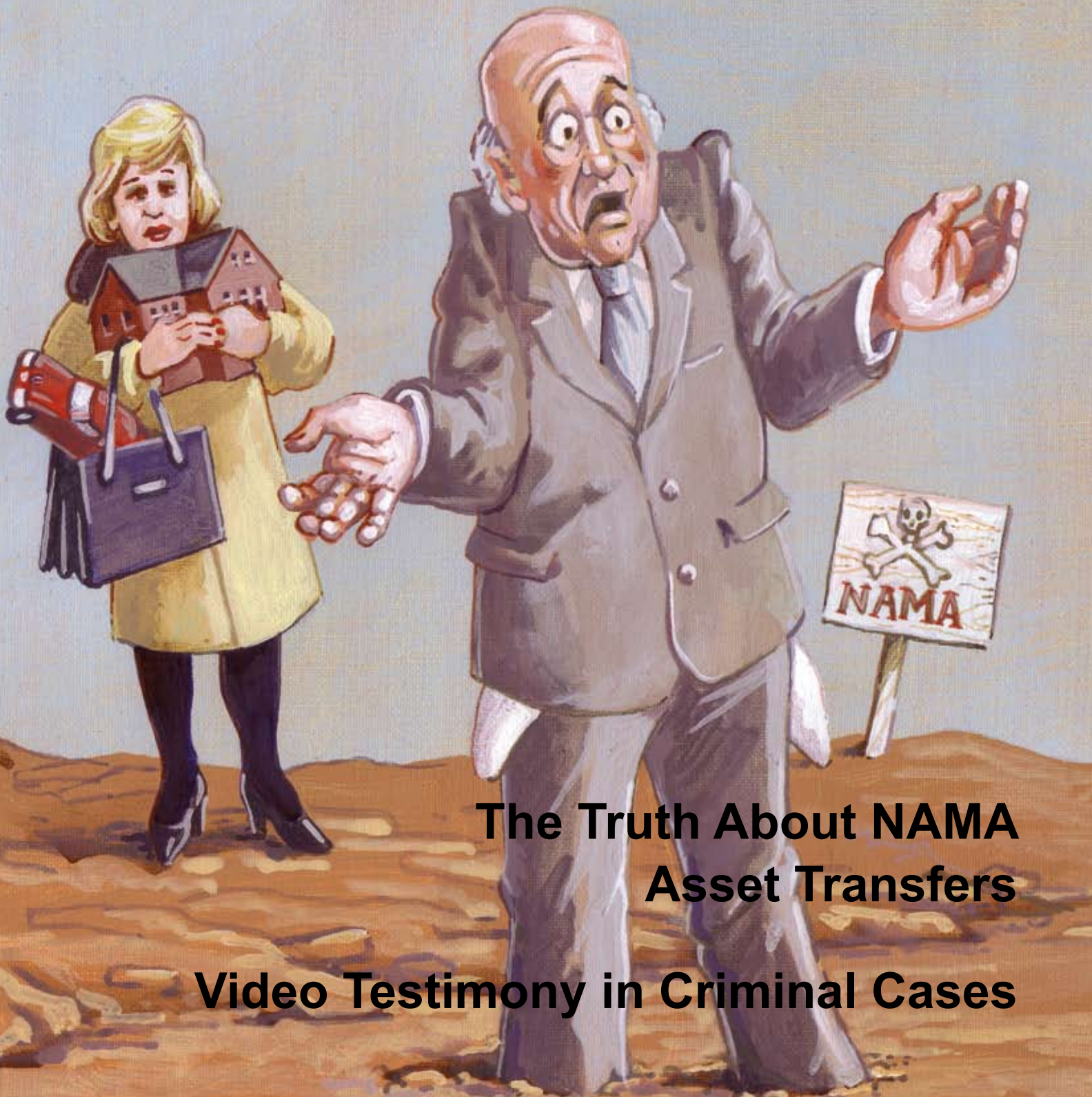


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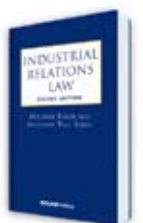
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The Bar Review

Volume 16, Issue 1, February 2011, ISSN 1339-3426

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

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Subscriptions: January 2011 to December 2011—6 issues

Annual Subscription: €260.00 + VAT

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The Bar Review February 2011

Video Evidence and s.16(1)(b) of the Criminal Evidence Act 1992

MIRIAM DELAHUNT BL*

Introduction

The inherent difficulties in the prosecution of offences involving child witnesses or witnesses with an intellectual disability have, over many years, prompted suggestions as to how the experience may be made less traumatic for these witnesses, while protecting the rights of the accused. One suggestion mooted a number of years ago¹ is the taking of pre-trial depositions to be used at hearing.

Many provisions to assist vulnerable witnesses were given legislative standing in the Criminal Evidence Act 1992, such as video link evidence², the use of an intermediary,³ the abolition of the need for the testimony to be given on oath or by affirmation as long as the witness was capable of giving an intelligible account⁴ and the elimination of mandatory corroboration of the witness' testimony^{5,6}. The measures were generally age eligible or available to persons with a "mental handicap" who did not fulfil the age requirement.⁷ The section that is the focus of this article is section 16(1)(b) of the Criminal Evidence Act 1992, which allows for a video recorded statement to be admitted at hearing in place of examination in chief testimony⁸. While legislative provision

for pre-trial depositions is available under ss. 4F and 4G of the Criminal Procedure Act 1967,⁹ this is rarely used and is quite different in scope¹⁰ to Section 16.

Despite the fact that most of the provisions of the 1992 Act were commenced in 1993, s. 16 (1)(b) was only commenced on 15th October 2008. The reason for this appears to have been the time necessary for the Minister for Justice, Equality and Law Reform to establish a Committee to draw up Good Practice Guidelines¹¹ as well as prepare appropriately equipped video recording rooms in which the interviews could take place. In addition, it was argued that time was needed to allow for the training of special members of An Garda Síochána in appropriate interviewing techniques.¹²

Although many interviews have taken place under the section since its commencement, the recent decision of Mr. Justice Barry White in a trial, (which for the purposes of this article, will be termed *DPP v XY*¹³), to admit a DVD recording of an interview of a vulnerable complainant as evidence under s.16(1)(b) is a significant step. This was the first time a DVD recording of a witness statement was admitted in such a case and it marks a shift in the perception of how the testimony of more vulnerable witnesses may be taken and heard at trial.

Background to section 16 (1)(b) Criminal Evidence Act 1992

The benefits of a full pre-trial deposition that recorded the

* Miriam Delahunt is a practising barrister and currently researching a PhD in the School of Law, Trinity College Dublin on the subject of support measures for child witnesses in criminal proceedings. She wishes to thank Sergeant Jennifer Molony, Detective Garda Philippa Cantwell, Sergeant Paul Landers, Caroline Biggs S.C. and Brendan Grehan S.C. for their assistance and kind support in the writing of this article. All errors and omissions are the responsibility of the author.

1 See The Report of the Advisory Group on Video Evidence (Home Office, UK) (1989) (Also known as "The Pigot Report")

2 S. 13 Criminal Evidence Act 1992

3 S. 14 Criminal Evidence Act 1992

4 S. 27 Criminal Evidence Act 1992

5 S. 28 Criminal Evidence Act 1992

6 S. 18 Criminal Evidence Act 1992 also relaxed the requirement for dock identification of the accused in certain circumstances.

7 s. 257 of the Children Act 2001 raised the qualifying age from 17 to 18 in the appropriate sections of Part III of the Criminal Evidence Act i.e. 13 (1) (a), 14 (1) (b), 15 (1) (b) and 16 (1) (a).

S.19 of the Criminal Evidence Act allows persons with a "mental handicap" to avail of the support measures which apply to appropriate child witnesses.

8 A recent case of the CCA, *DPP v Michael O'Brien* [2010] IECCA 103 may have caused confusion with this section. S. 16 of the Criminal Justice Act 2006 allows for the admission of witness statements in certain circumstances where evidence given in court is materially inconsistent with those statements. In that case, a video recorded statement was admitted where one of the complainants, aged nine at the time of the trial, gave evidence which was deemed, under s.16 Criminal Justice Act 2006, to be materially inconsistent with the statement she had given to the Garda Síochána in respect of sexual offences allegedly committed by her father. The appeal, which included grounds based on the admission of the statement, was dismissed.

9 S.4F and s. 4G Criminal Procedure Act 1967

10 The deposition must be taken in the presence of the accused and a judge of the District Court after the accused is sent forward for trial. The deposition will be admitted if the witness is a) dead b) unavailable c) unable to attend to give evidence at the trial c) is prevented from attending d) does not give evidence through fear or intimidation.

11 The Good Practice Guidelines drawn up by the Committee at the request of the Minister for Justice, Equality and Law Reform and used by the Garda Síochána, take as their reference point the Memorandum of Good Practice as used in the U.K and have been in place on a non-statutory basis since July 2003. ("The Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses in Criminal Proceedings" (Home Office / Department of Health 1992) has now been replaced by the updated and revised –"Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children" (Home Office 2007))

12 Parliamentary Questions, [42056/06] – Michael McDowell, Minister for Justice, Equality and Law Reform -6th December 2006

13 The accused was acquitted in this case and in order to avoid the risk of identification of the complainant and the accused, the proceedings can not be named. See The Irish Times, Tuesday 16th November 2010

examination in chief and cross examination testimony of the witness are varied. It would:

- Allow the witness to give his or her account closer to the time of the incident affording greater detail to be recounted and recorded.
- Alleviate the necessity of the witness to repeat the account of the incident to various agencies such as An Garda Síochána, social workers, legal practitioners and the court. This would reduce the stress of the witness as well as prevent the emotional quality of the recounting being lost through repetition.
- Spare the witness the trauma of waiting for the trial to come to hearing which can be considerable particularly for a child witness or witness with an intellectual disability. Testimony taken at an earlier stage could also allow the witness to avail of therapy which may have been delayed pending the trial.

In England and Wales, the Home Office' Advisory Group on Video Evidence, chaired by HH Judge Thomas Pigot QC, published its report in 1989 (The Pigot Report) which included recommendations that video recorded interviews, conducted by a police officer or social worker, be used as a substitute for the child's live testimony at trial. The Criminal Justice Act 1991 incorporated the proposals but only for examination-in-chief evidence. The legislation has since been updated and the Youth Justice and Evidence Act 1999 provided for video recorded examination in chief and cross-examination in chief.¹⁴ However, only legislation for the admission of video recorded examination in chief testimony has been commenced and the "half-Pigot" compromise has been in existence since the initial introduction of the provision.¹⁵

However, other common law jurisdictions such as Australia have embraced the notion of full pre-trial depositions, with both examination in chief and cross examination testimony recorded and played at trial, thus eliminating the need for the witness to give his or testimony live at trial. Almost all of the six states and 2 territories in Australia have embraced "full-Pigot" and provide full pre-trial depositions for children and vulnerable witnesses.

In this jurisdiction, the rise in reporting of sexual offences particularly against children and the mentally impaired in the latter part of the last century and the influence of the Pigot Report, prompted calls for the Law Reform Commission to examine the means by which these vulnerable witnesses with their individual needs could best be assisted to give evidence. The LRC Report on Child Sexual Abuse and the LRC Report on Sexual Offences against the Mentally Handicapped (both published in 1990), contained many recommendations as to how the more vulnerable witness could be assisted to give his or her evidence without the right of the accused to a fair trial being undermined.

Many of these recommendations were introduced in the Criminal Evidence Act 1992, including Section 16 (1)(b), which provides as follows:

"Videorecording as evidence at trial

- (1) Subject to *subsection (2)*
 - (a) a video recording of any evidence given, in relation to an offence to which this Part applies, by a person under 18 years of age through a live television link in proceedings under *Part 1A of the Criminal Procedure Act, 1967*, and
 - (b) a video recording of any statement made by a person under 14 years of age (being a person in respect of whom such an offence is alleged to have been committed) during an interview with a member of the Garda Síochána or any other person who is competent for the purpose,
shall be admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible:

Provided that, in the case of a video recording mentioned in *paragraph (b)*, the person whose statement was video recorded is available at the trial for cross-examination. ..."

The first application of section 16 (1) (b) in a trial in this jurisdiction was in November, 2010, with Mr Justice White presiding.¹⁶

In *DPP v XY*, the accused was alleged to have forced a female with an intellectual disability into performing the act of oral sex on him. As there is no provision for this specific offence under the Criminal Law (Sexual Offences) Act 1993 (which provides for certain sexual offences against persons with a mental impairment), he was charged under s. 4 of the Criminal Law (Rape) (Amendment) Act 1990, which makes no provision for offences against the mentally impaired. A DVD recording of the complainant's allegation against the accused was admitted in evidence. However, at the close of the prosecution evidence, an application for a direction to find the accused not guilty was granted by Mr. Justice White on the basis that there was no evidence of an assault or hostile act on the part of the accused. The complainant had said that she complied with the accused's repeated request for oral sex. Having found that evidence was not and could not be given that "force" had been an element of the circumstances surrounding the alleged offence, Mr. Justice White directed that the jury find the accused not guilty.

Who is the provision for?

Section 16(1)(b) Criminal Evidence Act 1992 is a specific provision for the admission of a video recorded statement taken by a member of An Garda Síochána or a person competent for the purpose, as examination in chief evidence for a witness under the age of 14 or a person who has reached

¹⁴ ss. 27 and 28 Youth Justice and Criminal Evidence Act 1999 as amended by the Coroners and Justice Act 2009

¹⁵ S.137 of the Criminal Justice Act 2003 makes the provision available for other witnesses.

¹⁶ See footnote 13 above

that age who suffers from a “mental handicap”. It only applies to those in respect of whom such an offence is alleged to have been committed and is therefore for complainants only. The section only relates to offences to which Part III of the Act applies¹⁷ and the witness must be available for cross examination.¹⁸

The statement may be taken by a member of An Garda Síochána or “any other person who is competent for the purpose” and there is a legislative presumption that the video recording “shall” be admitted unless it is not in the interests of justice to do so or there is a risk of unfairness to the accused. The out-dated term “mental handicap” is not defined within the Act.¹⁹ Neither are the terms “any other person competent for the purpose”²⁰ nor “interests of justice”. Section 15 of the Act allows for the accused to view the video prior to the hearing while s.16(3) also contains the safeguard that, in estimating the weight, if any, to be attached to any statement contained in such a video recording, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

Concerns in respect of the Section

One of the concerns which emerged in *DPP v XY* was that, under the section, there is no provision which would require the witness, while making the statement, to tell the truth or indeed, any requirement on the part of the interviewer to make him or her aware of any consequence if he or she does not do so. There is no statutory declaration similar to the requirement as per s.21(2)(b) of the Criminal Justice Act 1984 by An Garda Síochána when taking witness statements.

However, the Good Practice Guidelines, as used by An Garda Síochána, are clear in the importance of eliciting from the witness a description of his or her comprehension of the importance of telling the truth.²¹ The Guidelines are, however, non-statutory and therefore not mandatory.

At hearing, s.27 of the Criminal Evidence Act 1992 dispenses with the requirement for a child under 14 or a person with a mental handicap who has reached that age, to give their evidence under oath or affirmation and states that the test for deciding whether he or she is competent to give evidence is whether he or she can give an intelligible

account.²² Yet the offence of perjury is contained within the legislation.²³

Should the witness give evidence which he or she knows to be false, a prosecution for perjury under this section for a child under 12 would not, in any case, be possible under the amended s. 52 of the Children Act 2001²⁴ and prosecution of a child under 14 could not proceed without the consent of the Director of Public Prosecutions. The DPP Guidelines for Prosecutors states that significant “mental disability” is a factor to be considered as to whether the public interest requires a prosecution.²⁵ This would be relevant in respect of a prosecution for perjury under the Act and it is submitted that such a prosecution would be rare.

The section is silent as to the necessary requirements for testing of the statement in order that it be admitted, unlike s.16 Criminal Justice Act 2006 which does state that the witness’ statement must be a statutory declaration, or on oath or affirmation, or he or she must realise that he or she must tell the truth. The only safeguards that the section offers are that the admission must not risk any unfairness to the accused and should be in the interests of justice which are surely insufficient for the purpose of consistency and certainty in the application of the section.

Procedural Aspects of the Section

Should the video recorded statement not cover all aspects of the evidence required, the legislation deals unsatisfactorily with the issue of the prosecution’s right to ask supplemental questions of the complainant at trial. The Good Practice Guidelines mention the possibility of supplementary video interviews being required²⁶ but the issue of whether the admitted video recording is a complete substitute for the examination in chief testimony of the complainant is one which has not yet been fully determined by a court in this jurisdiction. Section 16(1)(b) states that that the video recording “shall be admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible.”

From the prosecution point of view, an attendant factor of s.16(1)(b) is that it removes the requirement to list the complainant as a witness in the Book of Evidence and the subsequent obligation, post *DPP v Lacy*²⁷, to put him or her in the witness box. The result of this is that the complainant is not a prosecution witness up until a decision of the trial judge to admit the video recording and therefore, the prosecution has no right to ask any questions of the complainant. However, if the video recorded statement is admitted, it then becomes the examination in chief evidence of the complainant and the words “direct oral evidence”, possibly equating as they do to “examination in chief” evidence, indicate that the testimony is complete from the prosecution point of view, with no supplemental questions

17 It applies mainly to sexual offences, crimes of violence, pornography and trafficking offences as outlined in s. 12 of the Criminal Evidence Act 1992

18 See *Donnelly v Ireland* [1998] 1 IR 321; *White v Ireland* [1995] 2 IR 268. See also *A.S. v Finland*, European Court of Human Rights, (40156/07, 28th September 2010)

19 In *DPP v XY*, the Court accepted the World Health Organisation definition of the term intellectual disability as “a condition of arrested or incomplete development of the mind characterised by impairment of skills and overall intelligence in areas such as cognition, language, and motor and social abilities.” (Also contained in Annex A of the Good Practice Guidelines – Dept. of Justice, Equality and Law Reform. (July 2003)).

20 Members of the HSE are also being trained as Specialist Victim Interviewers to carry out interviews, generally in conjunction with An Garda Síochána. There are at present 80 Garda staff and 22 HSE staff trained in specialist victim interviews. However, to date, interviews have been conducted by Specialist Victim Interviewers from An Garda Síochána only.

21 Paras. 3.8-3.10 - Good Practice Guidelines, Dept. of Justice, Equality and Law Reform. (July 2003)

22 See *O’Sullivan v DPP and Judge Hamill* [1999] 2 I.R. 9

23 S.27(2) Criminal Evidence Act 1992

24 S.129 Criminal Justice Act 2006 amends s.52 of the Children Act 2001

25 Para 4.22, pg. 20 Guidelines for Prosecutors (www.dppireland.ie)

26 Para. 1.30 p.14 - Good Practice Guidelines - Dept. of Justice, Equality and Law Reform (July 2003).

27 *DPP v Lacy* [2005] JIC 1204

being permissible other than redirect questions arising from any cross-examination.

Mr. Justice White commented on the possibility of the complainant having to answer supplementary questions at the hearing and thereby undermining the whole point of the admission of the video recording, as being one of those situations where the law may at times be an ass. However farcical it seems, it may at times be necessary (and the English legislation anticipated this²⁸) that the witness may have to answer supplemental questions which are not covered on the video recorded interview and s.16(1)(b) does not provide for this.

Although also not specified in the legislation, paragraph xv of the Good Practice Guidelines recommend that the complainant watch the interview as it is being played at trial before the jury.²⁹ In *DPP v XY*, the complainant was at all times present in the video link witness suite in the Criminal Courts of Justice and watched the DVD of her interview while it was being played to the jury.³⁰

Disadvantages to the Accused

Apart from the inherent issues in respect of the examination in chief being taken in the absence of the accused or his or her legal representative or a judge, a significant difficulty of the section is that counsel for the accused will not be able to assess how the complainant will react to questioning in the environment of the courtroom and in light of this, the accused may wish to forego the right to cross-examination rather than risk damaging his or her case. In *DPP v XY*, an application for a direction was made at the end of the playing of the DVD evidence of the complainant rather than, as more usually occurs, at the end of the prosecution case. The defence counsel did not wish to run the risk of cross examination eliciting information which had not been forthcoming in the DVD recording. As he stated, he was making the direction application then because he should not be put in a position where to cross examine would possibly risk enlarging or elucidating further the prosecution case

28 Supplemental questions are legislated for in England and Wales under s.27 (5)(b) of the Youth Justice and Criminal Evidence Act 1999 as amended by the Coroners and Justice Act 2009 in limited circumstances where the video recording does not cover necessary aspects of the evidence.

29 P. 9 of the Good Practice Guidelines, Dept. of Justice, Equality and Law Reform (July 2003). Research carried out in England and Wales would indicate that the editing and viewing of the video recorded interview are significant factors which may have a huge impact on the witness and that issues surrounding these factors should be anticipated by the prosecution. See Joyce Plotnikoff and Richard Woolfson - "Measuring Up? Evaluation implementation of Government commitments to young witnesses in criminal proceedings." The Nuffield Foundation / NSPCC (July 2009) Paras. 6.2. and 6.3, pps. 69 and 70 (http://www.nspcc.org.uk/inform/research/findings/measuring_up_wda66048.html)

30 On a practical point, in the recent hearing, it was directed that the complainant was to view the video recording while not in view (via video link) of the jury. It was only after the video interview had been playing for some time that the court was made aware that the complainant was not in fact watching the video interview from the witness suite. It was then necessary to replay the interview. Practical operational points such as this can make the running of the trial extremely difficult and one can only speculate as to how these issues may impact upon the jury.

rather than diminishing it. This was in circumstances where the application was based on a deficiency of evidence of assault in the account of the complainant. Mr. Justice White said he would not rule on the application until the prosecution case was concluded. No cross examination was conducted and subsequently the application for a direction was granted.

Disadvantages to the Prosecution

Para. xvi of the Good Practice Guidelines³¹ state that the interviewer is not expected to act as counsel but yet it is submitted that there is an unfair expectation on the interviewer to gather all the information which will ground the offence at an early stage in the proceedings with little scope for a later amendment of any omissions or errors. This places an undue burden on the interviewer to conduct full examination in chief questioning while also taking a witness statement. It is submitted that An Garda Síochána are being asked to take on an enormous responsibility *albeit* for which they receive specialised training that no legal practitioner receives in this jurisdiction as yet.³²

In addition, where a number of years have passed, the difficulties for a child witness or a witness with an intellectual disability in remembering and relaying details of what is likely to have been an extremely traumatic event are not assisted by splitting the testimony into two and requiring the witnesses to be available for cross examination after such a lengthy period of time has passed. This has always been one of the difficulties of prosecution of cases involving child witnesses and witnesses with an intellectual disability. Section 16(1)(b) can only go so far in resolving this problem.

Editing and Playing of the Recording

Provision for editing of the recording is not explicitly made in the section but only implicit within the phrase "or any part thereof". One of the most important aspects of the playing of the recording in *DPP v XY* was the operational difficulties which were involved. It was unfortunate that the edited version of the recording resulted in a significant loss of audible quality and further delays were likely before a solution was put forward by the court stenographer who suggested that the visual recording be played and synchronised with the audio recording on his transcription equipment which would allow the full recording to be audible to the court.

The provision of transcripts of the interview for the jury, particularly where the complainant has a speech impediment, a strong regional accent or is unable to speak audibly enough for the recording to pick up, may overcome such difficulties in the playing of the video recording. In England and Wales,

31 P. 9 of the Good Practice Guidelines - Dept. of Justice, Equality and Law Reform (July 2003)

32 As was pointed out by prosecution counsel in *DPP v XY*, the Gardaí who conduct the s.16(1)(b) interviews are now more specifically trained than senior legal practitioners in the techniques of interviewing children and persons with an intellectual disability. Specific advocacy training for legal practitioners in this area is recognised as an ongoing need in respect of the advocacy training provided by the Honorable Society of Kings Inns and the Law Society.

case law³³ allows for a transcript to be given to the jury while the recording is being played.

The Good Practice Guidelines are clear about the requirements for good recording equipment to be used as well as the need for operational familiarity. However, what was apparent in *DPP v XY* was that some of the issues in respect of the playing of the video recording were unforeseeable. It was significant that, once the court admitted the video recorded interview, all the court practitioners did their utmost to have the recording played to the jury to avoid further delays.³⁴

We do not, in this jurisdiction, benefit from pre-trial plea and case management hearings similar to that available in England and Wales which would anticipate and resolve these issues. Nor are on-site editing facilities available where quick and efficient editing can be carried out. It falls to the practitioners and personnel involved to anticipate any difficulties and resolve them with limited resources in limited time. This is not ideal in any hearing.

Conclusion

The commencement of the section allows for the admission,

in a court of any jurisdiction, as evidence in chief, of a video statement recorded in the absence of the accused and/or his or her legal counsel (without a judicial authority to supervise the administration of the rules of evidence). The video recording can be made in the absence of the making of any form of statutory declaration, oath or affirmation and without the input of a legal practitioner familiar with the rules of evidence. Yet, while still an unsatisfactory “half-Pigot” solution, s.16(1)(b) Criminal Evidence Act 1992 is undoubtedly a practical step towards making the testimony of child witnesses and witnesses with an intellectual disability more easily heard within the criminal justice system. However, it raises serious issues as to the potential undermining of the rights of the accused. The recent hearing highlighted major flaws and lacunae within the legislation. Also, it is doubtful whether vulnerable witnesses are truly being protected by our current legislation. Many issues are being left to the trial judge to resolve and we have lost the opportunity to learn from the successes and failures of other common law jurisdictions such as Australia and England.³⁵ Significant research and revision of our current legislation is required if we are to meet our responsibilities to those who are most vulnerable in our criminal justice system. ■

33 *R v Welstead* [1996] 1 Cr. App. R. 59 See Archbold –Criminal Pleading Evidence and Practice pps 1307 -1308 (Sweet and Maxwell, 2010)

34 Operational difficulties, which can cause stress to the witness and his or her family, are also something which are noted to occur in the playing of the video recording in courts in England and Wales and it should not be underestimated as to how these issues may affect the witness and impact upon the trial. See Plotnikoff, Joyce and Woolfson, Richard - “Measuring Up? Evaluation of the implementation of Government commitments to young witnesses in criminal proceedings. “ (The Nuffield Foundation / NSPCC July 2009) (http://www.nspcc.org.uk/inform/research/findings/measuring_up_wda66048.html)

35 Criminal courts in England and Wales are now attempting to resolve the difficulties inherent in protecting the rights of the witness and the accused through the wide scale use of intermediaries. An initial pathfinder project, initiated in 2004, has now developed into a national implementation of the use of intermediaries whose role it is to identify and address the individual needs and issues of the vulnerable witness and liaise with the court, at pre-trial plea and case management hearings as well as at trial, as to how best the witness may communicate his or her testimony.

EXAMINERS OFFICE

OFFICE NOTICE 1/2011

On the 12th January 2011 the Minister for Justice Equality and Law Reform signed Statutory Instrument No 2 of 2011.

The Statutory instrument amends the current Rules of the Superior Courts by removing the requirement to file Examiners Office documentation in the Central Office of the High Court in addition to the Examiners Office itself.

From the 1st February 2011 all affidavits, notices of motion, notices to proceed, Examiner’s certificates and Examiners orders **should be filed in the Examiner’s Office only**. There will be no requirement to file these documents or copies of these documents in the Central Office of the High Court.

The introduction of these new Rules will eliminate the need to attend in the Central Office of the High Court in respect of matters which lie within the remit of the Examiner’s Office. Such matters include court liquidations, mortgage suits (well charging proceedings), administration suits and any other matter remitted to the Examiner’s Office by the court.

John Glennon
Examiner
24th January 2011

Thomson Reuters Round Hall Judicial Review Conference

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The Thomson Reuters Round Hall Judicial Review Conference 2010 took place in the Royal College of Physicians on Saturday the 13th November 2010, chaired by The Hon Mr Justice Nicholas Kearns, The President of the High Court. What follows is an overview of the main topics addressed in the conference papers delivered by the various speakers.

Errors of fact and Law

Mr James O'Reilly SC presented a paper entitled: "Error of Fact and Judicial Review" where he explored the record of the Irish Superior Courts on the issue of jurisdictional error. The current position in Irish administrative law in this area remains that an error of law made by a statutory or administrative tribunal or by a court of limited or local jurisdiction, if made within jurisdiction, is not reviewable even where this would give rise to an injustice,¹ unless the error appears on the face of the record; or where a collateral or "jurisdictional" fact is involved.² In contrast, the courts in England and Wales have long abolished the esoteric distinction between errors of law which go to jurisdiction and errors of law which do not.³ Mr O'Reilly recommended consideration of the English case law and review and clarification of the Irish position along similar lines.

The jurisdiction of the Superior Courts to review errors of fact was a further area highlighted by Mr O'Reilly as much in need of clarification in Irish law in order to address the existing conflict between EU law and national law. The Irish case law on the potential for review on the grounds of manifest error of fact in domestic law proceedings remains regrettably opaque. The decision *The State (Lynch) v Cooney*⁴ suggests that a review jurisdiction does extend to considering matters of fact referable to the exercise of a statutory jurisdiction in judicial review proceedings challenging a decision. Yet, although the judgment thus clearly contemplates the potential for a review of fact for the purposes of the jurisdiction exercised,⁵ it was not among the authorities brought to the notice of the High Court in the leading Irish authority in this area: *Ryanair Limited v Flynn*.⁶ In that case, Kearns J held that where a factual determination

of an administrative body is in issue, the potential for judicial intervention on this ground to quash the decision is limited to the grounds of unreasonableness or irrationality⁷ identified by Henchy J in *The State (Keegan) v Stardust Compensation Tribunal*.⁸ The decision in *Ryanair v Flynn* has subsequently been relied upon as maintaining the distinction between non-reviewable errors of fact and reviewable errors of jurisdictional fact.⁹ However, confusingly, there is also a growing body of case law in the area of asylum where error of fact *has* been taken into account by the High Court, where the assessment of the credibility of an applicant for asylum by the investigating authority placed reliance upon a significant error of fact in a manner adverse to the applicant.¹⁰

By way of contrast, English administrative law has developed and established clear jurisprudence providing for review where there has been an error of material fact in the case of *E v Secretary of State for the Home Department*.¹¹ Mr O'Reilly urged consideration of the decision in *E* and clarification of the area of error of fact by the Irish Superior Courts without delay.

Ultra Vires and the European Convention on Human Rights

Mr Anthony Collins SC delivered what he described as a first principles examination of the application of the European Convention on Human Rights¹² in Irish law. His paper examined the extent to which a public body that fails to perform its functions in a manner compatible with the Convention may be deemed to act *ultra vires* and thus its decisions quashed or impugned on such grounds in judicial review proceedings.

Section 3(1) of the European Convention on Human Rights Act 2003¹³ provides that "...every organ of State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions." Mr Collins argued that this section operates to impose a positive statutory obligation on State organs to construe the rules governing it and to apply those rules if at all possible in a manner compatible with the Convention. To disregard

1 A matter expressed in the dissenting judgment of Kingsmill Moore J in *The State (Davidson) v Farrell* [1960] IR 438 at 455.

2 *R (Martin) v Mahony* [1910] 2 IR 695.

3 The interpretation of the seminal decision of the House of Lords in this area, *Anisminic Limited v Foreign Compensation Commission*, by Lord Diplock in the case of *O'Reilly v Mackman* rendered any error of law made by an administrative tribunal or inferior court in reaching its decision reviewable in that jurisdiction.

4 [1982] IR 337.

5 [1982] IR 337.

6 [2000] 3 IR 240.

7 *Ibid.*, at 265.

8 [1986] IR 642.

9 See the comments of Feeney J in *VP and SP v Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform* [2007] IEHC 415, at 7 – 8.

