The Bar Review

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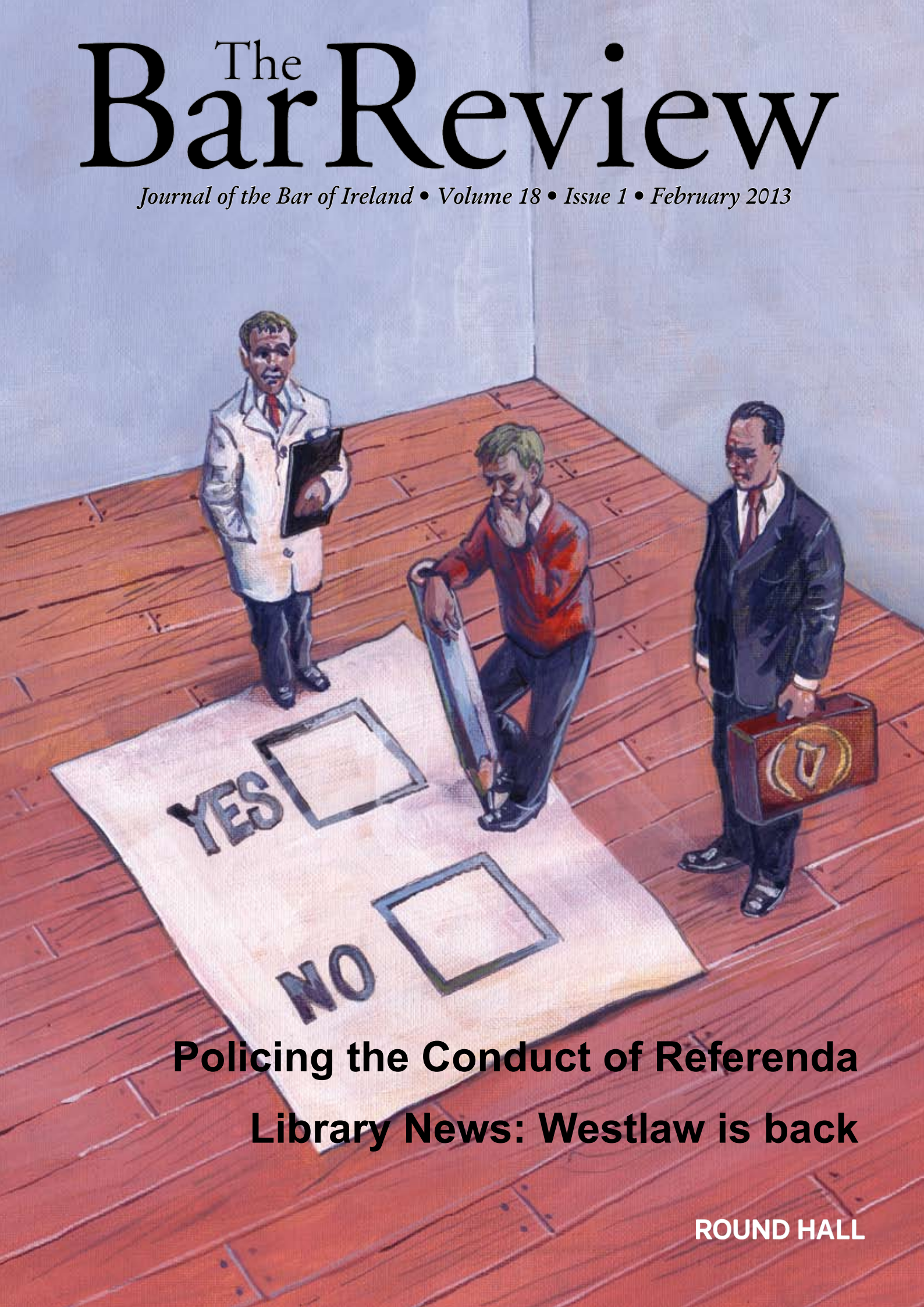

Policing the Conduct of Referenda

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- Statute Law Revision Act 2012
- European Stability Mechanism Act 2012
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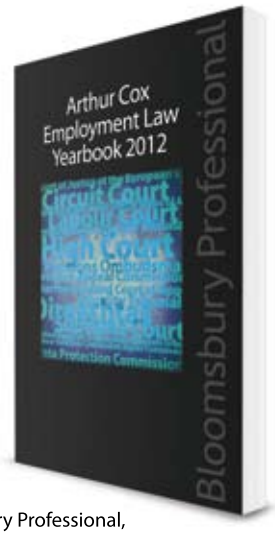

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Springboard injunctions: Allied Irish Bank PLC and Others v Diamond and Others [2011] IEHC 505; QBE Management Services (UK) Ltd v Dymoke & Ros [2012] EWHC 80; CEF Holdings Ltd v Mundey
[2012] IRLR 912

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Bullying and harassment: Kelly v Bon Secours Health System Limited [2012] IEHC 21

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Precautionary suspensions: Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402

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Alternative remedies: Stephens v Archaeological Development Services Ltd [2010] IEHC 540; Halstead v Paymentshield Group Holdings Ltd [2012] EWCA Civ 524

Working Time Directive: Fraser v Southwest London St George's Mental Health Trust [2012] IRLR 100; NHS Leeds v Larner [2012] EWCA Civ 103; Neidel Case C-337/10 [2012] IRLR 607; Asociacion Nacional de Grandes Empresas de Distribución (ANGED) v Federación de Asociaciones Sindicales (FASGA), Federación de Trabajadores Independientes de Comercio (Fetico), Federación Estatal de Trabajadores Case C-78/11; Dominguez v Centre informatique du Centre Ouest Atlantique, Préfet de région Centre C282/10; Roskell Limited and Armands Rikmanis DET No DWT12147 (probably the first in Ireland on the entitlement of employees to annual leave while on sick leave).

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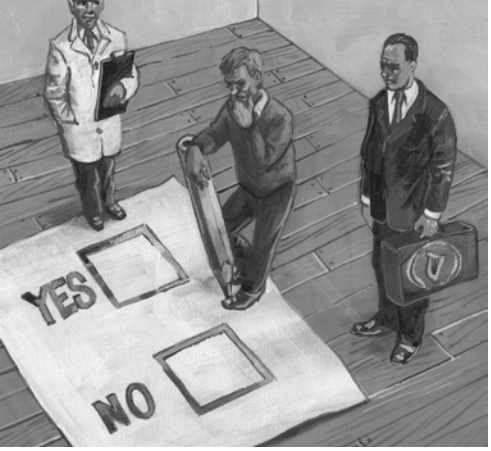

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The Challenges of Regulating Social Media

Ted Harding BL

Introduction

The decision of an Oireachtas committee to investigate abuses of social media and report to the Minister for Communications later in the year highlights one of the greatest challenges for law enforcement and free speech.

Concern about the growth of cyber-bullying and abusive comments made on social media has risen sharply following a number of high-profile cases, including the tragic death of minister of state Shane McEntee TD. Meanwhile, in the United Kingdom, those who did not see the BBC programme in which false child abuse allegations were made against an unnamed senior politician, later identified by Internet chatter as Lord Alistair McAlpine, may have heard about them through social media.

Controversy in the United Kingdom about the use of the criminal law against users of social media, prompted the Director of Public Prosecutions, Keir Starmer QC, to publish recently *Interim guidelines on prosecuting cases involving communications sent via social media*[1]. Experience in that jurisdiction may be of assistance to those assessing the situation here.

U.K. Guidelines

The guidelines set out, for the first time, the approach prosecutors should take when deciding whether to prosecute individuals for offences committed on social media.

In the United Kingdom, under section 1 of the Malicious Communications Act 1988, it is an offence to send an electronic communication which is indecent, grossly offensive, threatening or false with the intention of causing distress or anxiety to the recipient. Section 127 of the Communications Act 2003 similarly criminalises the sending of a message which is '*grossly offensive*' or of an '*indecent, obscene or menacing character*' via a '*public electronic communications network*'.

The leading example of a social media prosecution in United Kingdom is that of Paul Chambers, author of the infamous 'airport bomb tweet'. Chambers was convicted of sending a menacing communication under s.127. His conviction was ultimately overturned by the High Court last July[2].

The guidelines mentioned above identify three categories of case that will be '*prosecuted robustly*':

> (1) Credible threats of violence or damage to property;
> (2) Messages which specifically target an individual or group of individuals and which may constitute harassment or stalking;
> (3) Communications which breach a court order.

Communications which are '*grossly offensive, indecent, obscene or false*', but which do not fall within any of the categories above will be subject to a '*high threshold*'.

The public interest test

A prosecution is unlikely to be necessary and proportionate where:

> (1) The individual has taken swift action to remove the communication or expressed genuine remorse;
> (2) swift and effective action has been taken by others, for example, service providers, to remove the communication or block access to it;
> (3) communication was not intended or obviously likely to reach a wide audience, particularly where the intended audience did not include the victim or target of the communication;
> (4) content of the communication did not obviously go beyond what could conceivably be tolerable or acceptable in an open and diverse society which upholds and respects freedom of expression.

If a person is targeted and there is clear evidence of an intention to cause distress or anxiety, prosecutors should '*carefully weigh*' the effect on the victim.

The age and maturity of suspects should also be given '*significant weight, particularly if they are under the age of 18*'. Prosecuting a minor is therefore '*rarely likely to be in the public interest*'.

The guidance on grossly offensive, indecent, and obscene communications is unlikely to assist users of social media in assessing whether they face a realistic risk of prosecution. The vagueness of the underlying offence itself is problematic. Gross offensiveness, indecency and obscenity are inherently subjective concepts.

There are plainly good reasons why cyberspace is not beyond the scope of the criminal law. A message posted on Facebook or a threatening tweet can be equally menacing as a poison pen letter, a silent phone call or an intimidating email. Web-based witch-hunts can accelerate at a frantic and frightening pace, with devastating consequences for victims.

1 http://www.cps.gov.uk/news/press_releases/dpp_launches_public_consultation_on_prosecutions_involving_social_media_communications/

2 [2012] EWHC 2157 (QB)

The debate about the (ab)use of social media ought to be seen in the context of a wider debate about the use of the criminal law to restrict offensive and inflammatory speech. The European Court of Human Rights has repeatedly emphasised that Article 10 of the European Convention on Human Rights protects speech which shocks, offends and disturbs.

Seeking to apply old laws to new media is the crux of the matter. Should the individual user of Twitter or Facebook be held to the same standard as a news organisation?

Television stations, newspapers and magazines have (and if not, they should have) fact-checkers and legal advisers as part of the price of engaging in the kind of responsible journalism that attracts freedom of speech protections. It is not reasonable to hold individuals to a similar standard. Meanwhile, ineffectual threats that still the speech of only the most lawyer-sensitive are likely simply to undermine the value of a service such as Twitter.

