scheme, this power to impose immediate sanctions of a custodial nature.

The framework of pre-court review meetings at which the participant's progress would be discussed, in his /her absence, by a multi-disciplinary team headed by a district judge, followed by a court review at which the offender was present is similar to Parramatta and Glasgow. There were, unlike in Glasgow, different formal stages with eventual graduation. Drug testing was frequent with requirements initially of tests 2/3 times a week coming down to once a week. Substitute prescribing was, once again, one of the core treatment regimes. The participant had access to both a wide range of health-based resources and also to a considerable range of other professional help and advice. Finally, the existence of the Probation Act 1908 proved extremely useful as it empowered the court to "extend the benefit" of the Act and enabled it to make an Order without that counting as a conviction.

There was a slow start. While it was envisaged that the pilot could accommodate up to 100 participants at a time referrals to the court were slow in coming. There are no doubt many reasons for this. One clearly was a judicial reluctance to transfer cases that had come before their court. Another difficulty may have been lack of knowledge about what was available. It may also be the case that the incentives to a prospective participant of "getting better" did not appear to outweigh the rigours of a commitment to what must appear to be a demanding regime. The consequences of failure along the way are perhaps not drastic but the potential deprivation of liberty is flagged up at the very start.

The first graduation day was on 5th December 2002 with two graduates. It was anticipated that there might be three but the case review of the third was told that morning of a relapse which had occurred after a period of abstinence of 18 months. The court had a difficult decision to make but it had really little option. It deferred "graduation" in respect of a person who had otherwise worked very hard. It was almost as if there had been "self-sabotage" but one of the difficulties facing any court and health worker in this field is the clear potential for relapse at any stage.

Of the two who did graduate that day one entered the court programme on 10th July 2001; he completed phase one in September 2001 and phase two in May 2002. His personal history, criminal record and drugs history was not untypical. Alcohol abuse began at age 12 and progressed to abuse of other drugs at 17 with abuse of heroin coming later. His criminal history started in 1995 and, whilst it included a substantial suspended sentence, only 30 days actual imprisonment had been imposed in the past. This record was mirrored by his drug abuse with residential drug treatment in 1995, relapse two years later and a methadone reduction course in 1998, relapse in 1999 to abuse of heroin and then the committal of the offences for which he entered the Drugs Court programme in 2001. Of course it is impossible to predict the eventual outcome, especially given the history of relapses, but it seemed very clear, whatever way it was looked at, (improvement in health, lifestyle, the consumption of drugs and the reduction of offending) that the programme

had achieved a marked success over its period. When comparing the cost of prison with the cost of the programme, this, looked at purely from accountancy terms, would seem to be cost effective. There is some provision for follow up with post graduation meetings and support groups if these are felt helpful.

When looking at these three courts one of the outstanding factors in each is the extent of resources available to the court. In Dublin this, understandably, reflects the high political priority given to an acute problem. Equally, the pace of health development has also reflected this. The three years up to 1999 saw treatment places there rise by 2,500 and treatment locations rise from 34-53. In 1999 37 new stabilisation beds were provided and the increase in treatment centres was 21.

As the Dublin pilot moves from its pilot status to being rolled out, it still remains unclear how effective the Court is. It is early to assess eventual outcomes both because of the short periods involved and also the low numbers coming through. How one measures outcomes, benefits to the individual and benefits to the community, how control groups are decided and the timescale within which that measurement is to be done are all matters which are going to be important. The issue of greatest importance however is the political priority given to the problem. So long as the problem of opiate drug abuse remains acute in Dublin one suspects that the resources and priorities will favour the Drugs Court scheme.

The Northern Ireland Position

I approach this with some caution. Heroin as a significant drug of abuse has been a fairly recent development on the illicit drug scene in Northern Ireland. Partly as a result of this and partly because of the shortage of resources allocated to addiction research inside a small jurisdiction formal statistical research is very limited. The advent in 2000 of the Northern Ireland Drug Misuse Database Register[46] has been of help but its effect on available statistics has yet to be fully felt. Actual studies or projects, be they health or criminal justice inspired, have been limited. The Northern Ireland Drug Addicts Index whereby Doctors are required to notify certain addictions is still maintained.[47]

The picture, as perceived by the Drugs Squad of the former Royal Ulster Constabulary, was, at the end of 1999, that opiate abuse was both of recent origin and largely centred on Ballymena.[48] The latter half of 1997 saw a significant rise in the Ballymena area of numbers abusing heroin. In the same period, according to the police, the method of abuse of heroin altered from smoking or chasing to syringe and injecting.[49] If the police view is

---

[46] The Northern Ireland Drugs Misuse Database April 2000. DHSSPS.

[47] *NI Drug Addicts Index 2003*, published February 2004. It records 241 notified addicts, 72% of whom principally abuse heroin.

[48] Provided by the RUC Drugs Squad, 1999.

[49] For a fascinating account of both the different types of heroin (Medical morphine, brown and white heroin) and of means of use of heroin (Injecting, snorting and smoking or chasing), and of the medical and health implications of the same see, *Prevalence of Heroin Use In N.I.*, Karen McElrath, DHSSPS, May 2002.

accepted there were between 300 and 400 persons abusing heroin in the Ballymena area, compared to 200 in 1997.[50]

The relationship between heroin abuse and other types of crime mirrors that experienced in Sydney.[51] An analysis carried out by the RUC of police files showed that of a total of 65 robberies carried out in the Ballymena area between July 1998 and March 1999 39 were heroin related. Whilst robberies figures had shown some increase in the years immediately preceding 1997, they jumped from 40 to 62 between 1997 and 1998.

Not only was there some local support for a connection between heroin dependency and crimes of robbery in Ballymena there was also local police belief that there was a connection between acquisitive crimes generally and the opiate problem in Ballymena. There has now been some limited support for this view. In a study carried out by the police analysis branch[52] the following emerged. During the period from 26 November to 6 January (6 weeks) 43 persons were arrested for acquisitive crime of which 20 were heroin users. Of the 113 crimes cleared 86 were heroin related. There was some difference between burglary and theft/deception offences where the heroin user percentages were 64% and 76%. This overall connection is not surprising and reflects the view of the police that many of the "victims" of dealers are in the lower socio-economic bracket and unable to afford purchases of heroin without resort to crime. Whether it is the intention of dealers to ensure their clients remained as customers (police view) or whether it shows an easier flow of certain types of heroin into Northern Ireland, the price of a "wrap" had reduced significantly in 1999.

It was the police view that they faced difficulties penetrating the heroin trade in Northern Ireland and that without coordinated action by others such as health, education and housing it would be impossible to counter the increase in opiate trade in Northern Ireland.

The Probation Service of Northern Ireland has initiated research into the suspected connection between drug misuse and crime. A study of 436 Pre-sentence Reports for 2001 found that drug misuse was related to the current offence in 13% of cases. Alcohol was implicated in 45% of cases. The figure for past offences was 10% and 40% respectively.[53] Similarly, in a survey of substance abuse among 293 prisoners in Maghaberry Prison some

---

[50] It is possible that the apparent coincidence of this increases with the ceasefire and the aftermath of the Hillsborough Agreement is not entirely accidental. A hypothesis put forward by the former RUC is that certain individuals who had been expelled from Ballymena for selling other drugs returned as heroin addicts from places in England. They brought with them their own sources of supply. There has been a spread of the problem of abuse of heroin by injecting to other areas in Northern Ireland but the epicentre still seems to be Ballymena. Although it can understandably be dramatised by the media ("Addict toll rising in capital of heroin misuse, N.I." *The Irish News* 17 February, 2000) Ballymena seems to remain a centre of supply and distribution of the drug.

[51] In England see Hayton, 1998, *A Study Of The Drug Scene In Plymouth*. Plymouth and Devon Health Authority has an innovative policy running since 1997 based on harm reduction, methadone prescribing and involving both probation and police. See also Police Research Group, Home Office 1998.

[52] *Acquisitive Crime and Heroin Misuse*. Neeson, Police Analysis Branch, 2002.

[53] Information source PBNI.

30% of remand and 16% of sentenced prisoners reported drug misuse prior to imprisonment.[54]

Hospital statistics show a rise in numbers attending health facilities for treatment in connection with drugs (largely heroin). There was a tenfold increase between 1995 and 1998 to 102 persons.[55] A study conducted in Ballymena in 2000 estimated that in 1999-2000 there were 235-398 "heroin users" in the Homefirst Trust, which covers the Ballymena area.[56] Amongst this plethora of confusing statistics the 2003 figures from the Northern Ireland Drug Abuse Database do not record an appreciable increase in those presenting for treatment for heroin. Indeed the percentage reporting heroin abuse had reduced to 15% from 21% in 2001. Injecting behaviour had also significantly reduced.[57] Ballymena still had a figure approaching half of those in Northern Ireland abusing heroin.

Not much can be gleaned from the prosecution statistics kept by the office of the Director of Public Prosecutions. Court disposals in all courts of all types of offenders for drug offences were, in 1995, a total of 671 and, in 1999, a total of 581. These declines probably result from different policies by the police and prosecution as to how they deal with drug offences. The approach adopted by the courts had also perhaps ameliorated. Of the disposals made in 1995, 18% were sentenced to immediate custody and of those in 1999, 15% were immediately sentenced to custody. Great care has to be used in making any such conclusions however. Not only could there be changes in prosecution policy but there could also be alterations in the numbers of certain types of drugs coming before the courts. The reclassification of cannabis in February 2004 has still to have impact but, given the increase in penalties for trafficking in Class C drugs, that impact will be somewhat muted.

On this information, the picture in Northern Ireland and, locally, in the Division of Antrim would be less than clear. There has however been a recent comprehensive study[58] funded by the Drug and Alcohol Information and Research Unit of the Department of Health and Social and Public Safety. Its purpose was to provide estimates of the numbers of problem heroin users in Northern Ireland.[59] It estimated there to be between 695 and 1250 addicts

---

[54] Campbell *et al*. *Survey of Drug Misuse amongst Prisoners in HMP Maghaberry*, PBNI, 2002. The figures for "self-reporting" of drug use by prisoners inside prison make interesting reading.

[55] The local police view is that this rise masks the true extent of the problem since many addicts seek to conceal their addiction from family General Practitioners. I am not sure if current practice has changed but a referral to a community addiction team had to made by first seeing the patient's own GP. It was also then the view of the police that the only local facility for residential treatment and detoxification was at Holywell Hospital, Antrim, which had a reputation as a mental institution. Addicts do not see their problem as a mental illness.

[56] Woodhouse e*t al Heroin Needs Assessment*. Ballymena; Homefirst Community Addiction Service, 2000.

[57] Statistics from the Northern Ireland Drug Misuse Database, October 2003, at p 9.

[58] *Prevalence of Heroin Misuse in Northern Ireland op cit*.