10 See, for example, *AMT v Refugee Appeals Tribunal* [2004] 2 IR 607, at [20]; and *DVTS v Minister for Justice* [2008] 3 IR 476, at [29] – [33].

11 *E v Secretary of State for the Home Department* [2004] QB 414, at [66].

12 Hereafter, "the Convention."

13 Hereafter, "the Human Rights Act."

this obligation would, he argued, amount to an *ultra vires* act. As section 2(1) of the Human Rights Act imposes a similar duty on the Courts to interpret and apply the law “in so far as is possible” in a manner compatible with the Convention, Mr Collins suggested that failure by a court to comply with this statutory duty would equally amount to an *ultra vires* act. Notwithstanding the Supreme Court decision in *JMcD v PL*¹⁴ to the effect that the Convention is not directly applicable in Irish law, Mr Collins submitted that the effect of sections 2(1) and 3(1) is to place public bodies, including the Courts, under a statutory obligation *as a matter of Irish law* to perform their functions in a manner compatible with Ireland’s obligations under the Convention, except where Irish law is incapable of being applied or interpreted in a manner compatible with the Convention.

Mr Collins disagreed with the observations of Irvine J in the case of *Pullen v Dublin City Council (No. 3)*¹⁵ to the effect that as section 3(2) of the Human Rights Act creates a new action in damages for individuals who suffer loss or damage as a result of the breach by a State organ of the duty laid down in section 3(1), this deprived litigants of the option of seeking relief by way of judicial review on the grounds that a decision has been made *ultra vires*.¹⁶

A Review of Recent Landmark Cases

Conleth Bradley SC proposed a number of procedural reforms with respect to the judicial review leave requirement in order to improve its efficiency as a filtering process, as well as to ensure time and costs savings. First, he suggested that every leave application for judicial review ought to be on notice.¹⁷ Second, he proposed that the low threshold of “arguability” set out in *G v DPP*¹⁸ should be replaced with that suggested by Kearns J in the case of *O’Brien v Moriarty*¹⁹ of requiring a claimant to show a reasonably good chance of success if he is to be given leave.²⁰ Third, he recommended the adoption and application of the Commercial Court practice of “telescoped hearings”²¹ where, upon the agreement of the parties, the question of leave and, if appropriate, substantive relief can be considered and determined in one hearing.²²

Mr Bradley also presented an extensive review of recent case law. He examined the recent case of *Meadoms v Minister for Justice, Equality and Law Reform*²³ and the principles set out

therein regarding reasonableness and proportionality. In reviewing the extent to which political decisions are amenable to judicial review, he discussed *Doherty v The Government of Ireland and Others*²⁴ and the recent NAMA case, *Dellway Investment Limited and Others v NAMA and Others*.²⁵

In the area of arbitration, he referred to a recent Supreme Court case of *Galway City Council v Samuel Kingston Construction Limited and Hawker*,²⁶ where O’Donnell J warned against applying undue deference to the decision of an arbitrator, where issues of law are involved. He also reviewed recent cases developing the concept of bias (*AP v His Honour Judge Donagh McDonagh and PP*),²⁷ *Nurendale Limited (trading as Panda Waste Services) v Dublin City Council and Others*,²⁸ *Greenstar Limited v Dublin City Council and Others*²⁹ and *O’Brien & Desmond v Moriarty*³⁰ and legitimate expectation (*Atlantic Marine Supplies Ltd & Rogers v Minister for Transport*)³¹.

Is there a Future for Criminal Judicial Review?

Michéal P O’Higgins SC presented a paper entitled “Is there a Future for Criminal Judicial Review?”. Firstly, he noted the diminishing potential for prohibiting criminal trials on the grounds that lost evidence,³² delay³³ or an abuse of process³⁴ give rise to a real risk of an unfair trial.³⁵ However, he also observed what he called “green shoots of optimism” in the context of criminal judicial review in a number of areas. First, he highlighted the continuing judicial willingness to intervene in the context of *certiorari* applications to quash decisions made where unlawfulness, unreasonableness, irrationality and unfairness can be demonstrated.³⁶ He further emphasised the Supreme Court’s emphatic rejection of the view that the courts are vested with an overarching discretion to refuse relief on the basis of factors other than

14 [2007] IESC 81, (Supreme Court, 10 December 2009.)

15 [2009] 2 ILRM 484, at 498 – 499. (The decision in *Pullen* is currently under appeal to the Supreme Court.)

16 See the comments of Fennelly J in *Glencar Exploration plc v Mayo County Council (No. 2)* [2002] 1 IR 84, at 149 – 150, where he emphasised the primacy of *certiorari* as a form of relief in judicial review proceedings.

17 As proposed by the Law Reform Commission in their “*Report on Judicial Review Procedure*” (LRC 71-2004)

18 [1994] 1 IR 374, per Finlay CJ at 378 and per Denham J at 382.

19 [2005] IESC 32.

20 See also the leave requirement mandated in section 193 of the National Asset Management Agency Act 2009 of the Court being satisfied that the application “raises a substantial issue for the Court’s determination.”

21 See the case of *Sweetman v An Bord Pleanála & others* [2009] IEHC 174.

22 Adopted in the recent case of *Dellway Investment Ltd & others v National Asset Management Agency & others* [2010] IEHC 364.

23 [2010] IESC 3

24 [2010] IEHC 369; (unreported, High Court, Kearns P., November 3, 2010.)

25 [2010] IEHC 364; this case is currently under appeal to the Supreme Court.

26 [2010] IESC 18 (Supreme Court, March 25, 2010, O’Donnell J)

27 [2009] IEHC 310; (unreported, High Court, July 10, 2009)

28 [2009] IEHC 588

29 [2009] IEHC 588.

30 (Unreported, High Court, October 29, 2010).

31 [2010] IEHC 104.

32 *Braddish v DPP* [2001] 3 IR 127.

33 *Cormack v DPP and Farrell v DPP* (unreported, Supreme Court, 2nd December 2008).

34 Compare, for example, the decisions in *Evison v DPP* [2002] IESC 62 and *DS v DPP* (unreported, Supreme Court, 10th June, 2008) with the recent Supreme Court decision in *Warren Higgins v DPP* [2010] IESC 426.

35 In the context of missing evidence cases, concern in relation to unmeritorious and tactical applications has led Kearns P to direct that future leave applications for prohibition based on missing evidence grounds should be heard on notice to the DPP. (*Irvine v DPP*)

As regards what constitutes acceptable prosecutorial delay in summary cases, see the case of *Cormack v DPP and Farrell v DPP* (Unreported, Supreme Court, 2nd December, 2008.)

In the context of prosecutorial abuse of process, see the high threshold now established in *Warren Higgins v DPP*, [2010] IESC 426.

36 *Lalang Lado v Judge Martin and the DPP*, unreported, High Court, Kearns P, 26th April, 2010. (Refusal to vacate a bench warrant in circumstances where the accused had been in the lavatory at first call quashed.)

the procedural validity of the administrative decision under attack and reassertion of the principle that *certiorari* is a relief to be granted *ex debito justitiae* in *O’Keeffe v Connellan*.³⁷ Second, Mr O’Higgins commended the Supreme Court’s decision in the case of *H v DPP*,³⁸ for the court’s willingness to reconsider their jurisprudence in relation to the applicable principles in the context of delay in sexual abuse cases. Third, he praised the continuing application by the superior courts of strict and exacting standards when it comes to construing criminal statutes.³⁹ Fourth, he pointed to a number of successful challenges to procedurally deficient return for trial orders.⁴⁰ Fifth, he outlined a number of recent cases re-emphasising the necessity for Gardaí to inform citizens of the reasons for specific Garda activity when invoking compulsory police powers.⁴¹ Finally, he highlighted the cases of *Carmody v Ireland and Others*⁴² and *Heinullian v Governor of Cloverhill*,⁴³ upholding an accused’s right to be represented by counsel in the context of criminal prosecutions.

Fundamental Human Rights in EU Law Post-Lisbon

Michael Lynn BL delivered a paper on “Fundamental Human Rights in EU Law Post-Lisbon.” While the recognition of fundamental human rights has always been part of the EC or EU law,⁴⁴ one of the reforms brought about by the “Lisbon Treaty”⁴⁵ was to afford the Charter of Fundamental Rights “the same legal value” as the Treaties,⁴⁶ and to commit the European Union to accede to the European Convention on Human Rights, (ECHR).⁴⁷

Cases referred to included the recent Supreme Court decision in *Minister for Justice, Equality and Law Reform v Rettinger*,⁴⁸ where the Applicant opposed his surrender to Poland on foot of an European Arrest Warrant on the basis that he would be at risk of suffering inhuman or degrading treatment, contrary to Article 3 of the ECHR. The Supreme Court held that an individual’s surrender could be refused where evidence adduced provided “substantial grounds” for believing that if the individual were to be returned to the requesting country they would be exposed to a “real risk of being subjected to treatment contrary to Article 3 of the

ECHR.”⁴⁹ It is, as yet, unclear whether any other Articles of the ECHR may be invoked to prevent surrender.

The recent important decision of *Zambrano v Office National de l’Emploi*⁵⁰ was also discussed. Advocate General Sharpston handed down her opinion on the 30th September, 2010, where she analysed the impact of the Charter on EU Law rights flowing from Union citizenship. The case concerned a Union citizen child’s right to the company of his or her foreign national parents in the child’s Member State of citizenship (in this case, Belgium.)

Firstly, she held that the rights to “move and reside freely” outlined in Articles 20 and 21 of the TFEU ought to be read disjunctively such that a Union citizen has a free-standing right of residence under EU law apart from a right to move.⁵¹ She went on to state that as children cannot exercise this right without the support of their parents, Member State refusal to recognise a derivative right of residence for a foreign national parent could constitute an interference with a Union citizen child’s right of residence if found to be disproportionate by a national court.⁵² Second, she determined that the prohibition on discrimination on grounds of nationality outlined in Article 18 of the TFEU protected against “reverse discrimination,” towards citizens who have not moved from their Member State of citizenship from being treated less favourably than citizens of another Member State, where this would violate a fundamental right protected under EU law.⁵³ Finally, although rejecting the invocation of fundamental rights under EU law against a Member State, independently of any other provisions of EU law,⁵⁴ she proposed a gradual change in this direction in areas of EU competence.⁵⁵

In the area of refugee law and more specifically, the question of which member state has responsibility for determining an asylum application, when an asylum seeker has travelled through more than one member state, Mr Lynn also examined the cases of *Mamo, Mirza and Abrabimi v The Commissioner and the Minister*,⁵⁶ (currently under appeal to the Supreme Court) and the more recent case of *ME and others v Refugee Applications Commissioner*.⁵⁷ In the latter case, the Irish High Court has referred a question to the European Court of Justice for determination in light of adverse findings of the UNHCR⁵⁸ and the European Court of Human Rights⁵⁹ in relation to the treatment of asylum seekers in Greece.⁶⁰ The Applicants have argued that the discretion afforded by Article 3(2) must be interpreted to accord with the guarantee contained in Article 18 of the Charter of a right to asylum with due respect for the rules of the Treaty Establishing the

37 *O’Keeffe v Connellan* [2009] 3 IR 643.

38 [2006] 3 IR 575.

39 *DPP v Bernard Egan* [2010] IEHC 233; *Moorehouse v DPP* [2006] 1 IR 421.

40 *Healy v Minister for Fisheries and Others*, 28th May 2009; *Thomas “Slab” Murphy v DPP* 19th November 2008; *Mark Murphy v DPP*, 26th May 2009.

41 *Jason Mulligan v DPP* [2008] IEHC 334; *DPP (Higgins) v Farrell* 16th July 2009.

42 [2009] IESC.

43 20th May 2010.

44 As recognised by the European Court of Justice in the cases of *Stauder* [1969] ECR 425, para 7; and *Internationale Handelsgesellschaft* [1970] ECR 1125, para 4. See also the recognition by the European Court of Human Rights of the EU’s commitment to the protection of fundamental rights in *Bosphorus v Ireland*, (Judgment of 30th June, 2005, application number 45036/98).

45 The Treaty on European Union or “Lisbon Treaty” entered into force on 1st December 2009.

46 Article 6(1).

47 Article 6(2).

48 (unreported, Supreme Court, 23rd July, 2010.)

49 The case is currently before the High Court for re-determination.

50 Case C-34/09

51 [81] – [84]

52 [121]

53 [140] – [150]

54 [172].

55 [163].

56 (unreported, High Court, 21st October, 2009.)

57 Record Number 2010/177 JR.

58 UNHCR Position Paper Re: “The Return to Greece of Asylum Seekers with Interrupted Claims,” (26/07/07)

59 *SD v Greece*, Application No. 35341/07, unreported 11/06/09.

60 Similar arguments have not found favour before the European Court of Human Rights: see *KRS v United Kingdom* (Application No. 32733/08, decision of the 2nd December 2008.)

European Community and the Geneva Convention⁶¹ and Protocol⁶² Relating to the Status of Refugees. They have submitted that Member States are thus prohibited from transferring an asylum seeker to another Member State under Regulation 343/2003 and are obliged to determine an asylum application when sufficiently cogent material is provided questioning the compliance of the other Member State with the guarantee afforded by Article 18. The decisions of the Supreme Court on appeal in *Mamo* and the European Court of Justice in *ME* are awaited with anticipation. ■

61 28 July 1951.

62 31 January 1967.

Receivers Invincible! Or are they?

The duties of receivers and mortgagees to companies and their guarantors

KARL SWEENEY BL

Introduction

It is common practice that lenders to small or medium sized companies will take security over their main assets, such as a fixed charge over its real property and a floating charge over its business. They will almost always reinforce this by taking personal guarantees from the company's directors.

If the company fails, the lender will wish to remove itself and enforce all of its security whilst attempting to limit its inconvenience and expense. The lender may take steps to sell the charged property as mortgagee or appoint a receiver, and in the event of there being a shortfall, it can then pursue the directors who have provided the guarantees.

The guarantee claim should be straightforward if the guarantee was executed correctly. Often the directors simply concede and pay, but if they are short of money themselves (as they often are since their life savings may be tied to their businesses), then they might try to frustrate the guarantee claim by questioning the detail in order to negotiate a deal with the lender.

The most common argument deployed by guarantors is to claim that the charged property was sold by the lender at an undervalue (sometimes whether or not this is the case). They will argue that the lender is liable for this to everyone who has an interest in the equity of the property (including guarantors) and therefore their liability under the guarantee should be reduced.

Instead of selling as a mortgagee, the lender may instead appoint a receiver by virtue of its powers in the mortgage or debenture. The relevant clause in the said mortgage/debenture should provide that although the receiver is chosen and appointed by the lender, he is to act as agent of the company at all times.

This represents one of the key advantages to receivership. It allows the lender to avoid liability for the receiver's acts or omissions. Needless to say, it does not get the receiver off the hook if he breaches his duties, but it should not prevent

the lender from enforcing its rights against the rest of its security.

A problem occurs when the lender actively intervenes in the conduct of the receivership. This might happen in practice more than theory would suggest. Why? Because almost always, the receiver will report to the lender on paper and/or at meetings, and will often look to the lender for some degree of approval for his decisions.

A thin line exists between the lender being informed (and expressing its views) and actually influencing the decision that is made by the receiver. It is not difficult for the insolvent company or its guarantor to suggest that the lender is in fact directing the receiver, and therefore should be fixed with some liability for any breaches of duty.

The courts must therefore weigh up the opposing factors – the need of the lenders to be able to enforce their security promptly and without undue cost, and the protection of guarantors against being short changed by lenders who take insufficient care to make sure that charged property is sold for proper value.

This begs the important question – what duty is owed by the lender or receiver to the company or the guarantor?

The *Downsview* Jurisprudence

Up until 1993, judicial authority was tending towards making life easier for guarantors than for lenders. The courts held that a guarantor could maintain a claim in negligence against a lender who sold (or allowed a receiver to sell) a property at an undervalue; See *Cuckmere Brick Co Ltd and another v Mutual Finance Ltd* [1971] 2 All ER 633 and *Standard Chartered Bank Ltd v Walker and another* [1982] 3 All ER 938.

A duty of care in negligence might incorporate all sorts of duties: to sell quickly or not; to take steps to improve the property; in the case of floating charge security, to continue to trade the company, or some parts of the company.

This position altered with the most important case in this area of law: *Downsview Nominees Ltd v First City Corp* [1993]

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A directory of legislation, articles and acquisitions received in the Law Library from the
16th November 2010 up to 28th January 2011
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

ADMINISTRATIVE LAW

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– Regional Technical Colleges Act 1992 (No 16) sch 2, para 14 – Universities Act 1997 (No 24), ss 7 & 13 – Official Languages Act 2003 (No 32) ss 2, 4, 10, 13 & sch1, para 1 – Constitution of Ireland 1937, Article 25.4.6° - Plaintiff's appeal allowed (40 & 415/2009 – SC – 13/5/2010) [2010] IESC 32
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Articles

Daly, Eoin
Regulating religious functions: the strange case of mass cards
(2010) 9 HLJ 55

O'Connell, Paul
'Anxious scrutiny' in the Irish courts: too little, too late?
(2008-9) 8 HLJ 75

Scott, Maria
The house that the Supreme Court built: the rulings in Coughlan and McKenna, the Lisbon Treaty and the constitutional referendum in Ireland
(2010) 9 HLJ 219

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Article

Finegan, Thomas
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Award

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– Whether evidence admissible – Whether evidence of witness necessary in reaching decision – Application to remove arbitrator – Misconduct of arbitration – Errors of law on face of record – Arbitrator falling asleep during arbitration – Adequacy of performance of decision maker dependent on quality of decision – Whether arbitrator falling asleep reason in itself to remove arbitrator – Loss of confidence in arbitrator – Accumulation of incidents leading to loss of confidence – Whether arbitrator's interpretation of law correct – Whether remedy contained in contract between parties excluded common law remedy of repudiatory breach – *McCarthy v Keane* [2004] IESC 104 [2004] 3 IR 617 and *Keenan v Shield Insurance Co. Ltd.* [1988] IR 89 followed; *McStay v Assicurazioni Generali SPA* [1991] ILRM 237, *Laing Management Ltd v Aegon Insurance Company (UK) Ltd* (1997) 86 BLR, *Dalkia Utility Services Plc v Celtech International Ltd* (2006) EWHC 63, *Limerick City Council v Uniform Construction Ltd* [2005] IEHC 347 [2007] 1 IR 30, *Carrickdale Hotel v Controller of Patents* [2004] IEHC 85 [2004] 3 IR 410, *McJ Gleeson v Competition Authority* [1999] 1 ILRM 401 and *Orange v ODTR (No 2)* [2000] 4 IR 159 considered: *R v Betson* [2004] EWCA Crim 254 distinguished; *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd, The MV Pamphilos* [2002] EWHC 2292 (Comm); (2002) 2 Lloyd's Rep 681 and *London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWCH 1749 considered - Arbitration Act 1954 (No 26), ss 27, 28, 36, 37 & 38 – Plaintiff's appeal allowed (414/2008 – SC – 25/3/2010) [2010] IESC 18

Galway City Council v Samuel Kingston Construction Ltd

Article

Carrigan, Michael W.
Arbitration act spells radical changes
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Library Acquisition

Hill, Jonathan
International commercial disputes
4th edition

BANKRUPTCY

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Motion to dismiss – Summonses based on judgment debt – Whether issue arose on summonses requiring litigation outside bankruptcy proceedings – Whether court precluded from undertaking investigation of merits of case – *Minister for Communications, Energy and Natural Resources v M* [2009] IEHC 413 (Unrep, McGovern J, 12/5/2009) - Bankruptcy Act 1988 (No. 27), s. 8 – Summonses dismissed (2009/5054/5055/5056 – Dunne J – 1/3/2010) [2010] IEHC 63 *F (P) v D (K), (M) N & (McN) S*

CHARITY LAW

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Picarda, Hubert A P
The law and practice relating to charities
4th edition
Haywards Heath: Tottel Publishing,
2009
N215

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Carr, Nicola
Child care (amendment) bill 2009 - an attempt to arbitrate on a system's logic
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Report of the Ombudsman for children on the implementation of children first: national guidelines for the protection and welfare of children
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Lievens, Eva
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The Netherlands: Martinus Nijhoff Publishers, 2010
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to have been aware company insolvent – Continuation of trading and failure to take steps to liquidate company – No prospect of discharging debts – Lack of commercial probity – *Re Squash (Ireland) Ltd* [2001] 3 IR 35; *La Moselle Clothing Ltd v Soualbi* [1998] 2 ILRM 345; *Re Lo-Line Motors Ltd* [1988] BCLC 698; *Re Digital Channel Partners Ltd* [2004] 2 ILRM 35; *Re SPH Ltd* [2005] IEHC 152, (Unrep, Finlay Geoghegan J, 25/5/2005) considered - *Re Barings plc: Trade Secretary v Baker* [1999] 1 BCLC 433; *Re Barings plc: Trade Secretary v Baker* [2000] 1 BCC 523 approved – Companies Act 1990 (No 33), s 150 – Company Law Enforcement Act 2001 (No 28), s 56 – Restriction orders granted (2008/249 Cos – Finlay Geoghegan J – 19/4/2010) [2010] IEHC 115
Stafford v Murphy

Examiner

Interim examiner – Remuneration, costs and expenses – Role of interim examiner – Obligation to vouch costs and expenses – Limited functions of interim examiner – Hourly rate charge – Whether part of work for which interim examiner sought remuneration fell within his powers – Whether court ought to sanction hourly rate charge sought – *Re Coombe Importers Ltd* (Unrep, Hamilton CJ, 22/6/1995), *In re Edenpark Construction Ltd* [1994] 3 IR 126 and *Re Sharmane Ltd* [2009] IEHC 377, [2009] 4 IR 285 followed - Rules of the Superior Courts 1986 (No 3) 1991 (SI 147/1991), O 75A – Companies (Amendment) Act 1990 (No 27), ss 7, 9 and 29 – Rate reduced and costs referred to taxing master (2010/2Cos – Kelly J – 17/6/2010) [2010] IEHC 240
Re Missford Ltd t/a Residence Members Club

Examinership

Repudiation of leases - Insolvency – Interim examiner – Wholly owned subsidiary - Independent accountant report – Closure of underperforming stores essential to survival – Objection of landlords – Whether company failed to make full disclosure – Effect of repudiation – Property rights – No application to repudiate where parent company guarantor – Whether selection criterion for repudiation based on commercial considerations - Interim application - Compromise possible if application refused – Whether dominant motive for exclusion of leases for which repudiation not sought protection of interests of holding company - *Re Linen Supply of Ireland Ltd* (Unrep, SC, 10/12/2009) considered - *Re Linen Supply of Ireland Ltd* [2010] IEHC 28 (Unrep, McGovern J, 03/02/2010) distinguished - *Re Traffic Group Ltd* [2007] IEHC 445 [2008] 3 IR

253 and *Re Vantive Holdings Ltd* (No 2) [2009] IESC 69 (Unrep, SC, 14/10/2009) followed - Companies (Amendment) Act 1990 (No 27), ss 20(1) and 20(3) - Relief refused (2010/117COS – McGovern J – 23/04/2010) [2010] IEHC 155
In re Bestseller Retail Ireland Ltd

Examinership

Scheme of arrangement – Company repudiated leases - Scheme opposed by landlord creditors – Landlords prospective creditors at time of presentation of petition – Claim for future rent - Claim that scheme unfair and inequitable – Claim that scheme caused prejudice to landlord creditors – Jurisdiction of court to approve scheme – Amendment of scheme – Debts due to landlord creditors subject to impairment under the Act – Whether scheme of arrangement unfair and inequitable – Whether landlord creditors prejudiced by scheme of arrangement – Whether court had jurisdiction to approve scheme – Whether debts due to landlord creditors subject to impairment under the Act - Whether scheme should be amended - *Re Wogans (Drogheda) Ltd* (Unrep, Costello J, 7/5/1992) and *Re Cisti Gagan Barra Teo* [2008] IEHC 251 [2009] 1 ILRM 182 applied; *Stonegate Securities Ltd v Gregory* [1980] Ch 576, *Re Park Air Services plc* [1999] 2 WLR 396, *Oppenheimer v British and Foreign Exchange and Investment Bank* [1877] 6 Ch D 744, *Re Cancol Ltd* [1996] 1 All ER 37 followed; *Albatros Feeds Ltd v Minister for Agriculture* [2006] IESC 51 [2007] IR 221, *Blake v AG* [1982] IR 117 and *In re Housing (Private Rented Dwellings) Bill 1981* [1983] 1 IR 181 considered – Companies (Amendment) Act 1990 (No 27) ss 2, 3, 9, 18, 20, 22, 24, 25, 29 – In Scheme approved with amendments (2009/523COS – McGovern J – 3/2/3010) [2010] IEHC 28
In Re Linen Supply of Ireland Ltd

Examinership

Scheme of arrangement – Creditor opposing scheme – Whether scheme could be approved – Whether court had jurisdiction to approve scheme of arrangement – Whether businesses capable of surviving as going concern – Nature of examiner – Purpose of legislation – Jurisdiction of court – Overall objective of schemes – Onus of proof on examiner – Sale of profitable assets – Holding company – *In re Vantive Holdings* [2009] IESC 68, (Unrep, SC, 11/8/2009) and *In re Clare Textiles Ltd* [1993] 2 IR 213 followed; *In re Tuskar Resources plc* [2001] 1 IR 668 considered - Companies (Amendment) Act 1990 (No 27), ss 2, 2(2) 24(1), 24(4) and 25 – Creditor's appeal

allowed (440/2009 – SC – 4/3/2010) [2010] IESC 11
Re Timway Ltd

Liquidation

Members voluntary winding up – Subsequent petition by creditor to substitute voluntary winding up with compulsory winding up – Application for directions - Factors to be considered - Petitioner landlord creditor – Future rent payable to petitioner – Effect of voluntary winding up on petitioner – Main purpose of voluntary winding up to disclaim lease – Leasehold constituted onerous property - Whether compulsory winding up necessary – Whether directions should be given - Whether grievances of petitioner justified - *Re Hayes Homes Ltd* [2004] IEHC 124 (Unrep, O'Neill J, 8/7/2004) and *Re Balbradagh Developments Ltd* [2008] IEHC 329 [2009] 1 IR 597 applied – *Re Naïad Ltd* (Unrep, McCracken J, 13/2/1995), *Re Ranks (Ireland) Ltd* [1988] ILRM 751, *Tempany v Royal Liver Trustees Ltd* [1984] ILRM 273 and *Re Frederick Inns* [1994] 1 ILRM 387 considered – Companies Act 1963 (No 33) ss 267, 277, 286, 290 – Companies (Amendment) Act 1990 (No 27) ss 29, 31, 139 - Rules of the Superior Courts 1986 (SI 15/1986) O 74 r 68, O 78 r 138 - Relief refused; directions given (2010/55COS – Laffoy J – 22/3/2010) [2010] IEHC 163
Re Larkin Partnership Ltd (In Voluntary Liquidation)

Liquidation

Preferential creditors – Subrogation – Recoupment – UK guarantee institution – Payments in respect of employees – Whether debt gains priority – Whether debt acquires preferential status by subrogation or recoupment – Whether debt can obtain preferential status when legislation does not provide for it – Whether statutory framework excludes equitable principles of subrogation – *Station Motors Ltd v AIB Ltd* [1985] IR 756 and *Re Rampgill Mill Ltd* [1967] 1 Ch 1138 considered - Companies Act 1963 (No 33), s 285 – Companies (Amendment) Act 1982 (No 10), s 10 - Protection of Employees (Employer's Insolvency) Act 1984 (No 21), s 10 – Directive 80/987/EEC – Liquidator's appeal allowed (367/2006 – SC – 18/3/2010) [2010] IESC 15
Re Bell Lines Ltd

Shares

Legal ownership – Register of members - Share transfers - Share transfers not stamped - Current issued share capital - Extent of petitioner's shareholding

in company - Whether petitioner member of company - Whether proper instrument of transfer - Whether failure to stamp stampable document invalidates document – Whether stamping simply revenue requirement - Whether company entitled to register petitioner as member notwithstanding that transfer not stamped - Requirements in relation to maintenance of register of members - Rectification of register - *Nisbet v Shepherd* [1994] 1 BCLC 300 and *Re Motor Racing Circuit Limited* (Unrep, SC, 31/1/1997) followed - Companies Acts 1963 (No 33), ss 31, 81, 116, 122, 123, 124, 205, 213 and appendix N - Stamp Duties Consolidation Act 1999 (No 31), s 127(1) - Held that petitioner member of company and owns 7,936 shares in company jointly with respondent (2008/402COS - Laffoy J - 12/2/2010) [2010] IEHC 38
Kelly v Kelly

Winding up

Liquidation – Petition – Debt disputed – Arrears in shopping centre service charges Arbitration clause in lease contract – Whether petition an abuse of process – Whether court obliged to stay petition pending arbitration – Whether debt disputed in good faith and on substantial grounds - *Truck & Machinery Sales Ltd v Marubeni Komatsu Ltd* [1966] 1 IR 12 applied - *Gaya Ltd v Applied Medical Resources Corporation* [2006] IEHC 402 (Unrep, Kelly J, 30/6/2006); *Hayter v Nelson & Home Insurance Co.* [1990] 2 Lloyd's Rep. 265; *Campus & Stadium Ireland Ltd v Dublin Waterworld Ltd* [2005] IEHC 201 [2006] 2 IR 181 considered - Companies Act 1963 (No 33), s 214 - Arbitration Act 1980 (No 7), s 5 - Petition granted (2009/708COS – Laffoy J – 11/1/2010) [2010] IEHC 5
In re Abby Trinity Retail Ltd

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Cabinet confidentiality

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access – Information on emissions into environment – Whether meetings of Government internal communication of public authorities – Whether meetings of Government proceedings of public authorities – Whether discussions at Government meetings governed separately – *Van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten (Cases C-430 and 431/93)* [1995] ECR I-04705 considered - European Communities (Access to Information on the Environment) Regulations 2007 (SI 133/2007), articles 7, 8, 9, 10 and 13 – Constitution of Ireland, 1937, Article 28 – Appeal allowed (2008/183MCA- O’Neill J – 4/6/2010) [2010] IEHC 241
An Taoiseach v Commissioner for Environmental Information

Statute

Promulgation of legislation – Process of promulgation of laws – Constitutional arrangements for promulgation – Publication of notice in Iris Oifigiúil – Whether publication of Act necessary – Extradition – Appeal – Leave to appeal to Supreme Court – Whether appeal properly before Supreme Court – Whether certificate required from High Court – *Gottfried Heinrich (Case C-345/06)* [2009] ECR I-1659 and *Nolan v Russia* (2009) EHRR 262 distinguished - European Arrest Warrant Act 2003 (No 45), s 16(12) – Criminal Justice (Miscellaneous Provisions) Act 2009 (No 28), s 12(f) – Constitution of Ireland, 1937, Article 25 – Respondent’s appeal dismissed (413/2009 – SC – 13/5/2010) [2010] IESC 33
Minister for Justice, Equality and Law Reform v Adach

Statute

Validity – Gender discrimination – Sexual offences – Sexual intercourse with child under 17 years – Immunity from prosecution afforded to female children – Whether discrimination on grounds of gender constitutionally permissible – Whether discrimination justified by reason of differences of physical or moral capacity or social function – Adverse effects of under age sexual activity - Adverse effects borne unequally – Risk of pregnancy – Entitlement of society to deter under age sexual activity – Immunity limited to sexual activity carrying risk of pregnancy – *SM v Ireland (No 2)* [2007] IEHC 280, [2007] 4 IR 369 followed; *R v Kirk* [2002] EWCA (Crim) 1580, [2002] Crim LR 756; *E v DPP* [2005] EWHC (Admin) 147, (Unrep, English HC, Pill LJ, 1/2/2005) and *R v G (Home Secretary)* [2008] UKHL 37, [2009] 1 AC 92 considered - Criminal Law (Sexual Offences) Act 2006 (No 15), ss 3 and 5