In egregious cases of abuse via social media, usually the perpetrators will deliberately seek to spread untrue and damaging information about a specific person. However, in the recent case involving Lord McAlpine, over 10,000 uncoordinated tweets and retweets of the defamatory claims made against him were identified. This suggests something other than a case of an orchestrated campaign of character-assassination. Traditional media can retain relevance and be leaders in the dissemination of information by maintaining higher standards and assisting in the sieving of truth from falsehood.

Tasking Twitter with the broadcaster or newspaper editor's policing role is hardly a solution. Attempting in this jurisdiction to oblige Twitter to pre-screen content (by law or regulation) is most likely to result in the service refusing to transmit tweets from users based in Ireland. The notion that Twitter could be expected to monitor all tweets in order to block a small number of malicious ones is simply fanciful.

Similarly, legislating to pressure or force intermediaries to evaluate ambiguous areas of truth and falsehood and then "kill" offending tweets would necessitate a degree of intrusiveness at which even China has balked.

None of the foregoing should be taken to imply that current practices in social media cannot be improved. Communication providers such as Twitter can, and ought to, develop the means by which users of the service can not only retract offending tweets, but a follow-up message could also be sent via each of those who retweeted the information. Such an approach would permit those who tweet false information to withdraw and correct it. Those who innocently repeat the material can, with the aid of technology, help to repair the damage.

As for those who wilfully publish malicious lies, they may be identified and made accountable under existing criminal and civil law. To identify a random sample: Provisions of the Non-Fatal Offences Against the Person Act, 1997 cover offences relating to letters and phonecalls. The Communications (Retention of Data Act) 2011 permits An Garda Síochána to identify the IP (computer user) details of individuals. The Defamation Act, 2009 provides remedies for those who have been defamed. Meanwhile intellectual property and copyright law may be used by those whose commercial rights have been breached.

Conclusion

The rapid evolution of communication technology has the potential to empower people and can greatly promote freedom of speech. Balancing the reputational rights of the individual with the free expression of thoughts and ideas assumes even greater importance in this context. New legislation and the threat of prosecution are most likely to chill legitimate speech and balkanise the Internet. The all-pervasive nature of the Internet and the absence of transnational regulatory regimes mean that material will be withheld selectively from jurisdictions that adopt a draconian approach. Informed choices, rather than ones dictated by the threat of legal sanction ought to determine which information the social media user chooses to distribute or repeat. ■

Policing the Conduct of Referenda; Recent Case law

Eugene Regan SC

Introduction

Whether a referendum is required, the involvement of government in the referenda process and the role of the broadcasting media have been the subject of intense scrutiny by the Irish Courts. This has been the case since the time of the first proposals to amend the Treaty of Rome in 1986 - with the Single European Act - to the latest amendments in 2012 – regarding the European Council Decision of the 25th March 2011 on the Stability Mechanism[1] and the European Stability Mechanism Treaty of 1 February 2012.[2]

The jurisprudence laid down in the *Crotty*[3], *McKenna*[4] and *Coughlan*[5] judgments have been the subject of much debate and at times, criticism, that they unnecessarily oblige Governments to hold referenda on EU Treaty changes while preventing Governments promoting their referenda proposals.

There were always outstanding questions as to how these judgments should be interpreted and what flexibility was left to Government in conducting referenda. However, answers have been given in the series of judgments of the Superior Courts in the course of 2012 in the *Pringle*[6], *McCrystal*[7] *and Doherty*[8] cases.

Pre 2012 case law

(1) Crotty Judgment 1987

The wording of the Constitutional amendment providing for Ireland's membership of the Community assumed particular significance when the original Treaty of Rome was amended for the first time by Single European Act in 1986. It provided for *inter alia*, the completion of the internal market, the introduction of qualified majority voting in decision-making in certain areas and for the establishment of a new Court of First Instance.

In *Crotty v An Taoiseach* the Irish Supreme Court ruled that all of these provisions "*were properly within the constitutional licence of Article 29(4)(3) which authorised the States accession to a living, dynamic community.*"

However, the Single European Act contained additional provisions which provided for European Cooperation in the sphere of foreign policy and these provisions were deemed by the Irish Supreme Court to be incompatible with the Constitution and not covered by the constitutional licence of Article 29(4)(3). The Court held that in its conduct of foreign policy if the government purported to alienate any powers of government or fetter the sovereignty of the State, then the Government acted beyond the powers entrusted by the Constitution to it, and the Courts, as sole arbiters upon breaches of constitutional restraints, were obliged to restrain the government from so acting.

(2) McKenna Judgment 1995

In *McKenna v. An Taoiseach,* the Supreme Court's ruled that in expending public monies on the promotion of a particular result in the divorce referendum, the Government was acting in breach of the democratic process and the constitutional right to equality. The Court held that the Government was entitled to campaign for a yes vote but by methods other than the expenditure of public funds.

(3) Anthony Coughlan judgment 2000

In the case of Anthony Coughlan, it was alleged that RTE had infringed s18 of the Broadcasting Act 1960, as amended by the Broadcasting Authority (Amendment) Act 1976, by transmitting party political broadcasts,[9] all of which were in favour of the divorce referendum and only one broadcast by a group opposed to the referendum.

Judge Carney in the High Court held in favour of Mr. Coughlan stating that: "A package of uncontested or partisan broadcasts by the national broadcasting service weighted on one side of the argument was an interference with the referendum process and was undemocratic and was a constitutionally unfair procedure."

The Supreme Court upheld this judgment with the then Chief Justice Hamilton stating that: "it could not have been the intention of the Oireachtas that political party broadcasts transmitted under s. 18(2) of the Broadcasting Act, 1960, as amended, would be unaffected by section 18(1). But the second respondent remained under the obligation when it came to allocating uncontested broadcasts in purported reliance on section 18(2)."

1 Official Journal L91/1 of 6/4/2011. (2011/199/EU)
2 The Treaty establishing the European Stability Mechanism of 1 February 2012.
3 Irish Report [1987] 713.
4 No. 2 1995 IR, page 10
5 *Anthony Coughlan v the Broadcasting Complaints Commission, RTE & AG.* 3 IR 1
6 *Thomas Pringle v The Government of Ireland, Ireland and the Attorney General* High Court [2012] IECH 296, Ms. Justice Laffoy delivered on the 17th July 2012 and Supreme Court judgment delivered on the 19th October 2012 [2012] IESC 47
7 *Mark McCrystal v the Minister for Children and Youth Affairs*, The Government of Ireland, Ireland and the Attorney General Supreme Court 11 December 2012 Judgment page 6,7,16,17
8 *Pearse Doherty v the Referendum Commission and The Honourable Mr. Justice Kevin Feeney* High Court 2012/481JR Judgment page 17& 18 section 38 & 39
9 And one broadcast by a non-party group in favour of divorce.

Case law of 2012

(1) Pringle case

The fundamental question arising in this case was whether the European Stability Mechanism Treaty, done in Brussels on the 2nd February 2012, referred to as the ESM Treaty, involves a transfer of sovereignty to a degree that makes it incompatible with the Constitution, when one applied the principles set out by the Supreme Court in *Crotty v An Taoiseach* such that a referendum is required.

Judge Laffoy in the High Court held that participation in the ESM Treaty did not involve any transfer or diminution of sovereignty by Ireland to the ESM or other member states of the ESM, and that the ESM was not incompatible with the Constitution.

The Supreme Court upheld this ruling in a majority judgment. Chief Justice Denham held that: "the decision of the Government to enter into the ESM Treaty was a policy decision within its executive power, pursuant to the Constitution and so did not involve an impermissible transfer of sovereignty."[10]

Judge O'Donnell following an analysis of article 29, and related articles of the Constitution, stated that: "from these provisions may be drawn the unremarkable conclusion that the Constitution contemplates that the conduct of the State's foreign relations will necessarily involve the making of binding agreements with other states, which agreements could have financial consequences for the State, and on occasions require an alternation of its domestic law."[11]

He dismisses the argument that sovereignty equates with the right to say yes or no, as referred to by Walsh J in *Crotty*, since the move to qualified majority voting, provided for in the Single European Act, was considered in *Crotty* to be covered by the constitutional licence of the 1972 referendum.

Furthermore, he held that: "There is nothing in *Crotty*, or indeed in logic, to suggest that the concept of sovereignty contained in the Irish Constitution requires that Ireland, while it may enter into agreements, must insist that it retain the capacity to change its mind."[12]

In any event he maintained that: "it is the decision to enter into an agreement or alliance that is the exercise in sovereignty."[13]

Clarke J states that that "the ESM Treaty is not a Union measure at all", since it is an international agreement only between the member states within the Euro area.

He points out that: "the Constitution does not require, as a matter of principle, that all international agreements be put to the people for approval through a referendum."[14]

He added that: "the Government is given a very wide discretion as to how to conduct the foreign policy of this State under the Constitution (see *Hogan v An Taoiseach* [2003] 2 IR 468). It would be a strange conclusion indeed if that broad discretion was to mean that the Government could not, as a means of exercising that discretion and thus, exercising its sovereignty, enter into what must be the most usual way in which sovereign states exercise their sovereignty i.e. by agreeing with other sovereign states to pursue a specified policy in a specified way." [15]

Like O'Donnell J, Judge Clarke distinguished the very specific commitment in the ESM Treaty compared to the Single European Act which concerned every aspect of foreign policy.

Judge McKechnie makes the point in this judgment that "the fundamental difference between both (the Single European Act and the ESM Treaty) is the fact that the ESM Treaty is essentially policy implementing and not policy making."[16]

(2) Mark McCrystal case

The Supreme Court unanimously upheld the challenge of Mark McCrystal to the expenditure of public funds on a Government information campaign on the basis that the information was designed to promote a yes vote in the Children's' referendum in 2012, and overturned the ruling of the High Court on the matter.