[59] Using the BMA definition of ". . . use resulting in social, psychological, physical or legal problems associated with dependence, intoxication or regular

in the period between 1 November 2000 and 31 October 2001, with the higher part of the range reflecting a group of users who, although not dependent on heroin, are using opiates in a sufficiently intense or risky fashion to be at significant risk of serious health or social consequences.[60] The treatment data suggested that Ballymena had a higher proportion of injecting users and of younger users than elsewhere.[61]

There are of course uncertainties. Are users who smoke and snort heroin likely to progress to injecting? Are users more likely to go to treatment centres in Ballymena more quickly than elsewhere in Northern Ireland or, alternatively, is there a very large group of heroin users in that community who have not yet progressed to the sort of problematic use that would be identified in the data the report examined: treatment services, the addicts index[62] and arrests? The answer to this is of some importance. Resources are scarce and will be targeted at where there are perceived to be areas of need.[63]

It will be on estimates of projected figures that "treatment opportunities" such as residential accommodation, outpatient facilities and substitute prescription will depend. The figures locally are a matter of concern but they do not suggest a problem on the scale of any of the cities studied. The problem really is to assess what is happening.

Presently the response by government has been increasing. There is a Northern Ireland Drug Strategy.[64] A coordinator has been appointed to oversee the Government's approach to illicit drugs. Rob Phibbs replaced the first coordinator, Jo Daykin, in 2003. A wide range of working parties have been set up covering all those disciplines that could be relevant to drugs. They both bring together Departments and those from outside Government who have an interest in the subject of drug abuse and treatment. Currently substitute prescribing has been made available and is in the process of being provided across the various Health Boards. This is a recent but a major development for Northern Ireland and its implications will be considerable. They will also take time to assess.

One of the working parties is the Criminal Justice Working Party on Drugs. In the short term, the Government has made some funds available in excess of budgeted expenditure for purposes that are within the remit covered by

---

consumption". Its methodology was to essentially use three different measures of input based on the treatment services, the addicts register and arrests.

60 p 34.

61 Figures suggested that persons treated in Ballymena were 12 times more likely than those treated in Belfast to have injected. Interestingly there were in this period 21 deaths with heroin listed as the main cause. Average age of the deceased was 36. This compares with Dublin where in 1995 23 deaths were recorded in an area with a much larger number of addicts. One wonders whether this is because of differences in treatment regimes, a question posed by the author of the Report at p 32.

62 The NI Drugs Misuse Database established in April 2000.

63 In the Wirral, according to a report quoted at p 38, there were believed to be relatively few heroin users resident in the early 1980s but this had, within six years, grown to approximately 4000.

64 Published in August 1999, NIO.

this committee. These funds, however, are for projects that are essentially time limited. The interesting aspect of the work of this group is that it is the first obvious example of those concerned with health and welfare working together with those concerned with criminal justice. For understandable reasons I confine my remarks to criminal justice measures.

The following is very much a snap shot of what is happening and, since that relates to illicit drugs generally, there is not much that is specifically geared to the problem of opiates.

The principal powers that sentencers possess in Northern Ireland and which can incorporate a "therapeutic" element include probation orders to which a "condition of treatment" can be added[65] and the interesting innovation of custody/probation orders to which such a condition can also be added. Some sentencers have also used informally the power of adjourning a case to allow treatment to begin. More formally, but without any power to impose conditions, courts have used the power to defer sentence for up to six months to allow such treatment to begin or take place. A suggestion that the limitation of the period of deferral be extended to 12 months was initially well received by Government. The period of six months is too short to allow detoxification, assessment, placement on a course of treatment and then realistic assessment of progress to be made. For cases of addiction to hard drugs, deferral with its facility for immediate return to court has very considerable advantages. The proposal has, so far, not been taken up.

But what treatment is available, both for drug dependency generally and opiate dependency in particular?

A common theme coming from criminal justice has been both the lack of treatment facilities and the absence of certain treatment regimes, particularly in relation to the treatment of opiate abusing offenders. It is the view of Oliver Brannigan, the former Chief Executive of the Probation Service for Northern Ireland that there is a gap in the provision of a residential treatment facility dedicated to the detoxification and treatment of those coming off hard drugs. It is his view that whilst limited short term detoxification facilities exist in hospitals in Northern Ireland, "these are not positive environments for reforming addicts to rebuild their lives in a safe context with the help of a constructive regime and therapeutic interventions."

The former head of the Drug Squad of the RUC puts it even more strongly. It is his view that the requirement that addicts seeking treatment from community addiction teams be referred by their GPs and the fact that the only facilities for detoxification exist in a local hospital whose history is well known locally as that of a mental institution means that many opiate addicts are reluctant to refer themselves for treatment. These are views that have been put to the local health authorities and by the police to the former security minister, Adam Ingram.

CONCLUSIONS.

I trust these conclusions are realistic rather than complacent. In part they reflect uncertainty about the extent of the opiate problem in Northern Ireland.

---

[65] Criminal Justice Order (NI) 1966.

On the other hand there is little doubt about the close connection of that problem with acquisitive and violent crime. They also reflect the current position that Northern Ireland has reached as regards both treatment regimes and facilities. It will take some time before the impact of substitute prescribing is absorbed. Treatment facilities will always be limited. The conclusions however also reflect my own personal uncertainties about the extent to which the concept of a Drugs Court can usefully be applied to our local conditions in Northern Ireland.

If there appears to be significant benefit to the safety of the public and also to the health of individuals then the case for commencing a Drugs Court becomes considerable. The stage where that benefit can be clearly demonstrated has not yet arrived but may do so. There would be no point however in starting such a Court without the clearest indication that it is merited in terms of the problem and also that the treatment regimes and facilities exist which it needs. There is significant under-provision of residential and community care in Northern Ireland in this area.

I have therefore attempted to suggest a set of proposals that I feel are realistic.

The first is that the statistical efforts started by the Northern Ireland Office and the Department of Heath, Social Services and Public Safety continue. We really need to know the extent of the problem. I repeat the recommendation by Karen McElrath that there should be additional research with heroin users in Northern Ireland who are not in contact with health services.[66] This should be undertaken with urgency.

The second is that consideration should now be given to the introduction here of Drug Treatment and Testing Orders. There is evidence that these have been to some extent beneficial in England and Wales and now in Scotland.[67] Whilst a mixed picture may have emerged of differences in regional implementation of these there is no doubt that they are capable of having an impact on drug related crime.[68] The power to bring in such Orders was contained in the Criminal Justice (NI) Order 1998.[69] But it was never activated. This in itself will have substantial resource implications and make demands for health and criminal justice to work together in ways that are novel to Northern Ireland.

---

66 *Prevalence of Heroin Abuse in N.I. op cit.*

67 *DTTOs Final Evaluation Report* Home Office 2000.

68 National Audit Office: *DTTOs, Early Lessons*, London, HMSO March 2004. This report presents a very mixed picture. The success rate, if one calls it that, of successful completion of Orders is 28%. However, of those 50% appear to have stopped offending. When one considers the relationship between abuse of opiates and acquisitive crime this is a significant figure. There is no doubt a lesson to be learnt from this about better selection, earlier termination/breaching and of essentially a better targeting of resources and monitoring of outcomes. The cost per day is significantly less than the daily cost of imprisonment and, if early indications are right about reduced offending rates amongst those who successfully complete orders, then this is both cost effective and effective in reducing drug consumption and associated crime.

69 Art 8

The third is that consideration should be given to extending the period for deferral from 6 months to one year. The Scottish system has a much wider power to defer and it has proved very useful.[70] In my view it would allow closer supervision of offenders subject to a drug addiction. Whilst I would not envisage it being used in many cases the benefits of having an immediate return to court for sentence if expectations are disappointed are self-evident.

Finally, there should be a comparative study both of the ongoing and past evaluations of the Drug Courts at Glasgow, Dublin and Parramatta. This study should be geared to assessing the benefit to Northern Ireland of the introduction of a similar scheme here. I do not intend to minimise the difficulties of this in any way and I hope I have pointed out some of these above. The benefits of such a scheme would, if successful, be considerable. I have no desire to widen the net of those who ultimately go to prison and, as an American judge put it, there is no worse breach of the concept of the separation of powers than an unrestrained judiciary full of amateur psychologists, but if the figures show there to be a benefit to public safety and to health then the concept merits further investigation

I am finalising these conclusions after adjourning a case for a pre-sentence report of a 19 year old unemployed heroin addict who told me he paid his dealers £50 a day. It is not surprising perhaps that he spent six months of last year in custody at the Young Offenders Centre. The offences he admitted in the course of 2003 included thefts, burglaries and criminal damage. Taken altogether they totalled 12 but another 41 were "taken into consideration" by the Magistrate who dealt with him last. One does not have to be good at multiplication to assess the impact on public safety of this record. Is it too simplistic to say that dealing with the addiction of this offender will be of benefit to the public?

---

[70] *Deferral Of Sentence in Scotland*, Scottish Office 1998.

PROPERTY RESTITUTION AND ENDING DISPLACEMENT IN KOSOVO – COORDINATED EFFORT OR AT CROSS-PURPOSES?

Anneke Rachel Smit, School of Law, University of Reading[1]

ABSTRACT

When the Kosovo Housing and Property Directorate (HPD) and Commission (HPCC) were established by the international community in Kosovo in 1999 they were intended to encourage refugees and IDPs to return to their "homes of origin" by making determinations of the property rights attaching to contested dwellings in the region. After a disastrous start due to a shortage of funding and interest, the institutions have been fully functioning with a strong focus on efficiency of operations since late 2002. At the same time, stated purposes in restituting property seem to have shifted from encouraging refugee/IDP returns, to economic reform and invigoration through establishing certainty of private property rights. While these goals are admirable, key opportunities for coordination with other agencies working on different but complementary aspects of refugee/IDP return (such as encouraging interethnic reconciliation and creating a sense of security for ethnic minorities wishing to return) are being ignored. Further, individuals affected by HPD decisions are given little opportunity to participate in the process.

In the absence of other necessary conditions for return, successful HPD claimants are more likely to sell their homes than return to areas where their security cannot be assured, thereby permanently eliminating any possibility of return. The article is based largely on field-work conducted in Kosovo in June 2003 as well as follow-up interviews in July 2003 and January 2004.