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D (M) (a minor) v Ireland

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Breach

Franchise agreements – Notice premises sold – Sale not proceeding - Trading under new name - Non-compete clause – One year temporal limit – One mile geographical limit - Whether unreasonable or unlawful restraint of trade – Whether clauses void – Whether contrary to competition law – Whether abuse of process – Whether interim injunction inappropriate – Breach of duty of disclosure – Whether non-disclosure precludes entitlement to equitable relief – Whether injunction for payment of sums – Expiry of temporal limit of restriction clause – Undertakings – Loss of management and marketing fees – Whether defendant directed to account for profit – Whether damages proper remedy - Whether mandatory injunction justified – Trading post termination – Option to purchase not exercised - Erratic approach to sale of premises - Whether defendant entitled damages – Publication of interim injunction – Whether intention

to inflict damage on reputation – Whether plaintiff instigator of press release - *John Orr Limited v Orr* [1987] ILMR 702 followed; *Cooper-Flynn v RTE* [2004] 2 IR 72 considered - Competition Act 2002 (No 14) - Damages granted (2008/1683P – Laffoy J - 17/12/2008) [2008] IEHC 466

O’Briens Irish Sandwich Bars Limited v Byrne

Breach

Specific performance – Oral agreement – Purchase of shareholding in company - Whether parties arrived at concluded agreement – Whether agreement had intent and capability of forming binding legal contract – Whether oral agreement to be implemented by reference to further advice from company accountant and solicitors - Specific performance and damages granted (2005/2905P – Murphy J – 16/3/2010) [2010] IEHC 73
O’Reilly v Goff

Building contract

Interlocutory injunction – Receiver – Effect of appointment of receiver on contracts – Status of receiver – Liability of receiver – Priority of rights under building agreement and in mortgage – Purpose of contractual licence in building agreement – Application, *inter alia*, to compel defendants relinquish possession of land - Reasonable cause of action - Whether appropriate to join firm of employment of receiver as defendant – Whether rights under building agreement has priority over rights in mortgage unregistered at date of building agreement – Whether equitable rights under mortgage and rights of possession under building agreement suspended until determination of building agreement – Whether receiver entitled to possession of subject matter of mortgage where subject matter changed in character – Whether receiver bound by terms of building agreement – Whether serious question to be tried – Whether damages adequate remedy – Whether balance of convenience lies in favour of granting relief – *Hounslow LBC v Twickenham GD Ltd* [1971] 1 Ch 233 distinguished – *American Cyanamid v Ethicon Ltd*, [1975] AC 396; *Campus Oil v Minister for Industry (No 2)* [1983] 1 IR 88 considered - *Tara Civil Engineering Ltd v Moorfield Developments Ltd* (1989) 46 BLR 72; *Lathia v Dronsfield Bros Ltd* [1987] BCLC 321; *Ardmore Studios (Ir) Ltd v Lynch and Others* [1965] 1 IR 1; *Astor Chemical v Synthetic Technology* [1990] BCLC 1; *MacJordan Construction Ltd v Brookmount Erostin Ltd* [1992] BCLC 350; *De Mattos v Gibson* (1858, 1859) 4 De G & J 276; *Swiss Bank v Lloyds Bank* [1979] 3 WLR 301; *Gale v First National Building Soc* [1985] IR 609; *Barry v Buckley* [1981] 1 IR

306 approved - *Ó Murchú t/a Talkology v Eivcell Ltd* (Unrep, SC, 21/2/2001) applied; - Conveyancing Act 1881 (44 & 45 Vic, c 41), s 19 - Rules of Superior Courts (SI No 15/1986), O 19 r 28 - Reliefs sought by plaintiff refused, relief sought by first to third defendants granted (2009/10071P - Laffoy J - 21/4/2010) [2010] IEHC 162

Moylist Construction Ltd v Doheny, Deloitte & Touche, Ulster Bank Limited

Interpretation

Terms - Incorporation - Subsequent agreements - Collective bargaining agreements - Whether capable of binding parties to individual contracts - *Hay v O'Grady* [1992] 1 IR 210 distinguished - *Kenny v An Post* [1988] IR 285; *O'Rourke v Talbot Ireland Limited* [1984] ILRM 587; *Transport Salaried Staffs Association v Coras Iompair Éireann* [1965] IR 180 approved - Defendant's appeal allowed (2007/298 - SC - 29/4/2010) [2010] IESC 23

Irish Pharmaceutical Union and Others v Minister for Health and Children

Sale of land

Breach - Specific performance - Remedy in damages - Unconditional contract for sale of lands to be closed by sub-sale - Special conditions in sub-contract - Failure to complete sale within specified time period - Rescission of head contract - Whether contract for sale under head contract void for uncertainty or unenforceable - Whether defendant's liability affected if head contract void for uncertainty or unenforceable - Whether rescission of head contract affected by failure of plaintiffs to satisfy special conditions - Whether plaintiffs had sufficient interest in lands and could compel owner of lands to concur in proposed sale - Whether closing date could be implied into head contract - Whether completion notice invalid - Whether loss of non-refundable deposit in head contract a loss which was reasonably foreseeable - Whether defendant liable to plaintiffs for difference between two contract prices - *Harold Elliott (Builders) Ltd v Pierson* [1948] 1 Ch 452 considered - Judgment for €1,400,000 against defendant; rescission of sub-contract; counterclaim dismissed (2008/3455P - Feeney J - 22/2/2010) [2010] IEHC 72

Moloney v Fox

Sale of land

Terms - Specific performance - Agreement to purchase site - Agreement to construct road - Planning permission application with inaccurate map - Missiting of site road - Roadway constructed incorrectly

- Excess cost of road - Equitable remedy - Reasonable damages - Distortion of site - Whether plaintiffs entitled to equitable remedy - Whether land survey subject to error - Whether road intruded on plaintiffs' or defendants' site - Whether claim for reasonable damages arose - Damages awarded (2004/19480P - Charleton J - 20/5/2010) [2010] IEHC 230

Casey v Dondall

Specific performance

Oral contract - Statute of Frauds - 'Without prejudice' privilege - Authority of solicitor to act for defendant - Effect of correspondence post-agreement - Whether correspondence headed 'without prejudice' privileged - Whether concluded agreement - Whether adequate note or memorandum to satisfy Statute of Frauds - Whether solicitor authorised to act on defendant's behalf - *South Shropshire District Council v Amos* [1986] 1 WLR 1271; *O'Flanagan v Ray-Ger Limited* (Unrep, HC, Costello J, 28/4/1983); *Ryan v Connolly* [2001] 1 IR 627; *Bradford & Bingley plc v Rashid* [2006] UKHL 37, [2006] 1 WLR 2066; *Cutts v Head* [1984] 1 Ch 290 and *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 WLR 1378 considered - *Winn v Bull* (1877) 7 Ch D 2, *Guardian Builders Limited v Kelly* [1981] 1 ILRM 127 and *Mulhall v Haren* [1981] 1 IR 364 approved; *Kelly v Park Hall School* [1979] IR 340, *Boyle v Lee* [1992] 1 IR 555, *Supermac's Ireland Ltd and McDonagh v Katesan (Naas) Ltd* [2000] 4 IR 273 and *Jodifern Ltd v Fitzgerald* [2000] 3 IR 321 applied - Statute of Frauds (Ireland) 1695 (7 Will 3, c 12) - Vendor and Purchasers Act 1874 (37 & 38 Vic, c 78) - Relief granted (2008/4997P - Murphy J - 4/3/2010) [2010] IEHC 167

O'Connor v Elliott and Company Ltd

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Library Acquisition

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CORONER

Inquest

Powers of coroner - Post-mortem - Special examination - Genetic tests - Whether genetic tests carried out by coroner unlawful - Whether coroner called all relevant witnesses - Whether coroner proper person to be nominated to carry out post-mortem - Whether

no relevant evidence before coroner to support finding made - Whether inquest accorded with fair procedures - *Ramseyer v Mabon* [2005] IESC 82 [2006] 1 IR 216; *Eastern Health Board v Farrell* [2001] 4 IR 627; *Northern Area Health Board v Geraghty* [2001] 3 IR 321; *Morris v Dublin City Coroner* [2000] 3 IR 592; *Hanley v Cusack* (Unrep, McGuinness J, 10/6/2010) and *Farrell v Attorney General* [1998] 1 IR 203 considered - Coroners Act 1962 (No 9) - Relief refused (2008/549JR - Hedigan J - 19/3/2010) [2010] IEHC 74
Bingham v Farrell

Inquest

Procedure - Fair hearing - Next of kin - Contrary evidence - Scope statutory discretion - Whether widow excluded from meaningful participation - Verdict - Death by misadventure - Cannabis secondary and contributory cause of death in medical report - Whether entitlement to rely on pathologist finding that death precipitated by cannabis use - Whether other causes of death considered - Absence of contrary evidence - Whether Coroner acting within discretion in not seeking contrary views - Deference to Coroner's opinion - *O'Keefe v An Bord Pleanála* [1993] 1 IR 39 applied - *Farrell v Attorney General* [1998] 1 IR 203 considered - Coroners Act 1962 (No 9) - Relief refused (2007/134JR - Hedigan J - 28/04/2010) [2010] IEHC 154
Byrne v Geraghty

COURTS

Jurisdiction

Slip rule - High Court - Inherent jurisdiction - Orders - Amendment - Application to amend order made and perfected - Test to be applied - Whether order made accurately reflecting judgment and intention of court - Contempt - Breach of order - Standard - Whether plaintiff in breach of order as made and perfected - Test to be applied - Whether breach of order intentional - Whether standard of proof beyond reasonable doubt - *Belville Holdings Ltd v Revenue Commissioners* [1994] ILRM 29, *GMcG v DW (No 2)* [2000] 4 IR 1, *In re Swire* (1885) 30 Ch D 239, *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] 1 AC 15, *Stancomb v Trowbridge Urban District Council* [1910] 2 Ch 190 and *Competition Authority v Licensed Vintners Association* [2009] IEHC 439, (Unrep, McKechnie J, 24/7/2009) approved - European Convention on Human Rights 1950, article 6 - Amendment refused (2007/52MCA - 26/2/2010) [2010] IEHC 48

Kelly v National University of Ireland, Dublin

Jurisdiction

Stare decisis – Decision of High Court – Inadequate argument – Deficient reasoning – Common law offence – Whether offence known to law – *Thorpe v Director of Public Prosecutions* [2007] 1 IR 502, *Attorney General v Cunningham* [1932] IR 28, *King v Attorney General* [1981] IR 233, *Irish Trust Bank v Central Bank of Ireland* [1976] ILRM 50, *Re Worldport Ireland Ltd (In liquidation)* [2005] IEHC 189 (Unrep, Clarke J, 16/06/2005) and *Re Industrial Services Co Limited* [2001] 2 IR 118 (Kearns) followed; *Kelly v O’Sullivan* (1991) 9 ILTR 126 and *Clifford v DPP* [2008] IEHC 322 (Unrep, Charleton J, 29/10/2008) considered – Criminal Justice (Public Order) Act 1994 (No 2) – Relief refused (2009/835)JR – Kearns J- 23/04/2010) [2010] IEHC 231
Brady v DPP

CRIMINAL LAW

Autrefois acquit

Assault – Summary prosecution – Failure of prosecution to appear on hearing date – Dismissal by District Court judge – Subsequent prosecution on indictment – Legal effect of order of District Court judge – Whether dismissal on merits or dismissal without prejudice – Options available to District Court judge – Delay in instituting judicial review proceedings – Whether real risk of unfair trial in absence of CCTV footage – Inculpatory admissions – Balancing exercise to be carried out – *Dixon v DPP* (Unrep, Geoghegan J, 1/12/1997) and *DPP v Ní Chonduín* [2007] IEHC 321, [2008] 3 IR 498 distinguished – *Holmes v Campbell* [2008] EWHC (Admin) 503, *R v Dabhade* [1993] QB 329 and *McFarlane v DPP (No 2)* [2008] IESC 7 (Unrep, SC, 5/3/2008) considered – Courts Act 1971 (No 36), s 14 – Non-Fatal Offences Against the Person Act 1997 (No 26), s 15 – District Court Rules 1997(SI 93/1997), O 23, r 3 – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 11 – Relief refused (2008/1167)JR – O’Neill J – 26/3/2010) [2010] IEHC 100
Cleary v DPP

Bail

Refusal to grant bail – Fair procedures – Bias – Appearance of bias – Refusal by trial judge to recuse self – Committal warrant – Whether reasons existed to refuse bail – Whether hearing unfairly conducted – Whether evidence of objective bias – Whether committal warrant vague – Whether committal warrant void for uncertainty – Bail Act 1997 (No 16), s 2 –

Application refused (2009/1803SS – Peart J – 25/1/2010) [2010] IEHC 199
Shannon v Governor of Cloverhill Prison

Burden of proof

Reversed burden of proof – Standard of proof – Onus of proof on accused – Proof beyond reasonable doubt – Balance of probabilities – Lower standard – Presumption of innocence – Possession of controlled drugs – Appropriate direction to jury – Whether reversed burden of proof compatible – Whether burden of proof shifts to defence to prove existence of reasonable doubt – Whether accused required to prove more than reasonable doubt – Whether jury adequately charged – Whether incorrect direction given to jury – *People (DPP) v Byrne, Healy and Kelleher* [1998] 2 IR 417 considered; *People (DPP) v Noonan* [1998] 2 IR 439 applied – Misuse of Drugs Act 1977 (No 12), ss 3, 15, 15A and 29(2) – Criminal Law (Insanity) Act 2006 (No 11), ss 4 and 6 – Constitution of Ireland 1937, Article 38.1 – European Convention for the Protection of Human Rights and Fundamental Freedoms, article 6(2) – Convictions quashed; retrial ordered (25 & 26/2009 – CCA – 18/5/2010) [2010] IECCA 34
People (DPP) v Smyth

Charge sheet

Amendment – Application to re-amend after close of prosecution case – Fair procedures – Drunk driving – Location of offence – Amendment to location – Every element of charge admitted except townland – Whether re-amendment breach of fair procedures – Charge dismissed – Whether identification of townland element of offence – Order quashed (2007/1673)JR – O’Neill J – 19/01/2010) [2010] IEHC 338
DPP v Judge O’Connor

Delay

Prohibition – Prejudice – Specific prejudice – Loss of evidence – Materiality of unavailable evidence – Direction of trial judge as remedy to specific prejudice – Death of witnesses – Exceptional circumstances – Blackmail of accused by complainant – Serious risk of unfair trial – Principles to be applied – Evidence – Admissibility of evidence – Whether specific prejudice – Whether unavailable evidence material – Whether direction of trial judge would remedy prejudice – Whether exceptional circumstances – Whether blackmail of accused by complainant constituted exceptional circumstances – Whether serious risk of unfair trial – *H v DPP* [2006] IESC 55 [2006] 3 IR 575, *McFarlane v DPP* [2006]

IESC 11 [2007] IR 134, *DC v DPP* [2005] IESC 77 [2005] 4 IR 281, *T(P) v DPP* [2008] IESC 39 [2008] 1 IR 701, *J. O’C. v Director of Public Prosecutions* [2000] 3 I.R. 478, *MG v DPP* [2007] IESC 4 (Unrep, Supreme Court, 20/1/2007), *JD v DPP* [2009] IEHC 48 (Unrep, MacMenamin J, 3/2/2009) and *O’Keefe v District Judge Connellan* [2009] IESC 24 [2009] 3 IR 643 applied – *B v DPP* [2006] IESC 67 (Unrep, Supreme Court, 21/12/2006), and *P.L. v Judge Buttimer* [2004] IESC 110 [2004] 4 IR 494 considered – Criminal Law Amendment Act 1935 (No 6) s 6 – Relief granted (2008/1208)JR – MacMenamin J – 28/4/2010) [2010] IEHC 156
U (M) v DPP

Delay

Prohibition of retrial – Principles to be applied – Bipartite test – Unreasonable or culpable delay – Prejudice suffered as result of delay – Causal link between delay and any resulting prejudice – Death of witness in intervening period – Exceptional circumstances – Whether exceptional circumstances established – Whether delay excessive – Whether unreasonable delay – Whether applicant prejudiced – *DC v DPP* [2005] IESC 77, [2005] 4 IR 281, *McFarlane v DPP* [2006] IESC 11, [2007] IR 134, *PM v DPP* [2006] IESC 22, [2006] 3 IR 172, *PM v Malone* [2002] 2 IR 560 and *PH v DPP* [2007] IESC 3, (Unrep, Supreme Court, 29/1/2007) applied – Relief refused (2008/1319)JR – Hedigan J – 22/1/2010) [2010] IEHC 7
Carmody v DPP

Delay

Reasonable expedition – Sexual abuse case – Prejudice – Whether real risk of unfair trial – Mental disability of applicant – Psychiatric evidence – Significant cognitive impairment and illiterate – Simple man with limited recall – Whether applicant fit to understand court procedure – Applicable principles – Whether exceptional circumstances making it unfair to put applicant on trial – *W v W* [2009] IEHC 542, (Unrep, Charleton J, 18/12/2009); *DC v DPP* [2005] IESC 77, [2005] 4 IR 281; *PC v DPP* [1999] 2 IR 25; *People (DPP) v JT* (1988) 3 Frewen 141; *Z v DPP* [1994] 2 IR 476; *People (DPP) v EC* [2006] IECCA 69, [2007] 1 IR 749; *CK v DPP* [2007] IESC 5, (Unrep, SC, 31/1/2007); *McFarlane v DPP* [2006] IESC 11, [2007] IR 134; *H v DPP* [2006] IESC 55, [2006] 3 IR 575; *PT v DPP* [2007] IESC 39, [2008] 1 IR 701 and *Sparrow v Minister for Agriculture* [2010] IESC 6, (Unrep, SC, 29/1/2010) considered – Criminal Law (Insanity) Act 2006 (No 11), s 4 – Prohibition granted (2009/512)JR – Charleton J – 5/2/2010) [2010] IEHC 23

Detention

Lawfulness – Mental disorder – Powers of Review Board to detain – Conditional discharge from detention – Enforceability of conditions on release – Temporary release – Public interest – Discretion of Review Board – Whether detention permissible in circumstances where person no longer suffering from mental disorder – Whether right to release absolute where person no longer suffering from mental disorder – Whether lack of enforceability of conditions on discharge justified continued detention – Whether consideration of public interest conferred power of detention on Review Board – *JB v Mental Health (Criminal Law) Review Board* [2008] IEHC 303, (Unrep, Hanna J, 25/7/2008) and *Kolanis v UK* (2006) 42 EHRR followed - Mental Health Act 2001 (No 25) s 3 – Criminal Law (Insanity) Act 2006 (No 11) ss 1, 5, 11, 13 & 20(2) – Constitution of Ireland, 1937, Article 40.4.2° – European Convention on Human Rights, article 5(1) – Detention lawful (2009/2081SS – Hanna J – 5/5/2010) [2010] IEHC 195

L (A) v Kennedy

Disclosure

Third party disclosure – Drug driving – Whether certificate of analysis produced as soon as practicable - Whether disclosure necessary to rebut statutory presumption – Whether order for disclosure could be made against third party in criminal proceedings – Nature of information being sought – Whether amounted to evidence or an effective direction to conduct further investigation - Whether applicant had means to rebut statutory presumption in absence of disclosure – Right to fair trial – Whether District Court Judge's judgment rational – Road Traffic Act 1961 (No), s 49 – Road Traffic Act 1994 (No), s 19 – *People (DPP) v Gary Doyle* [1994] 2 IR 286; *Whelan v Kirby* [2005] 2 IR 30; *DPP v Judge Bronne* [2008] IEHC 391 (Unrep, McMahon J, 9/12/2008); *People (DPP) v Sweeney* [2001] 4 IR 103; *DH v Groarke* 2002] 3IR 522; *Health Service Executive v Judge White* [2009] IEHC 242 (Unrep, Edwards J, 22/5/2009) and *People (DPP) v O'Malley* [2008] IEHC 117 (Unrep, Gilligan J, 1/5/2008) considered – Reliefs refused (2008/1420JR – Ó Neill J – 16/2/2010) [2010] IEHC 58

Thompkins v DPP

Evidence

Admissibility - Detention – Access to legal advice – Reasonable – Whether breach of constitutional right to reasonable access to legal advice – *People (DPP) v Healy*

[1990] 2 IR 73; *People v Shaw* [1982] IR 1, *People (DPP) v Conroy* [1986] IR 460, *People v Madden* [1977] IR 336 and *People (DPP) v O'Brien* [2005] IESC 29, [2005] 2 IR 206 followed - Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 (SI 119/1987) – Appeal dismissed (20/2008 – CCA – 4/3/2010) [2010] IECCA 22

People (DPP) v Gormley

Evidence

Failure to preserve evidence – Drugs offences – Surveillance operation – Applicant arrested in vehicle – Opportunity given to solicitors of accused to examine vehicle – Failure to preserve vehicle – Whether delay in bringing judicial review – Whether reason given as to what material might be gleaned from forensic examination - *D (C) v DPP* [2009] IESC 70 (Unrep, Supreme Court, 23/10/2009) approved; *Murphy v DPP [1989] ILRM 71*, *Braddish v DPP* [2001] 3 IR 127, *Dunne v DPP* [2002] 2 IR 305, *Bowes & McGrath v DPP* [2003] 2 IR 25, *McKeown v Judges of Dublin Circuit Court* (Unrep, Supreme Court, 09/04/2003), *Fagan v Judges of the Circuit Criminal Court* [2006] IEHC 151 (Unrep, Dunne J, 28/4/2006), *McFarlane v DPP* [2006] IESC 11 [2007] 1 IR 134, *Ludlow v DPP* [2008] IESC 54 [2009] 1 IR 640, *Savage v DPP* [2008] IESC 39 [2009] 1 IR 185, *Scully v DPP* [2005] IESC 11 [2005] 1 IR 242, *Mc Hugh v DPP* [2009] IESC 15 (Unrep, Supreme Court, 12/02/2009), *Perry v Judges of the Circuit Criminal Court* [2008] IESC 58 (Unrep, Supreme Court, 28/10/2008), *Cole v Judge of the Northern Circuit* [2005] IEHC 193 (Unrep, Macken J, 17/06/2005), *Leahy v DPP* [2010] IEHC 22 (Unrep, Charleton J, 05/02/2010), *Keogh v DPP* [2009] IEHC 502 (Unrep, Birmingham J, 17/11/2009), *Balutis v Judge O'Shea* [2009] IEHC 402 (Unrep, Hedigan J, 19/08/2009), *Molloy v DPP* [2006] IEHC 1 (Unrep, Dunne J, 13/01/2006), *Kearney v DPP* [2009] IEHC 347 (Unrep, Hedigan J, 15/07/2009), *O'Driscoll v DPP* [2006] IEHC 153 (Unrep, Dunne J, 25/01/2006), *Byrne & McKenna v Judges of the Circuit Court* [2007] IEHC 366 (Unrep, Hedigan J, 31/10/2007), *English v DPP* [2009] IEHC 27 (Unrep, O'Neill J, 23/01/2009) considered – Misuse of Drugs Act 1977 (No 12) s 25 - Relief refused (2009/25JR – Kearns J- 23/04/2010) [2010] IEHC 232

Irwin v DPP

Evidence

Physical evidence - Preservation - Motor car destroyed pre-trial - Prohibition - Whether failure to preserve evidence exposed applicant to real risk of unfair trial

- Duty of gardaí in preserving evidence - Test - Onus of proof - Applicable threshold - Forensic report - Whether real risk of unfair trial established – Applicable principles - *Toobey v DPP* [2008] IESC 64, (Unrep, SC, 3/12/2008); *Z v DPP* [1994] 2 IR 476; *Savage v DPP* [2008] IESC 39, [2009] IR 185; *Murphy v DPP* [1989] ILRM 71; *Braddish v DPP* [2001] 3 IR 127; *McFarlane v DPP* [2006] IESC 11, [2007] 1 IR 134; *Scully v DPP* [2005] IESC 11, [2005] 1 IR 242; *Dunne v DPP* [2009] IESC 14, (Unrep, SC, 24/2/2009); *Ludlow v DPP*, [2008] IESC 54, [2009] 1 IR 640; *CD v DPP* [2009] IESC 70, (Unrep, SC, 23/10/2009); *People (DPP) v Crilligan (No 2)* [1989] IR 46; *Perry v DPP*, [2008] IESC 58, (Unrep, SC, 28/10/2008) and *People (DPP) v Tuíte* (1993) 2 Frewen 175 applied - Relief refused (2009/680JR – Charleton J - 5/2/2010) [2010] IEHC 22

Leahy v DPP & Judge O'Shea

Evidence

Missing evidence - Delay in prosecuting offence - Blood sample not retained - Application to prohibit trial – Refusal to permit taking of blood sample – Whether application misconceived - Whether trial should be prohibited – Whether exceptional circumstances – *DC v DPP* [2005] IESC 77 [2005] 4 IR 281 applied - Rules of the Superior Courts 1986 (SI 15/1986) O 84 r 21 – Road Traffic Act 1994 (No 7) s 13 – Relief refused (2009/943JR – Hedigan J – 18/5/2010) [2010] IEHC 183

Kennealy v DPP

Jurisdiction

Defective return for trial – Absence of statement of charges - Remand on bail – Return of bail bond – Application for amendment of return for trial – Submission that duplicate amended return for trial failed to confer jurisdiction where not fresh return for trial and sessions now passed – Whether conclusion that applicant on continuing bail correct – Whether jurisdiction to make new remand order – *In re Singer* (1963) 97 ILTR 130; *In re Singer (No 2)* (1964) 98 ILTR 112; *State (Hayden) v Good* [1972] IR 351 and *Kiely v Judge Ní Chondúin* [2007] IEHC 370, (Unrep, Sheehan J, 27/11/2008) considered – Relief refused (2009/688JR – O'Neill J – 26/3/2010) [2010] IEHC 99

Brady v Judge Fulham

Legal aid

Representation – File - Applicant seeking release of file - Inappropriate subject for judicial review – No substantial grounds – Whether judicial review appropriate

– Whether any grounds for judicial review
– Application dismissed (2010/581)JR
– MacMenamin J – 13/5/2010) [2010]
IEHC 174

Ryan v Herbert

Joint enterprise

Aiding and abetting – *Mens rea* – Intention to possess controlled substance for sale or supply – Whether mere presence at crime sufficient for conviction – Whether sufficient circumstantial evidence from which to infer intention – Whether evidence of encouragement – Misuse of Drugs – Possession – Conviction – Whether acquittal by direction on charge of possession precluded conviction on charge of possession with intent to supply – *R v Bland* [1988] Crim LR 41 distinguished - Criminal Law Act 1997 (No 14), s 7(1) - Misuse of Drugs Act 1977 (No 12), ss 3, 15 and 15A – Appeal dismissed (28/2008 – CCA – 28/1/2010) [2010] IECCA 3

People (DPP) v Boyle

Procedure

Director of Public Prosecutions – Charges – Decision not to prosecute – Subsequent review and reversal of decision not to prosecute – No new evidence – Whether decision *ultra vires* – Fair procedures – Right to fair trial – Delay – Whether prejudice to applicant by virtue of reversal of decision – Stress and anxiety to applicant - *Eviston v Director of Public Prosecutions* [2003] 2 IR 260 and *PM v Director of Public Prosecutions* [2006] IESC 22, [2006] 3 IR 172 followed; *LO’N v Director of Public Prosecutions* [2006] IEHC 184, [2007] 4 IR 481 distinguished - Applicant’s appeal dismissed (105/2008 – SC – 16/3/2010) [2010] IESC 14

Carlin v Director of Public Prosecutions

Road traffic offences

Drink driving - Failure to provide breath specimens following arrest – Summary trial – Cross-examination of garda witness – Submission that garda failed to follow instructions for use of apparatus – Application for direction of no case to answer – Unlawful detention pending arrival of alcometer – Breach of fair procedures in relation to provision of breath specimens – Whether failure to give reasons for decision to refuse application for direction of no case to answer – Whether failure to give reasons for decision to convict – Nature and extent of duty to give reasons – Entitlement to know reason for conviction – Due process – Summary hearing – Availability of appeal – Comment by trial judge – Wish to hear defendant – Legal representation – Absence of unfairness – *DPP v Rooney*

[1992] 2 IR 7; *DPP v McCormack* [1999] 4 IR 158; *O’Mahony v Ballagh* [2002] 2 IR 410; *Smith v Ní Chondúin* [2007] IEHC 270 (Unrep, McCarthy J, 3/7/2007); *Foley v Murphy* [2002] IEHC 232 (Unrep, McCarthy J, 2/7/2007); *H v Residential Institutions Redress Board* [2007] IEHC 381 (Unrep, McCarthy J, 3/1/2007); *Nasiri v Governor of Cloverhill Prison* [2005] IEHC 471 (Unrep, MacMenamin J, 14/4/2005); *Regina v Knightsbridge Crown Court ex parte International Sporting Club (London) Limited* [1982] 1 QB 304; *Regina v Harrow Crown Court ex parte Dave* [1994] 1 WLR 147; *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409; *Kenny v Coughlan* [2008] IEHC 28 (Unrep, O’Neill J, 8/2/2008); *Lyndon v Collins* [2007] IEHC 487 (Unrep, Charleton J, 22/1/2007) and *R v Galbraith* (1981) 73 Crim App Rep 124 considered – Road Traffic Act 1994 (No 7), s 13 – Relief refused (2009/231)JR – Kearns P – 23/3/2010) [2010] IEHC 96
Sisk v Judge O’Neill

Road traffic offences

Drink driving – Fair procedures – Request for disclosure of intoxilyzer maintenance records – Whether obligation on first respondent to disclose - Whether first respondent erred in law in refusing to entertain application – Whether *res judicata* – Whether first respondent erred in law in refusing to fix relevancy hearing – Whether applicant suffered loss of opportunity to rebut prosecution case – *McGonnell v AG* [2006] IESC 64 [2007] 1 IR 400; *DPP v Bronne* [2008] IEHC 391 (Unrep, McMahon J, 9/12/2008); *Whelan v Kirby* [2004] IESC 17 [2005] 2 IR 30; *DPP v Doyle* [1994] 2 IR 286; *DPP v McCarthy* [2007] IECCA 64 (Unrep, CCA, 25/7/2007) considered – Relief refused (2009/203)JR – O’Neill J – 19/3/2010) [2010] IEHC 65

Morgan v Judge Collins

Search

Search without warrant – Power to search - Reasonable cause to suspect offence committed or being committed – Third party complaint - Principles to be applied – Whether hearsay or anonymous information could ground garda’s reasonable suspicion that statutory offence being committed or that animal mistreated – Particularity of complaint - *DPP v Byrne* [2003] 4 IR 423 distinguished - *National Authority for Occupational Safety and Health v O’K Tools Hire and Sales Ltd* [1997] 1 IR 534 followed - *Byrne v Grey* [1988] IR 31; *DPP v Farrell* [2009] IEHC 368 ; *DPP v Finnegan* [2008] IEHC 347 [2009] 1 IR 48; *DPP v Cash* [2007] IEHC 108 (Unrep, Charleton J, 28/3/2007); *DPP v McCaffrey* [1986] IILRM 687; *Lister v Perryman* [1870]

LR 4 HL 521; *People (DPP) v Reddin and Butler* [1995] 3 IR 560; *Hussein v Chong Fook Kam* [1970] AC 942; *Dumbell v Roberts* [1944] 1 All ER 326 considered - Control of Horses Act 1996 (No 37), ss 34 & 35 - Question reformulated by consent and answered in the negative (2009/1643SS – Finlay Geoghegan J – 14/1/2010) [2010] IEHC 2