In her judgment, Denham C.J., pointed out that: "the referendum process, once the Bill has left the Houses of the Oireachtas, is not an executive or legislative function of government. It moves from a process where democracy is exercised by elected representatives to a process of direct democracy exercised by the people."[17]

She applies the *McKenna* principles to the case, holding *inter alia* that:

> "The Government is entitled to provide information and to campaign for a 'Yes' vote, by methods other than the use of public funds. However, the booklet, website and advertisements the subject of this appeal were funded by public funds" and that "the information, clarification and explanation given in the booklet, website and advertisements favoured one side in the referendum."
>
> He added that: "On the facts of the case, I am satisfied that the booklet, website and advertisements published by the Minister with the use of public funds were not fair, equal, impartial or neutral. Thus, I would allow the appeal on this second issue."[18]

The Chief Justice strongly suggested in her judgment that the Government should have no role in disseminating information in a referendum, when she stated that:

> "It is questionable whether it is wise to ask a Minister, who is promoting a referendum on behalf of the Government, to publish neutral information on the Referendum. It may be that it is itself inherently unfair to ask a Minister, and indeed her Department, which are promoting a referendum, and who clearly believe in its merit, and wish for a 'Yes' vote, to draft and publish neutral information. This role may

10 Page 55 of Judgment of Denham CJ
11 Paragraph 5 of judgment of O'Donnell J
12 Paragraph 22 of judgment of O'Donnell J
13 Paragraph 14 of judgment of O'Donnell J
14 Paragraph 4.19 of judgment of Clarke J
15 Paragraph 4.22 of Judgment of Clarke J
16 Paragraph 15
17 Paragraph 26 of judgment of Denham CJ
18 Paragraph 77of judgment of Denham CJ

be best performed by a body not invested in the referendum."[19]

Judge Donal O'Donnell also issued a judgment in this case in which he endorsed the Referendum Commission process and suggested, in effect, that the Government should not involve itself in referenda information campaigns in referenda. He stated that:

> "The Referendum Commission is now an established and welcome feature of the landscape in any referendum campaign. A decision therefore of the Government to launch its own and separate information campaign not only ran the risk of proceedings such as this (particularly because it was apparently believed that it was not possible for the sponsor of the proposal to be strictly neutral) but also a risk of considerable confusion and a consequent undermining of the function of the Referendum Commission."[20]

Judge O'Donnell suggested:

> "the main thrust of the defence was to argue that strict impartiality was neither required nor possible and that the material was not tendentious as to infringe the test in *McKenna No 2* as interpreted by them"[21]

He added:

> "the defendant's case appeared to be limited to contending for a narrow reading of the *McKenna No 2* decision, i.e. that it simply precluded direct advocacy of a yes vote when supported by public funds and contending at the same time for a high threshold for review." [22]

He rejected the finding in the High Court judgment that in order to breach *McKenna No 2*, that "the breach complained of must be something blatant and egregious" and followed the test laid down by Hamilton CJ in *McKenna No 2* of "*clear disregard*" of the Government's obligations under the Constitution.[23]

On the nature of the information provided by the Government, he quoted O'Flaherty J when he stated that*:*

> "it is no answer to say, as has been said, that the advocacy …is gentle, bland and mild and is put forward in the context of making a fair effort on the Government's part to put all matters before the people…" [24]

He emphasised the relevance of the Referendum Commission, stating:

> "the very existence of the Referendum Commission…. is the most clear demonstration that contrary to the evidence and submissions of the Defendants, it was possible to state the facts and issues in this very Referendum campaign without inevitably favouring the proposal."[25]

He held that:

> "The presentation of such images and slogans[26] are attempts to frame the debate in terms favourable to one side. It is a common observation that a person who is able to frame the debate, particularly if they can put themselves in a trusted position as the purveyor of information, will often succeed".

He pointed out that the "most valued position in politics, is the appearance of being above politics."[27]

(3) Pearse Doherty case 2012

In the case of *Pearse Doherty*, Judge Hogan ruled against Mr. Doherty who questioned the accuracy of statements made by the Chairman of the Referendum Commission on the Fiscal Treaty.

Hogan J. took the opportunity in his judgment to outline the political philosophy or jurisprudence underlying the referendum process and in doing so sets out the law in this area with great clarity, when he stated the following:

> "The Constitution envisaged a plebiscitary as well as a parliamentary democracy and in doing so it has created a State which can demonstrate –in both word and deed - that it is a true democracy worthy of the name. By providing in Article 6(1) for popular sovereignty in which the People would "in final appeal ….decide all questions of national policy", it envisaged a society in which all citizens would be called upon from time to time to make critical decisions regarding their future, the future of their neighbourhood and, ultimately, the future of their country.[28]
>
> It is necessary implicit in this Constitution thus places a premium on honest and fearless debate. The drafters of the Constitution must have understood than an inert, supine and indifferent public posed the greatest threat to the public welfare, since a plebiscitary democracy will simply not function under such circumstances. The Constitution, therefore, calls, especially at a time of referendum, for robust political debate from an informed public….[29]
>
> The referendum process reflects this by urging the citizenry to engage in robust political debate so that the forces of deliberation will prevail over the arbitrary and irrational so that, in this civic democracy, reasoned argument would prevail in this triumph of discourse."

He goes on to state that*:*

19 Paragraph 82 of judgment of Denham CJ
20 Paragraph 41 of Judgment of O'Donnell J
21 Paragraph 9 of Judgment of O'Donnell J
22 Paragraph 29 of Judgment of O'Donnell J
23 Paragraph 28 of Judgment of O'Donnell J
24 Paragrpah 36 of Judgment of O'Donnell J
25 Paragraph 41 of Judgment of O'Donnell J
26 Used in the Government's information campaign
27 Paragraph 42 of Judgment of O'Donnell J
28 Paragraph 21 of Judgment of Judge Hogan
29 Paragraph 22 of Judgment of Judge Hogan

"At the heart, therefore, of the Constitution, there are three core principles which are relevant to the issues raised by this application.

The first of these is the concept of popular sovereignty (to which we have just alluded) which is reflected in Article 5, Article 6, Article 46 and Article 47 of the Constitution. It may thus be said, adapting freely the words of Holmes, that the theory of popular sovereignty for which Griffith argued and Pearse fought and Collins died and de Valera spoke and Hearne drafted and Henchy wrote and Walsh decided has become our own constitutional cornerstone. It is that very cornerstone on which the entire referendum edifice is constructed.[30]

The second core principle is that of freedom of speech which is, of course, protected by Article 40.6.1 of the Constitution. As we have already observed both now and in the past, the People have been asked difficult and troubling questions via the referendum process on which there is, of course, rule for legitimate political dispute and argument. The Constitution trusts in the power of argument and debate and reasoned discussion and, again, the informed citizenry of which I spoke, who will discharge their civic responsibility to inform themselves in their own interests, that of their neighbours and that of their country.[31]

The third principle is that of equality. This ensures that during the referendum period, the arguments are fairly balanced so far as the public institutions of the State are concerned. As Denham C J. stressed delivering the judgment of the Supreme Court in *MD v. Ireland* [2012] IESC 12, Article 40.1 reflects a commitment to equality as a core constitutional value. It is reflected in well known Supreme Court judgments such as *McKenna (No. 2), Coughlan v. Broadcasting Complaints Commission* [2000] 3 I.R. 1 , *Kelly v. Minister for the Environment* [2002] 4 I.R. 191 which all stress the principle of equality during the election and referendum process. Article 40.1 thus reflects a deeply moral premise of strict equality of citizens. In the referendum context, the value of the humble to the most exalted are valued equally. It is in that context that, to aid political debate, the Commission was established by the Referendum Act of 1998 ("the Act of 1998")."[32]

Implications of the 2012 judgments

1. The judgment of the Supreme Court in the *Pringle case* represents a re-interpretation of *Crotty* which is less absolutist in defining what the exercise of sovereignty means, the limits of the Executive power to enter into international agreements and when an international agreement may be deemed to have a constitutional effect such that a referendum is required.
2. It opens the possibility that future amendments of the EU Treaties may not be considered, by definition, to require a referendum, provided the amendments are limited to the method of decision-making and related to limited, specific and discrete competences.
3. The judgment in *McCrystal* would suggest that any notion of reversing or modifying the *McKenna* judgment is unthinkable and accordingly the *McKenna* judgment is now written in stone.
4. After *McCrystal,* the Courts will look askance at any information campaigns rolled out by the Government in any future referenda as the caselaw makes it clear that the Referendum Commission alone should fulfill that role.
5. The *Doherty* judgment copper-fastens the *Coughlan* judgment and the principle of strict equality between citizens in the conduct of Referenda.
6. Accordingly on the basis of this judgment, legislation of the type suggested by the Joint Committee on the Constitution in April 2009[33], is unlikely to pass muster with the Courts. That report called for legislation that would inter alia provide for broadcasters to avoid:
   "the quite unreal situation of more or less absolute equality of time between supporters and opponents of the referendum" and "Broadcasters would be entitled to have regard to a range of factors to inform their own judgment about what constitutes fairness of treatment.. these factors could include considerations such as the relative strengths and standing of political parties…."[34]
7. It may be suggested that the only justification for deviating from the rule of strike equality may be that of absolute impossibility for broadcasters in finding proponents of opposing views in a referendum.
8. The use of public funds, either directly or indirectly, is likely to come under closer scrutiny in future referenda and indeed the cancelling of a photocall by the Joint Oireachtas Committee on Health and Children at the time of the Referendum on childrens' rights demonstrates a sensitivity to that reality. [35]
9. The Government is *functus-officio* and its work finished when it passes a referendum Bill and has no special role, *qua* Government, in the passing of a Referendum. This does not mean individual Cabinet ministers could not campaign in favour of a referendum, as long as there is no use of public money involved in that endeavour.
10. It cannot be ruled out that a future referendum result could be set aside by the Courts should the Government act in breach or clear disregard of the rules laid down by the Courts on the conduct of referenda. This would be more likely where the result of the referendum is close and there is a measurable impact on the result.

Conclusion

The jurisprudence on the conduct of referenda in Ireland, one might say, is now settled. The rules do make it difficult for any Government to secure the passage of any referendum. However, the passage of the Fiscal Treaty proves that it is not an impossible task and that people can be trusted to make the right decision. ■

30 Paragraph 23 of Judgment of Judge Hogan
31 Paragraph 24 of Judgment of Judge Hogan
32 Paragraph 25 of Judgment of Judge Hogan
33 First Interim Report 2009
34 Page 81
35 Irish Times 23 October 2012

Part-Time Judges and the ECJ Ruling in *Dermod O'Brien*

Michael Conlon SC*

The UK's Supreme Court recently ruled[1] that a Recorder (part time judge) was a 'worker' for the purpose of the Directive on part-time work (Directive 97/81).[2] The ruling followed a judgment[3]of Court of Justice of the European Union following a reference[4] from the UK's Supreme Court. The ruling and the judgment are potentially relevant to lawyers who exercise judicial functions for the State such as chairpersons or members of tribunals, particularly those who work on a part-time or a fixed-term basis.

Background

Dermod Patrick O'Brien QC is an English Barrister. He was called to the bar in 1962 and took silk in 1983. He worked as a Recorder from his appointment in 1998 until 2005 when he retired on his 65th birthday on the 31st of March 2005. In his work as a Recorder, he was paid a set fee per day worked.