INTRODUCTION

Almost five years after the official end of the conflict in Kosovo, housing and property restitution is finally appearing on the agendas of key international actors in that territory. After a troubled beginning, a new priority placed on the issue has seen the full establishment of

---

[1] PhD candidate, School of Law, University of Reading, on leave from position as Legal Counsel with the Department of Justice Canada (Immigration Law Services). The views expressed in this article are mine alone. I wish to thank Carl Stychin and Christopher Waters for comments on earlier drafts, and the School of Law, University of Reading for generous financial support of the fieldwork on which this article is based. I am also grateful for the assistance and support of staff and Visiting Fellows of the Refugee Studies Centre, Oxford University, during a visiting fellowship in the fall of 2003.

internationalized institutions dealing with property rights (which in the early years of the UN's mandate in Kosovo suffered from a lack of both moral and financial support). At the same time, efforts have recently been stepped up to increase the return of ethnic minority refugees and internally displaced persons (IDPs) to the area, with the establishment of the United Nations Mission in Kosovo's Office for Returns and Communities (ORC) in late 2001 and the release of ORC's *Manual for Sustainable Returns* in February 2003.

In principle these two developments should complement each other to encourage reconciliation and the building of a multi-ethnic Kosovo. However, the reverse may in fact be more true: in the push to create certainty of property rights, important opportunities for this process to contribute to return and reconciliation are being ignored. Further, the individuals concerned are largely excluded from any meaningful participation in the process, again missing key chances for interethnic communication and reconciliation and ignoring the emotional impact of losing and/or regaining one's home. In the absence of other conditions necessary for return, refugees and IDPs, when they receive a positive determination of their housing claims, are currently likely to sell their property, permanently eliminating the real possibility of return. This threatens to push Kosovo towards becoming a region with security of tenure but with few non-Albanian minorities.

This article begins with a short overview of the emerging right at international law of a displaced person to return to one's "home of origin". It then describes in some detail the considerable efforts which have been made by the international community in Kosovo to protect the property rights of the displaced and thereby encourage them to return, as well as substantial barriers encountered in the early days of the UN administration. The last half of the article reflects upon how, although the housing and property mechanisms are now fully established and working efficiently, the international community is now failing to effectively coordinate the work of these bodies with other aspects of encouraging return. The paper is based on fieldwork undertaken in Kosovo in June 2003 as well as follow-up interviews conducted in July 2003 and January 2004. It builds on my experience working for Citizenship and Immigration Canada in 1999 in refugee camps established on military bases in Canada following the airlift of Kosovo Albanians from camps in Macedonia during the conflict, and on my work as a Human Rights Officer with the Organisation for Security and Cooperation in Europe (OSCE) Mission in Kosovo from 1999-2000.

The Right Of Return To One's "Home Of Origin"

The right to return to one's home of origin, and the corresponding right to housing and property restitution for displaced persons, have been increasingly articulated in peace agreements and UN documents in recent years. The 1995 Dayton Accords, for example, laying out the framework for peace in Bosnia and Herzegovina, provided at article II.5 of the Bosnian Constitution that "All refugees and displaced persons have the right freely to

return to their homes of origin."[2] Security Council resolutions in other situations of mass displacement, such as Georgia/Abkhazia, have subsequently used similar language.[3]

On a rhetorical level, the United Nations High Commissioner for Human Rights (UNHCHR)'s Sub-Commission on Prevention of Discrimination and Protection of Minorities passed a resolution in 1998 entitled "Housing and property restitution in the context of the return of refugees and internally displaced persons" in which it reaffirmed "the right of all refugees [...] and internally displaced persons to return to their homes and places of habitual residence, should they so wish."[4] This has been followed upon by numerous subsequent resolutions confirming the right of return to home of origin, and linking this to the establishment of effective housing and property restitution mechanisms.[5] In 2002 a Working Paper studying the question of housing and property restitution was prepared by Sub-Commission member Paulo Sérgio Pinheiro and presented to the Commission on Human Rights.[6] Pinheiro was then appointed Special Rapporteur on housing and property restitution and returns issues and was commissioned to prepare an extensive report on the issue, a preliminary version of which was submitted to the Sub-Commission's fifty-fifth session in June 2003.[7] The preliminary report again recognises the "unique role that housing and real property restitution play in securing the voluntary, safe and dignified return of refugees and other displaced persons to their homes and places of original residence."[8] Similar developments have taken place within other UN bodies, for example the Committee on the Elimination of Racial Discrimination (CERD).[9]

Described by one observer as the "normative response of the international community to the problems and challenges posed by the phenomenon of

---

[2] *Constitution of Bosnia and Herzegovina*, adopted as Annex 4 of the Dayton Peace Accords, initiated in Dayton, Ohio (21 Nov 1995). Article 1(1) of annex 7 (which deals with refugee and displacement issues) contains an almost identical guarantee.

[3] UN Doc.S/RES/1187 (1998), para 3. United Nations General Assembly Resolution 194 on Palestine (A/RES/194 [III] [1948]) also famously resolved at para 11 that "the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible." For a comprehensive study of the development of the right to housing and property restitution for displaced persons, see Leckie, "New Directions in Housing and Property Restitution" in Leckie, ed, *Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons* (2003).

[4] E/CN.4/Sub.2/Res/1998/26.

[5] See, for example, E/CN.4/SUB.2/RES/2002/7. Note that the Sub-Commission changed its name in 1999 to the Sub-Commission on the Promotion and Protection of Human Rights.

[6] E/CN.4/Sub.2/2002/17.

[7] E/CN.4/Sub.2/2003/11.

[8] *Ibid*, p 14.

[9] General Recommendation No 22 (1997) (Article 5 on refugees and displaced persons) [A/51/18 (1997)].

internal displacement",[10] the non-binding *Guiding Principles on Internal Displacement* were issued in 1999 by the United Nations Secretary General's Special Representative on IDPs, Frances Deng, after years of discussion on the wording of the text.[11] Although the document stops short of explicitly guaranteeing an internally displaced person's right to return to the physical structure s/he occupied before fleeing, Principle 28(1) places a responsibility on officials to "establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence[.]" Principle 29(1) further requires officials to "to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement" or where this is not possible, to "provide or assist [IDPs] in obtaining appropriate compensation or another form of just reparation". Internationally speaking, then, the link between refugee/IDP returns and housing and property restitution has become well-established.

Early Days In Kosovo

After an intensive air campaign against the Federal Republic of Yugoslavia in mid-1999, NATO forces agreed to halt the bombing in exchange for the pull-out of Yugoslav forces from Kosovo and an agreement that the United Nations would move in to temporarily administer the territory until a long-term political solution could be reached. The responsibilities of the international community are laid out in United Nations Security Council Resolution 1244.[12] These include, at article 11(j), a commitment to assure "the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo". As described above, this language mirrors the terminology used internationally with increasing frequency.

During the conflict in Kosovo, upwards of 800,000 ethnic Albanians were displaced into refugee camps in neighbouring countries and many subsequently were airlifted further afield to countries including Canada, Australia, the United States and several states of western Europe. While the end of the conflict spurred a massive and spontaneous return migration of ethnic Albanians,[13] large numbers of ethnic minorities – primarily ethnic Serbs – were forced to flee the province. From the beginning it was clear that any movement to assist the ethnic minority IDPs and refugees to return would have to deal actively with the issue of housing and property. Shortly after the UN arrived in mid-1999 to establish a civil administration following

---

[10] Bagshaw, "Developing the Guiding Principles on Internal Displacement: The Role of a Global Public Policy Network", Case Study for the UN Vision Project on Global Public Policy Networks, www.gppi.net.

[11] E/CN.4/1998/53/Add.2. Dr. Deng was appointed the UN Special Representative on IDPs in 1992 and from that point worked to develop the Guiding Principles.

[12] UN Security Council Resolution 1244 (10 June 1999).

[13] In June of 1999, following the signing of the peace agreement for Kosovo, I was among the many working with the Kosovo Albanian refugees who were surprised at the determination of many refugees to return to Kosovo as quickly as possible, regardless of the lack of guarantees for their safety.

the signing of the Resolution 1244, an official described the situation as follows:[14]

> "[I]t appears that up to 150,000 Kosovo Serbs have been displaced into Serbia and Montenegro. Of the 45,000 remaining Serbs, many have been internally displaced into Serb-controlled municipalities. Among the other minority communities in Kosovo (Muslim Slavs, Roma, Turks), which totalled approximately 120,000 individuals before the conflict, it appears that up to 40,000 have left Kosovo. [. . .] Recent surveys calculate that 103,000 housing units are destroyed or otherwise uninhabitable, representing almost half of the housing stock. [. . .] Only 7,000 individuals are currently housed in internationally managed community shelters, indicating that most displaced persons are living with relatives, or are illegally occupying abandoned property."

As described, not only had many houses been destroyed, first by the Serbs during the conflict and then by Albanians in revenge-minded actions after the peace agreement, but there was a high occurrence of "secondary occupation" – individuals or families moving into houses belonging to those who had fled during or after the conflict. For example, many ethnic Albanian families fled to the Kosovo capital of Pristina/Prishtinë[15] in search of shelter and work during and after the war, occupying homes to which ethnic Serb families, displaced to Serbia proper during the conflict, lay claim.[16] Likewise, in primarily Serb areas such as North Mitrovice/Mitrovica, ethnic Albanians' homes were occupied by ethnic Serbs. The situation was further complicated by the fact that between 1989 and 1999 many housing allocations had been made by the Serb regime under discriminatory laws, which saw numerous Albanians lose the rights to housing they had previously enjoyed.[17]

Like in so many post-conflict situations, therefore, the importance of housing and property to the issue of refugee and IDP returns in Kosovo cannot be overemphasized, in both humanitarian and legal terms. The establishment of the Kosovo Housing and Property Directorate (HPD) and Housing and Property Claims Commission (HPCC) was thus an important ingredient of fulfilling the international community's commitment in this regard. The United Nations Human Settlements Programme (UN-HABITAT) was enlisted in late 1999 – early days of the UN administration in Kosovo – to coordinate the housing and property restitution process, at least as an interim measure until local mechanisms had been created to take over this function. It was the first time this agency had been involved in field operations in

---

[14] Das, "Regularizing Housing and Property Rights in Kosovo", p 2, <www.unhabitat.org>.

[15] Note that throughout this article I have referred to towns and villages within Kosovo by both their Serbian and Albanian names.

[16] See, for example: Beardsley, "Who owns what? UN tackles Kosovo housing tangle" (10 January 2002) *Christian Science Monitor*, <www.csmonitor.com>.

[17] Leckie, "Resolving Kosovo's Housing Crisis: Challenges for the UN Housing and Property Directorate" (April 2000) 7 *Forced Migration Review* 7 at 7.

Europe, and the first time it had been given responsibility for coordinating quasi-judicial mechanisms.[18]

Importantly, justifications for the funding and efforts to be put into housing and property restitution were clearly linked to encouraging refugee and IDP returns. An early briefing paper prepared by the then- Senior Legal Advisor to the Housing and Property Directorate in Kosovo stated:[19]

> "As the Bosnian experience shows, an orderly refugee return process requires a balance between the legal rights and humanitarian needs of different groups of people. Unless housing and property rights are addressed, any attempt to return minority refugees will raise severe political and practical problems. Because it combines a number of different functions within a single institution, the Directorate is potentially a very useful institutional tool for managing the return process."