DPP v O’Driscoll

Sentence

Assault – Suspended sentence – Period of suspension longer than maximum sentence - Whether inappropriate to suspend sentence for such lengthy period of time - Statutory provision silent as to whether any prohibition or inhibition on suspending sentence beyond expiry of term – Four month sentence suspended for period of five years – Whether any entitlement to go beyond expiry of sentence provided for in statutory provision - Whether sentence proportionate having regard to sentence of co-accused - *DPP v Hogan* (Unrep, CCA, 28/4/2003) considered - Non-Fatal Offences Against the Person Act 1997 (No 26), s 2 - Criminal Justice Act 2006 (No 26), s 99(3)(b) - Suspended term reduced to two years (90/09 - CCA - 18/2/2010) [2010] IECCA 14
People (DPP) v Carroll

Sentence

Co-accused - Disparity in sentencing – Guilty plea – Assistance to gardaí – Prior conviction – Mandatory minimum sentence – Whether sentence imposed on co-accused taken into account – Whether unexplained and unjustifiable disparity between sentences of applicant and co-accused – Whether trial judge entitled to have regard to difference in seriousness of prior convictions – Sentence reduced (134/2009 – Macken J – 19/5/2010) [2010] IECCA 49
People (DPP) v O’Driscoll

Sentence

Demanding with menaces – Seriousness of offence – Threat to lives of three people – Amount of demand – Maximum sentence – Reference to offences upon which applicant acquitted – Matters not taken into account – Medical problems of applicant – Non-national – Muslim – Loss of employment – Difficulties in personal life - Absence of previous convictions – Comparison of moral quality of conduct with that of applicant in related appeal – Suggestion of incompetence – Whether error in principle – Criminal Justice (Public Order) Act 1994 (No 40), s 17 - Leave refused (260/2008 – CCA – 12/3/2010) [2010] IECCA 24

People (DPP) v Eid

Sentence

Drugs offences - Early plea of guilty – Value of plea – Cooperation – Dependence on drugs – Debt – Whether early plea of value – Whether indebtedness for drugs ingredient in involvement – Whether objective of rehabilitation sufficiently considered by trial judge – Misuse of Drugs Act 1977 (No 12), s 15A – Criminal Justice Act 1999 (No 10), s 5 – Sentence substituted (170/2009 – CCA – 8/5/2010) [2010] IECCA 46

People (DPP) v Anderson

Sentence

Drugs offences - Presumptive minimum sentence – Addiction – Whether addiction substantial factor leading to commission of offence – Whether trial judge took account of s 27(3G) submission – Misuse of Drugs Act 1977 (No 12), ss 15, 15A, 27(3G) and 27(3) – Applicant directed to return on expiration of ½ term (123/2009 – CCA – 18/5/2010) [2010] IECCA 45

People (DPP) v Heaphy

Sentence

Drugs offences - Presumptive minimum sentence – Rehabilitation – Deterrence – Punishment – Transformation of applicant since offence – Early plea – Assistance to gardaí – Whether trial judge paid sufficient attention to extraordinary and exceptional circumstances of rehabilitation – Whether element of personal deterrence necessary – Misuse of Drugs Act 1977 (No 12), s 15A – Criminal Justice Act 1999 (No 10), s 4 – Firearms Act 1964 (No 1), s 27A – Criminal Justice Act 2006 (No 26), s 59 – Sentence varied (158/2009 – CCA – 18/5/2010) [2010] IECCA 44

People (DPP) v Murphy

Sentence

Drugs offences – Previous convictions - Severity – Aggravating factors - Whether sentencing judge committed error in principle - Whether permissible to take previous conviction into account as aggravating factor – Whether previous conviction can ever be considered to be aggravating factor – Whether previous convictions matter to be taken into account in relation to particular circumstances of convicted person - Value of drugs - Age of applicant - *People (DPP) v GK* [2008] IECCA 110, (Unrep, CCA, 31/7/2008) and *People (DPP) v Melia* [2008] IECCA 106, (Unrep, Keane, J,) considered - Misuse of Drugs Act 1977 (No 12), s 15A - Criminal Justice Act 1993 (No 6), s 2 - Criminal Justice Act 1999 (No 10), s 29 - Leave to appeal severity of sentence

rejected (45/09 - CCA - 18/2/2010) [2010] IECCA 13

People (DPP) v Ulrich

Sentence

Drugs offences – Relevant sentencing considerations – Sentences of co-accused – Appeal dismissed (28/2008 – CCA – 12/3/2010) [2010] IECCA 26

People (DPP) v Boyle

Sentence

Drugs offences – Relevant sentencing considerations – Whether time spent in custody must be taken into account in sentencing – Lack of clarity re dates of custody – Whether accused penalised for manner of defence – Overall effect of sentence notwithstanding irregularity in course of sentencing – Whether injustice to accused – Appeal dismissed (91/2009 – CCA – 26/4/2010) [2010] IECCA 31

People (DPP) v Fitzpatrick

Sentence

Drugs offences – Structure of sentence - Sentence of 7 years imprisonment imposed with 4 years suspended - 16½ years old - Disadvantaged background - Whether full rigours in respect of sentencing legislation applies to accused under age of eighteen – Whether error in principle in sentence – Whether proportionate and correct sentence with custodial element for relatively short period of time with suspended element – Whether suspension period should be subject to applicant remaining under supervision of probation services - Misuse of Drugs Act 1977 (No 12), s 15A - Application refused; extra conditions on suspension imposed (33/09 - CCA - 18/2/2010) [2010] IECCA 11

People (DPP) v Ellis

Sentence

Drugs offences – Two separate offences on same day - Minimum mandatory sentence of 10 year imprisonment in respect of each count to run concurrently imposed – Whether sufficient exceptional and specific factors to justify departure from mandatory minimum sentence present – Value of early guilty plea - Material assistance - Whether trial judge did not adequately take into account possibility of suspension of any part of sentence - Appeal granted; final two years of sentence suspended on terms (42/09 - CCA - 18/2/2010) [2010] IECCA 12

People (DPP) v Walsh

Sentence

Manslaughter - 10 years imprisonment – Plea of guilty to manslaughter not accepted - Whether any consideration

given to applicant in respect of offer of plea of guilty to manslaughter - Relevant sentencing principles - Mitigating factors – Whether sentence excessive and/or unduly severe and/or disproportionate - Whether error of principle - Statistical information on sentencing - *People (DPP) v Kelly* [2004] IECCA 14, [2005] 2 IR 321 and *People (DPP) v Greene* [2009] IECCA 117, (Unrep, CCA, 26/5/2009) considered - Leave to appeal granted; last two years of sentence suspended (304/08 - CCA - 26/2/2010) [2010] IECCA 15

People (DPP) v Colclough

Sentence

Perverting course of justice – Relevant sentencing considerations – Whether sentencing judge gave sufficient weight to mitigating factors – Offender's character and behaviour – Last year of sentence suspended (264/2009 – CCA – 11/1/2010) [2010] IECCA 21

People (DPP) v McLoughlin

Sentence

Totality of sentences – Consecutive sentences – Appropriateness of sentences – Proportionality – Aggravating factors – Rehabilitation – Guilty plea – Remorse – Youth of applicant – Whether sentences unduly severe – Whether totality of sentences appropriate and proportionate – Whether plea not given at early stage carried weight – *People (DPP) v Keane* [2007] IECCA 119, [2008] 3 IR 177 considered – Criminal Law (Rape) (Amendment) Act 1990 (No 32), s 4 – Sentence varied (140/2009 – CCA – 19/5/2010) [2010] IECCA 50

People (DPP) v McCarton

Sentence

Undue leniency – Assault by garda acting in course of duty – Relevant sentencing considerations – Whether imposition of Probation Act appropriate – Whether custodial sentence warranted – Mitigating factors – Seriousness of offence – Offender's conduct subsequent to offence – Appeal allowed; six month suspended sentence substituted for Probation Act (76CJA/2009 – CCA – 11/1/2010) [2010] IECCA 6

People (DPP) v Kiernan

Sentence

Undue leniency – Co-accused - Robbery committed in common – Serious robbery – Possession of drugs – Previous convictions – Proportionality between persons charged jointly with same offence – Offence committed on bail – Aggravating factor – Weapon wielded by accused given lesser sentence - Misuse of Drugs Act

1977 (No 12), s 15 – Criminal Justice Act 1993 (No 6), s 2 - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 14 - Consecutive sentences substituted for concurrent sentences and sentence of one respondent increased (156CJA/2009 & 157CJA/2009 – CCA – 15/2/2010) [2010] IECCA 16

People (DPP) v Mullins

Sentence

Undue leniency – Manslaughter – Absence of plea to manslaughter – Drug addict – Previous convictions – Acquitted of murder - Co-operation with gardaí – Prospects of rehabilitation - Aggravating factors – Weapon – Offence committed in presence of spouse and child of victim – Criminal Justice Act 1993 (No 6), s 2 - Suspended portion of sentence reduced (150CJA/2009 – CCA – 15/2/2010) [2010] IECCA 19

People (DPP) v Fahey

Sentence

Undue leniency – Manslaughter – Relevant sentencing considerations – Accused aware third party had gun – Whether time frame of events given sufficient consideration – Whether making and withdrawal by accused of allegations to be taken into account in sentencing - Appeal allowed; suspended sentence of three and a half years increased to sentence of three and a half years with final two and a half years suspended (80CJA/2009 – CCA – 24/3/2010) [2010] IECCA 27

People (DPP) v Craig

Sentence

Undue leniency – Not contested by respondent - 16 separate counts of robbery – Threats of violence - Production of knife or syringe - Mitigating factors – Co-operation with gardaí – Plea of guilt – Previous convictions - Probation report - Criminal Justice Act 1993 (No 6), s 2 - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 14 - Sentence increased (159CJA/2009 – CCA – 15/2/2010) [2010] IECCA 20

People (DPP) v Molloy

Sentence

Undue leniency – Possession of offensive weapon – Assault - Offences committed on bail – Consecutive sentencing – Suspended sentence – Personal circumstances of respondent – Whether sentence unduly lenient in all the circumstances - Application refused (52 & 53/2009 – CCA – 25/1/2010) [2010] IECCA 5

People (DPP) v Murtagh

Sentence

Undue leniency – Possibility of rehabilitation - Correctness of approach to sentencing – Whether any error in principle - Whether sentence well designed to encourage accused to mend ways - Criminal Justice Act 1993 (No 6), s 2 - Non-Fatal Offences against the Person Act 1997 (No 26), s 3 - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 14 - Application to review sentence refused (156CJA/08 - CCA - 8/2/2010) [2010] IECCA 7

People (DPP) v O’Grady

Sentence

Undue leniency – Robbery – False imprisonment – Violence – Production of knife – Serious offences – Maximum penalties – Prolonged nature of offence – Vulnerable nature of victim – Mitigating factors – Co-operation with Gardai – Plea of guilt – Probation report - High risk of re-offending – Previous convictions - Firearms and Offensive Weapons Act 1990 (No 12), s 11 – Criminal Justice Act 1993 (No 6), s 2 - Non-Fatal Offences Against the Person Act 1997 (No 26), s 15 - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 14 – Sentence increased (139CJA/2009 – CCA – 15/2/2010) [2010] IECCA 17

People (DPP) v Halligan

Sentence

Undue leniency – Serious nature of offences - Serious history of previous convictions Whether admittedly extremely lenient sentences imposed in error of principle – Whether sentence imposed to facilitate rehabilitation - Personal circumstances of offender - *People (DPP) v Jennings* (Unrep, CCA, 15/2/1999) approved - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), ss 17 and 18 - Firearms Act 1964 (No 1), s 27B, Criminal Justice Act 1993 (No 6), s 2 - Criminal Justice Act 2006 (No 26), s 60 – Application to review sentence refused (242CJA/09 - CCA - 8/2/2010) [2010] IECCA 9

People (DPP) v O’Connor

Sentence

Undue leniency – Special and exceptional circumstances - Correctness of approach to sentencing – Whether any error in principle – Whether sentence so light as to be unduly lenient - Criminal Justice Act 1993 (No 6), s 2 - Misuse of Drugs Act 1977 (No 12), s 15A - Application to review sentence refused (60CJA/09 - CCA - 8/2/2010) [2010] IECCA 8

People (DPP) v McGrane

Sentence

Undue leniency – Unlawful seizure of motor vehicle – Mitigating circumstances - Whether sentence unduly lenient – Criminal Law (Jurisdiction) Act 1976 (No 14) s 10 – Application refused (24, 23 & 22/2009 CJA – CCA – 25/1/2010) [2010] IECCA 4

People (DPP) v Bardauskas

Sexual offences

Corroboration warning – Discretion of trial judge re corroboration warning – Timing of decision re corroboration warning – Whether trial judge must give reasoned ruling when deciding whether to give corroboration warning - *People (DPP) v Dolan* [2007] IECCA 30 (Unrep, CCA, 3/5/2007) considered; *People (DPP) v JEM* [2001] 4 IR 385 explained - Criminal Law (Rape)(Amendment) Act 1990 (No 32), s 7(1) – Appeal refused (46/2009 – CCA – 20/4/2010) [2010] IECCA 29

People (DPP) v Ryan

Sexual offence

Defence – Child under 17 years of age – Defence of honest belief that child 17 or more years of age – Burden of proof – Standard of proof – Evidence of honest belief – Statutory interpretation – Whether defence of honest belief should be raised on evidence – Whether burden of proof of defence of honest belief lies with accused – Whether accused must show evidence of honest belief – Whether standard of proof is on balance of probabilities – Evidence – Admissibility – Relevance – Prejudice – Cloth with unidentified seminal stain found in accused’s car – Whether evidence relevant – *B (A Minor) v DPP* [2000] 2 AC 428; *CC v Ireland* [2005] IESC 48, [2006] 4 IR 1; *People (DPP) v Bambrick* [1999] 2 ILRM 71; *People (DPP) v Davis* [2001] 1 IR 146; *People (DPP) v Halligan* (Unrep, CCA, 13/7/1998); *People (DPP) v Kelly* [2000] 2 IR 1; *People v MacEoin* [1978] IR 27 and *People (DPP) v McDonagh* [2001] 3 IR 201 distinguished; *Convening Authority v Doyle* [1996] 2 ILRM 213; *R v Carr-Briant* [1943] 1 KB 607 and *R v Daniel* [2003] 1 Cr App R 6 considered - Criminal Law (Sexual Offences) Act 2006 (No 15), s 3 – Criminal Law Amendment Act 1935 (No. 6), s 1(1) – Leave to appeal refused (195/2009 – CCA – 26/3/2010) [2010] IECCA 28

People (DPP) v Egan

Sexual offence

Prejudicial evidence - Failure to discharge jury – Evidence of which no charges preferred – Evidence led by witness – Charge to jury – Background evidence

– Admissibility of evidence - Prejudicial effect of evidence – Probative value of evidence – Whether impropriety or unfairness – Amendment to indictment – Substitution of dates of offences – Absence of prejudice – Application for direction of no case to answer – Evidence before court – Age of applicant – State of health of applicant – Injury in prison – Acknowledgement of conduct – Whether error in principle by trial judge – Whether failure to give sufficient weight to relevant matters – *People (DPP) v McNeill* [2007] IECCA 95 (Unreported, CCA, 31/7/2007); *R v Pettman* (Unreported, English Court of Appeal, 2/5/1995) and *O’R(D) v DPP* [1997] 2 IR 273 considered – Leave to appeal against conviction refused; consecutive sentence suspended (11/2009 – CCA – 15/3/2010) [2010] IECCA 25
People (DPP) v Bailly

Trial

Jury selection – Entitlement to bilingual jury – Prohibition on restriction of jurors — Power to divide and/or limit jury district – *de Burca v Attorney General* [1976] 1 IR 38 applied - Juries Act 1976 (No 4), s 5 – Claim dismissed (2009/751JR – Murphy J – 14/5/2010) [2010] IEHC 179
Ó Maicín v Éire

Trial

Murder – Separate trial refused – Charge to jury on corroboration – Whether failure to accede to requisitions – Embarrassing statements by co-accused - Discretion of trial judge – Whether risk of unfair trial – Directions to jury – Excising of embarrassing portions of interviews – Application for corroboration warning – Whether warning sufficient in circumstances of case - *People (DPP) v Connolly* [2003] 2 IR 1 – Criminal Procedure Act 1993 (No 40), s 10 - Leave refused (278/2008 – CCA – 8/3/2010) [2010] IECCA 23
People (DPP) v Keohane

Trial

Practice and procedure – Severing of indictment – Drugs offences – Appeal - Large quantity of drug in bag and small quantity of same drug on person - Whether refusal of separate trials on separate counts prejudiced accused – Jury – Chain of evidence – Judge’s charge on expert evidence – Attitude of trial judge to counsel for accused – Fairness of trial – Discretion of trial judge in control of court – *Attorney General v Duffy* [1931] IR 144 considered - Criminal Justice (Administration) Act 1924 (No 44), s

6(3) - Appeal refused (91/2009 – CCA – 26/4/2010) [2010] IECCA 30
People (DPP) v Fitzpatrick

Violent disorder

Two accused - Three people necessary for offence of violent order to be established – Summons withdrawn in respect of one accused for ‘technical reasons’ – Whether possible to convict remaining two accused of violent disorder – Whether court had jurisdiction to convict applicants where two rather than three people eventually prosecuted – *R v Mabroof* (1988) 88 Cr App Rep 317, *R v Worton* (1989) 154 JP 201, [1990] Crim LR 124, *R v Lemon* [2002] All ER (D) 96 (Jun) and *R v Morris* [2005] EWCA Crim 609 [2005] All ER (D) 90 (Mar) followed – Criminal Justice (Public Order) Act 1994 (No 2) s 15 – Courts (Supplemental Provisions) Act 1961 (No 39) s 52 – Question answered (2010/11SS – Hedigan J – 19/5/2010) [2010] IEHC 186
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Assessment

Restitutio in integrum - Damage to plaintiff’s farm – Proper measure of damages – Restoration or diminution in value – Landslide - Exceptional case – Reasonable damages – Enhanced value of land – Whether proper measure of damages was cost of restoration to farm or diminution in open market value – Whether restoration cost comprehensively more than diminution value – *Munnelly v Calcon Ltd* [1978] IR 387 followed – Damages awarded (2004/18616P – De Valera J – 20/5/2010) [2010] IEHC 265
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Road traffic accident - Nature of injuries attributable to accident – Back pain – Disc prolapse - Delay - Whether disc prolapse attributable to accident - Plaintiff’s past medical history – Medical evidence - Clinical notes - Observation by private investigator doing gardening – Whether video footage indicated no outward signs of disability - Whether plaintiff consciously and deliberately exaggerated difficulties in order to mislead court - Whether back pain clinically established and explained – Psychiatric *sequelae* - Damages to which plaintiff entitled – Onset of alcohol abuse, psychotic episodes and disc prolapse excluded from assessment of damages – Damages assessed in sum of €95,000 (2008/4253P - Peart - High - 4/12/2009 - 2009 IEHC 617
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Free movement of persons

Family residence member card – Moot - Card issued prior to hearing – Costs of proceedings – Absence of automatic entitlement to costs – Whether entitlement in law to relief claimed – Application as spouse of EU citizen in employment – Failure to notify Minister as to redundancy – Request for review of refusal in effect new application based on new circumstances – Reasonableness of expecting temporary extension of visa until conclusion of review – Whether reasonable to commence proceedings to safeguard legitimacy of presence in State – Balance of justice – *Nearing v Minister for Justice, Equality and Law Reform* [2009] IEHC 489, (Unrep, Cooke J, 30/10/2009) considered - European Communities (Free Movement of Persons) Regulations 2006, reg 6 – 50% costs awarded to applicants (2009/1110)JR – Cooke J – 16/3/2010) [2010] IEHC 84
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Free movement of persons

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Free movement of persons

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European Arrest Warrant

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European Arrest Warrant

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European Arrest Warrant

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European Arrest Warrant

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European Arrest Warrant

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- Order for access granted - Access to include direct contact - Access in company of social worker – ‘Favourite uncle’ type of relationship – Undertakings to seek no parental role in child’s upbringing; to respect familial integrity of respondents and child; to defer to respondents re timing of revelation to child that applicant is child’s father - (2007/26M – Hedigan J – 27/4/2009) [2010] IEHC 120 *McD (J) v L (P) and M (B)*

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Wrongful removal – Habitual residence – Hague Convention – Consent to removal – Grave risk – Whether grave risk of psychological or physical harm to child if returned – *PN v TD* (Unrep, Edwards J, 4/3/2008) [2008] IEHC 77; *M (C) v Delegacion Provincial de Malaga* [1999] 2 IR 363; *MSH v LH* [2000] 3 IR 390; *RK v JK* [2000] 2 IR 416; *Friedrick v. Friedrich* (1996) 78F 3d 1060 considered – Council Regulation (EC) No 2201/2003 – Child Abduction and Enforcement of Custody Orders Act 1991 (No. 6) – Hague Convention on the Civil Aspects of International Child Abduction 1980 – Application granted (2009/18HLC – Edwards J – 12/3/2010) [2010] IEHC 77

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Licences

Seamen – Manning regulations – Non-compliance of crew with manning regulations – Notice of prohibition – Power of detention – Safety standards – Certificate of compliance – Certificate of competency – Standard of competence – Standard of English language competency required – Legitimate expectation – Manning arrangements accommodated for 28 years – Public interest considerations – Principles of equality and effectiveness – Proportionality – Delay – Whether power to detain in respect of deficiency in manning – Whether decision not to lift notices of prohibition until vessels in compliance with manning regulations *ultra vires* – Whether Ireland adopting higher standard than other EU countries *ultra vires* – Whether law of legitimate expectation in EU context could apply where no EU law governing manning of vessels – *Castletown Fisheries Ltd v Minister for Transport and Marine* [2009] IEHC 240 followed – *Mulder v Minister van Landbouw en Visserij* [1988] ECR 2321; *Spagl v Hauptzollamt Rosenheim* [1990] ECR I-454; *Glencar Explorations plc v Mayo County Council (No 2)* [2002] 1 IR 84; *R (Niazji) v Secretary of State for the Home Department* [2008] EWCA (Civ) 755; *Lett & Co Ltd v Wexford Borough Council* [2007] IEHC 195; *Pesca Valentia Ltd v Minister for Fisheries and Forestry (No 2)* [1990] 2 IR 305; *Wiley v Revenue Commissioners* [1994] 2 IR 160; *Tara Prospecting v Minister for Energy* [1993] ILRM 771; *Abrahamson v Law Society*

of Ireland [1996] 1 IR 403; *Curran v Minister for Education and Science* [2009] 4 IR 300 and *Duff v Minister for Agriculture (No 2)* [1997] 2 IR 22 considered – Sea Fisheries Act 1952 (No 7) – Merchant Shipping (Certification of Seamen) Act 1979 (No 37), ss 3, 5, 6 and 8 – Merchant Shipping Act 1894, s 459(1) – Merchant Shipping Act 1992 (No 2) – Council Directive 97/70/EC, arts 3, 5 and 6 – Council Directive 2005/36/EC – Fishing Vessels (Certification of Deck Officers and Engineer Officers) Regulations 1988 (SI 289/1988) – Fishing Vessels (Safety Provisions) Regulations 2002 (SI 418/2002) – Fishing Vessels (Certification of Deck Officers and Engineer Officers) Regulations 2000 (SI 192/2000) – European Communities (Second General System for the Recognition of Professional Education and Training) Regulations 1996 (SI 135/1996) – Fishing Vessels (Basic Safety Training) Regulations 2001 (SI 587/2001) – European Communities (Safety of Fishing Vessels) Regulations 2002 (SI 417/2002) - European Communities (Safety of Fishing Vessels)(Amendment) Regulations 2003 (SI 72/2003) – Recognition of Professional Qualifications (Directive 2005/36/EC) Regulations 2008 (SI 139/2008) – Merchant Shipping (Recognition of British Certificates of Competency) Order 1995 (SI 228/1995), art 2 – Merchant Shipping (Training and Certification) (STCW Convention States) Order 1998 (SI 555/1988) – Treaty of Rome, arts 10, 12, 39, 43, 49 and 294 – Torremolinas International Convention for the Safety of Fishing Vessels 1977 – Torremolinas Protocol of 1993 – IMO International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel 1995 – IMO International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 – Rules of the Superior Courts 1986 (SI 15/1986) O 84, r 21 – Relief granted (2008/1320)JR – O'Neill J – 20/5/2010) [2010] IEHC 190
Skellig Fish Ltd v Minister for Transport

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Time limits - Making of complaint – Computation of time period for making of complaint – Garda Síochána – Complaints Board – Complaint by member of public – Whether complaint made within statutory time frame – Whether date of conduct of complaint included in calculation of time period – Whether date of receipt of complaint included in calculation of time period – *Freeney v Bray Urban District Council* [1982] ILRM 29, *McCann v An Bord*

Pleanála [1997] 1 IR 264 and *McGuinness v Armstrong Patents* [1980] IR 289 followed - Garda Síochána (Complaints) Act 1986 (No 29), ss 1(1), 4(1)(a), 4(2)(a) and 4(3)(a) - Interpretation Act 1937 (No 38), s. 11(h) - Applicants' appeal allowed (147, 148, 195, 196, 197, 198 & 199/2008 - SC - 18/1/2010) [2010] IESC 2
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Terms - Bridging facility - Construction of terms of guarantee - Whether guarantee discharged - Meaning of 'amendment' - Whether extension of duration of bridging facility amounted to 'amendment' of agreement - Meaning of 'agreement in writing' - Difference between 'agreement in writing' and 'agreement evidenced in writing' - Whether oral agreement subsequently confirmed in letter from plaintiff creditor amounted to 'agreement in writing' - Whether defendant guarantor himself had to assent in writing to amendment to agreement - Whether mere knowledge of amendment sufficient to bind defendant guarantor - Whether assent of debtor company sufficient to bind defendant guarantor where defendant guarantor involved in debtor company - Whether assent by defendant guarantor must be formal or may be implied by conduct - Whether guarantee once discharged can be revived - Whether conduct of defendant guarantor sufficient to revive guarantee - Whether participation by defendant guarantor in negotiations with plaintiff creditor subsequent to discharge of guarantee sufficient to revive guarantee - Whether *contra preferentem* rule applicable - Whether defendant guarantor estopped from relying on entitlement to discharge guarantee - Guarantee enforced - *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 WLR 468 and *Wittmann (UK) Ltd v Willdov Engineering SA* [2007] EWCA Civ 824 followed; *Tam Wing Chuen and anor v Bank of Credit and Commerce Hong Kong Ltd (in liq)* [1996] 2 BCLC 69, *Rohan Construction Ltd v Insurance Corporation of Ireland Ltd* [1986] ILRM 419, *Levinson and ors v Farin and ors* [1978] 2 All ER 1149, *Oxonica Energy Ltd v Neuftec Ltd* [2008] EWHC 2127, *Swire v Redman* (1876) 1 QBD 536, *Gabbs v Boumbuis* [2007] BCSC 887, *High Mountain Feed Distributors Ltd v Paw Pleasers Ltd et al* [2004] MBQB 220 considered; *Analog Devices BV v Zurich Insurance Company* [2005] IESC 12, [2005] 1 IR 274 applied; Claim allowed (2009/4213S - Clarke J - 20/4/2010) [2010] IEHC 116

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Asylum

Appeal - Parties - Commissioner - Presenting officer absent - Whether Refugee Application Commissioner's presence required at Refugee Appeals Tribunal - Whether Commissioner party to appeal - Whether tribunal has jurisdiction to proceed with appeal in absence of presenting officer - Whether presence of presenting officer mandatory

for validity of hearing - Refugee Act 1996 (No 17) ss 13 and 16 - Refugee Act 1996 (Appeals) Regulations 2003 (SI 424/2003) - Relief refused (2008/1373 JR - Cooke J - 2/3/2010) [2010] IEHC 137
S (F K) v Refugee Appeals Tribunal

Asylum

Appeal - Point of law - Certificate enabling appeal to Supreme Court - Point of law of extreme public importance or desirable in public interest that appeal be taken - Whether Refugee Application Commissioner's presence required at Refugee Appeals Tribunal - *Arkelow Holidays v An Bord Pleanála* [2008] IEHC 2, (Unrep, Clarke J, 11/2/2008); *Glancré Teoranta v An Bord Pleanála* [2006] IEHC 250, (Unrep, MacMenamin J, 13/7/2006); *Kenny v An Bord Pleanála (No 2)* [2001] 1 IR 704; *RAIU v Refugee Appeals Tribunal* (Unrep, Finlay Geoghegan J, 12/2/2003); *R (I) v Minister for Justice Equality and Law Reform* [2009] IEHC 510, (Unrep, Cooke J, 26/11/2009) considered - Refugee Act 1996 (No 17), ss 11, 13 and 16 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - Refugee Act 1996 (Appeals) Regulations 2003 (SI 424/2003) - Constitution of Ireland 1937, art 34.4.3 - Relief refused (2008/1373 JR - Cooke J - 26/3/2010) [2010] IEHC 136
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Asylum

Credibility - Adverse credibility findings - Errors - Whether appraisal of credibility affected by errors - Whether tribunal member erred in law in assessing credibility of applicants - Whether decision of respondent should be quashed - Refugee Act 1996 (No 17) ss 11B, 13, - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) regs 5 and 9 - *Certiorari* granted (2007/1166JR - Cooke J - 4/2/2010) [2010] IEHC 149
U (NA) v Refugee Appeals Tribunal

Asylum

Credibility - Authenticity of identity document - Finding that identity document forgery - Duty of tribunal member to disclose to applicant nature and source of document relied upon in decision making process - Whether tribunal member in breach of statutory duty to disclose nature and source of knowledge regarding identity document - Refugee Act 1996 (No 17) s 16, - *N(M) v Refugee Appeals Tribunal* [2009] IEHC 301 (Unrep, Cooke J, 1/7/2009), *Okeke v MJELR* [2006] IEHC 46 (Unrep, Peart J, 17/2/2006), *S(O) v Refugee Appeals Tribunal* [2008] IEHC 342 (Unrep, Hedigan J,

4/11/2008), *A(C) v Refugee Appeals Tribunal* [2008] IEHC 261 (Unrep, Birmingham J, 2/7/2008) and *Y(LA) v Refugee Appeals Tribunal* [2009] IEHC 127 (Unrep, Clark J, 18/3/2009) applied – Reliefs refused (2008/77JR – Clark J – 3/2/2010) [2010] IEHC 145

W (B) v Refugee Appeals Tribunal

Asylum

Credibility - Contradicted by known facts – Effect of finding that applicant lied – Manner of leaving country of origin – Whether failure of another to flee relevant to assessment of applicant's credibility – Absence of reference to events in country of origin information – Whether entitled to draw inference from lack of reference in materials – Discrepancy in personal account and country of origin information - *R(I) v Minister for Justice, Equality and Law Reform* [2009] IEHC 353 (Unrep, Cooke J, 24/07/2009) followed - Refugee Act 1996 (No 17), s 11(B)(c) - Leave refused (2008/372JR – Cooke J – 28/04/2010) [2010] IEHC 125

D (T) v Refugee Appeals Tribunal

Asylum

Credibility – Delay – Extension of time – Good and sufficient reasons – Country of origin information – Opportunity to respond – Conflict in reports – Failure to take relevant information into account – Whether good and sufficient reason to extend time – Whether Tribunal failed to give applicant notice of information relied on – Whether reasonable explanation for failure to apply for asylum in other countries – Whether Ireland first safe country into which applicant arrived – *Abus v Refugee Appeals Tribunal* [2009] IEHC 281 and *S(DVT) v Refugee Appeals Tribunal* [2008] 3 IR 476 considered – Refugee Act 1996 (No 17), ss 13 and 16 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave refused (2008/406JR – Clark J – 29/4/2010) [2010] IEHC 124