Having retired, on 9 June 2005, he wrote to the Department of Constitutional Affairs (the functions of which were subsequently taken over by the Ministry of Justice) and, relying on Directive 97/81, asked for a judicial pension. He wrote:

> "I require you not to discriminate against me as a part-time worker but to pay me a retirement pension on the same basis, adjusted pro rata temporis, as that paid to former full-time judges who had been engaged in the same or similar work. In my case the comparator was a full-time circuit judge …Please acknowledge receipt of this letter and let me have your proposals as soon as possible."[5]

His request for a pension was refused. He was told that judges are office holders and do not have a contract of employment or employment relationship so that they are outside the scope of the legislation transposing the directive into UK law. He was told that in any event UK legislation specifically provides for the exclusion of fee-paid part-time judges from the ambit of that legislation.[6] It is notable that, unlike its UK counterpart, the equivalent Irish legislation transposing Directive (97/81) by its terms applies, inter alia, to persons holding office by or under the state.[7]

Advice from Eleanor Sharpston QC

In an article published in the journal *Counsel* in November 2006, Dermod O'Brien recounted the fact that he had been refused a judicial pension and said:

> "I therefore myself sought the advice of a specialist EU leader [Eleanor Sharpston QC][8] before she took up her present appointment [as Advocate General at the Court of Justice of the European Union]. She advised that the Directive does have direct effect, that in her view part time judges such as Recorders are within the category of those upon whom the Directive conferred benefits…"[9]

*My thanks to Gavin Barrett who assisted with an earlier version of this article.

1 See the notice on the UK Supreme Court website of the 9th of July 2012 at http://www.supremecourt.gov.uk/news/obrien-v-ministry-of-justice.html. The reasoned judgment to support the ruling was given on the 6th of February 2013: *O'Brien v Ministry of Justice* [2013] UKSC 6. The UKSC also held in that judgment that no objective justification had been shown for departing from the basic principle of remunerating part-timers *pro rata temporis*. The UKSC remitted the matter to the Employment Tribunal for determination of the amount of pension to which Dermod O'Brien was entitled.

2 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work *Official Journal L 014 , 20/01/1998 P. 0009 - 0014*

3 Case C-393/10

4 For the Judgment of the UK Supreme Court making the reference to the CJEU see *O'Brien v Ministry for Justice* [2010] UKSC 34; for the Judgment of the Court of Appeal see *O'Brien v Department of Constitutional Affairs* [2008] EWCA Civ 1448

5 Quoted in Court of Appeal Judgment ibid note 4 paragraph 11

6 See Court of Appeal Judgment ibid note 4, paragraph 12. The relevant UK legislation is the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, applies to *"workers"*. Regulation 1(2) of which provides *""worker" means an individual who has entered into or works under…(a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.'* Regulation 17 entitled *'Holders of judicial offices'*, provides that the regulations do not apply *'to any individual in his capacity as the holder of a judicial office if he is remunerated on a daily fee-paid basis'.*

7 The Protection of Employees (Part-time Work) Act, 2001 applies, *inter alia*, to: *"…a person holding office under, or in the service of, the State (including a civil servant within the meaning of the Civil Service Regulation Act, 1956) shall be deemed to be an employee employed by the State or Government, as the case may be, and an officer or servant of a local authority for the purposes of the Local Government Act, 1941 , or of a harbour authority, health board or vocational education committee shall be deemed to be an employee employed by the authority, board or committee, as the case may be."*

8 See the judgment of the Court of Appeal ibid footnote 4. See also Claire Darwin, UK Supreme Court Blog at http://ukscblog.com/case-preview-obrien-v-ministry-of-justice

9 'Too Hot to Handle', Dermod O'Brien, *Counsel*, November 2006, 33

Proceedings are instituted and are appealed resulting in a reference from the UK Supreme Court to the Court of Justice of the EU

Having taken advice, Dermod O'Brien started proceedings in the Employment Tribunal claiming a judicial pension. He won in the Employment Tribunal but lost on appeal to the Employment Appeals Tribunal, on the ground that his case was out of time. He appealed to the Court of Appeal who found with him on the time limit issue but against him on the substantive issue.[10] He then appealed to the UK Supreme Court.

When the case came before the UK Supreme Court, it was argued on behalf of Dermod O'Brien that either he had worked for remuneration subject to terms and conditions akin to an employment contract and that he had had a contract which brought him within the definition of 'worker' in the UK Regulations or, alternatively, that there had been an "employment relationship" falling within the meaning of that term in the directive (which is directly effective). The Ministry of Justice argued that he had not been a 'worker' for the purpose of the domestic legislation working under any contract, but rather the holder of an office. As a judge, it was argued, he was not subject to direction from anyone so that he did not have an employment relationship for the purpose of Directive 97/81.

Ultimately the UK Supreme Court referred two questions to the Court of Justice of the European Union:

> '(1) Is it for national law to determine whether or not judges as a whole are workers who have an employment contract or employment relationship within the meaning of Clause 2.1 of the Framework Agreement [on part-time work], or is there a Community norm by which this matter must be determined?
>
> (2) If judges as a whole are workers who have an employment contract or employment relationship within the meaning of Clause 2.1 of the Framework Agreement [on part-time work], is it permissible for national law to discriminate (a) between full-time and part-time judges, or (b) between different kinds of part-time judges in the provision of pensions?'

Advocate General Kokott and the Court of Justice of the European Union

Advocate General Kokott said that although it was left to Member States to define the term 'worker' (for the purpose of the Framework Agreement to Directive 97/81), there were limits on Member State discretion so that they might not define the word so narrowly as to jeopardise the objectives of the of the Framework Agreement (to improve the quality of part time work and to prevent discrimination against part time workers) or the relevant general principle of EU law (equality). She said that therefore the exclusion of a category of persons from the category of worker could not be accepted unless the *nature* of their employment was different from that of those who were within that category. The purely formal fact that judges are 'office holders' would not be sufficient to deny them the status of workers.

She noted that the UK Government had argued that the removal of judges from the scope of the Framework Agreement could be explained by the fact that the judiciary are and must be independent. She said, however, that the term 'worker' in the Framework Agreement was meant to draw a distinction between workers and self- employed persons. She noted that judges are subject to some organisation of their work. They are expected to work during defined times and periods, even though this can be managed by judges themselves with greater flexibility than might be the case with other workers. She also asked how the granting of a pension could jeopardise judges' independence and pointed out that it strengthened their economic independence. She took the view that independence in terms of the essence of an activity was not an appropriate criterion for justifying the exclusion of a professional category from the scope of the Framework Agreement.

The views of the Advocate General were echoed by the Court of Justice of the European Union which answered the two questions in the following terms:

> "1. European Union law must be interpreted as meaning that it is for the Member States to define the concept of 'workers who have an employment contract or an employment relationship' in…the Framework Agreement…and, in particular, to determine whether judges fall within that concept, subject to the condition that that does not lead to the arbitrary exclusion of that category of persons from the protection offered by Directive 97/81, as amended. …An exclusion from that protection may be allowed only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, under the category of workers.
>
> 2. The Framework Agreement…must be interpreted as meaning that it precludes, for the purpose of access to the retirement pension scheme, national law from establishing a distinction between full-time judges and part-time judges remunerated on a daily fee-paid basis, unless such a difference in treatment is justified by objective reasons, which is a matter for the referring court to determine."

The UK Supreme Court then ruled that Dermod O'Brien was a worker within the meaning of that term in the Framework Agreement. The outstanding issue of objective justification for the differing treatment of part-time judges remunerated on a fee-paid basis and full-time judges was subsequently resolved in Dermod O'Brien's favour and the case has now been remitted to the Employment Tribunal for determination of the amount of pension to which Dermod O'Brien is entitled.[11]

10 The Part-time Workers (Prevention of Less Favourable Treatment) Regulations, 2000

11 Ibid footnote 1.

Discussion/potential significance in Ireland

The judgment of the Court of Justice of the European Union in, *O'Brien* makes clear that there are limits to the ability of Member States to define 'worker' narrowly in legislation transposing the Directive on part-time work (Directive 97/81).[12] Further, that judgment challenges assumptions that judges or persons exercising judicial powers do not have EU law based employment type rights. It makes it clear that judges may be workers for the purpose of EU anti-discrimination legislation.

In fact, because (unlike its UK equivalent) the Irish legislation transposing the Directive (97/81) - the Protection of Employees (Part-Time) Work Act, 2001 - expressly includes certain officers within its scope[13], it might be easier for a person exercising a judicial function in Ireland to argue that he or she has rights under the 2001 Act than it was for Dermod O'Brien in relation to the equivalent the UK legislation. Section 9(1) of the 2001 Act provides that a part-time employee shall not, in respect of his or her conditions of employment, be treated less favourably than a comparable full time employee. Conditions of employment include pay[14], including occupational pensions[15], redundancy payments from voluntary or compulsory redundancy[16] and unfair dismissal compensation.[17] The rights conferred by the 2001 Act are subject to a defence of objective justification.

The relevant definition of worker in the Directive on fixed-term work (Directive 99/70) [18] is identical that in the Directive on part-time work (Directive 97/81). The Protection of Employees (Fixed Term Workers) Act, 2003 holds out, for fixed-term workers who come within it, the prospect (assuming they can overcome an objective justification defence) of a 'contract of indefinite duration' – a prospect which is particularly valuable for public servants in an era of cutbacks and the Croke Park agreement.

If, say, a part-time vice-chairperson of the Employment Appeals Tribunals who is working on a fixed-term basis could satisfy a Rights Commissioner, the Labour Court and ultimately the High Court that he or she comes within the protective legislation, the relevant part-time and fixed-term workers potential benefits could be substantial. However, it is worth quoting Dermod O'Brien's account of a warning given by Eleanor Sharpston QC (as she then was) before he started proceedings, *"she did however warn me that the Government might well take every point regardless of merit in an effort to avoid having to pay."* [19] ■

12 Ibid footnote 2
13 Ibid footnote 7
14 Case C-268/06 Impact. See generally Catherine Barnard, EU Employment Law, Fourth Edition, page 199
15 Case 170/84 *Bilka Kaufhaus v Weber Von Hartz*; Case C-262/88 *Barber* [1990] ECR I-1889
16 Case C-262/88 *Barber* [1990] ECR I 1889;
17 Case 167/97 *Seymour-Smith*
18 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP Official Journal L 175 , 10/07/1999 P. 0043 - 0048
19 Ibid footnote 9.

The Irish Jurist Publishes a Special Volume to mark the 75th Anniversary of *The Constitution of Ireland – Bunreacht na hÉireann*

The Hon Mr Justice Donal O'Donnell of The Supreme Court launched the special commemorative volume of *The Irish Jurist* in December 2012 pictured with Professor Paul O'Connor, Editor of *The Irish Jurist* and Catherine Dolan, Director of Round Hall, Thomson Reuters in The Royal Irish Academy. *The Irish Jurist* is available in print/on Westlaw IE, on Westlaw UK, and on Westlaw International.