Three individuals were appointed in August 1999 to be the first members of a quasi-judicial housing and property rights commission.[20] They were a South African with 5 years' experience as a judge on the Land Claims Court of that country, a Finn with a background in mass claims at UN tribunals, and a Kosovo Albanian who is a former justice of the Kosovo Supreme Court (the same three members continued to sit to January 2004).[21] Then in November 1999 United Nations Mission in Kosovo (UNMIK) Regulation 1999/23 officially created the HPD, which would receive and process property claims, and the independent HPCC, which would adjudicate them.[22] Although the regulation allows for several panels to sit concurrently, only one – composed of the original three appointees – was created.

Unfortunately, the progress on housing and property issues seemed to stop there for the time being. While some housing cases had been brought before the municipal courts prior to the signing of the founding regulation, with the creation of Regulation 1999/23 jurisdiction for all housing cases was removed entirely from the domestic courts,[23] leaving property rights cases in a vacuum until the international mechanisms were up and running. This could not happen before the Rules of Procedure for HPD/HPCC were passed. Instead of pushing ahead to get the necessary institutions up and running, the UN became preoccupied with matters of setting up functioning local

---

[18] UN-HABITAT is based in Nairobi, Kenya. The organisation's mandate is "to promote socially and environmentally sustainable towns and cities with the goal of providing adequate shelter for all" ("Overview" <www.unhabitat.org>).

[19] *Supra* n 14.

[20] "UN launches panel to regularize property rights in Kosovo" (17 August 1999) *Complete Kosovo Coverage*, <www.un.org/peace>.

[21] The Kosovo Albanian member rescues himself from cases in which he has previously been involved in his capacity as member of the Supreme Court. See also the book chapter written by the two international judges: Dodson and Heiskanan, "The Housing and Property Directorate in Kosovo" in Leckie, ed, *supra* n 3, 225.

[22] UNMIK/REG 1999/23.

[23] This was in line with standard legal interpretation in Kosovo.

administrations and the criminal justice system, and too little attention was paid to the housing question.[24]

Even the Organisation for Security and Cooperation in Europe (OSCE) which among the internationalized structures has the human rights monitoring mandate in Kosovo,[25] devoted relatively little energy to advancing property issues.[26] While the organisation participated in an early Working Group on property rights, and the Kosovo International Human Rights Conference, held in December 1999 in Pristina/Prishtinë, included a panel discussion on property rights, little else was done during the first year of the mission. By the spring of 2000 elections had become the primary focus for the OSCE, and property issues were often shoved aside. Finally in September 2000, the OSCE published a report entitled "The Impending Property Crisis in Kosovo" in which it emphasized the scale of the property rights problem and called on the international community to step up to dealing with the issue:[27]

> "The system for the protection of property rights in Kosovo is approaching crisis point. The level of destruction, both of physical property and of records, the years of discriminatory legislation, and the mass movements of persons since 1989 has led to a near total collapse in the structures that previously existed for the protection of property rights. The emerging property crisis is aggravated by the lack of an effective policy response by the international community [. . .] without a resolution of the property issue, the situation of internally displaced persons (IDPs) and refugees is aggravated since their homes are often occupied or destroyed."

The OSCE report called on the UN to ensure that HPD was fully functioning in Kosovo by the end of 2000. In October of that year UNMIK Regulation 2000/60, containing the HPD/HPCC Rules of Procedure and outlining many of the details of how the institutions were to function, was finally passed. These included the fact that HPCC members would sit as one panel and normally decide by consensus.[28] Generally speaking the basis for HPCC's

---

[24] The UN has been criticized for focussing on criminal justice in Kosovo to the exclusion of civil justice (interview with an OSCE Human Rights Officer, Pristina, 16 June 2003). As many of my interviewees continue to hold either the same position as when I interviewed them, or another position with an international organization in Kosovo or elsewhere, I have preserved their confidentiality by referring only to their job titles in the most general way possible unless they have given me permission to do otherwise.

[25] And whose staff have sometimes been described as the "tree-huggers" of the international community in Kosovo for their single-minded insistence on compliance with international human rights standards (*ibid*).

[26] It has been asserted that one reason for this may have that some members of staff of international organisations were illegally occupying housing belonging to displaced persons in the early days of the international mission, making it a sensitive area to tackle (*ibid*).

[27] "Background Report: The Impending Property Crisis in Kosovo", OSCE Mission in Kosovo (25 September 2000), p 1, <www.osce.org>.

[28] UNMIK/REG/2000/60, s 20.3.

determination was to be what property rights (ownership or possession)[29] attached – or, would have attached but for discriminatory practises – to the dwelling in question as of March 24, 1999.[30] While the current occupier of the property would be permitted to make submissions to HPCC, the only documents of relevance would be those which would go to proving that s/he was the lawful owner/possessor on the relevant date. According to Regulation 2000/60 HPCC was given jurisdiction to determine three types of cases. These are Category A – claims by individuals who lost property as a result of discriminatory laws after 1989, Category B – claims by persons who entered into unofficial transactions for the sale of their property, and Category C – claims by refugees and displaced persons who have lost possession of their property.[31]

While the passing of the Rules of Procedure in principle allowed HPD/HPCC to push ahead with property rights determinations, the reality was a different story. UN-HABITAT's operations were funded almost entirely from voluntary contributions and its administration was run from its headquarters in Nairobi. This combination led to the organisation being under funded and its administrative procedures unduly complicated. The result was that staffing and the purchasing of key equipment such as vehicles, was extremely difficult, leaving field operations severely restricted.[32] Repeated warnings by the organisation that funding was desperately in need in order for it to continue its work were not heeded.[33] Due to lack of funding HPD/HPCC had to curtail their claims determination operations to only processing claims which had already been received.

By July 2002 a full crisis – of both budget and morale – had developed within the organisation. While HPD offices had finally been nominally set up in 4 of the 5 regions of Kosovo (Prizren's claims were being dealt with by the office in Pec/Pejë), most claims were being dealt with from Pristina/Prishtinë and, although a total of 17,785 claims had been accepted by September 2002, only 448 had been determined.[34] HPD staff reportedly predicted at that point that it would be 10 years before all the claims had been dealt with.[35] The HPD Periodic Report of June 2002 stated:[36]

> "The HPD continues to experience a serious lack of funding and consequently, a lack of staff. The organization has the technical knowledge, and procedures needed to complete the

---

[29] Much of the housing stock in Kosovo before the conflict was socially-owned housing allocated to workers by state-owned enterprises.

[30] *Supra* n 28, s 2.

[31] *Supra* n 22, s 1.2.

[32] Telephone interview with former HPD international staff member, 12 January 2004.

[33] HPD's quarterly report for January-March 2002 gravely predicted: "The HPD continues to work with UNMIK, UN-HABITAT and donors to resolve the funding crisis. Without resolution of this issue, the HPD will close in Kosovo in September 2002 and in its entirety in December 2002" (*HPD Periodic Report, January-March 2002*, <www.hpdkosovo.org>).

[34] *HPD Periodic Report, April-June 2002*; *HPD in 2003 – Annual Report*, p 1, <www.hpdkosovo.org>.

[35] Interview with HPD international staff member, Pristina/Prishtinë, 12 June 2003.

[36] *HPD Periodic Report, April-June 2002*, *supra* n 34.

> mandate within a reasonable time. However, severe personnel and equipment shortages have forced the office to run with a skeletal staff core that is struggling to keep the institution functioning. Many international officers have been tasked with the duties of two, sometimes three persons, which has resulted in reduced production, job insecurity and staff turnovers."

At a donor conference in the same month, the Executive Director of UN-HABITAT and the UNMIK Deputy Special Representative of the Secretary General (second in command in the UNMIK structure) jointly warned that HPD was "in danger of collapse due to funding constraints".[37]

A New Approach

Thankfully, this unsettling upheaval in mid-2002 was the beginning of a sea change with respect to funding and priority for property rights determinations in Kosovo. Following the signing of a Memorandum of Understanding between UNMIK and UN-HABITAT in July, by November UN-HABITAT had handed over all the HPD/HPCC operations within Kosovo to UNMIK,[38] retaining responsibility only for satellite offices in Belgrade (Serbia), Podgorica (Montenegro) and Skopje (Macedonia). A new Executive Director of HPD/HPCC, the former Deputy Head of Mission of OSCE in Kosovo, was appointed, and a Director of Legal Process, an American lawyer with experience in mass claims, was brought in to manage the claims operation. Perhaps most importantly, sufficient funding to get the organisation fully up and running was secured from donors.

Since their reconfiguration HPD and HPCC have put a mammoth push on the determination of property rights claims. HPD has established, and fully funded and staffed, offices in all five regions and has decentralized much of its operations.[39] By June 2003 approximately 200 staff (25 internationals and 175 nationala) had been employed by HPD, spread out through headquarters and the regions.

The final deadline for the submission of claims (having been twice extended) was July 1, 2003, by which time a total of 28,832 claims had been received.[40] Of these almost 13,000 claims had been resolved by the end of 2003.[41] More than 95% of these determinations were made between November 2002

---

37 *UNMIK Press Release*, UNMIK/PR/764, 24 June 2002.

38 *UNMIK Press Briefing Notes*, 11 November 2002, <www.unmikonline.org>.

39 Regarding funding, however, note that HPD/HPCC are donor-funded as opposed to other UN agencies which receive "core UN funding". Generally speaking this results in far less generous financial support for HPD/HPCC than other UN agencies in Kosovo receive. A visit to HPD offices in Pristina/Prishtinë and Pec/Pejë, and by comparison UNMIK headquarters, in June 2003 made clear the difference in funding levels – HPD offices are sparsely furnished, with many staff sharing one office, and in the case of the Pec/Pejë office water damage from above was threatening to ruin hundreds of files stored in the Regional Director's office.

40 *HPD in 2003 - Annual Report*, *supra* n 34, p 1.

41 *Ibid*.

and December 2003, and HPD has received positive feedback in both media and OSCE monitoring reports for its streamlined operations and efficiency.[42]

Along with much improved funding, HPD staff hold up their new "mass claims" approach as a key reason for their efficiency relative to their UN-HABITAT predecessors.[43] HPCC functions on a case-law system and as such is bound by precedent.[44] The mass claims approach means that rather than determining each case individually, claims are grouped according to similar facts.[45] A representative sampling of cases (approximately 10) is taken from each fact scenario in order to assess how a decision might impact on a number of variations on a theme, and then a decision is made. This decision is then to be applied to the rest of the cases in the group, and determinations made and communicated to claimants.[46]

The goal is reportedly to have completed the rest of the straightforward claims in 2004, the difficult cases in 2005 and to shut down the institutions entirely by 2006,[47] having completed the task of making a property rights determination for every contentious residential property in Kosovo. Given progress to date, there is little reason to doubt that HPD/HPCC will accomplish the task within their stated timeline or near to it.