D (D) v Refugee Appeals Tribunal

Asylum

Credibility – Fair procedures - Proof of ethnicity – Kunama people of Eritrea – Fear of persecution – Whether assessment of credibility so clearly flawed or irrational as to be unlawful – Fair procedures – Whether tribunal erred in law in relying on country of origin information not distributed to applicant – Leave for judicial review refused (2008/281JR – Cooke J – 16/4/2010) [2010] IEHC 140

W (ZW) and M(Me), M(S) and M(Ma) (minors suing by their mother and next friend W (ZW)) v Refugee Applications Commissioner,

Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform

Asylum

Credibility – Fear of persecution – Application other than at frontiers of State – Whether reasonable explanation provided to show why application not made on arrival at frontier – Appeal without oral hearing – Whether decision in breach fair procedures – Whether duty consider country origin information when assessing subjective credibility – Whether opportunity to explain contradictions – Whether difference approach assessment credibility by Commissioner and Tribunal – Inquisitorial body – Whether statutory appeal sufficient remedy – Whether right oral hearing in general corollary of finding of lack of credibility – Whether written statements to Tribunal sufficient - *Imaju v Minister for Justice, Equality and Law Reform* [2005] IEHC 416 (Unrep, Peart J, 2/6/2005) applied; *Olunloyo v Minister for Justice, Equality and Law Reform* (Unrep, Cooke J, 6/11/2009), *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, *Nguedjo v Refugee Appeals Tribunal* (Unrep, White J, 23/7/2003) and *Idiakbeua v Minister for Justice, Equality and Law Reform* [2005] IEHC 150 (Unrep, Clarke J, 10/5/2005) followed - *Camara v Minister for Justice, Equality and Law Reform* (Unrep, Kelly J, 6/7/2000), *Moyosola v Refugee Applications Commissioner* [2005] IEHC 218 (Unrep, Clarke J, 23/6/2005), *JX v Refugee Appeals Tribunal* [2005] IEHC 167 (Unrep, Dunne J, 2/6/2005), *Stefan v Minister for Justice* [2001] 4 IR 203, *VZ v Minister for Justice* [2002] 2 IR 135, *State (Abenglen Properties Limited) v Dublin Corporation* [1984] IR 381, *McGoldrick v An Bord Pleanála* [1997] 1 IR 497, *Gill v Connellan* [1987] IR 541; [1988] ILRM 448, *Buckley v Kirby* [2000] 3 I.R. 431, *Koyode v Refugee Applications Commissioner* [2005] IEHC 172 (Unrep, O'Leary J, 25/04/2005), *BNN v Minister for Justice* [2008] IEHC 308 [2009] 1 IR 719 and *Akinyemi v Minister for Justice, Equality and Law Reform* (Unrep, Smyth J, 2/10/2002) considered; *D(A) v Refugee Applications Commissioner* (Ex temp, Unrep, Cooke J, 27/01/2009) and *JGM v Refugee Applications Commissioner* [2009] IEHC 352 distinguished - Refugee Act 1996 (No 17), ss 11(B)(d) and 13 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) Leave refused (2008/814JR – Herbert J – 28/04/2010) [2010] IEHC 127
G (MY) v Minister for Justice, Equality and Law Reform

Asylum

Credibility – Fear of persecution – Availability of protection in country

of origin – Failure to apply as soon as reasonably practicable - No oral hearing – Whether finding of lack of credibility formed basis for negative finding – Whether reliance on s 13(6) justified if lack credibility underpinning decision - Whether denial of constitutional justice in such circumstances – Decision based on assessment of recorded contents of interview - Decision not based on negative credibility finding – Absence of oral hearing justified - *GK v Minister for Justice* [2002] 2 IR 418, *Moyosola v Refugee Applications Commissioner* [2005] IEHC 218 (Unrep, Clarke J, 23/06/2005) and *Konadu v Minister for Justice, Equality and Law Reform* (Unrep, Birmingham J, 11/04/2008) followed - Refugee Act 1996 (No 17), ss 13(5) and 13(6) - Leave refused (2009/739JR – Herbert J – 28/04/2010) [2010] IEHC 126
A (K) v Refugee Applications Commissioner

Asylum

Credibility – Fear of persecution - Country of origin information - Age and maturity - Absence of country of origin information - Benefit of doubt – Whether sufficient regard paid to age of applicant – Whether duty to apply liberal benefit of doubt given age and maturity of applicant – Decision based on conjecture and speculation in absence of country of origin information - Consideration of subjective credibility required given absence of country of origin information – European Council Resolution 26/06/1997 (97/C 221/03) – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5(1)(c) - United Nations Convention on Rights of Child 1989, art 3 - *Zhuchkova v Minister for Justice, Equality and Law Reform* [2004] IEHC 404, (Unrep, Clarke J, 26/11/2004) followed – *Certiorari* granted (2007/1535JR - Edwards J - 05/02/2010) [2010] IEHC 151
O (S) (a minor) v Minister for Justice, Equality and Law Reform

Asylum

Credibility – Evidence on which finding based – Oral testimony – Corroboration – No inconsistent evidence - Whether fundamental inconsistency in version of events – Whether attempts made to corroborate oral testimony – *R (I) v Minister for Justice Equality and Law Reform* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) considered – *Certiorari* granted (2008/76JR – Cooke J – 4/3/2010) [2010] IEHC 131

G (E) and G (F) v Refugee Appeals Tribunal

Asylum

Credibility - Internal relocation - Defective

internal relocation assessment - Role of Court - Whether Tribunal's assessment of internal relocation substantial ground - Whether Tribunal's assessment of credibility substantial ground - Refugee Act 1996 (No 17), ss 2, 11B - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 7 - Convention Relating to Status of Refugees - Application refused (2007/1280)JR - Cooke J - 25/2/2010 [2010] IEHC 133

E (SB) v Refugee Appeals Tribunal

Asylum

Credibility - Repetition of error in section 13 report - Assessment of state protection - Application while pregnant - Irish born child - No objective basis for fear - No oral appeal - Failure to report to police - Precluded from claiming state protection - No valid reason for fear - Error of attribution of source no material effect - Arguments made for first time in leave application - No country of origin information furnished by applicant - Presumption state protection in absence of breakdown of state apparatus - Twelve day delay - Whether good and sufficient reason to extend time - *Ali v The Minister for Justice, Equality and Law Reform* [2004] IEHC 108 (Unrep, Peart J, 26/05/2004), *Okeke v The Minister for Justice, Equality and Law Reform* [2006] IEHC 46 (Unrep, Peart, 17/02/2006), *B(GO) v The Minister for Justice, Equality and Law Reform* [2008] IEHC 229 (Unrep, Birmingham J, 03/06/2008) and *O(AB) v The Minister for Justice, Equality and Law Reform* [2008] IEHC 191 (Unrep, Birmingham J, 27/06/2008) considered; *S v Minister for Justice, Equality and Law Reform* [2002] 2 IR 163 followed - Leave refused - (2007/324)JR - Clark J - 04/03/2010 [2010] IEHC 170

M (A) & M (V) (a minor) v Refugee Appeals Tribunal

Asylum

Credibility - Standard for review - Assessment of credibility - Whether evidential basis for adverse credibility findings - *Kayode v RAC* [2005] IEHC 172 (Unrep, O'Leary J, 25/4/2005); *B (NN) v Minister for Justice* [2008] IEHC 308 (Unrep, Hedigan J, 9/10/2008); *D (A) v RAC* [2009] IEHC 77 (Unrep, Cooke J, 27/1/2009); *Akintunde v RAC* (Unrep, Cooke J, 29/4/2009); *A v Minister for Justice* [2009] IEHC 215 (Unrep, Cooke J, 30/4/2009) considered - Leave refused (2007/1338)JR - Cooke J - 14/1/2010 [2010] IEHC 150

M (IOA) (an infant) v Minister for Justice, Equality and Law Reform

Asylum

Credibility - Understatement of supportive elements - Irreconcilable divergence - Whether matters of real importance addressed - Whether major errors of fact - Injury in riot - Description injury deliberate - Decision suggestive of misfortunate injury - Interpretation of Spirasi report - Choice of less favourable version - Whether appreciation of essence of complaint - Omission of parts of narrative - Significance of omission in light of finding abusive treatment isolated incident - Whether finding conflicting accounts justified - Individual issues not of major significance - Issues in isolation not justifying reliefs - Whether justice dictated cumulative effect required rehearing - Authenticity of arrest warrant - Freedom of political party - Finding in conflict with country of origin information - Importance not deconstructing decision - *Nasser v Refugee Appeal Tribunal* [2009] IEHC 432 (Unrep, Clark, 7/10/2009) considered - *R(I) v Minister for Justice, Equality and Law Reform* [2009] IEHC 353 (Unrep, Cooke J, 24/7/3009) approved - *Certiorari* granted (2008/15)JR - Birmingham J, 20/4/2010 [2010] IEHC 117

A (VEA) v Minister for Justice Equality and Law Reform

Asylum

Decision - Reasons - Credibility - Examination of applicant - Decision materially unsound - Duty of tribunal to put matters to applicant for comment and rebuttal - Lack of clarity of basis upon which decision reached - Refugee Act 1996 (No 17) s 16 - *Certiorari* granted (2009/62)JR - Cooke J - 16/2/2010 [2010] IEHC 132

M (L) v Refugee Appeals Tribunal

Asylum

Decision - Reasons - Findings - Credibility - Fair procedures - Assessment of credibility - Failure to give explicit findings - Whether substantial grounds for review - Leave granted (2007/632)JR - Cooke J - 5/3/2010 [2010] IEHC 82

Olayinka v Minister for Justice, Equality and Law Reform

Asylum

Delay - Extension of time - Substantial grounds for leave - Right to respect for private and family life - Claim that respondent did not properly consider applicant's rights under Article 8 of the European Convention of Human Rights - Proportionality of decision by respondent - Lack of information from applicant in original application - Whether

substantial grounds for leave - Whether decision of respondent proportional - Whether Article 8 rights considered in decision making - Whether adequate information provided by applicant in original application - *Kugathas v Secretary of State for Home Department* [2003] EWCA Civ 31, *Darren Omorgie v Norway* (App No. 265/07) 31/7/2008, *O(G) v MJELR* [2008] IEHC 190 (Unrep, Birmingham J, 19/6/2008), *Singh (Pavendeep) v Entry Clearance Officer New Delhi* [2004] EWCA Civ 1075, *Cirpaci v MJELR* [2005] IESC 42 [2005] 4 IR 109, *R(Razgar) v Home Secretary* [2004] 1 AC 368, *Huang v Home Secretary* [2007] 2 AC 167 and *R (Mahmood) v Home Secretary* [2001] 1 WLR 840 considered - *S(BI) v MJELR* [2007] IEHC 398 (Unrep, Dunne J, 30/11/2007), *Kouaype v MJELR* [2005] IEHC 380 (Unrep, Clark J, 9/1/2005) and *Aghonlabor v MJELR* [2007] IEHC 166 [2007] 4 IR 309 applied - *Meadows v MJELR* [2010] IESC 3 (Unrep, Supreme Court, 21/1/2010) distinguished - Immigration Act 1999 (No 22) s 3 - Leave refused (2009/882)JR - Birmingham J - 12/5/2010 [2010] IEHC 173

S (OO) v Minister for Justice, Equality & Law Reform

Asylum

Extension of time - Delay - Leave to seek judicial review - Good and sufficient reason for delay - Interests of justice require merits of case to be considered - Whether medical evidence corroborative of applicant's claim - Consideration of previous decisions - *Fasakin v Refugee Appeals Tribunal* [2005] IEHC 423, (Unrep, O'Leary J, 21/12/2005); *Atanasov v Refugee Appeals Tribunal* [2005] IEHC 237, (Unrep, MacMenamin J, 7/7/2005); *Khazadi v Refugee Appeals Tribunal* [2006] IEHC 175 (Unrep, MacMenamin J, 2/5/2006); *M (N) v Minister for Justice Equality and Law Reform* [2008] IEHC 130, (Unrep, McGovern, 7/5/2008); *A (T M A) v Refugee Appeals Tribunal* [2009] IEHC 23, (Unrep, Cooke J, 15/1/2009); *L (LC) v Refugee Appeals Tribunal* [2009] IEHC 26, (Unrep, Clark, 21/1/2009); *I (E F) v Refugee Appeals Tribunal* [2009] IEHC 94, (Unrep, Clark J, 25/2/2009); *G (E) & G (D) v Refugee Appeals Tribunal* (Ex tempore, Hedigan J, 16/12/2008); *The State (Keegan & Lysaght) v Stardust Victims Compensation Tribunal* [1986] IR 642 considered - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - Relief refused (2008/130)JR - Clark J - 19/3/2010 [2010] IEHC 134

L (L) v Refugee Appeals Tribunal

Asylum

Fear of persecution - Adverse credibility decision - Country of origin information - Absence of identification documents

– Absence of full explanation as to arrival in State – Whether Tribunal erred in law in relying upon country of origin information which failed to address applicant’s personal circumstances – Whether information relied on relevant – Refugee Act 1996 (No 17), ss 11B and 13 – Application refused (2007/1723)JR – Cooke J – 3/3/2010) 2010 IEHC 147

I (K) v Refugee Appeals Tribunal

Asylum

Fear of persecution – Adverse credibility decision – Whether error of fact of material nature – Whether failure to take account of directly relevant information – Whether material and adverse credibility findings made on foot of error – Whether matter complained of represents core finding upon which adverse credibility decision based – Whether immaterial and minor deficiencies detract from overall validity of decision – *Radzwick v Minister for Justice, Equality and Law Reform* (Unrep, HC, Cooke J, 24/7/2009) followed – *T(AM) v Refugee Appeals Tribunal* [2004] 2 IR 607; *DVTS v Minister for Justice, Equality and Law Reform* [2008] 3 IR 476; *Keagnene v Minister for Justice, Equality and Law Reform* [2007] IEHC 17; *Da Silveira v Refugee Appeals Tribunal* [2004] IEHC 436; *R(R) v Refugee Appeals Tribunal* [2008] IEHC 406; *Carcin v Minister for Justice, Equality and Law Reform* [2003] IEHC 41; *Tabi v Refugee Appeals Tribunal* [2010] IEHC 109; *Moisei v Refugee Appeals Tribunal* [2004] IEHC 153; *Sibanda v Minister for Justice, Equality and Law Reform* (Unrep, HC, Birmingham J, 15/1/2009); *K(G) v Minister for Justice, Equality and Law Reform* [2002] 2 IR 418; *Banzuzi v Minister for Justice, Equality and Law Reform* [2007] IEHC 3; *S(AW) v Refugee Appeals Tribunal* [2007] IEHC 276; *G(T) v Refugee Appeals Tribunal* [2007] IEHC 377 and *T(MJ) v Refugee Appeals Tribunal* [2008] IEHC 102 considered – Refugee Act 1996 (No 17), ss 2, 13 and 16 – Claim dismissed (2007/1412)JR – Edwards J – 12/2/2010) 2010 IEHC 141

Z (MU) v Refugee Appeals Tribunal

Asylum

Fear of persecution – Country of nationality – Former habitual residence – Whether applicant stateless – Whether refugee status assessed in context of country of origin being country of nationality – Whether possible to have more than one former country of habitual residence – Whether Tribunal erred in assessing applicant as stateless – *Liechtenstein v Guatemala* (1955) ICJR 4; *Lay Jong Tji v Minister for Immigration and Ethnic Affairs* [1998] FCA 1380; *O(A) & L(D) v Minister for Justice, Equality and Law Reform* [2003] 1 IR 1; *Corrigan v Irish Land Commission* [1997]

IR 317; *Lennon v Cork City Council* [2006] IEHC 438; *Brennan v Governor of Portlaoise Prison* [2007] IEHC 384; *Q(M) v Judge of the Northern Circuit* (Unreported, High Court, McKechnie J, 14th November, 2003); *C(C) v Early* [2006] IEHC 147; *Van Duyn v Home Office* [1975] 1 CMLR 1; *K(G) v Minister for Justice, Equality and Law Reform* [2002] 2 IR 418; *Banzuzi v Minister for Justice, Equality and Law Reform* [2007] IEHC 2; *S(AW) v Refugee Appeals Tribunal* [2007] IEHC 377 and *J(MT) v Refugee Appeals Tribunal* [2008] IEHC 102 considered – *Matijevic v Minister for Justice, Equality and Law Reform* (Unrep, HC, Finlay-Geoghegan J, 4/6/2003) distinguished – Refugee Act 1996 (No 17), s 2 – Convention relating to the Status of Refugees 1951 – Leave granted (2007/1309)JR – Edwards J – 10/2/2010) [2010] IEHC 142

K (TB) v Refugee Appeals Tribunal

Asylum

Fear of persecution - Credibility - Adverse credibility findings - Nationality of applicant at issue – Language analysis test used to establish veracity of alleged nationality – Alleged failure by respondent to give reasons – Use of language test which was allegedly fundamentally flawed - Alleged failure by respondent adequately assess applicant’s submissions on notice of appeal – Errors of fact by tribunal member – Whether language test fundamentally flawed - Whether use of language test in breach of fair procedures – Whether failure to give reasons breached natural and constitutional justice – Whether respondent reached adverse credibility findings as result of unfair procedures - Refugee Act 1996 (No 17) ss 11, 13 - *DVTS v Minister for Justice Equality and Law Reform* [2007] IEHC 305 [2008] 3 IR 476, *K(I) v MJELR* [2008] IEHC 173 (Unrep, Birmingham J, 12/6/2008), *G(T) v Refugee Appeals Tribunal* [2007] IEHC 377 (Unrep, Birmingham J, 7/10/2007), *I(U) v Refugee Appeals Tribunal* [2007] IEHC 72 (Unrep, Murphy J, 23/1/2007), *Muia v Refugee Appeals Tribunal* [2005] IEHC 363 (Unrep, Clarke J, 11/11/2005), *Keagnene v MJELR* [2007] IEHC 17 (Unrep, Herbert J, 31/1/2007), *Bisong v Refugee Appeals Tribunal* [2005] IEHC 157 (Unrep, O’Leary J, 25/4/2005), *Zhuchkova v Minister for Justice Equality and Law Reform* [2004] IEHC 414, (Unrep, Clarke J, 26/11/2004), *Da Silveira v Refugee Appeals Tribunal* [2004] IEHC 436, (Unrep, Peart J, 9/7/2004) and *GK v MJELR* [2002] 2 IR 418 considered – *Rajah v Royal College of Surgeons* [1994] ILRM 223, *O’Donoghue v An Bord Pleanála* [1991] ILRM 750, *Kikumbi v Refugee Application Commissioner* [2007] IEHC 11 (Unrep, Herbert J, 7/2/2007), *P(F) v MJELR* [2002] IR 164, *Imafu v Minister*

for Justice [2005] IEHC 416 (Unrep, Peart J, 9/12/2005) and *Tabi v Refugee Appeals Tribunal* (Unrep, Peart J, 27/7/2007) applied – Relief granted (2007/1114)JR – Edwards J – 3/2/2010) [2010] IEHC 143

A (A) v Minister for Justice, Equality and Law Reform

Asylum

Fear of persecution - Credibility – Country of origin information – Whether error in interpretation of country of origin information in assessing future risk of persecution – Whether failure to take adequate account of past persecution suffered by applicant – *Adan v Secretary of State for the Home* [1991] 1 AC 293 considered - Illegal Immigrants (Trafficking) Act 2000 (No 29) s 5(2) - Leave granted (2008/804)JR – Clark J – 19/1/2010) [2010] IEHC 144

J (AMS) v Refugee Appeals Tribunal

Asylum

Fear of persecution – Credibility – Inference as to credibility – Probative value to be attributed to medical reports – Substantial grounds – Whether applicant was personally believable – Whether any substantial ground raised which would justify granting leave – Whether procedure free of any material defect of law or fact – *Camara v Minister for Justice* (Unrep, HC, Kelly J, 26/7/2000) followed – *Khazadi v Minister for Justice, Equality and Law Reform* (Unrep, HC, Gilligan J, 19/4/2007) and *Pamba v Refugee Appeals Tribunal* (Unrep, HC, Cooke J, 19/5/2009) considered – Refugee Act 1996 (No 17), ss 6, 11B and 13 – Leave refused (2008/6)JR – Cooke J – 16/3/2010) [2010] IEHC 139

E (LD) v Refugee Appeals Tribunal

Asylum

Fear of persecution - Differential impact – Risk of persecution - Whether differential impact could amount to persecution - Adverse credibility findings – Whether failure by tribunal member to consider issue of differential impact – Whether question that differential impact amounted to persecution considered - *Adan v Home Secretary* [1998] 2 WLR 702, *Viharajah v United Kingdom* [1991] ECHR 13163/87, *G v Home Secretary* [2006] EWCA 1342 [2006] All ER (D) 189 (Oct) and *Salah Sheekh v Netherlands* [2007] ECHR 1948/04 considered – Refugee Act 1996 (No 17) s 2 - Relief granted (2008/804)JR – Birmingham J – 18/5/2010) [2010] IEHC 188

J (AMS) v Minister for Justice Equality & Law Reform

Asylum

Fear of persecution - Failed asylum seeker - Risk of persecution - Documentary evidence - Country of origin information - Failing to weigh evidence - Failing to assess fear of persecution as failed asylum seeker - Failure to give adequate reasons for rejection of evidence - Whether claim before tribunal - Whether claim more relevant to claim for subsidiary protection - *Imafu v Minister for Justice* [2005] IEHC 416, (Unrep, Peart J, 9/12/2005) and *Horvath v Secretary of State* [2000] 3 WLR 379 applied; *Gidey v Refugee Appeals Tribunal (Ex tempore)*, Clark J, 26/2/2008 distinguished; *FVV v Refugee Appeals Tribunal* [2009] IEHC 268, (Unrep, Irvine J, 28/5/2009); *Mia v Refugee Appeals Tribunal* [2008] IEHC 336, (Unrep, Hedigan J, 29/10/2008); *Muina v Refugee Appeals Tribunal* [2005] IEHC 363, (Unrep, Clarke J, 11/11/2005); *I v Refugee Appeals Tribunal* [2007] IEHC 72, (Unrep, Murphy J, 23/01/2007); *GK v Minister for Justice* [2002] 2 IR 418 and *AA v Home Secretary* [2006] EWCA Civ 401, [2007] 1 WLR 3134 considered; *DVTS v Minister for Justice* [2007] IEHC 305, [2008] 3 IR 476 and *Banzuzi v Refugee Appeals Tribunal* [2007] IEHC 2, (Unrep, HC, Feeney J, 18/1/2007) approved - Refugee Act 1996 (No 17) - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5 - Relief refused (2007/1214JR - McCarthy J - 2/12/2009) [2009] IEHC 530

DBM v Refugee Appeals Tribunal

Asylum

Fear of persecution - Fear of traditional rituals - Internal relocation - Internal flight alternative - Safety of applicant - Credibility - Substantial grounds - Whether fears alleged were real - Whether threats could be avoided by moving to different area - Whether fundamental flaw or illegality in impugned decision - Whether paper based appeal inadequate - Whether absence of oral hearing prejudicial - *S(P) v Refugee Appeals Commissioner* [2009] IEHC 298 and *M(JG) v Refugee Applications Commissioner* [2009] IEHC 352 considered Refugee Act 1996 (No 17), ss 11 and 13 - Illegal Immigrants (Trafficking) Act 2000, s 5(2) - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 7 - UNHCR Guidelines on International Protection No 4 "Internal Flight or Relocation Alternative" 2003 - Leave refused (2009/393JR - Clark J - 16/3/2010) [2010] IEHC 146
E (Ra O)(A minor) v Minister for Justice, Equality and Law Reform

Asylum

Fear of persecution - Membership of social group - Acceleration of assessment of claim on grounds of particular nationality - Whether finding that fear of stepfather was not fear of persecution by reason of membership of a particular social group substantial ground - Whether acceleration of assessment of claim substantial ground - Whether substantial ground regarding assessment of age of applicant and police protection - Refugee Act (No 17), s 2 - Leave refused (2008/97JR - Cooke J - 2/3/2010) [2010] IEHC 130
O (D) v Refugee Appeals Tribunal

Asylum

Fear of persecution - Past persecution - Relocation - Credibility - Fair procedures - Whether State protection available - Whether effective legal system in place - Whether well-founded fear of persecution in future - Whether Tribunal had regard to past persecution - Whether applicant could ascertain from decision why appeal failed - *Pamba v Refugee Appeals Tribunal* (Unrep, HC, Cooke J, 19/5/2009) followed - *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 applied - *T(MS) v Refugee Appeals Tribunal* [2009] IEHC 529 and *N(Fr) v Minister for Justice, Equality and Law Reform* [2008] IEHC 107 considered - Refugee Act 1996 (No 17), ss 13 and 16 - Council Directive 2004/83/EC, art 2 - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 2 and 5(2) - UNHCR Guidelines on International Protection No 4 "Internal Flight or Relocation Alternative" 2003 - Relief granted (2009/96JR - Clark J - 23/4/2010) [2010] IEHC 171

M (WM) v Refugee Appeals Tribunal

Asylum

Fear of persecution - Societal discrimination - HIV positive - Distinction between persecution and societal discrimination - Duty to give reasons - Consideration of previous similar decisions - Whether societal discrimination amounted to persecution for the purposes of the act - Whether tribunal member considered previous relevant decisions - Refugee Act 1996 (No 17) s 2 - European Communities (Quality and Safety of Human Tissues and Cells) Regulations (SI 158/2006), reg 9 - *S(EM) v MJELR* [2004] IEHC 398 (Unrep, Clarke J, 21/12/2004), *Atanasov v Refugee Appeals Tribunal* [2006] IESC 53 (Unrep, SC, 26/7/2006) and *Kuthyar v Minister for Immigration and Multicultural Affairs* (2000) FCA 10 considered - *I (BF) v Refugee Appeals Tribunal* [2009] IEHC 95 (Unrep, Clark J, 25/2/2009) distinguished

- Leave refused (2008/1059JR - Clark J - 20/1/2010) [2010] IEHC 138
S (B) v Refugee Appeals Tribunal

Asylum

Judicial review - Leave - Commissioner's report - Circumstances where judicial review of Commissioner's report appropriate - Function of Commissioner and Tribunal - Role of Commissioner and Tribunal in asylum process - Applicant found lacking credibility - Appeal to Tribunal to be determined without hearing - Whether judicial review of Commissioner's report appropriate - *(K)A v Minister for Justice, Equality and Law Reform* (Unrep, SC, 28/1/2009) applied - *(O)F v Minister for Justice, Equality and Law Reform* [2009] IEHC 300 (Unrep, Cooke J, 26/2/2009) and *O(BA)(A Minor) & Ors v Minister for Justice, Equality and Law Reform* [2009] IEHC 499 (Unrep, Cooke J, 6/11/2009), *A(RL) v Refugee Application Commissioner* [2009] IEHC 216, (Unrep, Cooke J, 30/4/2009), *A(NA) v Refugee Applications Commissioner* [2007] IEHC 54, [2007] 2 IR 787 approved - and *I(GO) v Minister for Justice, Equality and Law Reform* [2009] IEHC 463, (Unrep, Cooke J, 15/10/2009) approved - *M(SO) v Refugee Applications Commissioner* [2005] IEHC 218, (Unrep, Clarke J, 23/6/2005) distinguished - Refugee Act 1996 (No 17), ss 11, 13, 15, 16 & 17 - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5 - Council Directive 2005/85/EC, art 39 - Leave refused (2007/1221JR - Cooke J - 10/2/2010) [2010] IEHC 148
C (XL) v Minister for Justice, Equality and Law Reform and Refugee Applications Commissioner

Asylum

Leave - Country of origin information - Duty of Tribunal in assessing claim - Assessment of country of origin information - Failure to consider UNHCR Handbook guideline - Role of Court - Whether selective reliance on country of origin information by Tribunal substantial ground - Whether failing to consider UNHCR guideline substantial ground - *S(DVT) v Minister for Justice, Equality and Law Reform* [2007] IEHC 305 (Unrep, Edwards J, 4/7/2007); *O(H) v Refugee Appeals Tribunal* [2007] IEHC 299 (Unrep, Hedigan J, 19/7/2007) and *A(MI) v Refugee Appeals Tribunal* [2008] IEHC 336 (Unrep, Hedigan J, 29/10/2008) approved - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - Leave refused (2008/323JR - Cooke J - 24/3/2010) [2010] IEHC 135
E (E) v Refugee Appeals Tribunal

Asylum

Oral appeal – Internal relocation – Whether paper based appeal adequate remedy when internal relocation in issue – Applicants not dealing with new issue on which no decision previously made – In depth analysis of internal relocation not in issue where no well-founded fear of persecution – United Nations guidelines directed to refusal of refugee status to people with well-founded fear of persecution – Appeal not dependent on personal testimony or demeanour – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2) - *S(P) v Refugee Appeals Commissioner* [2009] IEHC 298 (Unrep, Cooke J, 18/06/2009) and *M (JG) v Refugee Applications Commissioner* [2009] IEHC 352 (Unrep, Clark J, 29/07/2009) distinguished – United Nations guidelines on internal relocation (2003), para 36 – Refugee Act 1996 (No 17), s 13(6)(a) – Leave refused (2009/393JR & 395JR – Clark J – 16/03/2010) [2010] IEHC 146

E (Ra) and E (Rp) (minors) v Minister for Justice, Equality and Law Reform

Asylum

Procedural unfairness – Undisclosed factual material – No reasonable opportunity for applicant to consider or comment upon matters materially affecting decision of respondent – Right to oral hearing waived by applicant – Well founded fear of persecution – Conscientious objector – Deserter – Political opinion – Whether procedural unfairness – Whether decision unfair where no opportunity for applicant to consider or comment upon matters materially affecting decision – Whether certiorari appropriate in the circumstances – Whether decision should be quashed for procedural unfairness for manner in which reached - *Idiakheuea v Refugee Appeals Tribunal* [2005] IEHC 150 (Unrep, Clarke J, 10/5/2005) applied – *Re Hanghey* [1971] IR 217 considered – Refugee Act 1996 (No 17) ss 11 & 13 - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) arts 9 & 12 - Relief granted (2007/1410JR – Cooke J – 11/5/2010) [2010] IEHC 177
S (P) v Refugee Appeals Tribunal

Deportation

Family reunification – Father – Impact on child and family – Whether proportionate and reasonable assessment made of impact – Failure to give fact specific consideration to welfare rights and best interests of child applicant – Whether breach of Convention rights – Whether deportation of father breached rights of family – Whether decision to deport reasonable

and proportionate – *R (Mahmood) v Home Secretary* [2001] 1 WLR 840; *Fajujonu v Minister for Justice* [1990] 2 IR 151; *AO & DL v Minister for Justice* [2003] 1 IR 1; *Oguekwe v Minister for Justice* [2008] IESC 25 [2008] 3 IR 795; *Dimbo v Minister for Justice* [2008] IESC 344 (Unrep, SC, 14/11/2006) considered - Leave refused (2009/114JR – Cooke J – 13/1/2010) [2010] IEHC 89
Ofabuike (a minor) v Minister for Justice, Equality and Law Reform