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 18, Issue 1, February 2013

A directory of legislation, articles and acquisitions received in the Law Library from the 18th November 2012 up to 31st January 2013
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Deirdre Lambe and Renate Ní Uigín, Law Library, Four Courts.

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from denying set-off permitted – Purpose of transfer of monies – Whether equitable obligation took priority over any beneficial ownership in monies – Whether plaintiff entitled to monies in accounts – *Lynch v Burke* [1995] 2 IR 159; *Dempsey v Bank of Ireland* (Unrep, SC, 6/12/1985); *Analog Devices B.V v Zurich Insurance Company* [2005] IESC 12, [2005] 1 IR 274; *Bank of Ireland v Martin* [1937] IR 189; *Irish Life Assurance Co Ltd v Dublin Land Securities Ltd* [1989] IR 253 and *Doran v Thompson Ltd* [1978] IR 223 applied; *C(J) v C(JH)* (Unrep, Keane J, 4/8/1982); *RF v MF* [1995] 2 ILRM 572; *Thomson v Clydesdale Bank Ltd* [1893] AC 282; *Westminster Bank Ltd v Hilton* (1926-27) 43 TLR 124; *ICS Ltd v West Bromwich BS* [1998] 1 WLR 896; *Nat Westminster Bank v Halesowen Presswork* [1972] AC 785; *Hanak v Green* [1958] 2 QB 9; *Government of Newfoundland v Newfoundland Railway Co.* (1888) 13 App Cas 199; *Federal Commerce v Molena Alpha* [1979] AC 757; *Rawson v Samuel* (1838) 59 ER 428; *Bhogal v Punjab National Bank* [1988] 2 All ER 296; *Moorview Developments Ltd v First Active plc* [2009] IEHC 214, (Unrep, Clarke J, 6/4/2009) and *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 approved; *Geldof Metaalconstructie v Simon Carves* [2010] EWCA Civ 667, [2010] 4 All ER 847 and *O'Keeffe v O'Flynn Exhams and Partners and Allied Irish Banks* (Unrep, Costello J, 31/7/1992) distinguished – Declaration granted (2010/5874P – Laffoy J – 28/10/2011) [2011] IEHC 402
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Rule in *Foss v Harbottle* – Control – Whether fraud on minority – Personal defendants majority shareholders and directors of

company – Whether plaintiffs could institute proceedings on behalf of company – Whether wrongdoers in control of company – Definition of control of company – Whether exceptions to rule to be expanded – Costs – Costs follow event – Derivative action – Whether shareholders entitled to indemnity from company – Whether minority shareholder had reasonable grounds to bring derivative action – *Foss v Harbottle* (1843) 2 Hare 461 applied – Appeal dismissed (49/2008 – SC – 23/2/2012) [2012] IESC 15
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Liquidation

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Children

Paternity – Registration of birth of minor – Claim of paternity – Application for entry of name on registration details of birth – Inquiry into correctness of registration details – Proceedings by registered parents to restrain inquiry – Whether jurisdiction to hear proceedings without child being put on notice – Refusal of registered parents to inform child – Whether jurisdiction to direct someone other than registered parents to inform child – Constitutional right of claimant to have proceedings determined within reasonable timeframe – Constitutional right of child to be informed – Fair procedures – Entitlement of child to have views taken into account – Right personal to child – Primary right and duty of registered parents to ensure constitutional right of child protected – Entitlement of State through courts to step in where registered parents fail in duty – Consideration of expert evidence in relation to child – *FN v CO (Guardianship)* [2004] 4 IR 431; *Re Article 26 and the Adoption (No 2) Bill 1987* [1989] IR 656; *North Western Health Board v HW* [2001] 3 IR 622; *S v S* [1983] 1 IR 68; *Northern Area Health Board v An Bord Uchtála* [2002] 4 IR 252 and *N v Health Service Executive* [2006] IEHC 278, [2006] IESC 60, [2006] 4 IR 374 considered – Civil Registration Act 2004 (No 3), s 22 – Constitution of Ireland 1937, Arts 40.3 and 42.5 – Declaration that proceedings not proceed without notice to child and that jurisdiction to direct somebody other than parents to inform child (2004/3876P – Laffoy J – 23/5/2008) [2008] IEHC 472
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Fair procedures

Right to be heard – Property rights – Proportionality – Whether rights affected – Meaning of property rights – Equity of redemption – Vesting orders – Whether position of NAMA similar to that of traditional mortgagee – Whether decision amounted to interference or potential interference with constitutionally protected rights – Right to earn livelihood – Contractual rights – Damage to reputation – Land and Conveyancing Reform Act 2009 (No 27), ss 92 and 96 – National Asset Management Agency Act 2009 (No 34), ss 7, 69, 80, 84, 87, 101, 103, 139, 145, 152, 153 and 155 – Constitution of Ireland 1937, Articles 40.3.2º and 43 – European Convention on Human Rights and Fundamental Freedoms 1950 – Appeal allowed (396/2010 – SC – 12/4/2011) [2011] IESC 14
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Legality of detention

Immigration – Warrant – Detention order – Jurisdiction – Defect – Whether detention order showed basis of jurisdiction on its face – Whether reference to section in statute sufficient to show jurisdiction – Whether fact of refusal of permission to land required to be stated in order – Whether reasonable suspicion of garda that applicant had been unlawfully present in the State for a period of less than three months required to be stated in order – Whether necessary for detention order to state time permitted for detention – *The State (Hughes) v Lennon* [1935] IR 128 applied – *Simple Imports Ltd v Revenue Commissioners* [2000] 2 IR 243 approved – *Howard v Gosset* (1845) 10 QB 411 considered – Immigration Act 2003 (No 26), s. 5(2) – Constitution of Ireland 1937, Article 40.4.2° – Release ordered (2011/1616SS – SC – 28/10/2011) [2011] IESC 41
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Legality of detention

Unsworn affidavit with partial set of documents – Whether applicant unlawfully detained – Absence of evidence suggesting unlawful detention – Absence of documentary evidence – *The State (McDonagh) v. Frawley* [1978] IR 131 considered – Constitution of Ireland 1937, Art 40.4.2° – Order refused (2010/765SS – Charleton J – 17/5/2010) [2010] IEHC 528
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Validity – Equality – 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 – Social policy within power of Oireachtas – Entitlement of Oireachtas to have regard to danger of pregnancy for teenage girls – Prosecutorial discretion – *Michael M v Superior Court of Sonoma County* (1981) 450 US 464 considered; *JMcD v PL* [2008] IEHC 96, [2009] IESC 81, [2010] 2 IR 199 followed – Status of European Convention on Human Rights – Criminal Law (Sexual Offences) Act 2006 (No 15), ss 3 and 5 – Constitution of Ireland 1937, Articles 38.1 and 40.1 – European Convention on Human Rights 1950, articles 6, 8 and 14 – Appeal dismissed (176/2010 – SC – 23/2/2012) [2012] IESC 10
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Mutuality of obligations – Conditions precedent –Effect of waiving conditions precedent – Whether loan given as part of overarching agreement – Whether conditions precedent for the benefit of both parties – Whether conditions severable – Whether contract of loan on facilities letters came into operation – Whether monies borrowed repayable – *Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989; *BNY Trust Company [Ireland] Ltd v Treasury Holdings* [2007] IEHC 271 (Unrep, Clarke J, 5/7/2007); *ICS Ltd v West Bromwich BS* [1998] 1 WLR 896 and *National Tourism Development Authority v Coughlan* [2009] IEHC 53, [2009] 3 IR 549 approved; *Analog Devices BV v Zurich Insurance Company* [2005] IESC 12, [2005] 1 IR 274 applied; *Mannai Ltd v. Eagle Star Life Ass Co Ltd* [1997] AC 749; *Antaios Compania SA v Salen AB* [1985] AC 191 and *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523 approved – Judgment entered (2011/1759S – Charleton J – 14/6/2012) [2012] IEHC 262
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Breach

Sale of quarried materials – Whether supplied infill ruined by abundance of pyrite – Allegations of poor design and construction – Cause of damage – Whether pyrite under floors caused upward heave – Burden of proof – Onus on proof on plaintiff – Expert evidence – Inability of experts to agree – Evaluation of expert evidence – Sale of goods – Whether Irish legislation as to sale of goods applicable – Implied condition as to merchantability and fitness for purpose – Whether goods of merchantable quality – Whether goods fit for purpose – Whether clause limiting liability to cost of infill notified to purchaser – Burden of proof on party relying on exclusion clause – Methods of incorporating condition – Necessity for reasonable notice of exclusion or limitation clause to be given – Whether limitation clause enforceable as matter of law – Whether limitation clause fair and reasonable – *Davey v Magistrates of Edinburgh* [1953] SC 34; *Best v Wellcome Foundation Ltd* [1993] 3 IR 421; *Loveday v Renton* [1989] 1 Med LR 117; *Millar v Minister for Pensions* [1947] 2 All ER 372; *People (DPP) v Kiely* (Unrep, CCA, 21/3/2001); *Rhesa Shipping SA v Edmunds* [1985] 1 WLR 948; *Hanrahan v Merck Sharp and Dohme (Ireland) Ltd* [1988] ILRM 629; *Quinn v (a minor) v Mid Western Health Board* [2005] IESC 19; [2005] 4 IR 1; *Nathan v Bailey Gibson Ltd* [1998] 2 IR 162; *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) [1990] ECR 3135; *Aswan Engineering Co v Lupdine Ltd* [1987] 1 All ER 135; *Christopher Hill Ltd v Ashington Piggeries* [1972] 1 AC 441; *Rogers v Parish Ltd* [1987] QB 933; *Cavalier Marketing (Australia) Pty Ltd v Rasell* [1990] 96 ALR 375; *Richardson, Spence & Company v Rowntree* [1894] AC 217; *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163; *Olley v Marlborough Court Ltd* [1949] 1 KB 532; *Shea v Great Southern Railways Co* [1944] 1 IR Jur Rep 26; *Shearan v Great Southern and Western Railway Co* (1898) 12 ILTR 108; *Interfoto Library v Stiletto* [1989] QB 433; *AEG (UK) Ltd v Logic Resources Ltd* [1996] CLC 265 and *Carroll v An Post National Lottery Company* [1996] 1 IR 433 considered – Sale of Goods and Supply of Services Act 1980 (No 16), ss 10, 14 and 22 – Judgment granted with damages to be assessed (20084767P – Charleton J – 25/5/2011) [2011] IEHC 269
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Interpretation