Housing and Property Restitution and Refugee Returns

Should the revamped HPD/HPCC therefore be hailed a success? On their face, the numbers do tell a success story. Operations of the agencies have been streamlined since the restructuring, and moving to a mass-claim system is allowing HPCC to churn through claims at a speed which could not be contemplated when UN-HABITAT was running the show. All this has been done on a far less generous budget than most UN agencies in Kosovo. It is also alleviating concerns that claimants' rights under article 6(1) of the *European Convention on Human Rights* were being violated due to the length of time it was taking to process claims.[48] HPD/HPCC's accomplishment of improving the efficiency with which claims for property

---

[42] See, for example: Islami, "Kosovo: Housing Dispute Breakthrough" (2 January 2003) *Institute for War and Peace Reporting*, <www.iwpr.net>; "Property Rights in Kosovo, 2002-2003", OSCE Mission in Kosovo Department of Human Rights and Rule of Law, pp 14-15, <www.osce.org/kosovo>.

[43] *Supra* n 35.

[44] See "Index – HPCC Decisions no. 1-71 (16th Commission session)" and "Summary of HPCC decisions", both documents produced by HPCC and on file with the author.

[45] In particular, cases with similar circumstances with respect to how secondary occupiers gained the opportunity to possess the property they currently occupy – for example those with permits granted by KFOR (the NATO military peacekeeping force in Kosovo) or the TMK (the descendents of the Kosovo Albanian paramilitary organization KLA) are grouped with other cases of the sort.

[46] *Supra* n 35.

[47] *Ibid.*

[48] *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11*. Article 6(1) states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law" [emphasis added].

are dealt should therefore not be underemphasized. However, it is clear that the current push towards the quick and efficient determination of property rights in Kosovo has more to do with establishing the rule of law and jump-starting a capitalist economy (through the provision of legal certainty over property rights) than with the original goal of contributing to the refugee/IDP return process, or reconciliation within deeply wounded communities.

While the importance of certainty of tenure to the stimulation of post-socialist economies has been widely argued,[49] such effects are difficult to quantify, particular in relatively early days in Kosovo. Nonetheless, the desire to improve the economy has become a guiding force for HPD/HPCC. The organisation's 2003 Annual Report states, "a determined effort is underway to ensure that a market economy takes root in Kosovo. Privatization is intertwined with the regularization of the property market, emphasizing the importance of rehabilitating housing and property rights."[50] The focus on certainty of property rights seems to correspond with the international community's (and specifically western donors') preference for projects which are seen as leading directly to a revival of Kosovo's economy. Another recent funding favourite has been the UN's Kosovo Trust Agency, tasked with privatization of the territory's socially-owned enterprises. Both of these institutions have reportedly been under pressure to "get it done before the funding runs out" (i.e. before donor interest turns elsewhere). One OSCE Human Rights Officer stated that "what we are witnessing here is a fifth gear transition to a market economy".[51]

However a thriving and self-sufficient economy is not the only entity the international community is committed to building and nurturing before it leaves Kosovo. A new "Standards for Kosovo" document, released by UNMIK in December 2003 and outlining the conditions which must be met before the region's political status is determined and UN control over governing is handed over to local authorities, envisages "a Kosovo where all – regardless of ethnic background, race or religion – are free to live, work

---

[49] See, for example: de Soto, *The Mystery of Capital: Why Capitalism triumphs in the West and fails everywhere else* (2000); Batalov, "Note and Comment: The Russian Title Registration System for Realty and its Effect on Foreign Investors" (1998) 73 *Wash. L. Rev.* 989; Gerson, "Peacebuilding: The Private Sector's Role" (2001) 95 *A.J.I.L.* 102; Eyre and Wittkowsky, *The Political Economy of Consolidating Kosovo: Property Rights, Political Conflict and Stability* (May 2002) Friedrich Ebert Stiftung, <http://library.fes.de>.

[50] *HPD in 2003 – Annual Report*, *supra* n 34.

[51] *Supra* n 24. The privatization task, too, is not without its complications: see Matic, "Serbia Angered by Kosovo Privatisation" (30 May 2003) *Institute for War and Peace Reporting*; and Qirezi, "Kosovo: Mixed Feelings at Steiner Exit" (6 June 2003) *Institute for War and Peace Reporting*, both available at <www.iwpr.net>. On 7 October 2003 the privatization process was at least temporarily halted following ongoing protests from Belgrade about the legality of the process [see Grubanovic, "Privatization Halted" (13 October 2003) *Transitions On-line*, <www.tol.cz>]. This "rush to privatize" has been criticized in other post-conflict contexts. See, for example: "Iraq economy: Say no to privatization" (23 September 2003) *The Guardian* A17 (editorial).

and travel without fear, hostility or danger and where there is tolerance, justice and peace for everyone."[52]

Further, as stated above, the international community pledged in Resolution 1244 to oversee "the safe and unimpeded return of *all* refugees and displaced persons to their homes in Kosovo" [emphasis added]. The link between housing and property restitution and refugee/IDP returns was made explicit at the time that HPD/HPCC were created. This was reflected both in statements made by high-ranking UN officials at the time, as well as in one of the founding regulations of the institutions: Regulation 2000/60 clearly incorporated the protection of the right of return into the mandate of HPD/HPCC, stating: "Any refugee or displaced person with a right to property has a right to return to the property, or to dispose of it in accordance with the law, subject to the present regulation."[53] Unfortunately, there exists a very real fear on the part of many involved in the returns process (including refugees and IDPs themselves) that rather than encouraging return and reconciliation, HPD/HPCC's current approach will in fact be detrimental to many of the international community's social goals. In the remainder of this paper I highlight two elements of HPD/HPCC's approach which may be having an adverse effect on these aims.

(a) Lack of coordination with returns agencies/organisations

First, a failure of coordination between HPD/HPCC and other agencies working on key aspects of return means that many displaced persons receiving a positive determination of their housing and property claims from HPCC do not feel that return is a real option, since other conditions necessary for successful return are not provided for at the same time. Part of the blame for this can arguably be laid at the feet of HPD/HPCC: it seems that the organisations may now be slaves to the (at least perceived) narrowness of their defined task, i.e. to make a determination of the housing and property rights attaching to each contested dwelling in Kosovo. While HPD and HPCC were originally envisaged as a "potentially very useful tool for managing the return process"[54] the goal has become much narrower. The simplicity of the mandate makes the prospect of finishing the task in the near future seem much more attainable. But the encouragement of refugee/IDP returns, and particularly the coordination of property determinations with other elements of return, seems often to be forgotten.

Ostensibly returns do remain an important aim of HPD/HPCC. The opening line of the 2003 HPD/HPCC Annual Report states: "The fundamental right to property and accommodation is a prerequisite for the sustainable return of refugees and the internally displaced in post-conflict situations."[55] However, HPD's Director of Legal Process emphatically states:[56]

---

[52] UNMIK/PR/1078 (13 December 2003). See also Greicevci, "New Standards for Kosovo" (15 December 2003) *Transitions On-line*, <www.tol.cz>.

[53] *Supra* n 28, s 2.5.

[54] *Supra* n 14.

[55] *Supra* n 34.

[56] Interview with HPD Director of Legal Process, Pristina/Prishtinë, 12 June 2003. One of the HPD's regional directors also used the "we're not in the returns business" catchphrase when I spoke with him, suggesting that this is a sort of

> "We're not in the returns business. Of course we're part of the returns process, but we're not a returns organisation. Just like we're part of the process of creating law and order in Kosovo but we're not the police. Returns are for [the UN agencies with responsibility for refugees/IDPs] to deal with. But if we do housing and property rights determination intelligently then it's up to people to return or not."

Rather than the task being seen as a positive obligation to ensure the right to return, therefore, the obligation now seems to be viewed as a negative one – HPD/HPCC's job is simply to ensure that no one is actively deprived of the right to return due to a lack of housing and property restitution.

There is obviously a political aspect to this approach as well. The Director of one HPD regional office formulated the interplay between his office's role and returns in the following way:[57]

> "Housing and property restitution has been used as a scapegoat by local political leaders to explain why returns have not happened. At the time of handover – that is, when the United Nations leaves Kosovo – either UNMIK or the elected [local] officials are going to have to explain why returns are not happening. If property rights determinations have been made, then that blame cannot be put on the UN/HPD, and the burden of explaining will be on the elected [local] officials."

Ultimately whether or not to return is a personal choice for each displaced person or family, and property restitution is simply seen as giving people the option. However, it must be asked how real the option really is when displaced individuals are left holding a piece of paper affirming their right to their home, yet knowing that if they try to exercise that right they will find a plethora of other obstacles: for example, returning might make them the only people of their ethnic group in the village, they may not have a means to support themselves, and a range of other services may not be available to them in a language they speak.

The landscape has admittedly changed since the "first" HPD was created, and other mechanisms have been developed in attempts to facilitate returns to Kosovo. ORC's *Manual for Sustainable Return*, in encouraging the development of projects for return, foresees the cooperation of - among others – NGOs, the local municipalities, the displaced populations themselves, and ORC (which is primarily responsible for procuring donor funding for return projects).[58] ORC has established working groups for

---

mantra for the organisation. In some ways this may not be entirely new, however. One veteran of the earlier incarnation of HPD suggested that refugee returns were always a justification which could be emphasized when speaking to potential donors about HPD's activities, even if in reality they did not always constitute a real focus for the organization (*supra* n 32).

[57] Interview with an HPD Regional Director, Kosovo, 11 June 2003. Stated another way, the current approach seems more geared towards "putting property rights in a holding pattern" than actually encouraging returns (*supra* n 35).