Deportation

Family rights – Parent - Minor Irish citizens – Representations – *Pro forma* considerations taken into account – Alleged assurances – Alleged failure to take into account steps taken by applicant – Alleged prejudicial reference to questioning by gardai – Alleged failure to give regard to absence of claim for social welfare – Alleged failure to analysis risk faced by minor applicants – Ministerial obligations – Mandatory considerations – Effect of deportation order on spouse and children of prospective deportee – Rights to respect for privacy and family rights – Whether decision reasonable and proportionate – Business venture of applicant – Balancing of rights – *Dimbo v Minister for Justice, Equality and Law Reform* [2008] IESC 26 (Unrep, SC, 1/5/2008); *Oguekwea v Minister for Justice, Equality and Law Reform* [2008] IESC 25 [2008] 3 IR 795 and *Ojobuike v Minister for Justice, Equality and Law Reform* [2010] IEHC 89 (Unrep, Cooke J, 13/1/2010) considered - Refugee Act 1996 (No 6), s 5 – Immigration Act 1999 (No 22), s 3 – Leave refused (2010/3JR – Cooke J – 12/2/2010) [2010] IEHC 88

O (C) v Minister for Justice, Equality and Law Reform

Deportation

Injunction – Application to restrain deportation – Refusal to revoke deportation order – Delay in raising of new issue – Lack of candour – Credibility – Whether substantial grounds for review – Whether Minister erred in failing to take appropriate account of new information – Obligation to seek state protection in country of origin – Internal relocation – *LC v Minister for Justice* [2006] IEHC 36, [2006] IESC 44 [2007] 2 IR 133 followed – *R v Minister for Justice* [2006] IEHC 353 (Unrep, Cooke J, 24/7/2009); *Hogarth v Home Secretary* [2001] 1 AC 489 considered – Illegal Immigrants Trafficking Act 2000 (No 29), s 5 - Leave refused (2009/1177JR – Charleton J – 14/1/2010) [2010] IEHC 10

A (O) v Minister for Justice, Equality and Law Reform

Deportation

Leave to remain – Family rights – Married to Irish citizen – Constitutional right as married couple – Interference with right to respect for family life – Extension of time for judicial review – Good and sufficient reason – Substantial grounds – Legislative policy – Failure to provide reason for decision – Whether interference was in accordance with law, in pursuit of pressing need and legitimate aim, necessary in democratic society, in pursuit of pressing social need and proportionate to legitimate aim – Whether Minister considered impact of deportation on constitutional rights of applicant – Whether justification to extend time to amend statement of grounds – Whether deportation order would expose deportee to risks – *Muresan v Minister for Justice, Equality and Law Reform* [2004] 2 ILRM 364 and *Baby O v Minister for Justice, Equality and Law Reform* [2002] 2 IR 169 followed – *Abdulaziz v United Kingdom* [1985] 7 EHRR 471; *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840; *A(F) v Refugee Appeals Tribunal* [2007] IEHC 290; *Fitzpatrick v Minister for Justice, Equality and Law Reform* [2005] IEHC 9; *S(BI) v Minister for Justice, Equality and Law Reform* [2007] IEHC 398; *Pok Sun Shum v Minister for Justice, Equality and Law Reform* [1986] ILRM 593; *O(G) v Minister for Justice, Equality and Law Reform* (Unrep, HC, Birmingham J, 19/6/2008) and *C(T) v Minister for Justice, Equality and Law Reform* [2005] 4 IR 109 considered – *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3 distinguished – Illegal Immigrants (Trafficking) Act 2000, s 5 – Immigration Act 1999 (No 22), s 3 – Refugee Act 1996 (No 17), s 5 – Constitution of Ireland 1937, art 41 – European Convention on Human Rights and Fundamental Freedoms, arts 3 and 8 – International Covenant on Civil and Political Rights, art 12 – Leave refused (2009/1174JR – Hanna J – 5/3/2010) 2010 IEHC 80

Ugbo v Minister for Justice, Equality and Law Reform

Deportation

Injunction – Fair issue to be tried – Damages as adequate remedy – Balance of convenience Alleged illegality of deportation order – Alleged inadequacy of consideration of applicant's case – Whether fair issue to be tried – Whether damages adequate remedy – Whether balance of convenience lay in granting injunction – Illegal Immigrants (Trafficking) Act 2000 (No 29) s 5 - *Campus Oil v Minister for Industry (No 2)* [1984] ILRM 47 applied – Relief refused

(2009/1226JR – Cooke J – 4/2/2010) [2010] IEHC 87
Omosanya v Minister for Justice, Equality and Law Reform

Deportation

Mother and children – Irish born children – Alleged fear of persecution – Alleged risk of female genital circumcision - Application for asylum – Negative credibility findings - Application for leave to remain – Supporting documentation – Letters of support – Decision on leave to remain – Delay in issuing proceedings – Whether good and sufficient reason for delay – Challenges to validity of decisions to deport – Whether insufficient reasons given by Minister – Whether failure to consider best interests of children – Whether substantial grounds for review – Whether failure to consider issue of refoulement – Nature of obligation to assess refoulement – Availability of internal relocation – United Nations Convention on Rights of Child – Whether convention conferred rights on children – Absence of representations to Minister – *Jolly v Refugee Appeals Tribunal* (Unreported, Finlay Geoghegan J, 6/11/2003); *S v Refugee Appeals Tribunal* [2002] 2 IR 163; *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3 (Unreported, SC, 21/1/10); *Baby O v Minister for Justice, Equality and Law Reform* [2002] 2 IR 169; *Kouyape v Minister for Justice, Equality and Law Reform* [2005] IEHC 380, (Unreported, Clarke J, 9/11/2005) and *Kavanagh v Governor of Mountjoy Prison* [2003] 3 IR 97 considered – Constitution of Ireland 1937, art 29 - Refugee Act 1996 (No 6), s 5 – Immigration Act 1999 (No 22), s 3 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave refused (2009/373JR – Clark J – 16/3/2010) [2010] IEHC 83
O (O) v Minister for Justice, Equality and Law Reform

Deportation

Mother and children – Irish born child – Alleged fear of persecution – Negative credibility findings - Deportation orders – Alleged failure to consider rights to respect for privacy and family life – Failure to identify facts indicating interference with rights – Absence of exceptional circumstances - Alleged failure to consider individual circumstances of children – Failure to bring special personal or humanitarian considerations to attention of Minister - Whether selective use made of country of origin information – Whether substantial grounds for review - *Kozhukarov v Minister for Justice, Equality and Law Reform* [2005] IEHC 424 (Unreported, Clarke J, 14/12/2005); *Niemietz v Germany* (1993) 16 EHRR 97 and *O(J) v Refugee*

Appeals Commissioner [2009] IEHC 478 (Unrep, Cooke J, 28/10/2009) considered - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave refused (2006/1125JR – Clark J – 18/3/2010) [2010] IEHC 92
A (O) v Minister for Justice, Equality and Law Reform

Deportation

Refoulement - HIV/Aids - Country of origin information – Alleged failure to consider claim – Alleged failure to state reason for rejecting claim – *McNamara v An Bord Pleanála* [1995] 2 ILRM 1 and *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3 (Unreported, SC, 21/1/2010) considered - Refugee Act 1996 (No 6), s 5 – Leave granted on single ground (2008/529JR – Cooke J – 25/3/2010) [2010] IEHC 94
E (J) v Minister for Justice, Equality and Law Reform

Deportation

Subsidiary protection – Fear of persecution – Whether Minister failed to investigate whether there would be a ‘serious and individual’ threat to applicant’s life or person – Test to be applied in deciding whether applicant faced serious harm if deported – Credibility – International or internal armed conflict – Indiscriminate violence - Whether Minister failed to consider whether applicant at risk of serious harm from indiscriminate violence arising from internal armed conflict – Test to be applied – Country of origin information - *T(G) v Minister for Justice* [2007] IEHC 287 (Unrep, Peart J, 27/7/2007); *N(FR) v Minister for Justice* [2008] IEHC 107 (Unrep, Charleton J, 24/4/2008); *B(GO) v Minister for Justice* [2008] IEHC 229 (Unrep, Birmingham J, 3/6/2008); *H(N) v Minister for Justice* [2007] IEHC 277 (Unrep, Feeney J, 27/7/2007) considered - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Application refused (2008/756JR – Clark J – 14/1/2010) [2010] IEHC 93
Obuseh v Minister for Justice, Equality and Law Reform

Deportation

Subsidiary protection – Leave to remain - State protection – Country of origin information - Differences in conclusions of respondent and Tribunal regarding availability of state protection – Whether conclusions of respondent and Tribunal differed – Whether differences amounted to irrationality - Whether respondent’s conclusion on state protection rationally supported by country of origin information - *Meadows v MJELR* [2010] IESC 3

(Unrep, Supreme Court, 21/1/2010) and *B(GO) v MJELR* [2009] IEHC 229 (Unrep, Birmingham J, 3/6/2008) considered- European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) regs 4, 5- Refugee Act 1996 (No 17) ss 5, 13, 16, 17 – Criminal Justice (UN Convention Against Torture) Act 2000 (No 11) s 4 - Immigration Act 1999 (No 22) s 3 - Relief refused (2009/1204JR – Clark J – 18/5/2010) [2010] IEHC 184

Adeniran v Minister for Justice, Equality and Law Reform

Deportation

Transfer order – Fair procedures – Applicant previously refused asylum in Belgium – Claim of serious illness and dependency on sibling claimed after transfer order made – Whether Minister erred in finding that applicant was not suffering from “serious illness” - Whether rational – Council Regulation (EC) No 343/2003, article 15 – Application for judicial review refused (2009/563JR – Cooke J – 25/3/2010) [2010] IEHC 81
Fampumu v Minister for Justice, Equality and Law Reform

Deportation

Validity of order – Application to revoke order – Change in circumstances - Leave to seek judicial review – Interim injunction – Marriage of applicant and birth of child since deportation order made – *Cosma v Minister for Justice Equality and Law Reform* [2006] IESC 44, (Unrep, SC, 10/7/2006) considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Immigration Act 1999 (No 22), s 3 – Application refused (2010/475 JR – Cooke J – 19/4/2010) [2010] IEHC 118
Adugbole v Minister for Justice, Equality and Law Reform

Judicial review

Leave – Test – Human rights – Criteria courts should apply when reviewing validity of administrative decisions where constitutional or convention rights at stake – Whether established criteria for grant of judicial review correct test to apply in cases in which human or constitutional rights – Whether anxious scrutiny applicable where issues of fundamental human rights concerned – Proportionality – Reasons – Deportation - Leave to remain – Humanitarian grounds – Refusal – Constitutional rights – Principle of non-refoulement – Female genital mutilation – Judicial review – Decision – Reasons – Statutory considerations – *O’Keeffe v An Bord Pleanála* [1993] 1 IR 39, *East*

Donegal Co-Operative Livestock Mart Ltd v Attorney General [1970] IR 317, *State (Lynch) v Cooney* [1982] IR 337, *O'Neill v Governor of Castlereagh Prison* [2004] IESC 7 and 73, [2004] 1 IR 298, *O'Brien v Bord na Móna* [1983] IR 255, *Greene v Minister for Agriculture* [1990] 2 IR 17, *Clinton v An Bórd Pleanála* [2007] IESC 19, [2007] 4 IR 701, *Radio Limerick One Ltd v Independent Radio and Television* [1997] 2 IR 151, *State (Keegan) v Stardust Compensation Tribunal* [1986] I.R. 642 *Fajujonu v Minister for Justice* [1990] 2 IR 151, *AO & DL v Minister for Justice* [2003] 1 IR 1, *FP v Minister for Justice* [2002] 1 IR 164, *Baby O v Minister for Justice* [2002] 2 IR 169 and *Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 considered - Refugee Act 1996 (No 17), s 5 - Immigration Act 1999 (No 22) s 3 - Applicant's appeal allowed (419/2003 - SC - 21/1/2010) [2010] IESC 72
Meadows v Minister for Justice, Equality and Law Reform

Naturalisation

Certificate of naturalisation - No reasons given - Absolute discretion - Necessity to give reasons - Absolute discretion of respondent in granting citizenship - Arguable case - Necessary proofs - Whether decision of respondent unlawful - Whether obligation on respondent to give reasons for decision where absolute discretion to make decision - Whether arguable case made out that refusal tainted by illegality - Whether entitlement to reliefs claimed established by applicant - *Pok Sun Shum v Ireland* [1986] ILRM 593, *Mishra v Minister for Justice* [1996] 1 IR 189 and *Singh v MJELR* [2010] IEHC 86 (Unrep, Cooke J, 17/2/2010) applied - *B(A) v MJELR* [2009] IEHC 449 (Unrep, Cooke J, 18/6/2009), *H(LG) v MJELR* [2009] IEHC 78 (Unrep, Edwards J, 20/1/2009) and *R v Home Secretary, ex parte Fayed* [1997] 1 All ER 228 distinguished - *East Donegal Co-operative Livestock Mart Ltd v AG* [1970] IR 317 considered - Irish Nationality and Citizenship Act 1956 (No 26) ss 14, 15, 16 - *Illegal Immigrants (Trafficking) Act 2000* (No 29) s 5 - Leave refused (2010/626)JR - Cooke J - 19/5/2010) [2010] IEHC 187

Jiad v Minister for Justice, Equality and Law Reform

Naturalisation

Right to citizenship - Privilege extended on discretionary basis - Whether applicant of good character - Whether citizenship automatic - *Mishra v Minister for Justice Equality and Law Reform* [1996] 1 IR 189; *TV3 Television Co v Independent and Radio Television Commission* [1994] 2 IR 439 distinguished - *O'Brien v Bord na Móna* [1983] IR 255 approved - Application

dismissed (2009/802 JR - Cooke J - 16/4/2010) [2010] IEHC 109
Tabi v Minister for Justice, Equality and Law Reform

Residence

Family rights - Irish born citizen child scheme - Application for residence - Dependent child over 18 years of age - Whether constitutional or convention rights fell to be considered under scheme - Whether applicant satisfied conditions of scheme - Whether Minister erred in fettering his discretion to grant visa to dependent child who was an adult - Whether evidence of family relationship beyond 'normal emotional ties' - *S(BI) v Minister for Justice* [2007] IEHC 398 (Unrep, Feeney J, 30/11/2007); *Agbonlabor v Minister for Justice, Equality and Law Reform* [2007] 4 IR 309; *R (Mahmood) v Home Secretary* [2001] 1 WLR 840; *Boughanemi v France* (1996) 22 EHRR 228; *D(J) v Residential Institutions Redress Committee* [2009] IESC 59 (Unrep, SC, 27/7/2009); *Slivenko v Latvia* (2004) 39 EHRR 24; *Emonet v Switzerland* (2009) 49 EHRR 11; *Kwakyie-Niti v Netherlands* (App No 31519/96, 7/11/2000); *Advic v UK* (1995) 20 EHRR; *Sijakova v Macedonia* (App No. 67014/01, 6/3/2003); *Abmut v Netherlands* (1997) 24 EHRR 62; *Sen v Netherlands* (2003) 36 EHRR 7 considered - European Convention on Human Rights, articles 3(1) and 8 - Relief refused (2009/500)JR - Clark J - 14/1/2010) [2010] IEHC 91
Khalimov v Minister for Justice, Equality and Law Reform

Residence

Leave - Extension of time - Delay - No explanation or excuse - No good and sufficient reason to extend time - Retention of right of residence - Failed asylum application - Deportation order - Subsequent marriage to European Union national - Temporary residency - Separation from European Union national spouse - Refusal to renew residence card - No divorce or annulment proceedings in being - Whether renewal of permission to remain in State on basis of marriage required applicant to have successfully concluded or started divorce or annulment proceedings - Whether requirements of family law imposed impossible condition - Whether separated non-national spouse of European Union national no longer in host Member State, retained right to reside in host Member State until such time as decree of divorce or nullity obtained - *A(J) v Refugee Applications Commissioner* [2008] IEHC 431 (Unrep, Hedigan J, 18/12/2008), *K(G) v Minister for Justice, Equality and Law Reform* [2002] 2 IR 419 and *S(C) v Minister for Justice*

[2005] 1 IR 343 followed - *Diatta v Land Berlin* Case 267/83 [1985] 2 ECR 567 considered - European Communities (Free Movement of Persons) (No 2) Regulations 2006 (SI 656/2006), reg 6 and 10(2) - European Communities (Free Movement of Persons) (Amendment) Regulations 2008 (SI 310/2008) - Immigration Act 1999 (No 22), s 3(4) - Family Law (Divorce) Act 1996 (No 33), s 5 - Council Directive 2004/38/EC, art 13(2) - Rules of the Superior Courts 1986 (SI 15/1986), O 84, 21(1) - Leave refused (2009/392)JR - Herbert J - 28/04/2010) [2010] IEHC 153

Shyllon v Minister for Justice, Equality and Law Reform

Transfer order

Responsible member state - Lapse of time - Implementation - Asylum application - Criteria and mechanisms for determining member state responsible for examining asylum applications lodged in one member state by third party national - Arguable case - Whether transfer order void due to lapse in time in excess of six month limitation period - Whether transfer order, if valid and capable of implementation, affected by respondent's agreement to consider fresh representations prior to implementation - *Makumbi v Minister for Justice* [2005] IEHC 403 (Unrep, Finlay Geoghegan J, 15/1/2008) considered - Council Regulation (EC) No. 343/2003, articles 16 and 20 - Leave granted (2009/922)JR - Cooke J - 13/1/2010) [2010] IEHC 90

Wadria v Minister for Justice, Equality and Law Reform

Article

Dewhurst, Elaine
Access to justice for migrant workers
(2008-9) 8 HJL 1

INJUNCTIONS

Interlocutory injunction

Delay - Urgency of application - Effect of delay - Appropriate forum for planning permission grievances - Restraint from refusing entry on land for purpose of erecting electric line - Whether urgency to application - Whether granting application would dispose of substantive proceedings - Whether strong case likely to succeed - Whether relief prohibitory or mandatory - Whether damages adequate remedy - Whether balance of convenience favoured granting relief - *ESB v Gormley* [1985] IR 129 and *Electricity Supply Board (ESB) v Harrington* (Unrep, SC, 9/5/2002) applied - *ESB v Burke* [2006] IEHC 214, (Unrep, HC, Clarke J, 23/5/2006) and

Nolan Transport (Oaklands) Ltd v Halligan (Unrep, HC, 22/3/1994) approved – *Jacob v Irish Amateur Rowing Union Ltd* [2008] IEHC 196, [2008] 4 IR 731; *Hanraban v Merck Sharpe & Dohme (Ireland) Ltd* [1988] ILRM 629 distinguished – *American Cyanamid Company v Ethicon Limited* [1975] 1 AC 396 approved – *Lingam v Health Service Executive* [2005] IESC 89, [2006] 17 ELR 137 applied; *Shelbourne Hotel Holdings Ltd v Torriam Hotel Operating Company Ltd* [2008] IEHC 376 (Unrep, HC, Kelly J, 18/12/2008) considered – Electricity (Supply) Act 1927 (No 27) ss 46, 53 – Electricity (Supply) (Amendment) Act 1945 (No 12), s 46 – Planning and Development Act 2000 (No 30), s 42, 43, 50 – Planning and Development Regulations 2001 (SI 600/2001), art 47 – Relief granted (2010/1367P – Laffoy J – 23/4/2010) [2010] IEHC 158
ESB and Eirgrid Plc v Roddy

Interlocutory Injunction

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Interlocutory relief – Enforcement notice – Business to be closed down - Whether fair issue to be tried – Whether damages adequate remedy – Balance of convenience – Concurrent application for leave to apply for judicial review – Test – Substantial grounds – Exemptions – Whether planning authority took into account extraneous matters – Planning and Development Act 2000 (No 30), ss 50(9) – Planning and Development (Strategic Infrastructure) Act 2006 (No 27), s 13 – Planning and Development Regulations 2001 (SI 600/2001), arts 9 and 10 - *White v Dublin City Council* [2004] IESC 35, [2004] 1 IR 545 and *Campus Oil Ltd v Minister for Industry and Energy (No 2)* [1983] IR 88 applied - (2009/724JR – MacMenamin - 27/7/2009) [2009] IEHC 621
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[2004] 2 IR 625 applied – *Kenny v Dublin City Council* [2009] IESC 19 (Unrep, Supreme Court, 5/3/2009), *Ashbourne Holdings v An Bord Pleanála* [2002] ILRM 321 and *Boland v An Bord Pleanála* [1996] 3 IR 435 considered – *O’Connor v Dublin Corporation* (Unrep, O’Neill J, 3/10/2000) distinguished - Relief refused (2009/405JR and 2009/406JR – MacMenamin J – 22/1/2010) [2010] IEHC 13
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Unauthorised development

Quarry - Lawfulness - Preliminary issue as to validity of proceedings - Planning authority registered respondent’s lands as quarry subject to conditions - Whether s 160 procedure available as mechanism to enforce compliance with conditions imposed on operation of quarry – Mechanism to challenge unauthorised development - Whether registration by planning authority interfered with right to challenge development - Interpretation - Registration process - Purpose of legislation - Judicial review - Procedure – Whether only remedy by way of judicial review in lieu of right to challenge nature of development - Limitations of judicial

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Costs

Security for costs – Inability on part of plaintiff to discharge costs - *Prima facie* defence to plaintiff’s claim – Special circumstances – Whether plaintiff discharged onus of establishing special circumstances such that Court should exercise discretion not to order security for costs – Companies Act 1963 (No 33), s 390 – Order for security for costs granted (2007/2511P – Laffoy J – 5/2/2010) [2010] IEHC 60

Ronbow Management Company Ltd v Soroban Builders Ltd

Costs

Taxation - Review of taxation - Solicitors’ instructions fee - Brief fees of senior and junior counsel - Approach for Taxing Master in assessing costs - Obligations of Taxing Master - Failure to ascertain nature and extent of work done - Failure to evaluate work - Failure to ascertain time spent on work - No reduction for concession of liability made 2½ weeks before date of trial - Whether fees grossly disproportionate to defendants’ solicitors - Relevance of timesheet records – Whether established that Taxing Master erred as to amount of allowances so that decision was unjust - Whether impossible to understand how figure arrived at - Whether Taxing Master must act judicially and proceed in rational and transparent way - *Mahony v KCR Heating Supplies* [2007] IEHC 61, [2007] 3 IR 633; *Landers v Judge Patwell* [2006] IEHC 248, (Unrep, Smyth J, 20/6/2006) and *Minister for Finance v Goodman* (Unrep, Laffoy J 8/10/1999) considered - *Treasury*

Solicitor v Register [1978] 1 WLR 446 and *Thompson v Department of the Environment* [1986] NIJB 73 distinguished - *Superquinn Ltd v Bray UDC (No 2)* [2001] IR 459 and *CD v Minister for Health & Children* [2008] IEHC 299 (Unrep, Herbert J, 23/7/2008) followed - Courts and Court Officers Act 1995 (No 31), s 27- Rules of the Superior Courts 1986 (SI 15/1986) O 99, r 37(22) - Direction that fresh taxation take place by different Taxing Master (2007/2078P - Ryan J - 5/2/2010) [2010] IEHC 24 *Cajolla v Kilkenny*

Discovery

General discovery – Relevance and necessity – Real or genuine need – Evidential difficulties – Proportionality in discovery orders – Technical breach – Reasons – Due process – Fair trial – Whether documents relevant or necessary – Whether real or genuine need for documents – Whether evidential deficit – *Hardiman v Eastern Regional Health Authority* (Master of Hc, 17/10/2003); *Taylor v Clonmel Healthcare Ltd* [2004] 1 IR 169 and *PJ Carroll & Co Ltd v Minister for Health and Children* [2006] IESC 36 followed – European Convention on Human Rights and Fundamental Freedoms 1950, article 6 – Application refused (2008/7767P – Master Honohan – 18/3/2010) *Caffrey v Borton*

Discovery

Necessity – Privilege – Public interest in disclosure – Litigious advantage – Equality of arms – Proportionality – Confidentiality – Transcript of hearing of Fitness to Practise Committee of Medical Council – Whether evidence heard *in camera* could be disclosed – Whether transcript privileged – Whether possession of transcript conferred litigious advantage – Whether equality of arms between parties – Whether discovery proportionate to right to confidentiality – Whether discovery proportionate to right of Fitness to Practise Committee to conduct hearings in camera – *Buckley v Bough* (Unrep, Morris J, 2/7/2001) followed; *Eastern Health Board v Fitness to Practise Committee of the Medical Council* [1998] 3 IR 399 applied; *Cooper Flynn v Radio Telefís Éireann* [2000] 3 IR 344 and *Science Research Council v Nassé* [1980] AC 1028 approved - Medical Practitioners Act 1978 (No 4), s 45 - Disclosure order (2008/565P – Hanna J – 26/3/2010) [2010] IEHC 169 *Miggin (a minor) v Health Service Executive*

Discovery

Relevance – Necessity – Breach of contract - Whether documents necessary to dispose fairly of cause – Confidential

documentation - Test of proportionality applied in making order for discovery of confidential documents - Whether discovery of documents proportionate - *Hannon v Commissioner for Public Works* (Unrep, McCracken J, 4/4/2001); *Framus Ltd v CRH Plc* [2004] 2 IR 20; *Independent Newspapers v Murphy* [2006] IEHC 276 [2006] 3 IR 566 followed - *National Education Welfare Board v Ryan* [2007] IEHC 428 [2008] 2 IR 816; *Moorview Developments Ltd v First Active* [2008] IEHC 211 [2009] 2 IR 788 considered - Order for discovery of some documents (2009/6582P – Clarke J – 15/1/2010) [2010] IEHC 3 *Hartside Ltd v Heineken Ireland Ltd*

Discovery

Necessity – Relevance – Categories – Specific documents - Patent infringement suit – *Schneider (Europe GmbH) v Conor Medsystems Ireland Ltd* [2007] IEHC 63 (Unrep, Finlay Geoghegan, 2/2/2007); *Medtronic Inc v Guidant Corp* [2007] IEHC 37 (Unrep, Kelly J, 23/2/2007) applied - *Ranbaxy Laboratories v Warner Lambert Company* [2005] IESC 81 [2006] IR 193; *Compagnie Financière du Pacifique v. The Peruvian Guano Co. (1882) 11 Q.B.D. 55* considered - Discovery of some documents ordered against both parties (2008/10436P & 2009/24COM – Finlay Geoghegan J – 19/1/2010) [2010] IEHC 6 *Medinol Ltd v Abbot Ireland*

Dismissal of action

Delay – Inordinate and inexcusable – Balance of justice – Reasons for delay – Plaintiff awaiting outcome of tribunal – Ill health of plaintiff – Change of solicitor – Prejudice to defendant - Claim arising out of bullying and harassment – Whether delay inordinate and inexcusable – Whether balance of justice lay in striking out proceedings – Whether reasons for delay made it excusable – Whether defendant prejudiced by delay - *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459, *Stephens v Paul Flynn Limited* [2008] IESC 4 [2008] 4 IR 31, *Desmond v MGN Limited* [2008] IESC 56 [2009] IR 737, *Comcast International Holdings Inc v Minister for Public Enterprise* [2007] IEHC 297 (Unrep, Gilligan J, 13/06/2007), *Murray v Devils Glen Equestrian Centre* [2001] 4 IR 34 and *Anglo Irish Beef Processors Ltd v Montgomery* [2002] 3 IR 510 applied - *Birkett v James* [1978] AC 297 followed – Application refused (2002/5994P - Dunne J – 20/5/2010) [2010] IEHC 194 *Jackson v Minister for Justice Equality and Law Reform*

Dismissal of proceedings

Inordinate and inexcusable delay – Balance of justice – Prejudice – Post-commencement delay – Difficult and complex case – Bullying and harassment claim – Plaintiff's ill health – Change of solicitor – Whether claim should be dismissed for want of prosecution – Whether inordinate and inexcusable delay in prosecuting proceedings – Whether total delay was such that fair trial could not now be had – Whether defendants prejudiced by continued delay – Whether necessary for plaintiff to await outcome of Tribunal – Whether witnesses would have same degree of recall – *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 and *Stephens v Paul Flynn Ltd* [2008] 4 IR 31 followed – *Desmond v MGN Ltd* [2009] 1 IR 737; *Comcast International Holdings Inc v Minister for Public Enterprise* [2007] IEHC 297; *Gilroy v Flynn* [2004] IESC 98; *Anglo Irish Beef Processors Ltd v Montgomery* [2002] 3 IR 510; *Murray v Devil's Glen Equestrian Centre* [2001] 4 IR 34 and *Birkett v James* [1978] AC 297 considered – Application refused (2002/5994P – Dunne J – 20/5/2010) [2010] IEHC 194 *Jackson v Minister for Justice, Equality and Law Reform*

Dismissal of proceedings

Want of prosecution – Delay – Inordinate and inexcusable delay – Balance of justice – Prejudice to defendants – Acquiescence – Conduct on part of defendants – Delay by defendants - Whether delay inordinate and inexcusable – Whether balance of justice lay in dismissing proceedings – Whether prejudice to defendants – Whether defendants acquiesced in delay – Whether conduct of defendants contributed to delay – *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 and *Rooney v Ryan* [2009] IEHC 154 (Unrep, Dunne J, 31/3/2009) applied - *Allergan Pharmaceuticals (Ireland) Ltd v Noel Deane Roofing and Cladding Ltd* [2006] IEHC 215 (Unrep, O'Sullivan J, 6/7/2006), *Anglo Irish Beef Processors Ltd v Montgomery* [2002] 3 IR 510, *O'Connor v John Player and Sons Ltd* [2004] IEHC 99 (Unrep, Quirke J, 12/3/2004), *Desmond v Times Newspapers Ltd* [2009] IEHC 271 (Unrep, Dunne J, 12/6/2009), *Gilroy v Flynn* [2004] IESC 98 [2005] 1 ILRM 290 and *Stephens v Paul Flynn Limited* [2005] IEHC 148 (Unrep, Clarke J, 28/4/2005) considered – Relief refused (1997/2244P – Dunne J – 19/5/2010) [2010] IEHC 185 *Muchwood Management Ltd v McGuinness*

Dismissal of proceedings

Want of prosecution – Inordinate and inexcusable delay – Proceedings by

manufacturer and distributor of veterinary products - Claim of wrongful withdrawal of statutory authorisation to store spirits free from duty – Allegation of wrongful removal of stock from premises – Defence and counterclaim – Criminal prosecution – Prohibition of trial on certain charges – Infringement of right of plaintiff to expeditious trial – Chronology of civil proceedings – Summary proceedings by Revenue Commissioners – Applicable principles of law – Whether delay inordinate and inexcusable – Balance of justice – Fair procedures – Whether prejudice to defendant – Delay on part of defendant – Acquiescence – Whether risk of unfair trial – Delay in commencing proceedings – Reasons for delay – Ill health of plaintiff – Change in legal representation – Complexity of case – Discretion of court – Prejudice to defendants – Character of plaintiffs – Conduct of defendants – Scope and ambit of defence and counterclaim – Whether defendants induced plaintiffs to incur further expense in pursuing proceedings – Delay in bringing application to dismiss – Effect of dismissal on counterclaim – Serious allegations of conspiracy and fraud – *Cabalane v Murphy* [1994] 2 IR 262; *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459; *Birkett v James* [1978] AC 297; *Anglo Irish Beef Processors Ltd v Montgomery* [2002] 3 IR 510; *Dowd v Kerry County Council* [1970] IR 27; *O'Domnaill v Merrick* [1984] IR 151 and *Desmond v MGN Ltd* [2009] IESC 56, [2009] 1 IR 737 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 122, r 11 – Application dismissed (1993/7693P – Laffoy J – 12/3/2010) [2010] IEHC 95

Cabalane v Revenue Commissioners

Expert Witness

Assessors to court - Independent professional expert – Increased length of hearing – Whether attendance of assessor could be limited to evidence relevant to expertise – Scope of relevant evidence – Whether unfairness if attendance limited – Whether opportunity for submissions if difference opinion of court and assessors – Whether opportunity undermined by absence of assessor – Advice of assessor – Whether trial could proceed – Organic nature cross-examination – Monitoring transcripts – Video link – Medical evidence - *Competition Authority v O'Regan*, [2004] IEHC 330 (Unrep, Kearns J, 22/11/2004) followed; *Kiely v Minister for Social Welfare* [1977] IR 267, *Lafferty v Donegal County Council* [1946] IR 309, *Van Orsboven v Belgium* (1999) 26 EHHR 55, *Kremer v Czech Republic* (2001) 31 EHHR 41, *Owners Bow Spring v Owners of Manzanillo II* [2004] EWCA Civ 1007