Commercial law – Licence agreement – Breach – Partial termination – Limitation of damages clause – Construction of commercial contract – Statutory interpretation – Gross negligence – Conflict of laws – Tortious liability – Place of damage – Dépa—age – Islamic law – Whether breach of licence – Whether termination of licence lawful – Whether cure notice was wrong – Whether second notice necessary – Whether defendant entitled to partial termination – Whether wilful act of gross negligence – Whether damage limitation clause applied – Whether possible to split applicable law – *Afovos Shipping Co. SA v Pagnam* [1983] 1 WLR 195; *Analog Devices BV v Zurich Insurance Company* [2005] IESC 12, [2005] 1 IR 274; *Austin v Manchester, Sheffield and Lincolnshire Railway Company* (1850) 10 CB 454; *Beal v South Devon Railway* [1861] All ER Rep 972; *BNY Trust Company (Ireland) Ltd v Treasury Holdings* [2007] IEHC 271, (Unrep, HC, Clarke J, 5/7/2007); *Grill v General Iron Screw Collier Company* (1866) LR 1 CP 600; *Hilton v Dibber* (1842) 2 QB 646; *ICS Ltd v West Bromich BS* [1998] 1 WLR 896; *Lomas v Peek* [1947] 2 All ER 574; *Mardorf Peach & Co Ltd v Attica Sea Containers Corp* [1977] AC 850; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989; *Red Sea Tankers Ltd v Papachristidis (The Hellesport Ardent)* [1997] 2 Lloyd's Reports 547; *Wheeler v. New Merton Board Mills Limited* [1933] 2 KB 669 and *Re Young and Hartson's Contract* (1885) 31 Ch D 168 considered – Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11/7/ 2007, on the law applicable to non-contractual obligations (Rome II), arts 1, 2, 3, 4 and 15 – Claim allowed (2010/10396P – Clarke J – 4/8/2011) [2011] IEHC 343
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Full and final settlement – Construction – Business efficacy – Implied term – Frustration – Possibility that property might not be sold – Intention – Construction of agreement – Officious bystander test – Common intention of parties – Whether payment conditional on sale of property – Whether payment due and owing – Whether agreement lacked business efficacy – Whether term should be implied into agreement – Whether agreement frustrated – Whether agreement capable of fulfilment – Whether agreement clear and workable – *Zuphen v Kelly Technical Services (Ireland) Ltd* [2000] IEHC 117, (Unrep, Murphy J, 24/5/2000); *William Neville & Sons Ltd v Guardian Builders Ltd* [1995] 1 ILRM 1; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675; *Macklin v Graecen & Company Ltd* [1983] IR 61; *Tradax (Ireland) Ltd v Irish Grain Board* [1984] 1 IR 1; *The Moorcock* [1889] 14 PD 64 and *Shirlaw v Southern Foundaries* [1939] 2 KB 206 considered – Judgment awarded and counterclaim struck out (2010/997S – Peart J – 13/12/2011) [2011] IEHC 520
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Terms

Loan – Verbal contract – Surrounding circumstances – Intention of parties – Subsequent events – Plaintiff's role in company – Shadow director – Credibility – Whether money represented personal loan or company investment – Whether terms of agreement varied – Whether evidence unequivocally showed conduct consistent only with conclusion that terms of contract varied, waived or altered – Whether personal loan converted into *de facto* loan to company – *Re Wogan's (Drogheda) Ltd* [1993] 1 IR 157 and *Bula Ltd v Tara Mines Ltd* (Unrep, SC, 15/1/1999) followed – *Kramer v Arnold* [1997] 3 IR 43; *Fyffes Plc v DCC Plc* [2005] IEHC 477, [2009] 2 IR 417 and *Re Hocroft Developments Ltd* [2009] IEHC 580, (Unrep, HC, McKechnie J, 9/12/2009) considered – Companies Act 1990 (No 33), s 27(1) – Claim allowed (2009/4304S – Hogan J – 20/12/2011) [2011]] IEHC 528
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Undue influence

Guarantee – Constructive notice – Second defendant guaranteeing liabilities of first defendant's business – Defendants in personal relationship – Witness of guarantee – Whether requirement that guarantee be witnessed amounted to acceptance by plaintiff of obligation to advise second defendant – Whether second defendant under undue influence of first defendant

– Whether non-commercial aspect to guarantee – Whether plaintiff placed on inquiry of operation of undue influence – Whether steps taken by plaintiff to ensure guarantee openly and freely given – *Ulster Bank Ireland Ltd v Fitzgerald* (Unrep, O'Donovan J, 9/11/2001) not followed; *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 considered; *ACC Bank plc v Kelly* [2011] IEHC 7, (Unrep, Clarke J, 10/1/2011); *Irish Bank Resolution Corporation Ltd v Quinn* [2011] IEHC 470, (Unrep, Kelly J, 16/12/2011) followed – Claim dismissed (2008/2550S – Clarke J – 9/3/2012) [2012] IEHC 166
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CRIMINAL LAW

Appeal

Application to admit new evidence – Test to be applied – Possession of controlled drug with intent to sell or supply – Co-accused – Evidence of co-accused exculpating applicant – Whether exceptional circumstances – Whether public interest requiring accused to bring forward entire case at trial – Whether heavy onus on applicant – Whether evidence known at time of trial – Whether impossible for applicant to call evidence at trial – Whether test to be interpreted flexibly – Whether evidence credible – Whether assessment of credibility and materiality of evidence to be conducted by reference to other evidence in trial – Whether evidence capable of being believed – *People (DPP) v O'Regan* [2007] IESC 38, [2007] 3 I.R. 805 applied – *People (DPP) v Willoughby* [2005] IECCA 4 (Unrep, CCA, 18/2/2005) followed – Appeal allowed, re-trial directed (192/09 – CCA – 21/10/2011) [2011] IECCA 77
People (DPP) v Dutton

Appeal

Point of law of exceptional public importance – Certification – Assault causing harm – Firearms offences – Applicant in person – Alternative District Court – Jurisdiction – Sending forward for trial – Whether District Court Judge sitting as alternative District Court entitled to send applicant forward for trial – Whether District Court Judge required to remand applicant to District Court in which applicant resided or offence committed – Jury – Whether applicant given in charge to jury – Whether counts read over to jury – Whether applicant arraigned before jury – Whether District Court Judge required to direct jury to convict on changing of plea to guilty – Whether re-arraignment required following change of plea – Whether issues of sufficient public importance – *People (DPP) v Davis* [1993] 2 IR 1 and *People (DPP) v Nally* [2006] IECCA 128, [2007] 4 IR 145 followed – *R v Poole* [2002] 1 WLR 1528 and *R v McPeake* [2005] EWCA Crim 3162, [2006] Crim LR 376 approved – Courts of Justice Act 1924 (No 10), ss 29 & 79 – Criminal Justice Act 1999 (No 10), s 21 – Application refused (226/2007 – CCA – 19/10/2011) [2011] IECCA 70
People (DPP) v Ward

Appeal

Possession of firearm – Constructive possession – Handling stolen property – Whether applicant had prior knowledge of robbery – Whether applicant handled stolen property – Whether applicant in possession of gun – Whether applicant participant, approved of or involved in possession – Whether participant in disposal of stolen goods – Whether applicant resisted, obscured or obstructed prosecution of others – Conviction quashed (112/2009 – CCA – 9/12/2011) [2011] IECCA 97
People (DPP) v Radford

Bail

Pending appeal – Whether tests met – Whether strong submissions to be made in appeal against sentence – Whether priority should be afforded to appeal against sentence – *People (DPP) v Corbally* [2001] 1 IR 180 considered – Bail refused (151/2011 – CCA – 29/7/2011) [2011] IECCA 57
People (DPP) v Little

Bail

Pending appeal on sentence – Serious assault – Sentence of imprisonment – Whether discrete point with good chance of success – Whether sentence served before appeal hearing – Whether sentence unduly severe – Whether error of principle – *People (DPP) v Corbally* [2001] 1 IR 180 considered – Application refused (201/2011 – CCA – 8/12/2011) [2011] IECCA 96
People (DPP) v Whelan

Bail

Retrial – Duty to obtain trial as soon as reasonably possible – Change in circumstances – Flight risk – Length of time in custody – Whether error in law or fact – Whether due regard taken that appellant in custody – Whether flight risk – Whether court erred in finding no jurisdiction to hear fresh application – Whether material change in circumstances – Criminal Law Act 1997 (No 14), s 4(3) Appeal dismissed (300/2009 – SC – 18/1/2012) [2012] IESC 1
People (DPP) v McCabe

Buggery

Abolition of offence – Revival of liability for offence – Nature of offence – Common law or statutory basis – Clarity in criminal law – Effect of abolition of offence – Lack of transitional provisions – Effect of subsequent saving provisions – Statutory interpretation – Lacuna re offence of buggery of child if alleged acts occurring prior to abolition of offence – Prospective effect of legislation – Whether offence of buggery abolished – Whether any transitional provisions enacted at time of abolition of offence of buggery – Whether criminal liability for offence could be revived even though lost when offence abolished – Whether saving

provisions enacted subsequent to abolition of offence of buggery could revive offence – Whether accused charged post abolition of offence could be prosecuted for offences allegedly committed prior to abolition of offence – *Norris v AG* [1984] IR 36 and *Norris v Ireland* (App. No 10581/83), (1991) 13 EHRR 186 considered; *Grealis v DPP* [2001] 3 IR 144 followed; *Dudgeon v UK* (App No 7525/76), (1981) 4 EHRR 149, *Liversidge v Anderson* [1942] AC 206, *People (DPP) v Cagney* [2007] IESC 46, [2008] 2 IR 111, *Attorney General v Cunningham* [1932] IR 28, *King v Attorney General* [1981] IR 233, and *DPP v Flanagan* [1979] IR 265 considered – Offences against the Person Act 1861, (24 & 25 Vict, c100), ss 47, 52, 61, 62 and 63 – Statute Law Revision Act 1892 (55 & 56 Vict, c19) – Interpretation Act 1937 (No 38), s 21 – Criminal Law (Sexual Offences) Act 1993 (No 20), ss 2, 3, 4 and 14 – Non–Fatal Offences against the Person Act 1997 (No 26), s 28 – Interpretation (Amendment) Act 1997 (No 36), s 1 – Interpretation Act 2005 (No 23), ss 3(2)(b) and 27 – Constitution of Ireland, Articles 15.5 and 38.1 – Appeal allowed as respects buggery (14/2010 – SC – 8/2/2012) [2012] IESC 7
DPP v Judge Devins and O'M(M)