[58] *Manual for Sustainable Return* [published by ORC and United Nations High Commissioner for Refugees (UNHCR)], January 2003 edition, <www.unmikonline.org>.

return in 24 of Kosovo's 30 municipalities and may be understood to be overseeing international efforts to assist the returns process in those areas.[59]

These would seem to be potentially important venues for the coordination of return efforts with property rights determinations. HPD representatives do sometimes attend the inter-agency working groups on returns, although their attendance is not mandatory (and indeed is not even contemplated by the Operational Guidelines set out in the *Manual*). However, little actual coordination reportedly goes on with respect to property rights. One OSCE Human Rights Officer who attended such meetings stated: "I constantly had to warn members of the working group that 'if you don't pay attention to it this property issue is going to blow up'".[60]

HPD staff state they have told ORC that if there is a specific area being considered for a returns programme, HPD could be willing to do all the claims determinations for that village at once and in priority in order to help facilitate a return movement.[61] Occasional offers to collaborate with ORC on a plan of return (for example to accelerate the determination of claims in originally Serb villages in a corridor reaching from the Serbian border and encircling Pristina/Prishtinë so that a returns plan could be implemented there) have reportedly never been taken up by ORC.[62] ORC staff for their part seemed unaware that HPD would be willing to approach claims in such a way.[63] Staff of UNHCR (the United Nations High Commissioner for Refugees) in Serbia working with ethnic Serb IDPs from Kosovo also express frustration at the lack of information they receive from HPD, even when such communication is requested. One Protection Officer states that if her office had ever been given the opportunity to suggest areas for prioritized claims determination, it would have helped them immensely in facilitating return of the IDPs the office works with.[64]

Instead, many IDPs who have submitted claims to HPD find themselves with few options even when they receive a positive determination of their claim. As one ethnic Serb IDP originally from Urosevac/Ferizaj stated:[65]

---

[59] These meetings are held in each municipality, chaired by the UN Municipal Administrator, and are attended by the President of the Municipal Assembly [interview with ORC international staff member, Pristina, 13 June 2003; *ibid.*, Part II-5]. Regional Working Groups also exist to coordinate the activities within each region.

[60] *Supra* n 25.

[61] *Supra* n 35.

[62] *Ibid*.

[63] Interview with ORC international staff member, *supra* n 59.

[64] E-mail communication with UNHCR Protection Officer, Serbia, 2 July 2003.

[65] Interview with ethnic Serb male IDP in central Serbia, originally from Urosevac/ Ferizaj, 4 July 2003. One complication to this approach, not mentioned by current HPD staff members but encountered by CRPC in Bosnia, is the difficulty within a strictly rights-based system of determining one person's claim in priority to another, even if the latter had made his/her claim first (*supra* n 32). A UNHCR Protection Officer in central Serbia did report that some Serb IDPs in that area were concerned that their neighbours who had made their claims much later than they might receive their HPCC decisions first if claims were prioritized by village (*ibid.)*.

> "I filed my HPD claim in 2001. At first I thought of a possibility to return but knowing that no one else returned to the place made me feel insecure. I have children and it would be very difficult for them to live there."

The same IDP stated that if HPD had been able to arrange to settle the claims of, for example, all the Serbs living on his street in his home village at the same time, he may have been more willing to contemplate a return. Instead, when he received his positive determination, he simply sold his house, thereby eliminating any practical likelihood of his family ever returning to Kosovo.

HPD staff fully admit that the organisation's role is not coordinated with other bodies when it comes to returns, but lay some of the blame for this on other institutions' lack of efficiency. As one HPD international staff member stated,[66]

> "We're moving too fast for [the rest of the UN]. If we are able to make even 500 HPCC decisions per month [half the current average], are the police prepared to protect those 500 properties when people are evicted? Is ORC prepared to organise the return of 500 families per month to their homes?"

At present the answer to both of these questions is quite clearly no. It is simply not possible for Kosovo's police force to protect all properties. While Kosovo has at present approximately 9,500 international and national police officers,[67] the problems of maintaining law and order in the province are seemingly endless and there is no guarantee that the police would be able to provide adequate protection for houses vacated following HPCC decisions, even if they attempted to do so.[68] Further, the police are at present not even informed by HPD when an eviction (carried out by HPD Evictions Officers) is to take place. The result is that homes are often burned either by occupants as they are leaving under an eviction order or afterwards while they sit empty. The same ethnic Serb IDP quoted above recounts: "HPD actually evicted the family from my house but by the time I had the key back from HPD and visited the place the house was looted and almost completely destroyed."[69]

A new HPD policy is reportedly helping to change this: even when a property determination has been made, current occupants are now not evicted until the rightful owner declares his/her firm intention to return.[70] However, even so, once an eviction order has been made the owner has 14 days in which to return. Although houses are "sealed" by HPD during this period, in practise homes are sometimes damaged or burned to the ground. Generally speaking, too, the role of the police in investigating and prosecuting

---

66 *Supra* n 35.

67 As of 22 February 2004. This includes approximately 3,700 international police and approximately 6,000 national police officers.

68 See, for example, "Violence Destabilizes Kosovo" (13 August 2003) *Transitions On-line*; Greicevci, "First UNMIK Casualty in Kosovo" (11 August 2003) *Transitions On-line*, both at <www.tol.cz>.

69 Interview with ethnic Serb male IDP in central Serbia, *supra* n 65.

70 *Supra* n 35.

property-related offences has not been clear (although a Memorandum of Understanding between the police and HPD has reportedly been signed recently).[71]

Further, while ORC is working to encourage returns as quickly as possible, even if individuals were willing, nowhere near 500 individuals could at present be coordinated and convinced to return home each month under the auspices of the ORC. During 2002 only about 2,000 ethnic minority IDPs returned to Kosovo; ethnic minorities displaced from Kosovo still numbered an estimated 40,000 at the end of that year.[72]

While HPD's current approach does reflect positively on the organisation's efficiency, especially given its limited resources, the lack of interest in coordination, both from HPD's perspective and ORC's, does little to develop a well thought-out and workable approach to returns. The right to return has been described as "a composite of many different, interlocking legal rights";[73] the failure of the international community to effectively coordinate the activities of the organisation tasked with protecting one of the most key rights with those working on other elements of return jeopardizes the process.

(b) Lack of owner/occupier involvement in procedure for claims determination

A second, related, failure of the current approach to property rights determination in Kosovo is in the lack of concerned individuals' active involvement in the process. While the mass claims approach has radically improved the efficiency of HPD/HPCC, important opportunities for communication and reconciliation between parties – which could ultimately assist in creating the security conditions necessary for return – and for individuals to feel a sense of ownership over the decision made, are being lost.

In a 2001 article Day criticised the procedure used by the Commission for Real Property Claims (CRPC) in Bosnia-Herzegovina as excluding the claimant (generally the displaced person) and particularly the respondent (the

---

[71] E-mail communication with an OSCE Human Rights Officer, Kosovo, 30 June 2003.

[72] UNMIK Office of Returns and Communities *2003 Strategy for Sustainable Returns*, document produced for Donor Co-ordination Meeting for Kosovo, Brussels, 5 November 2002, p 4. Note that such figures generally track only in-migration and not those displaced persons who subsequently decide to leave again, meaning that numbers of returnees may be inflated. The number of minority returns is said to have increased during 2003, however comprehensive statistics are not yet available at time of writing.

[73] Besides property rights, this includes personal security and freedom from discrimination [Cox and Harland, "Internationalized Legal Structures and The Protection of Internationally Displaced Persons" in Fitzpatrick, ed., *Human Rights Protection for Refugees, Asylum Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (2003) 521 at 524-5].

secondary occupier, who may in turn also be a displaced person from another region) from meaningful participation in the determination process:[74]

> "Notwithstanding the inability of participants to accept or reject the outcomes within an adjudicatory model, other aspects of the CRPC draw into question the level of satisfaction among participants. [T]he level of participation by the claimant is potentially minimal, limited for the most part to the initial consultation and filing of a claim. More troubling still is that no provision exists to ensure the participation of the second-occupier [. . .] Even if justice demands that the returnee has a right to reclaim the land, the second-occupier should not be denied an opportunity to participate in the decision, nor should the procedure be ostensibly so unequal."

Describing the CRPC's (and the rest of the international community in Bosnia's) failure to encourage a real return movement, Phuong also predicted that similar challenges would arise in Kosovo:[75]

> "Determined efforts have been made in Bosnia and Herzegovina to resolve property disputes against a background of war and ethnic division. The number of minority returns has been less than anticipated. The same problems, and the same dilemmas, will recur in Kosovo should displaced Serbs one day decide to try to return to homes now occupied by Kosovans."

While largely modelled on the Bosnian example, the structures of HPD and HPCC have incorporated some subtle improvements over CRPC.[76] Despite these small changes, however, not enough has changed: much of Day's criticism of CRPC in Bosnia could also fairly be levied against HPD/HPCC in Kosovo. Human rights monitors in Kosovo state that there is still not enough of a "best practises" approach taken – more could be learned from what has worked or failed in Bosnia and other post-conflict situations when attempting to deal with property issues in Kosovo.[77]

Although a claimant must go in person to an HDP office to make a claim – thereby ensuring at least one opportunity to talk to someone about what has happened to her/his home – the process is more administrative than a real

---

[74] Day, "Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, a Case Study of Rwanda" (2001) 16 *Geo. Immigr. L. J.* 235 at 245.

[75] Phuong, "At the heart of the return process: solving property issues in Bosnia and Herzegovina" (April 2000) 7 *Forced Migration Review* 5 at 7. On housing and property restitution in Bosnia-Herzegovina, see generally: Hastings, "Implementation of the Property Legislation in Bosnia-Herzegovina" (2001) 37 *Stan. J. Int'l L.* 221; Prettitore, "The Right to Housing and Property Restitution in Bosnia and Herzegovina: A Case Study" (April 2003) paper prepared for BADIL Expert Forum for a Rights-Based Approach to the Palestinian Refugee Question 2003-2004, <www.badil.org>.

[76] *Supra* n 24.

[77] Some positive steps are being taken to bring together "best practices" worldwide however: see, for example Leckie, ed, *supra* n 3; and Cox and Harland, *supra* n 73.

chance to give testimony. Likewise, once the claim has been made, the current occupant of the house will be invited to go to the HPD to make a statement and submit any relevant documents.[78] This involvement of the secondary occupier is perhaps the most significant improvement over Bosnia.[79] The two parties may also be contacted separately by the legal officer investigating their claim if additional information is needed. Other than this, however, there is no further involvement on the part of the two parties. The parties are not permitted to give any testimony before the HPCC, and there is no hearing for them to attend even as observers. They are simply made to wait, often several months, before being informed by letter once a decision is made in their case. In the meantime, accessing information from HPD on the status of their claims or the claims against them is reportedly very difficult.[80] The parties may be left feeling like very passive participants in the process. Further, when the HPCC decision is made it is binding and, while there is a mechanism in place for requesting a reconsideration of the decision, this is done by the same body which issued the first decision. There is no opportunity for appeal. [81]

Nowhere in the process, then, is there a formalized opportunity (or requirement) for the two parties to meet or in any way work together to come to an agreement. Interestingly, Regulation 2000/60 did envisage a role for mediation, with HPD staff meant to coordinate this activity. Section 1.2 states in part:

> "The Directorate shall refer [. . .] claims to the Housing and Property Commission for resolution or, if appropriate, seek to mediate such disputes and, if not successful, refer them to the Housing and Property Claims Commission for resolution."