[2005] 1 WLR 144, *Ranbaxy Laboratories Ltd v Warner-Lamber Co*, [2007] IEHC 256 (Unrep, Clarke J, 10/07/2007), *Competition Authority v Beef Industry Development Society Ltd* [2006] IEHC 294 (Unrep, McKechnie J, 27/07/2006), *City of Berlin* [1908] P 110, *Gannet (Owners of the Steamship) v Algoa (Owners of the Steamship)* [1900] AC 234, *Melanie (SS) v San Onofre (No.1)(SS)* [1927] AC 162 and *O'Brien v Moriarty (No 3)* [2006] 2 IR 474 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 36, r 41; O 26, r 41; Os 63, 64 - European Convention on Human Rights Act 2003 (No 20) – Trial continued - (2007/4691P - Gilligan J – 10/03/2010) [2010] IEHC 330
Hansfield Developments v Irish Asphalt Ltd

Evidence

Rules of evidence - Statement of evidence – Circumstantial evidence – Principles to be applied – Cross examination - Whether plaintiff entitled to place reliance on witness statements of evidence not called – Whether court should have regard to circumstantial evidence – Whether evidence admissible – Whether document tendered in evidence - *Mooreview Developments Ltd v First Active plc* [2009] IEHC 214 (Unrep, Clarke J, 6/3/2009), *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459, *AG v Kyle* [1933] IR 15 applied – *Thomas v Jones* [1921] KB 22 followed – *Gregory v Tavernor* (1833) 6 Car & P 280, *Senat v Senat* [1965] P 172 and *Owen v Edwards* (1983) 77 Cr App R 191 considered – *Snowden v Branson* [1999] EWCA Civ 1777 [1999] All ER (D) 738 considered – *The Queens Case* (1820) 2 Brod & Bing 284 followed – Inferences to be drawn – *Prima facie case* - Facts necessary to support plaintiff's case - Whether plaintiff established as matter of probability facts necessary to support verdict in its favour – Whether inferences should be drawn – Whether plaintiff adduced convincing proof - *O'Toole v Heavey* [1993] 2 IR 544 and *Fyffes plc v DCC* [2005] IEHC 477 (Unrep, Laffoy J, 21/12/2005) applied – Application for non-suit dismissed; lease rectified (2008/1923P – Edwards J – 29/1/2010) [2010] IEHC 152
Leopardstown Club Ltd v Templeville Developments Ltd

Stay

Appeal – Relevant considerations in granting stay pending appeal - *Bona fide* appeal – Balance interests to minimise risk of detriment to each party – Whether to grant stay pending appeal re judgment of *circa* six million euro – Difference between *bona fide* and tactical appeal – Balance analogous to balance of convenience test – Deny justice to neither party – *Bona fide* appeal re construction of terms of

guarantee – *Redmond v Ireland and Attorney General* [1992] 2 IR 362 and *Irish Press plc v Ingersoll Irish Publications Ltd (No 3)* [1995] 1 ILRM 117 applied; *Evans v IRFB Services (Ireland) Ltd* [2005] IEHC 107 (Unrep, Clarke J, 11/4/2005) followed - Application for stay granted conditional on undertakings on both sides – Undertaking by plaintiff not to seek to have defendant made bankrupt; to repay any reasonable damages if defendant should succeed on appeal – Undertaking by defendant to preserve his assets pending appeal (2009/4213S – Clarke J – 27/4/2010) [2010] IEHC 119

Danske Bank A/S trading as National Irish Bank v McFadden

Strike out

Delay – Delay in instituting and prosecuting claim – Inordinate and inexcusable delay – Balance of justice - Prejudice to defendant - Unavailability of witnesses for defendants – Evidential difficulties due to delay – Acquiescence – Substitution of defendant - Whether delay inordinate – Whether delay inexcusable – Whether balance of justice favoured dismissal of proceedings – Whether prejudice occasioned to defendants – Whether defendants had acquiesced to delay - *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 and *Desmond v MGN Limited* [2008] IESC 56 (Unreported, SC, 15/10/2008) applied – Rules of the Superior Courts 1986 (SI 15/1986), O 17, r 4 and O 15, r 13 - Relief refused (1999/11113P – Laffoy J – 29/1/2010) [2010] IEHC 27

Duffy v Irish Progressive Life Assurance Co. Ltd

Strike out proceedings

Delay – Prejudice – Death of witnesses – Medical negligence claim – Symphysiotomy procedure – Delay in instituting proceedings – Claim concerning appropriateness of procedure – Whether delay inordinate and inexcusable – Whether prejudice to defendant – Whether plaintiff had knowledge of and consented to procedure – Whether procedure should have been carried out – Whether reformulation of claim removes prejudice to defendant - *Dunne (an inf) v National Maternity Hospital* [1989] IR 91 applied – Plaintiff's appeal allowed (343/2006 – SC – 26/3/2010) [2010] IESC 20

Kearney v McQuillan

Summary judgment

Arguable defence – Question of law - Test- Whether defendant has arguable defence – Whether obligation on court to resolve questions of law – Issues to be tried not simple and clear – *Bank of Ireland*

v Educational Building Society [1999] 1 IR 220; *Aer Rianta cpt v Ryanair Ltd* [2001] 4 IR 607; *McGrath v O'Driscoll* [2006] IEHC 195, [2007] 1 ILRM 203; *Cow v Casey* [1949] 1 KB 474 considered – *Banque de Paris v de Naray* [1984] Lloyds Rep 21 approved – Rules of the Superior Courts 1986 (SI 15/1986), O 37 r 7- Appeal from Master allowed; proceedings remitted to plenary hearing (2008/1373 JR – Cooke J – 26/3/2010) [2010] IEHC 136
Danske Bank t/a National Irish Bank v Durkan New Homes

Summons

Renewal - Set aside - Applicable principles – Prejudice - Balance of justice - Whether good reason for the court to renew summons – Whether unjust to permit claim to go ahead – Whether sufficient substance in explanation offered for delay to constitute good reason – Whether plaintiffs' interest in being permitted to make claim outweighs disadvantage to defendants - *McCooney v Minister for Finance* [1971] IR 159; *Kerrigan v Massey Brothers (Funerals) Ltd* (Unrep, Geoghegan J, 15/3/1994); *Moyinihan v Dairy Gold Cooperative Society Limited* [2006] IEHC 318, (Unrep, Peart J, 13/10/2006); *Chambers v Kenefick* [2005] IEHC 402, [2007] 3 IR 526; *O'Grady v Southern Health Board* [2007] IEHC 38, [2007] 2 ILRM 51 and *Bingham v Crowley* [2008] IEHC 453, (Unrep, Feeney J, 17/12/2008) considered – Rules of the Superior Courts 1986 (SI 15/1986) O 8, rr 1 and 2 - Relief refused (2006/4352P - Ryan J - 15/2/2010) [2010] IEHC 39
Shivling Construction v Ring

Trial

Modular hearing – Contract dispute – Trial of preliminary issues – Jurisdiction of court – Factors for consideration in determining whether to hold modular hearing – Whether modular hearing suitable for trial of preliminary issues in contract dispute – Whether issues capable of determination in isolation from other issues – Whether clear saving of court time and costs – Whether modular hearing prejudicial to parties – Whether application for modular hearing made in good faith – *P J Carroll & Co Ltd v Minister for Health (No 2)* [2005] IEHC 267, [2005] 3 IR 457 and *Cork Plastics (Manufacturing) v Ineos Compound UK Ltd* [2008] IEHC 93, (Unrep, Clarke J, 7/3/2008) followed - Rules of the Superior Courts 1986 (SI 15/1986), O 25, r 1 – Rules of the Superior Courts (Commercial Pleadings) 2004 (SI 2/2004), O 63A, rr 4 and 5 – Modular hearing ordered (2009/6975P – Charleton J – 11/5/2010) [2010] IEHC 164
McCann v Desmond

Article

Samad, Mahmud
Article 5(1) of the Brussels regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters - part I
2010 ILT 233

Statutory Instrument

Rules of the Superior Courts (review of the award of public contracts)
2010
SI 420/2010

PRISONS

Detention

Transfer of sentenced person - Life imprisonment - Expiry of tariff period of sentence – Legal nature and duration of sentence – Whether applicant's consent to transfer rendered detention lawful – Whether motivation of trial judge in setting tariff changed nature of sentence – Whether sentence aggravated as to its legal nature and duration – Nature of life sentence in United Kingdom - Whether nature of life sentence changed when prisoner transferred from United Kingdom to Ireland – Whether detention lawful – *Brennan v Governor of Portlaoise Prison* [2008] 3 IR 364, *WQ v Mental Health Commission* [2007] 3 IR 755 and *The State (Byrne) v Frawley* [1978] IR 326 considered; *Re Khan* [2006] EWHC 2826 followed - Transfer of Sentenced Persons Act 1995 (No 16), ss 1, 2, 5, 6 & 7 – Transfer of Sentenced Persons (Amendment) Act 1997 (No 41), s 1 – Constitution of Ireland, 1937, Article 40.4.2° – Convention on the Transfer of Sentenced Persons 1983 articles 2, 3, 5, 6, 7, 9, 10 and 11 – Detention found lawful (2010/521SS – Charleton J – 20/5/2010) [2010] IEHC 213
Caffrey v Governor of Portlaoise Prison

PROBATE

Article

Shee, Patrick
At debt's door
2010 (Oct) GLSI 28

PROFESSIONS

Disciplinary proceedings

Professional misconduct – Nursing Board – Fitness to Practise Committee – Absence of definition of professional misconduct – Standard to be applied – Expected standards test – Breach of fair procedures – Natural and constitutional justice

– Obligation to give reasons – Adequacy of reasons – *De novo* hearing – Right to make submissions – Whether professional misconduct embodies expected standards test – Whether applicant's conduct fell below standard expected of a midwife – Whether reasons provided adequate – Whether necessary to hear oral evidence – *Prendiville v Medical Council* [2008] 3 IR 122; *O'Loaire v Medical Council* (Unrep, Keane J, 27/1/1995) and *P(F) v Minister for Justice, Equality and Law Reform* [2002] 1 IR 164 followed – *Perez v An Bord Altranais* [2005] 4 IR 298; *In re M, a Doctor* [1984] IR 479; *K(C) v An Bord Altranais* [1990] 2 IR 396; *O'Connor v Medical Council* [2007] IEHC 304 (Unrep, Finnegan J 17/7/2007); *Doughty v General Dental Council* [1987] 3 All ER 843; considered – Nurses Act 1985 (No 18), ss 13, 38, 39, 40, 41 and 51 – Medical Practitioners Act 1978 (No 4), s 46(9) – Unfair Dismissals Act 1977 (No 10), s 64 – Application denied (2009/209SP – Dunne J – 20/5/2010) [2010] IEHC 193

Brennan v An Bord Altranais

Solicitors

Disciplinary Tribunal – Appeal - Grounds for appeal – Whether appeal justified – Whether appeal should be allowed – Solicitors (Amendment) Act 1960 (No 37) s 7 – Appeal dismissed (2010/1SA – Kearns P – 10/5/2010) [2010] IEHC 181

White v Law Society of Ireland

Solicitors

Disciplinary tribunal – Appeal from tribunal – Allegation by client of misconduct – Delay - Misconduct alleged to have occurred 25 years before allegation – Whether unconscionable delay in bringing application – *Toal v Duignan (No. 1)* [1991] ILRM 135 considered – Appeal dismissed (2009/98SA – Kearns P – 15/2/2010) [2010] IEHC 76

White v Reen

Solicitors

Statutory interpretation – Purposive interpretation – Solicitor struck off Roll – Jurisdiction of court to make orders in respect of solicitor struck off Roll – Further orders in respect of solicitor struck off Roll - Whether 'solicitor' included former solicitor – Whether jurisdiction to make further orders in respect of former solicitor - Solicitors Act 1954 (No 36) s 10 - Solicitors (Amendment) Act 1960 (No 37) ss 8,20 – Solicitors (Amendment) Act 1994 (No 27) s 3 – Statute interpreted (2009/95SA – Kearns P – 10/5/2010) [2010] IEHC 175

In Re Michael Murphy Solicitor

SALE OF GOODS

Library Acquisitions

Adams, John N.
Atiyah's sale of goods
12th edition
Harlow: Pearson Higher Education,
2010
N280

Bridge, Michael
Benjamin's sale of goods
8th ed
London: Sweet & Maxwell, 2010
N280

SOCIAL WELFARE

Benefit

Entitlement – Time limit – Appeal -
Whether breach of statutory time limits for
appeal – Whether unreasonable failure to
comply with provisions of Social Welfare
Acts – Obligation to notify Minister of
change in circumstance affecting right
to benefit – Appeal pending - Whether
failure by applicant to exhaust appeal
remedies provided by statute for review
of decision – Whether substantial grounds
for review – Discretionary relief - *State
(Abenglen Properties) v Dublin Corporation*
[1984] IR 381; *Stefan v Minister for Justice,
Equality and Law Reform* [2001] 4 IR 203
- Social Welfare Consolidation Act 2005
(No 26), s 142(4)(a) - Social Welfare
(Consolidated Claims, Payments and
Control) Regulations (S/1 142/2007),
s 181- Relief refused (2009/1156)JR
– MacMenamin J – 14/1/2010 [2010]
IEHC 4
*Sheehan v Minister for Social and Family
Affairs*

SOLICITORS

Discipline

Disciplinary tribunal – Appeal from
tribunal – Allegation of misconduct
by complainant – Whether actions of
solicitor constituted misconduct – *Res
judicata* – Isaac Wunder order – Appeal
dismissed and Isaac Wunder order granted
against appellant (2009/106SA – Kearns
P – 11/1/2010) [2010] IEHC 1
Stevenson v O'Neill

Article

Neary, Anne
Studying the form
2010 (Oct) GLSI 20

SPECIFIC PERFORMANCE

Property

Contract – Agreement for sale and
purchase of property – Compliance with
planning permission– Breach of contract
– Rescission – Return of deposit – Implied
right to inspect – Unwillingness to permit
inspection – Duty to cooperate – Whether
plaintiff ready, willing and able to complete
sale when completion notice served
– Whether property in compliance with
planning permission at date of service of
notice of completion – Whether defendant
entitled to rescind – Whether defendant
entitled to return of deposit – Whether
implied entitlement of purchaser to
inspect property when built – *Duffy v Ridley
Properties Ltd* [2008] IESC 23 [2008] 4 IR
282 followed – *Windham v Maguire* [2009]
IEHC 359 considered – Plaintiff's claim
and defendant's counterclaim dismissed
(2008/10888P – Finlay Geoghegan J
– 20/5/2010) [2010] IEHC 192
Mackin v Deane

STATUTE

Interpretation

Canons of construction – Discretionary
powers – Firearms – Granting of
firearms certificate – Conditions imposed
by superintendent – Whether good
reason for requiring firearm – Whether
superintendent entitled to consider
firearm when evaluating good reason
– Whether superintendent had power
to impose conditions – *Persona designata*
– Policy – Firearms – Granting of firearms
certificate – Importation – Firearms dealer
– Whether policy rigid and inflexible
– Whether unlawful fettering of discretion
– Whether *ultra vires* – *Keane v An Bord
Pleanála* [1997] 1 IR 184 and *Dunne v
Donohoe* [2002] 2 IR 533 followed -
Firearms Act 1925 (No 17), ss 2, 3, 4 &
17 – Firearms Act 1964 (No 1), ss 15 &
16 – Applicants' appeal allowed (44/2005,
413/2008 & 11/2009 – SC – 11/5/2010)
[2010] IESC 28
McCarron v Superintendent Kearney

Interpretation

International convention – Statute giving
effect to international convention – Use
of explanatory report as aid to interpreting
convention - *Reg v Home Sec, Ex p Read
(HL (E))* [1989] AC 1014 followed and
Crilly v T & J Farrington Ltd [2001] 3 IR 251
applied - Convention on the Transfer of
Sentenced Persons 1983 articles 2, 3, 5, 6,
7, 9, 10 and 11 – Detention found lawful
(2010/521SS – Charleton J – 20/5/2010)
[2010] IEHC 213
Caffrey v Governor of Portlaoise Prison

Interpretation

Public at large – Ordinary colloquial
meaning – Penal provision – Use of
dictionary – *Inspector of Taxes v Kiernan*
[1981] IR 117 distinguished; *Proes v Revenue
Commissioners* [1998] 4 IR 174 followed
- Public Health Tobacco Act 2002 (No
2), s 47(7)(c) – Public Health (Tobacco)
Amendment Act 2004 (No 6), s 16 - Case
stated answered in favour of appellant
(2010/85SS – Charleton J – 19/5/2010)
[2010] IEHC 165
Health Service Executive v Brookshore Ltd

TAXATION

Library Acquisitions

Bradley, John A.
PRSI and levy contributions: social welfare
and pension's legislation
2005-2010: finance act 2010
12th ed
Dublin: Irish Taxation Institute, 2010
M336.93.C5

Herlihy, Julie
Corporation tax: finance act 2010
2010 ed
Dublin: Irish Taxation Institute, 2010
M337.2.C5

TELECOMMUNICATIONS

Article

O'Neill, Kevin
Trial by television
2010 (Nov) GLSI 16

TORTS

Limitation of actions

Medical negligence – Trial of preliminary
issue – Whether claim statute barred
- Personal injury summons – Alleged
negligent treatment of adenoid cystic
carcinoma – Alleged delay in diagnosis of
recurrence – Date of knowledge – Date
of knowledge of attribution – Date when
sufficient knowledge possessed to embark
on preliminaries to issue of writ – *Gough
v Neary* [2003] 3 IR 92; *Halford v Brooks*
[1991] 1 WLR 428; *Fortune v McLoughlin*
[2004] 1 IR 526 and *Cunningham v Neary*
[2004] IESC 43 (Unrep, SC, 20/7/2004)
considered - Statute of Limitations 1957,
s 11 - Statute of Limitations (Amendment)
Act 1991 (No 18), s 2 – Application refused
(2006/6476P – Dunne J – 26/3/2010)
[2010] IEHC 102
Naessens v Jermyn

Nuisance

Noise – Operation of public transport
system – Liability of defendants for noise

generated by Luas – Failure to install noise barrier – Common law approach – Whether substantial interference with enjoyment of house and garden – Whether defence of statutory authority – Whether defence made out on facts – Environmental impact statement – Report of inspector – Specific conditions in relation to abatement of noise – Whether defendants operating within parameters permitted by Order – Temporal limits on noise – Whether failure to mitigate noise – Representations before construction – Sleep disturbance – Sensitivity of plaintiffs – Expert evidence – Guidelines and standards – Methodology – Acoustic screening – Consequence of order to install screens – Whether failure to provide acoustic screens to mitigate noise a failure to act with reasonable regard for plaintiffs’ interests – Whether proceedings an unlawful collateral challenge to validity of Order – Onus of proof – Constitutional rights – Strict construction of statute – Presumption of constitutionality – Whether defendants acting lawfully – Construction of order – Whether operation in accordance with law – Whether noise level within limits of environmental impact assessment – What temporal limits would be agreed if condition complied with – Whether noise would be in breach of such limits – Whether nuisance established - *Hanrahan v Merck Sharpe & Dohme (Ireland) Ltd* [1988] ILRM 629, *East Donegal Co-Operative Ltd v Attorney General* [1970] IR 317 and *McDonald v Bord na gCon* [1965] IR 217 followed; *Molunby v Kearns* (Unrep, O’Sullivan J, 19/01/1999), *Lanigan v Barry* [2008] IEHC 29 (Unrep, Charleton J, 15/02/2008), *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343, *Watson v Croft Promo-Sport Ltd* [2008] 3 All ER 1171, *Watson v Croft Promo-Sport Ltd* [2009] 3 All ER 249, *Wheeler v JJ Saunders Ltd* [1996] Ch 19, *Hunter v Canary Wharf Ltd* [1997] AC 655, *Manchester Corporation v Farnworth* [1930] AC 171, *Byrne v Grey* [1988] IR 31, *In Re Viscount Securities* [1978] 112 ILTR 17, *State (FPH Properties SA) v An Bord Pleanála* [1987] IR 698, *ESB v Gormley* [1985] IR 129 and *Dreher v Irish Land Commissions* [1984] ILRM 94 considered; *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, *Kelly v Dublin County Council* (Unrep, O’Hanlon J, 21/02/1986), *Clifford v Drug Treatment Centre Board* (Unrep, McCracken J, 7/11/1997) and *Superquinn v Bray UDC* [1998] 3 IR 542 distinguished - Transport (Railway Infrastructure) Act 2001 (No 55) – Transport (Dublin Light Rail) Act 1996 (No 24) - Transport (Dublin Light Rail) Act 1996 (Line B — St. Stephen’s Green To Sandyford Industrial Estate Light Railway) Order 1999 (SI 280/1999)

– Claim dismissed (2006/1375P - Laffoy J - 05/03/2010) [2010] IEHC 290
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Occupier’s liability

Negligence – Duty of care toward visitor – Contributory negligence – Personal injuries – Muddy path with child carried on back – Whether behaviour foreseeable in family resort – Appropriate footwear – Special damages - *Hogan v Steele & Co Ltd* [2000] 4 IR 587 followed – Claim allowed but with 25% contributory negligence (2009/5290P – Charleton J – 30/4/2010) [2010] IEHC 129
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Wills

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Surviving spouse - Legal right share - Appropriation – Consideration of rights of all beneficiaries – Calculation of date of valuation - Whether date of valuation for legal right share date of appropriation, date of death or date of election – *In re Collins* [1975] 1 WLR 309; *H v O* [1978] 1 IR 194; *In re Urquhart* [1974] IR 197 and *In re Kennedy* [2007] IEHC 77 (Unrep, O'Neill J, 26/1/2007) considered - Succession Act 1965 (No 27), ss. 55, 65 and 111 – Held date of valuation is date of exercise of appropriation (2009/99SP – Murphy J – 12/3/2010) [2010] IEHC 70
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AT A GLANCE

ACTS OF THE OIREACHTAS AS AT 27TH JANUARY 2011

Information compiled by Clare O'Dwyer, Law Library, Four Court.

Acts of the Oireachtas 2010

- 1/2010 Arbitration Act 2010
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- 2/2010 Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010
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- 3/2010 George Mitchell Scholarship Fund (Amendment) Act 2010
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- 4/2010 Petroleum (Exploration and Extraction) Safety Act 2010
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- 5/2010 Finance Act 2010
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- 6/2010 Criminal Justice (Money Laundering and Terrorist Financing) Act 2010
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- 7/2010 Euro Area Loan Facility Act 2010
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- 9/2010 Intoxicating Liquor (National Conference Centre) Act 2010
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- 10/2010 Inland Fisheries Act 2010
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- 11/2010 Energy (Biofuel Obligation and Miscellaneous Provisions) Act 2010
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- 14/2010 Merchant Shipping Act 2010
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- 26/2010 Údarás na Gaeltachta (Amendment) Act 2010
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<p>28/2010 Social Welfare (Miscellaneous Provisions) Act 2010 <i>Signed 21/07/2010</i></p>	<p>3/2011 Communications (Retention of Data) Act 2011 <i>Signed 26/01/2011</i></p>
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<p>31/2010 Value-Added Tax Consolidation Act 2010 <i>Signed 23/11/2010</i> <i>(Not yet available on Oireachtas website)</i></p>	
<p>32/2010 Chemicals (Amendment) Act 2010 <i>Signed 24/11/2010</i></p>	
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<p>38/2010 Financial Emergency Measures in the Public Interest 2010 <i>Signed 22/12/2010</i></p>	
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<p>40/2010 Criminal Law (Insanity) Act 2010 <i>Signed 22/12/2010</i></p>	

ABBREVIATIONS

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

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

Acts of the Oireachtas 2011

<p>1/2011 Bretton Woods Agreements (Amendment) Act 2011 <i>Signed 21/01/2011</i></p>	
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AC 295, where over NZ\$2.5m damages were awarded against a receiver who recklessly carried on the company's business for over 12 months, made large losses and adversely affected the value of the Plaintiff's second charge on the company's assets. In *Downsview* it was held that the mortgagee or the mortgagee's receiver (and they are to be treated largely the same to the extent of their duties) *does owe a duty to the borrower (and by extension to the guarantor)*, but that duty is a *duty in equity*, which is a more precise and confined duty than the duty of care in negligence.

It appears that this equitable duty is clear cut and restricted: the lender/receiver must act in good faith with the object of preserving and realising assets for the benefit of the lender; it must take reasonable care to sell the property for a proper price, no more and no less. If he carries out his duties in good faith, he cannot be criticised further, even if he is incompetent.

This approach may seem harsh to the borrower or guarantor. The court did note that anyone interested in the equity of redemption, and unsatisfied with the way that the property or the receivership is being managed, may buy out the chargeholder, and therefore has little ground for complaint if he fails to do that and then raises concerns about the actions of the receiver. On the other hand, in many situations the parties with the legal ability to buy out the chargeholder will not have sufficient money to be able to do so.

After Downsview

The cases after *Downsview* do not deviate from its principles, but they do explain that in some circumstances, the views of the courts might not be as rigid as they initially appear. In *Medforth v Blake* [2000] Ch 86, a pig farmer was successful in holding a receiver of his business liable for failure to negotiate a bulk discount for the pig feed which he purchased. The equitable duty referred to in *Downsview* included a duty of *due diligence* as well as one of good faith.

In *Silven Properties and others v The Royal Bank of Scotland and others* EWCA [2003] Civ 1409, the equitable duty was further explained. The question in this case was whether a receiver should improve the saleability of properties by obtaining planning permission and finding tenants. The court held (following an earlier line of cases including *Gomba Holdings (UK) Ltd v Homan* [1986] 1 W.L.R. 1301) that the receiver was entitled to give primacy to the interests of his appointor (for example with regard to the timing of the sale). However, to the extent that it does not conflict with his primary interest, he must also give some weight to the mortgagor (so that, whatever the timing of the sale, he should obtain the best price reasonably obtainable at the time he chooses).

More specifically the receiver *is* under a duty to expend money to maintain the value of the security, but *not* to improve it. Therefore in this particular case, it was held that he did not have to take active steps to improve the security by obtaining planning permission or tenants.

Barclays Bank plc v Kingston

The decision in *Barclays Bank plc v Kingston and others* [2006] EWHC 533 (QB) should give lenders more reason to pause for thought.

In this pre-trial hearing concerning a preliminary issue, the court was asked to accept as a premise that the sale by the administrators of the company was at an undervalue and that they were acting at the direction of the bank (and therefore the bank was in the same position as if the receivers were acting at its direction – ie. as a mortgagee.). The bank (while not agreeing that these premises were correct) asked whether it could avoid liability for any undervalue sale nonetheless, and pursue the guarantors regardless. In doing so it put forward two grounds:

- a) The guarantee contained clauses purporting to exclude the bank's liability for undervalue sales;
- b) The guarantor's rights to rely on any undervalue sale were limited by their non-payment of the demanded sums.

The bank's second argument requires some explanation. A guarantor who pays the creditor in full will have a right to stand in the creditor's shoes (by virtue of subrogation) to enforce his claim for indemnity against the principal debtor. This will put him in an improved position to expect payment where the creditor has security on the debtor's assets.

Counsel for the bank argued that the decision in *Burgess v Auger* [1998] 2 BCLC 478 showed that the source of the guarantor's rights set out in the *Downsview* decision was simply an aspect of the subrogation doctrine, and therefore should only be available to paying guarantors. The judge did not accept the argument and instead reiterated that the *Downsview* duties were entirely independent of any right of subrogation.

The bank's principal argument, the exclusion of liability, was based on the relevant exclusion clauses in the guarantee. It hoped that the clauses would either exclude in its entirety its liability for any sale at an undervalue; or at least prevent the guarantors setting off any liability of the bank against the liability to the bank. The result of excluding set-off would be that the bank would obtain judgment on its claim, but that the guarantors would be able to proceed with their cross claim.

The leading case on excluding rights of set-off is *The Fedora* [1986] 1 Llyods Rep 441. This decided that clauses excluding set-off should not normally be treated with the disdain that courts normally express for attempts to exclude liability for breach of contract.

In this case, the court did not explicitly deal with whether the exemption clauses prevented the guarantors from setting off their cross claim against the bank's claim. However, the Judge stated that he did "*not approach the provisions of the guarantee with the hostility traditionally shown to exemption clauses. I shall seek to interpret the guarantee as a whole as a commercial document and to give it a sensible meaning*". He went on to challenge the applicability of the bank's exclusion clauses.

The exclusion clause that would seem to be the most relevant went as follows:

"From time to time we may:

- (e) take or deal with any security, guarantee or other legal commitment for the customer liabilities; or

(f) release, enforce or not enforce our rights under any such security, guarantee or commitment. Should we choose to carry out any of the above acts, or do or fail to do anything else, this will not affect our rights under the guarantee, even if it would have done so if this condition did not exist”.

This might be taken to include the sale of a charged property. However the judge held that this did not apply. The reference to the “above acts” did not help the bank: the complaint was not that the bank had sold the property, but rather that the bank had sold the property at an undervalued amount. In other words, it was not *what* the bank did, but rather *how* it did it.

Similarly, the words “fail to do anything” were insufficient to exclude the cross-claim against the bank. Again, it was not that the bank failed to do anything (as argued by the defendants), but what it did do, it did badly. The words were found to be too unclear to be effective.

Another clause provided that the guarantors “unconditionally guarantee that all customer liabilities will be paid or satisfied” and “will immediately have to pay the amount guaranteed when we demand payment”. These too failed to assist the bank. If the bank had sold the property at an undervalue, then the customer liabilities and the amount guaranteed would have been reduced accordingly.

The bank’s reluctance to be overly specific is understandable. There are reputational reasons why it would not wish to state (even if this approach were to be effective) in its guarantee documents: our rights under the guarantee will remain unaffected, and we shall not be liable to you even in the event that we, negligently or otherwise, fail to take reasonable care to sell secured property for a proper price.

Perhaps in circumstances such as those described, a more specific clause against a set-off would be appropriate, for example, “you shall make payment free from set-off, counterclaim, cross-claim or deduction of any kind”. However, even then there might be grounds for dispute, as there is authority that suggests that any exclusion clause (even a set-off clause) must pass a reasonableness test or the court will refuse to validate it. In *Bank of Scotland v Reuben Singh* LTL 22/9/2005, the court appears to accept that a clause which would be capable of excluding set-off even in the event of fraud by the claimant, or an admitted overpayment to him, should be completely struck out and disregarded, whether or not it is relied on for these purposes; although the court did hold that the particular set-off clause in question was reasonable.

In essence, it is extremely difficult for a borrower/guarantor to succeed in negligence claims against a receiver,

but it is not impossible. The current law provides plenty of material to muddy the water.

Lenders protecting their position

What can the banks do to protect their position? There are various factors that the lender will depend upon, including the amount at stake and in particular the attitude of the guarantor(s). The aforementioned case suggests that it may be better to enforce the guarantees *before* realising the security. However this is not practical for the following reasons:

- 1) With most types of security the time of the sale should be dictated by commercial considerations (for examples fluctuations in price and the cost of preserving the security) rather than “what the lawyers want”.
- 2) It would be a strong argument to suggest that waiting until the guarantees are enforced before selling the security could itself be a breach of the *Downsview* good faith principle.

Lenders must follow the correct procedure beginning *inter alia*, the formal calling in of the loan in order to avoid guarantors taking legal action.