Delay

Right to fair trial – Right to expeditious trial – Prohibition of trial – Prejudice – Prosecutorial delay – Test to be applied – Whether "real and substantial risk to fair trial" correct test – Whether delay inordinate – Whether delay inexcusable – Whether balance of justice lay in favour of prohibition of trial – Whether prosecutor culpable in delay – Whether permissible for prosecutor to await successful prosecution of witness for related charges – Whether medical evidence necessary to prohibit trial due to stress and anxiety – Whether claim for damages necessary to prohibit trial for breach of European Convention on Human Rights – *The State (O'Connell) v Fawsitt* [1986] IR 362 doubted; *PM v Malone* [2002] 2 IR 560 approved; *Cosgrave v DPP* [2012] IESC 24, (Unrep, SC, 26/4/2012) approved – Constitution of Ireland 1937, Article 38.1 – European Convention on Human Rights and Fundamental Freedoms 1950, articles 3 and 6 – Appeal dismissed (315/2011 – SC – 7/6/2012) [2012] IESC 34
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Evidence

Burden of proof – Shifting of burden – Lawful authority – Elements of crime – Begging – Whether burden of proving accused had no licence, permit or authorisation on prosecutor – Whether burden shifts to accused to prove contrary where prima facie case established by prosecutor – *Woolmington v DPP* [1935] AC 462 followed; *Reg v Edwards* [1975] 1 QB 27 and *Reg v Hunt* [1987] 1 AC 352 not followed; *McGowan v Carville* [1960] IR 330 applied; *Attorney General (Comer) v Shorten* [1961] IR 304, *Minister for Industry and Commerce v Steele* [1952] IR 304 and *Rex v Kakelo* [1923] 2 KB 793 referred to – Criminal Justice (Public Order) Act 2011 (No 5), ss 1(2) and 2 – Case stated answered in affirmative (2011/1493 & 1494SS – M White J – 31/1/2012) [2012] IEHC 19
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Miscarriage of justice

Aggravated sexual assault – Conviction based on applicant's sworn evidence – Whether miscarriage of justice – Whether new evidence or newly discovered evidence – Criminal Procedure Act 1993 (No 40), ss 2 – Application refused (125/2009 – CCA – 17/10/2011) [2011] IECCA 71
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Road traffic offence

Drink driving – Arrest – Grounds of arrest – Case stated – Whether failure of arresting garda to recite specific statutory section for arrest rendered arrest unlawful – Whether technical or precise language must be used – Whether arrested person knew in substance reasons for arrest – Whether sufficient for reasons for arrest to be conveyed in ordinary language – Evidence – Intoxyliser – Statement – Presumption – Whether evidential burden on accused capable of discharge based upon prosecution evidence, answers given in cross examination and statutory presumptions – Whether question in cross examination posed in general form admissible – Whether rebuttal of presumption of sufficiency of statement resulted in deprivation of evidential effect of statement of fact therein – *Director of Public Prosecutions v Mooney* [1992] 1 IR 548, *Director of Public Prosecutions v Kemmy* [1980] IR 160 and *O'Broin v District Judge Ruane* [1989] IR 214 followed – Road Traffic Act 1961 (No 24), ss 49(4) & (6) – Road Traffic Act 1994 (No 7), ss 13, 17 & 21 – Road Traffic Act 1994 (Section 17) Regulations (SI 326/1999), rr 4 & 5 – Questions answered (201/2007 – SC – 6/12/2011) [2011] IESC 46
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Road traffic offence

Drink driving – Reasonable cause for suspicion – Reasonableness of opinion formed – Lack of challenge by defence – Whether correct in dismissing case – Whether garda validly formed opinion necessary to ground arrest – Whether opinion *bona fide* – *DPPv Duffy* [2000] 1 IR 393; *DPP v Gilmore* [1981] ILRM 102; *DPP (O'Mahony) v O'Driscoll* [2010] IESC 42, (Unrep, SC, 1/7/2010); *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286; *DPP (Grant) v Reddy* [2011] IEHC 40, (Unrep, HC, Kearns P, 4/2/2011); *DPP v O'Connor* [2005] IEHC 422, (Unrep, HC, Quirke J, 14/12/2005) and *DPP v Farrell* [2009] IEHC 368, (Unrep, HC, Clark, 16/7/2009) considered – Road Traffic Act 1961 (No 24), s 49 – Road Traffic Act 2006 (No 23) – Case stated questions answered in negative, appeal allowed and case remitted to District Court (2011/1034SS – Hedigan J – 16/12/2011) [2011] IEHC 476
DPP v Kulimushi

Sentence

Severity – Assault – Seriousness of offence – Guilty plea – Whether principle of rehabilitation taken into account – Whether sentencing judge entitled to attach little merit to guilty plea – Whether sentencing judge entitled to attach little merit to expression of remorse – Bail – Consecutive sentence – Whether commission of offence while on bail aggravating factor – Whether sentence imposed within jurisdiction – Application refused (124/2010 – CCA – 7/11/2011) [2011] IECCA 85
People (DPP) v Carberry

Sentence

Severity – Assault – Theft – Public order – Previous convictions – Child – Whether sentence took account of fact that applicant was 16 at the time of commission of offences – Whether applicant out of control – Whether longer sentence appropriate to facilitate modification of applicant's behaviour – Leave to appeal granted, sentence varied (171/2010 – CCA – 25/7/2011) [2011] IECCA 60
People (DPP) v Tobin

Sentence

Severity – Burglary – Previous convictions – Early admissions – Co-operation with gardaí – Guilty plea – Whether early admissions indicative of guilty plea – Whether co-operation with gardaí of exceptional nature – Whether sentencing judge took all relevant factors into account – Appeal allowed, sentence varied (200/2010 – CCA – 7/11/2011) [2011] IECCA 84
People (DPP) v McDonagh

Sentence

Severity – Child abduction – Imprisonment – Whether offence capable of attracting maximum penalty in principle – Approach to sentencing for child abduction – Gravamen of offence – Aggravating factors – Mitigating factors – Proportionality – Constitutional rights of victim – *People (DPP) v Loving* [2006] IECCA 28, [2006] 3 IR 355, *People (DPP) v M* [1994] 3 IR 306 and *People (AGl) v Edge* [1943] IR 115 considered – Non-Fatal Offences Against the Person Act 1997 (No 26), s 17 – Appeal dismissed (193/2011 – CCA – 8/2/2012) [2012] IECCA 36
People (DPP) v Ismaeil

Sentence

Severity – Dangerous driving causing death – Suspension of driving license – 20 years – 5 year mandatory – Wishes of victim's family

– Good character – 3 year prison sentence not appealed – Occupation of appellant – Whether error in principle – Suspension of license reduced to 10 years (142/10 – CCA 17/11/2011) [2011] IECCA 90
People (DPP) v Lordan

Sentence

Severity – Driving offences – Reckless endangerment – Dangerous driving – Driving under influence – Driving without insurance – Mitigating circumstances – Personal circumstances – Four years imprisonment – Whether mitigating circumstances – Whether sentence within range of appropriate sentences – Whether error of principle – Non-Fatal Offences Against the Person Act 1997 (No 26), s 13 – Leave refused (252/2010 – CCA – 17/11/2011) [2011] IECCA 91
People (DPP) v Connors

Sentence

Severity – Driving offences – Reckless endangerment – Dangerous driving – Using mechanically propelled vehicle without owner's consent – Youth – Five years imprisonment – Reactivated sentence – Totality principle – Failure to avail of rehabilitation – Whether principles in Children's Act should apply – Whether within range of appropriate sentences – Whether error of principle – Whether extraneous matters taken into account – Non-Fatal Offences Against the Person Act 1997 (No 26), s 13 – Road Traffic Act 1961 (No 24), s 112 – Leave refused (121/2010 – CCA – 17/11/2011) [2011] IECCA 88
People (DPP) v Maguire

Sentence

Severity – Drugs offence – Possession for sale or supply – Courier – Guilty plea – Cooperation – No previous convictions – Seven years imprisonment – Whether error of principle – Whether sentence within margin of appropriate sentences – Misuse of Drugs Act 1977 (No 12), s 15A – Leave refused (235/2010 – CCA – 17/11/2011) [2011] IECCA 87
People (DPP) v Walsh

Sentence

Severity – Drugs offence – Possession with intent to sell or supply – Guilty plea – Co-operation with gardaí – Addiction – Whether trial judge took all relevant factors into account in constructing sentence – Whether court should interfere with trial judge's conclusion that applicant's involvement with drugs arose out of threats and debts – Whether sentence within range of appropriate sentence – Application refused (108/2010 – CCA – 25/7/2011) [2011] IECCA 59
People (DPP) v O'Shea

Sentence

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Severity – Drugs offence – Possession with intent to sell or supply – Principles of sentencing – Gravity of offence – Nature of offence – Circumstances of commission of offence – Personal circumstances – Whether error in principle – Whether sentence imposed at low end of scale – Whether sentencing judge should have procured probation report – Whether applicant disclosed wrongdoing to gardaí – Whether lack of previous convictions taken into account – Whether good character taken into account – Whether fact that applicant was foreign national and impact of imprisonment on applicant's family taken into account – Whether expression of remorse taken into account – Whether early guilty plea taken into account – Application refused (287/10 – CCA – 7/11/2011) [2011] IECCA 82
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Severity – Probation report – Drug use – Whether sentencing drug took account of fact that applicant had embellished attempts at controlling drug use – Whether sentencing judge correct in taking into account high risk of re-offending – Whether sentencing judge correct in taking into account applicant's poor compliance with probation services – Whether sentence imposed within range of appropriate sentences – Whether error in principle – Whether sentencing judge should have considered option of suspending part

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Sea-fisheries (Celtic sea technical measures) regulations 2012
EA Sea-fisheries and maritime jurisdiction act, 2006 s14 (REG/737-2012)
SI 412/2012

Sea-fisheries (community control system) (amendment) regulations 2012
EA Sea-fisheries and maritime jurisdiction act, 2006 s14
SI 453/2012

Sea pollution (prevention of pollution by sewage from ships) (amendment) regulations 2012
SI 492/2012

Wild salmon and sea trout tagging scheme regulations 2012
SI 556/2012

FOOD

Statutory Instruments

European Communities (general food law) (amendment) regulations 2012
SI 473/2012

European Union (special conditions governing the import of certain foodstuffs from certain third countries due to contamination risk by aflatoxins) (amendment) regulations 2012
(REG/274-2012)
SI 472/2012

European Communities (official controls on the import of food of non-animal origin for pesticide residues) (amendment) (no. 4) regulations 2012
(REG/889-2012
SI 418/2012

European Communities (official controls on the import of food of non-animal origin) (amendment) (no. 3) regulations 2012
(REG/889-2012)
SI 475/2012

FORESTRY

Statutory Instrument

European Communities (forest consent and assessment) (amendment) regulations 2012
SI 442/2012