The original idea was therefore that the Claims Commission would function only "where mediation is not appropriate".[82] However, no steps were taken to ensure that HPD offices were staffed with someone who had experience in mediation, and in the new push towards efficient procedures, the mediation option has been dropped altogether. An international member of HPD's staff

---

[78] As discussed above, however, the only relevant documents are those which prove ownership/possession rights on the relevant date.

[79] Also an important improvement is a "humanitarian permit" regime allowing those who truly have nowhere else to go to be granted an abandoned or HPD-administered house to live in on a temporary basis. This is still a very bare-bones approach which can provide assistance for only the most destitute of applicants. The HPD website states "The HPD's limited properties dedicated for humanitarian use are primarily meant for people whom the HPD must evict from other properties which were the subject of a successful claim but who would literally have no other place to go but onto the street. The HPD cannot vouch for the quality of these properties, only that they have four walls and a roof" ("HPD: Frequently Asked Questions", <www.hpdkosovo.org>).

[80] *Supra* n 64.

[81] Further, there have been accusations of HPD bias amongst both the Albanian and Serb communities which will detract from the feeling of satisfaction or closure parties may experience following the conclusion of the procedure: interviews with an HPD Regional Director, *supra* n 57, and an OSCE Human Rights Officer, Kosovo, 13 June 2003.

[82] *Supra* n 14.

states, "No one in their right mind could have thought that [mediation] could work in a mass-claim process." The staff member continues:[83]

> "[W]hen it was tried on some test cases, it was basically the parties haggling over prices. It's not like there is a dispute which can be compromised – one party had a right to the property but no possession and the other party had possession but no right. So either the property was sold or it was not. There really wasn't anything the HPD lawyers could do. If the HPD lawyers tried to take an active role, they basically became real estate brokers, which presented a conflict of interest. If the parties agreed on a price, they did not need the HPD to mediate. If the parties did not agree on a price, there was not much the HPD could do but sit there and let things drag on. To have this be a serious step in a mass claims process would have dragged this on forever. So active mediation was quickly abandoned."

Of course it *is* still possible for claimants and current occupiers to contact each other privately, and HPD does still declare itself willing to assist in these matters by providing contact information if both parties are interested. However, as suggested in the quotation above this generally only happens when the claimant owns the house in question and is interested in selling it to the occupier. Any negotiation which takes place is really only on the level of trying to agree on whether a sale will take place and what the price will be.[84]

Further, when a decision is made against the current occupant and the rightful owner wishes to return to the home, the occupants are served concurrently with an eviction order requiring them to quit the premises within 14 days. If they do not do so, on the expiry of the notice period an HPD Evictions Officer will come to the property and enforce the eviction, which may involve physically removing all the occupiers' belongings from the house if they still remain. The owner is not to be present at the home until the house or flat is empty.

On one hand the lack of parties' personal involvement in the new HPD/HPCC procedures, and specifically the lack of a role for mediation, makes perfect sense – there is a simple legal determination to be made, and with the relevant documentation provided, the Commissioners need simply to be left to make it. There is only one rightful owner or occupier according to the criteria established by UNMIK and therefore no need to muddy the waters by dragging out the process with personal interaction and discussion.

On the other hand, there may be a price to pay for the exclusion of concerned persons from the process. There are presently few situations in which members of the majority ethnic group (ethnic Albanians) and minority ethnic groups[85] (ethnic Serbs, Turks, Roma for example) are required to come face

---

[83] E-mail communication with an HPD international staff member, 20 July 2003. This echoes comments by a former HPD international staff member: "What is there to negotiate? Either you own the property or you don't" (*supra* n 32).

[84] E-mail communication with HPD international staff member, *ibid*.

[85] Or "non-majority ethnic groups" as they are increasingly referred to amongst the international community in Kosovo.

to face with each other. Providing a real opportunity for individuals to sit down together to reach an agreement on housing, even if it is simply to decide when the secondary occupier will leave, might have a positive effect on reconciliation.[86]

Further, the current approach seems to treat property rights as solely economic interests. While this is surely one part of the equation, the detached, mass claims rights-based approach ignores certain psychological realities surrounding human beings' relationships with their physical environments. Far from being solely economic, property rights, particularly in the structure that has served as a family's home for a few or many years, can play a key role in a person's sense of identity and indeed one's sense of security. Kearns *et al* hint at this dual relationship:[87]

> "Housing is often considered as a consumption or asset good, meeting immediate needs such as for shelter, and in many cases also providing investment returns and access to other financial benefits via the ownership of equity. Less often do we consider the non-material, non-financial benefits of housing[.]"

Abramson and Theodossopoulos make similar observations. They identify two major types of relationships which people have with land, "the one finding strong moral and emotional identity with the estate, the other commercially objectifying it from a subjective distance".[88] Exploring the emotional side of the equation, Saunders describes the home as a place "[w]here people feel in control of the environment, free from surveillance, free to be themselves and at ease, in the deepest psychological sense, in a world that might at times be experienced as threatening and uncontrollable."[89] While a streamlined, rights-based approach to property

---

[86] I am not unmindful of criticisms made of mediation between individuals in other contexts, for example that there may be power imbalances between parties or (as has been the criticism in the present context) that a mediated settlement may be unsatisfactory for a party who feels s/he is completely in the right (see, for example: Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale Law Journal* 1545). However, others support mediation as a tool through which difficult relationships can be transformed and individuals empowered (see, for example: Bush and Folger, *The Promise of Mediation* [1994]; Rifkin, "Mediation from a Feminist Perspective: Promise and Problems" (1984) 2 *Law and Inequality* 21).

[87] Kearn *et al*, "'Beyond Four Walls'. The Psycho-social Benefits of Home: Evidence from West Central Scotland" (2000), 15(3) *Housing Studies* 387 at 387.

[88] Abramson and Theodossopoulos, *Land, Law and Environment* (2000), p 7.

[89] Saunders, *A Nation of Home Owners* (1990), p 361. The term "home" is obviously rooted in the English language and as such one must be careful in the extent to which ideas surrounding it are applied in non-English cultural contexts. However enough work has been done into how the concept extends cross-culturally that it seems justifiable to transfer the concept to other cultures, at least those which have a rather static (as opposed to nomadic) approach to housing and shelter [see, for example: Mandic and Clapham, "The Meaning of Home Ownership in the Transition from Socialism: The Example of Slovenia" (1996) 33 *Urban Studies* 83; Kent, "Ethnoarchaeology and the Concept of Home: A Cross-Cultural Analysis" in *The Home: Words, Interpretations, Meanings, and Environments* (1995) 163].

rights determinations may deal effectively with the economic side of property rights, it fails to recognise or address the emotional connection people form to their physical surroundings and the trauma they may experience upon losing their homes.

Such emotional connections may seem obvious with respect to the displaced persons who make HPD property claims (both from the perspective that they claim to be the legal owners or occupiers and in that in many cases they or their families will have resided in the dwelling in question for years, if not decades). But they equally be important to secondary occupiers, who have in many cases now lived in the contested dwellings for as many as five years. They, too, may feel a sense of loss in being forced to leave following an HPCC decision in favour of the claimant. Over the years that they have occupied the house, attachments will have formed to the physical spaces. Children have been born in these houses, weddings have taken place, family members have died, and physical changes or improvements have been made to accommodate the tastes and needs of those who have been living in the houses, all of which strengthens a family's connection to the place it occupies.[90] Surely this has in some way become home to them.

One OSCE Human Rights Officer in Kosovo reported being present at an eviction in which the occupying family, having been given 14 days notice to leave the home they had occupied since the conflict, simply stood by on the expiry of the notice period and watched as HPD Evictions Officers emptied the house of their belongings. The Human Rights Officer wondered – was it simply disbelief on the part of the family that it would actually come to this (i.e. that HPD would actually get organized enough to perform an eviction)? Or a feeling that this had somehow become their home, regardless of what the property rights determination was, and they could/should not be forced to leave this way?[91] The current approach ignores these factors in the hurry to protect the economic aspects of property rights.

---

[90] Although most literature on displaced persons and "home" has tended to focus on home as the place from which people fled, a growing body of work is addressing the multiple ties a displaced person or family may feel, and indeed the numerous places which may serve as home, all in their own ways. See, for example: van Hear, "From durable solutions to transnational relations: Home and exile among refugee diasporas" (March 2003) *UNHCR New Issues in Refugee Research Working Paper No. 83*; Fog Olwig, "Epilogue: Contested Homes: Home-making and the Making of Anthropology" in Rapport and Dawson, eds., *Migrants of Identity: Perceptions of Home in a World of Movement* (1998) 225-236; Van Amersfoort, *Transnationalisme, Moderne Diaspora's en Sociale Cohesie* (2001); Holm Pederson, "Between homes: post-war return, emplacement, and the negotiation of belonging in Lebanon" (February 2003) *UNHCR New Issues in Refugee Research Working Paper No. 79*. Property law researchers are also increasingly challenging the widely-propogated notion that home ownership plays a significant role in the way a person connects to his/her physical environment, recognizing that significant connections may form even without a deed of ownership: see, for example, Mandic and Clapham, *ibid*. Granted, some adverse possessors/secondary occupiers are simply war profiteers who may by now have acquired several properties as a reward for their service during the conflict, but these are the minority of cases.

[91] Interview with an OSCE Human Rights Officer, *supra* n 81. At the same time, the Human Rights Officer reported actively discouraging an OSCE colleague who

Porteous and Smith write, "if home is the 'centre of the world', then losing home is 'undoing the meaning of the world'".[92] Any mechanism designed to deal with housing and property restitution in a post-conflict context surely must take account of the impact that the loss of one's home has had or will have on a party to the claims procedure. The restitution process has the potential to bring individuals of differing ethnic groups face to face, and further to assist individuals in coming to terms with emotional losses sustained through the loss of "home". However, to do so, claimants would need a far greater level of involvement in process, either as active participants or at least involved observers, than is currently the case.

This is not to downplay the importance of housing and property restitution as a legal process, nor in any way to argue against the increasing momentum internationally towards the establishment of post-conflict restitution mechanisms. As Leckie writes, describing many situations worldwide, "Even when conditions may be secure and stable enough for return to occur, many millions of people continue to be prevented from returning to their homes of origin, recovering property or receiving compensation".[93] Restitution mechanisms must therefore be encouraged.

However, unlike the situations which Leckie describes, in Kosovo conditions of security and stability do not yet exist for individuals who are ethnic minorities in the areas from which they originate. In a recent paper, the Deputy Special Representative of the United Nations Secretary General in Kosovo trumpeted the successes of the international community in ending ethnic conflict in Kosovo. One of the pitfalls, however, which he admitted the international community had not avoided was the failure to ensure the return of ethnic minority refugees. He stated: "Even though some [ethnic minorities] do return, many Serbs feel that the interethnic security situation is too fragile and the unemployment too high, to allow them to settle again in Kosovo."[94] Communities still show the scars of war, and while ethnic violence is much decreased since the official end of the conflict, horrendous acts are still occuring.[95] Housing and property restitution is therefore not

---

proposed inviting the owners of a property to the eviction process of the occupying family – with the two parties having been excluded from the process up to that point, she felt having them meet face to face at the eviction would only invite trouble.