Most obviously, the lender should take reasonable steps to sell the charged property for the best price reasonably obtainable at the time. This may involve making sure that the property is thoroughly marketed (where time permits) and/or obtaining independent valuation reports (where time is short). These steps should be documented scrupulously.

The lender should not attempt to meddle with the receivership. The lender should ensure that any meeting with the receiver is closely recorded (minuted) to show that the receiver is not being directed by the lender and that it is clear who makes the decisions.

The lender should redraft any exclusion clauses. A clause which allows the guarantor to bring a separate claim against it in the event of an undervalue sale, but not to assert the issue as a set-off may be enough to overcome the inevitable difficulty.

It is clear from the lack of relevant case law in Ireland that there have been few guarantors if any who have been successful in bringing similar actions against lender and receivers. With the sudden influx of receivers appointed recently, it will be interesting to see if the principles argued in *Downsview* and related cases will prove successful in this jurisdiction. One thing is for certain, receivers and indeed lenders are not invincible. The correct set of facts could prove to be the “invincible” receiver’s or indeed the lender’s kryptonite. ■

Run for your Wife? The truth about NAMA Asset Transfers

TED HARDING BL

Introduction

Controversy surrounding the transfer of assets by developers to family members focuses attention on the powers of the National Asset Management Agency (“NAMA”) to reverse such transactions. Doubts have been raised about the agency’s ability to seize assets moved before it was set up, or secure the reversal of transfers. The reality is somewhat different.

Along with powers conferred by the legislation which established the agency, NAMA may have recourse to legislative provisions relating to fraud in order to challenge asset transfers. However, this article examines other options available, principally under bankruptcy legislation and, to a lesser extent, in company law.

NAMA has insisted it will pursue developers through the Courts if they do not return assets consensually within a set time. But the range of potential approaches open is particularly important where NAMA finds that, under the legislation establishing it, the agency may only pursue assets transferred to relatives since it was founded in December 2009.

The question of a challenge to an asset transfer was addressed by the High Court recently, albeit in a different context. The Court overturned the transfer by former Anglo Irish Bank chief executive, David Drumm, of his half share in his former family home into the sole ownership of his wife. The bank has sought the overturning of the transfer of ownership, claiming it was a fraud on creditors. The Drumms insisted the transfer was for taxation reasons. Mrs Lorraine Drumm subsequently consented to the transfer being quashed and the property reverting into joint ownership with her husband. Applications could then be made to have Mr Drumm’s share realised for the benefit of his creditors.

The National Asset Management Agency Act 2009

Under the National Asset Management Agency Act 2009, section 211 provides for the avoidance of certain transactions.

The section states:

“(1) Where, on the application of NAMA or a NAMA group entity, it is shown to the satisfaction of the Court that –

- (a) an asset of a debtor or associated debtor, guarantor or surety was disposed of, and
- (b) the effect of the disposition was to defeat, delay or hinder the acquisition by NAMA or a NAMA group entity of an eligible bank asset, or to impair the value of an eligible bank asset

or any rights (including a right to damages or any other remedy, a right to enforce a judgment and a priority) that NAMA or the NAMA group entity would have acquired or increased a liability or obligation but for that disposition,

the Court may declare the disposition to be void if in the Court’s opinion it is just and equitable to do so.

(2) In deciding whether it is just and equitable to make a declaration under subsection (1), the Court shall have regard to the rights of any person who has in good faith and for value acquired an interest in the asset the subject of the disposition.

(3) Nothing in this section affects the operation of section 14 of the Conveyancing Act 1634 or section 74(4)(a) of the Land and Conveyancing Law Reform Act 2009”.

Proceedings grounded on section 211 represent the most obvious course when a challenge to an asset transfer is deemed appropriate as the agency seeks to recover billions of euro owed by indebted developers. Nevertheless, there has been media speculation that NAMA may be frustrated in its attempts to claw back assets belonging to developers who transferred properties to family members prior to the setting up of the State’s so-called “bad bank”.

Such speculation fails to take account of the potential weapons in the armoury of those seeking to reverse asset transfers provided under bankruptcy legislation and company law.

Upon an adjudication of bankruptcy, a person’s assets vest in the Official Assignee in Bankruptcy. Faced with the threat of bankruptcy proceedings and / or sanctions under company law, more than a few developers who were previously filled with hubris, but are currently insolvent, may be forced to reverse asset transfers at the request of NAMA.

Anti-asset-stripping measures

The prospect of losing assets in an impending bankruptcy concentrates the mind. It is not uncommon for debtors to attempt their disposal prior to an adjudication, to prevent the assets vesting in the Official Assignee.

Sections 57 to 59 of the Bankruptcy Act 1988 (“the 1988 Act”) were enacted specifically to address “asset-stripping” by a debtor. For the purposes of this article, the sections are relevant where a developer settled property on (or sold it at an undervalue) to a spouse, relative or friend in order to divest himself of the asset.

Sections 57 to 59 of the Act empower the Official

Assignee to take action where there has been a fraudulent preference, sale at an undervalue, or a fraudulent conveyance. In addition, a conveyance or transfer of property, or the creation of any charge on property, which would under the Act be void as a fraudulent preference if the debtor were adjudicated bankrupt, is an act of bankruptcy under section 7(1)(c) of the 1988 Act.

Section 135 of the Companies Act 1990 renders invalid any act relating to property made or done by or against a company within six months before the commencement of the winding up of the company, if it would qualify as a fraudulent preference in the bankruptcy of an individual.

Therefore the principles established by the Courts in fraudulent preference cases in the context of a liquidation may be generally applicable to fraudulent preference cases in bankruptcy. It is also submitted that the authorities would also be relevant to proceedings taken under section 211 of the National Asset Management Agency Act 2009.

Section 57 of the Bankruptcy Act 1988

Section 57(1) of the 1988 Act states:

“every conveyance or transfer of property or charge made thereon, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor or any person in trust for any creditor, with a view to giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, incurring, taking or suffering the same is adjudicated bankrupt within six months after the date of making, incurring, taking or suffering the same, be deemed fraudulent and void as against the Official Assignee; but this section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.”

In calculating the period of six months, the point of reference is the date of adjudication, rather than the date on which the bankruptcy petition or petition of arrangement were presented.

The value of the preferred person's interest is determined as at the date of the transaction which constitutes the fraudulent preference. It is determined as if the interest were free of all encumbrances, except those to which the charge for the bankrupt's debt was then subject. As the impugned transfer or transaction is void as against the Official Assignee, the Court will usually order the return of the property transferred.

The intent to prefer is crucial in determining whether a transaction is a fraudulent preference. It must be shown that the transfer was made “...with a view to giving such creditor ... a preference over the other creditors”.

The judicial authorities in this area are somewhat inconsistent. Matters are further complicated by the fact the onus of proof of intent is placed on the Official Assignee. He must establish that the dominant motive of the debtor was

to prefer; and “... this dominant motive is one to be inferred or rejected by the Court on an examination of the evidence, and ... there is no presumption against the creditor, the onus not being on him”¹.

In the context of asset transfers to a spouse, it is significant that “...neither natural love and affection, gratitude, expectation of benefit, sympathy, vindictiveness, or any other mental condition can in such cases eliminate the view to prefer ..., however strongly the debtor may be convinced he is doing what is right and fair”².

The Court may infer an intention to prefer where it is satisfied that this is the dominant intent. Nevertheless, if the facts of the case are equally consistent with the absence of intent, the burden of proof will not have been discharged. In addition, facts must be proved from which it may be inferred that the bankrupt knew or thought that he was, or might be, insolvent³.

Fraudulent conveyances and voluntary conveyances of assets

Certain transfers of assets by a person subsequently adjudicated bankrupt may be set aside by the Court as void against the Official Assignee. Such transfers are usually known as “fraudulent conveyances”, but it is clear that section 59 of the 1988 Act also captures voluntary conveyances that may not necessarily be fraudulent. An application by the Assignee to have such transfers set aside may be made under:

- a) Section 59 of the Bankruptcy Act 1988, or
- b) Section 74 of the Land and Conveyancing Law Reform Act 2009.

Section 59 of the 1988 Act states that:

“Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall –

- (a) if the settlor is adjudicated bankrupt within two years after the date of the settlement, be void as against the Official Assignee, and
- (b) if the settlor is adjudicated bankrupt at any subsequent time within five years after the date of the settlement, be void as against the Official Assignee unless the parties claiming under the settlement prove that the settlor was, at the time of making the settlement, able to pay all of his debts without the aid of the property comprised in the settlement and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof”.

The two year time period specified in section 59(a) may be of particular significance to NAMA, as the second anniversary of its establishment approaches later this year.

1 O'Brien LC in *In re Oliver, a bankrupt* [1914] 2 IR 356 at 362
2 Porter MR in *In re Daly & Co. Ltd* (1887-1888) 19 LR Ir 83 at p. 97
3 Carroll J in *In re Station Motors Ltd* [1985] IR 756

“Property”, as defined in section 3 of the 1988 Act (as amended by the European Communities (Personal Insolvency) Regulations 2002, S.I. 334 of 2002, Article 3:

- (a) “includes money, goods, things in action, land and every description of property, whether real or personal,
- (b) includes obligations, easements and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incidental to property,
- (c) in relation to proceedings opened in the State under Article 3(1) of the Insolvency Regulation, includes property situated outside the State, and
- (d) in relation to proceedings so opened under Article 3(2) of the Regulation, does not include property so situated;”

Under the 1988 Act, the word “settlement” includes “any conveyance or transfer of property”⁴.

Taking in good faith and for valuable consideration

A purchaser or incumbrancer must take the property in good faith and for valuable consideration, if Section 59 is not to be deemed applicable to the conveyance or transfer of the property to him. While a purchaser must act in good faith, it is not necessary for both parties to act in good faith⁵. In *In re Thomas O’Neill, a bankrupt*⁶, Hamilton P quoted *dicta* of the House of Lords in *Butcher v Stead*⁷ interpreting the words “in good faith” in section 2 of the Bankruptcy Act 1869 to mean without notice that any fraud or fraudulent preference is intended. Hamilton P also held that the term “in good faith” in the Conveyancing Act (Ireland) 1634 (“the 1634 Act”) “... must be taken to mean without notice of the intention to delay, hinder or defraud creditors of their lawful debts, rights and remedies”⁸.

On the facts of the case before him, Hamilton P held that the conveyance in question had been made with the intention to hinder, delay and defraud the creditors. The Court held that the purchaser (who was the daughter of the bankrupt), had notice of his intention. As a result, the purchase of the premises by her was held not to be in good faith, and the Official Assignee was entitled to a declaration that the conveyance was void and should be set aside.

Based on the above, it is submitted that a person who does not have the requisite good faith for the purposes of the 1634 Act will lack sufficient good faith for section 59 of the 1988 Act.

Aside from acting in good faith, the transferee of the property must be a “purchaser or incumbrancer” and have given valuable consideration. The term “consideration” has

been defined as “... a consideration moving to the debtor, which replaces the property extracted from his creditors”⁹.

There must be a *quid pro quo*. It has been held that a wife’s contribution to the original purchase price paid for a matrimonial home, and her assumption of joint liability for a mortgage on the property, did not amount to “valuable consideration” in a commercial sense¹⁰. While the consideration must be “valuable”, it does not have to be “equal to the assets acquired”, which is taken to mean market value. In *In re Pope*¹¹, under a post-nuptial settlement, a wife covenanted not to take divorce proceedings against her husband. This was held to be sufficient valuable consideration to make her a “purchaser” and it was not necessary that money or physical property should be given.

Based on the foregoing, it appears that provided there is an adequate *quid pro quo* and that the consideration given is not simply voluntary, it will be held to be valuable consideration.

The Land and Conveyancing Law Reform Act 2009

Section 74 of the Land and Conveyancing Law Reform Act 2009 (“the 2009 Act”) is intended to replace the “complicated and uncertain” provisions governing fraudulent dispositions in the 1634 Act, as amended by the Voluntary Conveyances Act 1893.

Nevertheless, it has been submitted that the effect of section 74 is not to amend the relevant provisions of the 1634 Act significantly. Hence much of the case law relating to the 1634 Act will continue to be of relevance when interpreting section 74 of the 2009 Act¹².

Section 74 states that:

“(1) Subject to subsection (2), any voluntary disposition of land made with the intention of defrauding a subsequent purchaser of the land is voidable by that purchaser.

(2) For the purposes of subsection (1), a voluntary disposition is not to be read as intended to defraud merely because a subsequent disposition of the same land was made for valuable consideration.

(3) Subject to subsection (4), any conveyance of property made with intention of defrauding a creditor or other person is voidable by any person thereby prejudiced.

(4) Subsection (3) does not –

(a) apply to any estate or interest of property conveyed for valuable consideration to any person in good faith not having, at the time of the conveyance, notice of the fraudulent intention, or

(b) affect any other law relating to bankruptcy of an individual or corporate insolvency.”

4 S. 59(4)

5 Per Hamilton P in *In re Thomas O’Neill, a bankrupt* [1989] IR 544 at 551, approving the *dicta* of Stirling J in *Mackintosh v Pogose* [1895] 1 Ch 505 at p. 509.

6 *Ibid*

7 LR 7 HL 839

8 At p. 551

9 *In re a Debtor, ex. P. the Official Receiver v Morrison* [1965] 1 WLR 1498 at 1505

10 *In re Windle (a bankrupt)*, [1975] 1 WLR 1628

11 [1908] 2 KB 169

12 Mark Sanfey & Bill Holohan, *Bankruptcy Law & Practice*, 2nd ed., (Round Hall, Dublin, 2010), Chap. 8-18, p188

As referenced above, there are specific remedies under the law of insolvency which can be sought against individuals and / or companies that divest themselves of property, resulting in depriving creditors of access to the assets. Section 10 of the 1634 Act was commonly invoked by assignees and liquidators when seeking to have such transfers set aside. Section 74(3) of the 2009 Act was enacted, primarily, to recast the provisions of section 10 of the 1634 Act, which is commonly known as “the Statute of Charles”.

Overend J, referencing the statute, said it was his opinion that the class of fraud which is contemplated and against which the statute is directed is one where the debtor seeks to defeat the claims of his creditors by bogus or colourable transactions under which the debtor retains a benefit to himself¹³.

Intent to defraud

Section 74(3) requires that the conveyance must be made with the “intention of defrauding” a creditor or other person. It is important to note that fraud may be inferred from the surrounding circumstances. Palles CB stated in *In re Moroney*:

“One conveyance... may be executed with the express intent and object in the mind of the party to defeat and delay his creditors, and from such an intent the law presumes the conveyance to be fraudulent, and does not require or allow such fraud to be deduced as an inference of fact. In other cases, no such intention actually exists in the mind of the grantor, but the necessary or probable result of his denuding himself of the property included in the conveyance, for the consideration, and under the circumstances actually existing, is to defeat or delay creditors, and in such a case ... the intent is, as a matter of law, assumed from the necessary or probable consequences of the act done.”¹⁴

When inferring fraud, the matter is to be decided in the circumstances and on the facts of each case. However, there are circumstances that may be regarded as “badges of fraud”. Their presence may indicate fraud unless a satisfactory explanation is provided. They were set forth by Lord Coke in *Thyne’s case*¹⁵ as follows:

- (1) That the gift is general, comprising a man’s whole property;
- (2) That the gift was made in secret;
- (3) That it was made *pendente lite*
- (4) That the donor remained in possession of the goods after the gift;
- (5) That, in fact, there was a trust for the grantor;
- (6) That the deed of gift contained unnecessary averments of its own *bona fides*.

It is not necessary that the settlor was insolvent when the

settlement is made and an intention to defraud future and even only possible creditors will suffice¹⁶.

Section 74 of the 2009 Act is silent regarding the party who bears the onus of establishing the “intention of defrauding”. In *In re O’Neill, a bankrupt*¹⁷, it was submitted on behalf of the Official Assignee that the onus of proof that the conveyance was made in good faith and for valuable consideration lay on the purchaser, who, in turn, sought to place the onus of proving lack of good faith and valuable consideration on the Official Assignee.

Hamilton P. did not determine the issue, but stated that, in the circumstances of the case, he treated the onus as being on the Official Assignee. The Court held that the purchaser had not shown good faith.

In *O’Neill*, Hamilton P. defined the concept of good faith in the Statute of Charles as being “without notice of the intention to delay, hinder or defraud creditors of their lawful debts, rights and remedies”¹⁸.

The wording of section 74(4)(a) may be considered somewhat unclear, but it would suggest that it is the transferee of the property who must show “good faith” in order to avail of the protection provided for in the section. It has been suggested that the protection of section 74(4)(a) would be held to extend to a subsequent purchase from the original purchaser, who could likewise show good faith and valuable consideration¹⁹. Where a transfer has been made for full valuable consideration, it cannot be impeached unless the purchaser is proved to be privy to the vendor’s fraudulent intention²⁰. Nevertheless, a sale at an undervalue may be evidence of fraud if the buyer, in the circumstances of the case and being a man of business, had grounds for believing that the seller wanted to dispose of property with a view to getting funds into his own hands to cheat his creditors²¹.

The Official Assignee’s options

The Official Assignee has the option of proceeding on foot of section 59 of the 1988 Act, or under section 74 of the 2009 Act. Sanfey and Holohan have suggested that it will be easier (in general) for the Official Assignee to satisfy the requirements of section 59(1)(a) or (b), than to prove an intention by the bankrupt to defraud his creditors²². The Official Assignee may opt to examine the bankrupt before the Court, pursuant to section 21 of the 1988 Act. Any answer given in such an examination would be admissible in evidence in proceedings under section 59.

While section 59 is silent as to who is entitled to proceed under it, section 59(1) states that the consequence of a settlement contravening the section is that it is “void as against the Official Assignee”. As the relief provided for under the section benefits the Official Assignee, he may be the only person with the power to invoke it. However, a creditor might be able to proceed against the bankrupt on behalf of

13 *Rose v Greer* [1945] IR 505 at 510

14 (1887) 21 LR Irl 27 at 61-2

15 (1601) 3 Co Rep 806

16 *Murphy v Abraham* (1864) 15 Ir Ch Rep 371

17 *Ibid*

18 *Ibid* at 551

19 Sanfey & Holohan, op. cit., Chap. 8-22, p. 191

20 *Bryce v Fleming & Gibbarry* [1930] IR 376, adopting the *dicta* of Fry J in *In re Johnston: Golden v Gilliam*, 20 ChD 389

21 *Cook v Caldecott* (1830) 4 Car & P 314

22 Op. cit., Chap 8-23, p. 192

the creditors where the Official Assignee was reluctant or unable to do so.

Section 139 of the Companies Act 1990 specifically permits a liquidated creditor or contributory of a company to apply to Court to order the return of assets where they have been improperly transferred by a company which is being wound up.

From the creditor's perspective, section 59 does not require that he must show an "intention of defrauding". Section 59(1)(a) simply requires that it be proven that the settlement of property by the bankrupt, if it occurs within two years prior to the adjudication, was not made before, or in consideration of, marriage, or made in favour of a purchaser or incumbrancer in good faith for valuable consideration.

Under section 7(1)(b) of the 1988 Act, a debtor commits an act of bankruptcy if, in the State or elsewhere, he makes a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof. In practice, it is rare for this act of bankruptcy to be relied upon by petitioning creditors, as

the act on which the petition is founded must have taken place within three months before the petition is presented.

Section 58 of the 1988 Act contains provisions regarding the sale of assets at an undervalue and certain other transactions. However, uncertainty as to the kind of transaction that the section is intended to address may explain the reluctance to invoke it since the coming into force of the Act.

Conclusion

Ireland's spectacular property market crash has produced a febrile atmosphere. Speculation that NAMA may be unable to claw back assets belonging to developers who transferred properties to family members creates the kind of lurid headlines that sell newspapers. Yet such speculation fails to take account of the legal strategies open to those wishing to place pressure on developers and force the reversal of asset transfers. ■

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For further details on the CCBE and on the Irish Delegation visit: www.ccbe.eu ■

Diminished Responsibility and Sentencing Provisions.*

NICOLA MUNNELLY BL

The defence of diminished responsibility is a relatively new addition to Irish criminal law. It was introduced by Section 6 of the Criminal Law (Insanity) Act 2006 which states;

6. (1) Where a person is tried for murder and the jury or, as the case may be, the Special Criminal Court finds that the person –
 - (a) did the act alleged,
 - (b) was at the time suffering from a mental disorder, and
 - (c) the mental disorder was such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act,the jury, or court as the case may be, shall find the person not guilty of that offence but guilty of manslaughter on the grounds of diminished responsibility.
- (2) Subject to *section 5 (4)*, where a person is tried for the offence specified in *subsection (1)*, it shall be for the defence to establish that the person is, by virtue of this section, not liable to be convicted of that offence.

Many articles have been published about the 2006 Act since its introduction¹, however this article intends to deal with the sentencing provisions available in this jurisdiction and in neighbouring jurisdictions.

Ireland

Diminished responsibility provides for the return of a manslaughter verdict however there are no specific sentencing guidelines for the presiding judge to follow. The finding must be returned by a jury or in certain instances the Special Criminal Court, and it is then for the presiding judge to decide an appropriate sentence. As there are no specific provisions in statute, there is a wide ambit of sentences available to the judge up to the maximum sentence of life imprisonment. It is this lack of clarity wherein the problem lies. Professor Tom O'Malley has stated;

“...sentencing for manslaughter resulting from a successful plea of diminished responsibility will be highly discretionary, as it should be, but its

effectiveness will depend on the range of suitable dispositions available to the courts.”²

The defence is in its infancy in Ireland and as a result there is very little jurisprudence available on sentencing in this jurisdiction. It is worth noting however the various sentences imposed in these cases and contrasting the approach taken with other jurisdictions.

The first recorded conviction using the defence of diminished responsibility was in the case of *DPP v O'Dwyer*.³ In this case, Mr. O'Dwyer hit his sister over the head with a hammer and stabbed her 90 times. Mr. O'Dwyer described a feeling of “drifting” into another world. The jury, on hearing the evidence, accepted that he was suffering from a mental disorder at the time and this in turn greatly reduced his responsibility for the crime. The victim's mother asked for leniency and Carney J. In his judgement referred to the case of *R v Staines*⁴ and stated;

“...diminished responsibility does exactly what it says; it reduces it but it does not extinguish it.”

As this was the first case in the State, the learned trial judge looked to similar cases in England for guidance. He stated the law relating to sentencing was more “sophisticated” in that jurisdiction as provision was made for the “mental element.” In sentencing Mr. O'Dwyer, Carney J. stated that;

“...unfortunately he had to deal with it in the ‘crude way’ as expressed by Irish law which boiled down to a question of imprisonment.”

After taking the mitigating factors into account, including the remorse shown and the lack of previous convictions, the learned trial judge imposed a custodial sentence of 6 years.

The defence of diminished responsibility was again used in the case of *DPP v Crowe*.⁵ This case involved a plea of guilty to manslaughter on the grounds of diminished responsibility, which was accepted by the DPP. The defendant had entered a dwelling house with another man, where he knew his victim would be. They were wearing balaclavas and had in their possession two shotguns. They targeted the two men they were looking for. One was shot at point blank range by the co-accused and death was instantaneous. The other was shot in the upper arm by the defendant and suffered serious injuries. The defendant was charged with the murder of the

* With thanks to Derek Cooney BL for his kind input. All views expressed and errors made are entirely those of the author.

1 Tony McGillicuddy, Bar Review, June 2006 p.96

2 Professor Tom O'Malley, Sentencing Law and Practice, p.403

3 *DPP v O'Dwyer* (2007) Unreported

4 *R v Staines* [2006] 2 Cr. App R(s) 61

5 *DPP v Crowe* [2009] IECCA 57

first victim and the attempted murder of the second. In the course of interviews, the defendant requested that the tapes be turned off and he tried to ascertain the evidence against him. After being told that a witness had made a statement, the defendant admitted that he had shot the second victim. The Central Criminal Court, with Carney J. presiding, was told that the defendant had been shot in 2004 and believed that the deceased man had been involved. He had also been warned by the Gardai that his life was in danger again.

Medical reports from Dr. Paul O'Connell, a Consultant Forensic Psychiatrist at the Central Mental Hospital, and from Dr. Nataraj Gojanur, a visiting Psychiatrist to Limerick Prison were put before the court along with a victim impact statement from the mother of the deceased. Carney J. imposed a sentence of life imprisonment for manslaughter and further sentences of fifteen years for attempted murder and five years for assault, all to run concurrently.

The Appellant decided to appeal the severity of the sentence and cited the medical reports put before the court. Dr. O'Connell's report suggested that Mr. Crowe "*could have been suffering a post traumatic stress disorder at the material time.*" He felt this disorder could have arisen from his experience of having been shot in 2004. This diagnosis had not been made prior to his assessment. Dr. O'Connell noted that the Appellant had abstained from drink and drugs for a period of time and had only starting abusing these substances on hearing that his life was in danger. It was also noted that these intoxicants could contribute to a post traumatic stress disorder, but in his concluding assessment Dr. O'Connell stated that:

"...even if a mental disorder was present at the material time, in my opinion there is insufficient evidence that this mental disorder, namely PTSD, would have of itself compromised Mr. Crowe's capacity for the act. In my opinion, the effect of the variety of intoxicants being used by Mr. Crowe, in the particular context of being supported by his associates at the time, were determining factors in the act, overriding consideration of a mental disorder."

Dr. Gojanur's view was that the Appellant was fit to plead, attend court and stand trial. It was his opinion that there was a failure to benefit from previous custodial sentences and that he posed an ongoing risk to others.

In the Court of Criminal Appeal comprised of Kearns J, De Valera J and McCarthy J, the difficulty arose in that the DPP had accepted the plea of guilty due to diminished responsibility. The Court recognised that that the Appellant could not and should not be treated in the same manner as a person fully responsible for their actions and as such imposed a finite sentence on the Appellant. This was to reflect the fact that the offence was at the higher end of the scale but also allowing for the mitigating factors before the court. As a result, a sentence of twenty years imprisonment was substituted for life on the manslaughter charge. The remaining sentences would stand.

In 2009 the case of *DPP v Egan*⁶ came before the courts. In this case, Mr. Egan killed a fellow cell-mate in Mountjoy

prison. At the time of the murder, Mr. Egan was suffering from auditory hallucinations and it was accepted by both sides that a verdict of diminished responsibility was the most appropriate and just option. When considering an apt sentence, the trial judge, Birmingham J, felt on considering both aggravating and mitigating factors, that the offence was on the higher end of the scale and as such imposed a sentence of life imprisonment. This sentence was upheld on appeal.⁷

England and Wales.

The defence of diminished responsibility is a long established principle in English and Welsh jurisprudence, having been introduced by Section 2 (1) of the Homicide Act 1957. As a result of this, there is a vast amount of case law available to us and a wider range of sentencing provisions open to the courts. While again, as in this jurisdiction, the maximum sentence available to the court is life imprisonment, it would appear that the court is more willing to impose a more lenient sentence if it can be shown that the offender is suffering from a specific and recognised mental disorder such as severe stress, post traumatic stress disorder and battered wife syndrome, to name a few.

We must now look at some of the different options open to the English and Welsh courts. In the case of *R v Chambers*,⁸ the Defendant pleaded guilty by reason of diminished responsibility to the murder of his wife, who had recently left him, taking their child with her. He was sentenced to 10 years which was later reduced to 8 years on appeal. The expert evidence given at the trial stated that Mr. Chambers was suffering from an anxiety disorder at the time which impaired his responsibility and this was reflected in the variance of his sentence on appeal.

In the 1997 case of *R v Bakshish Kaur Sangha*⁹ the Defendant pleaded guilty to the manslaughter of her husband after discovering he was having an affair. The court imposed a sentence of 18 months imprisonment which on appeal was changed to a 3 year Probation Order. The court had heard in the course of the proceedings that the Defendant had suffered mental and physical abuse from her husband over the course of their relationship. The medical opinion was that the Defendant was suffering from a depressive illness and the Appeal Court's imposition of a non-custodial sentence reflected this.

The court also adopted a more lenient approach in *R v Lawrenson*.¹⁰ This involved a woman who suffered from post traumatic stress disorder, battered wife syndrome, a depressive disorder and a personality disorder. The Appellant had been involved in a number of abusive and violent relationships and had been drinking with the deceased on the night of his death. A sentence of 5 years imprisonment was reduced to 3 years on appeal following all the medical reports being put before the court.

Perhaps one of the most recent diminished responsibility cases to come out of England is *R v Wood (No.2)*.¹¹ Originally,

6 *DPP v Egan* (2009) Unreported

7 Unreported CCA 29/10/2010

8 *R v Chambers* [1983] 5 Cr. App R(s) 190

9 *R v Bakshish Kaur Sangha* [1997] 1 Cr.App R(s) 202

10 *R v Lawrenson* [2004] 1 Cr. App R(s) 5 44

11 *R v Wood (No.2)* [2009] WLR(D) / [2009] 1 WLR 496

the Appellant was convicted of murder and sentenced to life imprisonment with a minimum of 18 years to be served. On appeal, however, the court substituted the verdict with manslaughter due to diminished responsibility and reduced the minimum time to be served to 13 years. The Appellant was a chronic alcoholic who awoke to see the man he was staying with trying to sexually assault him. The Appeal Court held that the level of responsibility was only just diminished but that a substantial element of mental responsibility remained. The primary aggravating factor was the prolonged and unprovoked nature of the attack. The Appeal Court acknowledged that culpability was reduced but not extinguished and upheld the sentence of life imprisonment but reduced the minimum time to be served. The discretionary term of life imprisonment was upheld as the court felt that the crime was on the higher end of the scale.

Other Jurisdictions.

The defence of diminished responsibility is recognised in other jurisdictions but the courts acknowledge the difficulty in dealing with the sentencing of offenders who are deemed mentally ill. This was especially outlined in the New Zealand case of *R v Wright*¹² where the Court of Appeal stated;

“...it can be very difficult for a judge to sentence a person for serious violence induced by a mental disorder falling short of the legal defence of insanity. Often an imperative of public protection may overshadow considerations of reduced responsibility. But a court is faced with the balancing rightful condemnation of violent conduct, which has brought tragedy and grief to others, with a just appreciation of reduced moral responsibility because of mental disorder, in circumstances where issues of deterrence and risk to others have limited application...”

Sentencing Guidelines.

While we have looked at some of the varying sentences

12 *R v Wright* [2001] 3 NZLR 22 at p.24

handed down in this jurisdiction and in England, it is perhaps more interesting to look at the specific guidelines which have been set out in England, a jurisdiction which has more experience with the defence of diminished responsibility. These guidelines¹³ cite *R v Chambers*¹⁴ as their marker for sentencing in a case of manslaughter by reason of diminished responsibility and are set out as follows:

1. Hospital Order – where recommended by Psychiatric report.
2. Life Imprisonment – Hospital Order not recommended and offender constitutes a danger to the public for an unpredictable period.
3. Determinate Sentence – there is no basis for a Hospital Order but responsibility is not minimal. The length is determined by an assessment of the degree of responsibility and of the time the offender will remain a danger to the public.
4. Release and Suspension – where there is no danger of repetition of violence, the responsibility is grossly impaired and the degree of responsibility is minimal.

Conclusion.

It can be seen therefore that there are many problems in relation to sentencing in diminished responsibility cases in this jurisdiction. It is incredibly difficult to see any pattern and there are no guidelines in this jurisdiction as there are in others. As the defence is relatively new to Ireland and there is limited experience with using it, it is very difficult to gauge what possible sentence an offender will receive. The courts here receive very little outside support as in England with sentencing guidelines, and as such it is difficult for practitioners and the judiciary to establish any equal standard for sentencing in these cases. ■

13 www.sentencing-guidelines.gov

14 *R v Chambers* [1983] 5 Cr. App R(s) 190

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