92 Porteous and Smith, *Domicide: The Global Destruction of Home* (2001), p 34.

93 Leckie, "Introduction – Going home: Land and property issues" (April 2000) 7 *Forced Migration Review* 4.

94 "Kosovo is good lesson in international action against ethnic conflict – UN official" (28 January 2004) *UNMIK News Coverage*, <www.unmikonline.org>.

95 The recent murder of an ethnic Serb family in Obiliq/Obilic, a village near Pristina/Prishtinë to which there had recently been some ethnic minority returns, is evidence of ongoing interethnic tension (see Breicevci, "Serb Family Murdered in Kosovo" (9 June 2003) *Transitions On-line*, <www.tol.cz> and "Press Statement on Kosovo by Security Council President", Press Release SC/7781, <www.un.org>). See also Beardsley, "In Kosovo, former neighbours warily eye each other" (29 May 2002) *Christian Science Monitor*, <www.csmonitor.com>. While the depth of psychological wounds people carry from the war is still not fully understood, studies have concluded that a large portion of the local population is suffering from various psychological problems stemming from the conflict, with one study estimating that 67% of Kosovo Albanians are suffering

simply a final step in the process in Kosovo but rather only one part of a challenge-filled movement to encourage returns.

Still, this is not necessarily to suggest that a rights-based approach to housing and property restitution in Kosovo is inappropriate: given the history of discrimination and the instrumental use of housing and property rights in the oppression of the ethnic Albanian community prior to the war, there are strong arguments in favour of using such an approach.[96] However, a rights-based process which allows parties some participation in – and therefore ownership over – decisions made, rather than pushing through in a hurried, mass-claims way, might prove to be much more successful in meeting the social goals of the housing and property restitution process in the long term. The slowing down of the process might be a small price to pay for a more effective outcome. International involvement in post-conflict areas is increasingly seen to be most successful when there is a long-term commitment to assist, rather than a short-sighted "do the job and leave" approach.[97] After all, there is little use in finishing a task early at the expense of it having been of any use to the people it was meant to benefit. Greater involvement in the process and formalized opportunities for claimants to meet with members of other ethnic groups – including the person occupying their home – might allow some level of understanding to be reached which could help to lead to increased security and reconciliation in potential areas of return, and therefore more actual return.

---

from post-traumatic stress disorder (PTSD) [see Lama, "Kosovo: Psychological Wounds" (15 April 2003) *Institute for War and Peace Reporting*, <www.iwpr.net>].

96 However while generally beyond the scope of this article, it should briefly be asked here whether a different approach to finding solutions to housing and property issues of the displaced following situations of displacement – particularly where there is a protracted displacement and a lack of other conditions conducive to return – could be preferable to the approach currently finding favour in the international community. Could alternatives to a rights-based approach be tenable and justifiable at international law, while providing refugees and other displaced persons more "real" opportunities for return or other durable solutions to their displacement? For example, if conditions do not otherwise exist for the return of refugees and IDPs, could a workable system of compensation or other assistance be implemented for displaced persons in place of the restitution of their property (which they would only sell anyways) to help them integrate locally into the area where they have taken refuge? Could housing be provided in parts of the area/country of return other than the village from which the displaced person came? These options raise important concerns of international law and human rights and do not provide the satisfying solution of having reversed the "ethnic cleansing" which has taken place during the conflict. As such they are often rejected out of hand by international organizations. Yet it is worth asking whether in some cases, particularly in protracted refugee/IDP situations, such approaches might have the impact of ensuring a right to housing which can actually be enjoyed.

97 See, for example: Weiss Fagen, "Post-Conflict Reintegration and Reconstruction: Doing It Right Takes a While" in Steiner *et al*, eds, *Problems of Protection: The UNHCR, Refugees, and Human Rights* (2003) 197.

CONCLUSION

To date the international community has taken an approach to housing and property restitution in Kosovo which is almost entirely based on determining rights on paper. This approach offers simplicity of mandate and implementation, thereby allowing a "quick" completion of the task. However, it also ignores a key original goal of the process – providing conditions for successful and widespread return of displaced populations. To accomplish this larger goal what is necessary is not only a right in principle to property but a real possibility to return to one's home in conditions of economic stability and security.

The formal protection of property rights is important. But the protection of a property right which cannot be exercised except by alienation of the right may arguably not be worth the trouble. In a world of limited budgets and human resources the international community needs to reconsider what is being done to encourage returns, and come to terms with the fact that its current HPD approach in Kosovo may actually be negating positive steps towards return taken by other organisations. A more coordinated approach, even if it takes a little longer, may prove far preferable.

BOOK REVIEW

A THEORY OF CONSTITUTIONAL RIGHTS. By Robert Alexy (translated by Julian Rivers) [Oxford, OUP, 2002]

This is an excellent translation in English of Robert Alexy's *Theorie der Grundrechte*. The original, published in 1985, contains what in the German-speaking world is one of the most important theories of constitutional rights in general, and not merely regarding the German constitution (Grundgesetz), considering that any legal document entitled "Constitution of X", but not establishing the rights that are more or less instituted by the Grundgesetz, would suffer a relative conceptual loss.

The author frames his theory as a theory of the rights of the Grundgesetz, a theory that beyond an empirical dimension has also a normative one, is general and primarily structural, for it investigates the concepts, conceptions, and forms of the process of constitutional law reasoning.

The main argument of the book is that constitutional rights have a double character, namely they are both rules and principles, but foremost principles. The author reformulates the familiar distinction of Ronald Dworkin between rules and principles and defines principles as optimisation requirements relative to what is factually and legally possible, in contradiction to rules, which are defined as definitive requirements. In contrast to Dworkin's moral conception of principles, however, Alexy asserts that principles are not reasons for rights only, but also reasons for collective interests. It is this conception that justifies the competition between principles, which, let it be noted, are in Alexy's opinion reducible to equivalent values. The author, however, does not explain why rights as principles may not simply be incompatible with one another or with collective interests as principles; nor does he explain, whether, how, and to what extent the competition in question is a conceptual or a contingent feature thereof. In any event, principles, according to Alexy, stand constantly in a relation of mutual competition - perhaps more accurately of opposition. It is precisely for that reason that the non-satisfaction of one principle must, according to the author's regulative Law of Balancing, be counterbalanced by the significance of an opposite principle.

Now, the conception of constitutional rights, without any further qualification, as principles under constant balancing, conflicting with one another or with collective goods, raises the question of the soundness of the theory's analytical statements. In the context of such a conception of constitutional rights, the supremacy of these rights over collective aims depends on the result of the balancing in question. This latter statement is easily derived from consequentialist theories, but not from non-consequentialist ones, *e.g.* from a conception of rights as anti-utilitarian trumps. Therefore, the theory is open to substantive disagreement and its characterization as structural seems doubtful.

It is certainly intelligible and perhaps may be true of some rights (be it constitutional or non-constitutional) or of some aspects of these rights that

they are susceptible to balancing against public interest, as are for example some institutional forms of economic freedom. However, the question whether the same or something of the kind is true of the rights of the Grundgesetz, as a semantic characteristic thereof, should be addressed within the subject matter of each right. Pending the relevant substantive reasons, Alexy's theory may fail to qualify as general.

To the above Law of Balancing we should, following a suggestion of the author in his postscript to this edition, add an epistemic Law of Balancing, latent in the main body of the book, according to which, the more intensive an interference in a constitutional right is, the greater must be the certainty of its underlying premises. In the light of the two Laws of Balancing and the distinction between rules and principles, Alexy achieves a remarkably lucid and consistent reading of the Grundgesetz, the case-law of the German Federal Constitutional Court (Bundesverfassungsgericht), as well as the doctrinal controversies with respect to the principle of proportionality, the limits and/or the extent of rights, the general rights to liberty and equality and, in general, the constitutional rights, as being rules for the burden of argumentation. From an empirical point of view, this theory is indeed the best reconstruction of German constitutional law. Yet, what happens from a normative point of view?

Article 1(1)(1) of the Grundgesetz provides that "[h]uman dignity [Menschenwürde] is inviolable". It is certainly a considered judgment that human dignity *per definitionem* cannot be balanced against any collective aim; nor may it be denied satisfaction so that other claims are satisfied, even constitutional ones. (Besides, there is no opposite provision in the Grundgesetz.) How is it then possible to perceive the constitutional principle of human dignity as competing with anything? Alexy takes into account this objection, but does not avoid committing a conceptual fallacy. He asserts that this principle has a dual aspect like all other constitutional rights. The norm: "human dignity may not be subjected to balancing" is the human dignity rule (here "rule" stands for a definitive as opposed to prima facie requirement). However, given the open-endedness of the rule, in order to determine what it definitively prescribes, we must balance human dignity against other principles. Of course, there is no objection to assuming that the human dignity norm is a principle, and to that extent an optimisation requirement. The conception of principles as optimisation requirements does not, however, mean that these stand in a relation of mutual competition. For, given the absoluteness of the principle, the question of under which circumstances human dignity may be violated is a matter of the principle itself (of intrinsic reasons), not of its balancing with other competing principles (of extrinsic reasons). Since most of the rights of the Grundgesetz are subjective aspects of the human dignity principle (lest any positivist objections be raised, this is explicitly stated in the International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights), an important question is raised: are these rights also susceptible to balancing against collective interests? What is more, this reasonable thought seems to call in question the idea that it is possible to have genuine conflicts between these rights for most of them derive from the same principle. For, if constitutional rights derive (normatively, not logically) from the human dignity principle and at the same time are in conflict, then we are applying double standards to the content of human dignity. It follows that the respect

of rights, to the extent we take them seriously, is a matter of dignity (that is why we speak of an inalienable core of rights [Wesengehaltsgarantie]). Along these lines, when claims based on these rights intersect, we must interpret each right in the terms of the other rights, treating them as integrated values, in order to find the proper principle applicable to the specific circumstances. For all these reasons, it follows that we have to query the normative limits of the theory as regards the crucial matter of the protection of human dignity, and, in particular, we have to consider whether this theory is capable of being critical of the legal practice.

The reasons for my reservations with respect to what otherwise is one of the most sophisticated theories of constitutional rights available, are best illustrated when Alexy, somewhat paradoxically, disputes the rightness of a (right) decision of the Bundesverfassungsgericht about the absoluteness of the human dignity principle, in accepting that it is intelligible from the standpoint of constitutional law that a competing principle may have a greater weight than (that of) human dignity.

DR PHILIPPOS C. VASILOYANNIS
Member of the Athens Bar Association