GARDA SÍOCHÁNA

Compensation

Assault – Causation – Liability – Damages – Prospective risk of injury – Medical evidence – Whether infection developed as result of assault – Whether applicant entitled to compensation for pain and suffering – Whether assailant's malicious conduct substantial cause of injuries complained of – Whether infection could be traced to assault – Whether reliance on s 10(2) incorrect – *Carey v Minister for Finance* [2010] IEHC 247, (Unrep, Irvine J, 15/6/2010) considered – Garda Síochána (Compensation Act) 1941 (No 19), ss 2 and 10(2) – Claim failed (2009/772SP – Irvine J – 14/12/2011) [2011] IEHC 482
Roche v Minister for Finance

Discipline

Delay – Appointment of investigating officer – Whether failure to proceed with expedition resulted in disciplinary proceedings becoming void – Whether interference with right to fair hearing – Whether prejudice caused by delay – Whether requirement of expedition mandatory or directory –Statutory interpretation – Intention of legislature – Purpose of Regulations – Public interest in expeditious investigation of allegations of misconduct – *McNeill v Commissioner of An Garda Síochána* [1997] 1 IR 469 distinguished; *McCarthy v Garda Síochána Complaints Tribunal* [2002] 2 ILRM 371; *Kennedy v Commissioner of An Garda Síochána* [2008] IEHC 72, (Unrep, MacMenamin J, 14/3/2008); *Ruigrok v Commissioner of An Garda Síochána* [2005] IEHC 439, (Unrep, Murphy J, 19/12/2005); *Ryan v Commissioner of An Garda Síochána* [2009] IEHC 424, (Unrep, Ó Néill J, 6/10/2009) and *The State (Elm Developments) v An Bord Pleanála* [1981] ILRM 108 considered – Garda Síochána (Discipline) Regulations 1989 (SI 94/1989), reg 8 – Applicant's appeal dismissed (174/2007 – SC – 26/1/2012) [2012] IESC 3
Gillen v Commissioner of An Garda Síochána

Act

Europol Act 2012
Act No. 53 of 2012
Signed on 26th December 2012

National Vetting Bureau (Children and Vulnerable Persons) Act 2012
Act No. 47 of 2012
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HEALTH

Library Acquisition

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Act No. 46 of 2012
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Signed on 26th December 2012

Statutory Instruments

Dieticians Registration Board (establishment day) order 2012
SI 439/2012

Health (delegation of ministerial functions) order 2012
SI 553/2012

Health (miscellaneous provisions) act 2009 (commencement) order 2012
SI 493/2012

Health professionals (reduction of payments to registered dentists) regulations 2012
SI 548/2012

Health services (drug payment scheme) regulations 2012
SI 526/2012

Health services (prescription charges) regulations 2012
SI 545/2012

Irish Medicines Board (fees) regulations 2012
SI 572/2012

Occupational Therapists Registration Board (establishment day) order 2012
SI 440/2012

Social workers registration board criteria for restoration to the register bye-law
SI 430/2012

Speech and Language Therapists Registration Board (establishment day) order 2012
SI 441/2012

Tobacco products (control of advertising, sponsorship and sales promotion) (amendment) regulations 2012
SI 525/2012

HOUSING

Statutory Instruments

Housing (local authority loans) regulations 2012
SI 408/2012

Housing (sale of houses) regulations 2012
SI 420/2012

Housing (sale of houses to long-standing tenants) (amendment) regulations 2012
SI 465/2012

IMMIGRATION

Asylum

Country of origin information – Refugee Appeals Tribunal – Persecution – Non state actor – Gang – Police protection – Whether tribunal member entitled to select country of origin information – Whether respondent entitled to ignore significant country of origin information tendered by applicant – Whether respondent dealt adequately with evaluation of country of origin information – Fair procedures – Statutory requirement to notify applicant of nature and source of information arising in the course of appeal – Country of origin information reports – Failure to disclose – Whether respondent breached statutory requirement – Whether prejudice to applicant – Whether breach of mandatory safeguard fatal to decision – *QAS v Refugee Applications Commissioner* [2010] IEHC 421 (Unrep, Hogan J, 23/11/2010) considered – *IR v Minister for Justice* [2009] IEHC 353 (Unrep, Cooke J, 24/7/2009), *ASO v Refugee Appeal Tribunal* [2009] IEHC 607 (Unrep, Cooke J, 9/12/2009) and *Olatunji v Refugee Appeals Tribunal* [2006] IEHC 113 (Unrep, Finlay Geoghegan J, 7/4/2006) followed – Refugee Act 1996 (No 17), s 16(8) – Decision quashed (2008/951JR – Hogan J – 16/12/2011) [2011] IEHC 493
J(LO) v Refugee Appeal Tribunal

Asylum

Decision – Reasons – Credibility – Errors of fact – Principle that decision be read as whole Whether errors of fact material – Adverse credibility finding regarding action of parents of applicant – Whether finding erroneous, speculative or unsupported by evidence – Finding of inconsistency of evidence – Whether requirement to put this finding to applicant – Misunderstanding of evidence – Whether distinct finding based on misunderstanding – Observation based on insufficient evidence –Whether observation part of overall evaluation – Finding regarding censorship – Whether based on evidence – Finding regarding lack of documentation – Whether conclusion reached open to respondent – Alleged mistake in interpretation of evidence – Whether mistake as to material fact – Whether substantial grounds to grant leave – *R(I) v Minister for Justice, Equality and Law Reform* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) approved – Refugee Act 1996 (No 17), s 13 – Leave refused

(2008/1431JR – Cooke J – 14/10/2011) [2011] IEHC 390
F(F) v Refugee Appeals Tribunal

Asylum

Leave application – Fear of persecution – Lack of credibility – Inconsistent claim – Fair procedures – Whether tribunal member had jurisdiction to examine question of credibility – Whether breach of fair procedures – *R(I) v Refugee Appeals Tribunal* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009); *N(N) v Refugee Appeals Tribunal* [2007] IEHC 230, (Unrep, McGovern J, 28/6/2007); *A(O) v Refugee Appeals Tribunal* [2009] IEHC 296, (Unrep, Cooke J, 25/6/2009) and *A(TT) v Refugee Applications Commissioner* [2009] IEHC 215, (Unrep, Cooke J, 29/4/2009) considered – Application refused (2008/1372JR – Cooke J – 21/12/2011) [2011] IEHC 484
T(B) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review – Leave application – Credibility assessment – Re-admission to asylum process – Failure to advance case regarding homosexuality on previous occasion – Deteriorating conditions for homosexuals in Uganda – Legitimate expectation – Amendment of proceedings – Whether credibility assessment flawed – Whether failure to exhaust administrative asylum process – Whether new elements or findings – Whether jurisdiction to formulate fresh ground of leave – Whether case still "at hearing" – *Fakih v Minister for Justice* [1993] 2 IR 406; *R v Secretary of State for the Home Department, ex p Onibiyo* [1996] QB 768; *S(EM) v Minister for Justice, Equality and Law Reform* [2004] IEHC 398, (Unrep, HC, Clarke J, 21/12/2004); *I(CO) v Minister for Justice* [1007] IEHC 180, [2008] 1 IR 208; *B(S)(Uganda) v Home Secretary* [2010] EWHC 338 (Admin), (Unrep, QBD, Hickinbottom J, 24/2/2010); *U(MA) v Minister for Justice, Equality and Law Reform (No 2)* [2011] IEHC 95, (Unrep, HC, Hogan J, 9/2/2011) and *R(I) v Refugee Appeals Tribunal* [2009] IEHC 353, (Unrep, HC, Cooke J, 24/7/2009) considered – Immigration Act 1999 (No 22), s 3 – Refugee Act 1996 (No 17), s 17(7) – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 20(3) – European Communities (Asylum Procedures) Regulations 2011 (SI 51/2011), art 8 – Leave granted (2011/438JR – Hogan J – 13/12/2011) [2011] IEHC 473
K(J)(Uganda) v Minister for Justice and Equality

Asylum

Judicial review – Motion to dismiss leave application – Remedies – Statutory appeal available – Fear by mother of forcible circumcision – Generalised grounds – Whether application frivolous, vexatious or doomed to fail – Whether abuse of process – Whether judicial review proceedings delay tactic – Whether statutory appeal inadequate, ineffective or inconvenient – Refugee Act 1996 (No 17), s 13 – Proceedings dismissed (2011/757JR – Cooke J – 19/12/2011) [2011] IEHC 485
A(MA) v Minister for Justice and Equality

Asylum

Remedy – Judicial review – Effectiveness of remedy – Applicable time limit t – Status of decision to grant refugee status – Whether judicial review effective remedy against decision regarding asylum – Whether substantial grounds to grant leave –*HID v Refugee Applications Commissioner (Case C-175/11)*, (Unrep, Advocate General, 6/9/2012); *D(T) v Minister for Justice, Equality and Law Reform* [2011] IEHC 37, (Unrep, Hogan J, 25/1/2011) approved; *S(O) v Minister for Justice, Equality and Law Reform* [2011] IEHC 291, (Unrep, Hogan J, 7/4/2011); *B(J) v Minister for Justice, Equality and Law Reform* [2010] IEHC 296, (Unrep, Cooke J, 14/7/2010); *F(ISO) v Minister for Justice, Equality and Law Reform* [2010] IEHC 457, (Unrep, Cooke J, 17/12/2010); *Lofinmakin v Minister for Justice, Equality and Law Reform* [2011] IEHC 38, (Unrep, Cooke J, 1/2/2011); *Albion Properties v Moonblast* [2011] IEHC 107, [2012] 1 ILRM 439 and *Efe v Minister for Justice* [2011] IEHC 214, [2011] 2 IR 798 approved – The Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Refugee Act 1996 (No 17), s 17 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – European Convention on Human Rights 1950 – Council Directive 2005/85/EC, arts 2, 39, ch 5, recital 27 – Treaty on the Functioning of the European Union 30th March 2010 C83/49, art 267 – Constitution of Ireland 1937 – Leave refused in part; balance of application adjourned (2011/147JR – Hogan J – 28/10/2011) [2011] IEHC 409
M(P) v Minister for Justice and Law Reform

Asylum

State protection – Internal relocation – Test – Decision of respondent – Finding by respondent state protection available – Finding internal relocation viable option –Whether open to respondent to make such findings – Whether substantial grounds to grant leave – *E v Minister for Justice, Equality and Law Reform* (Unrep, Clarke J, 24th June 2005) – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 2 – Refugee Act 1996 (No 17), ss 2 and 13– Leave refused (2008/1214JR – Cooke J – 12/10/2011) [2011] IEHC 389
A(A) (Morocco) v Refugee Appeals Tribunal

Deportation

Family rights – Irish citizen child –Approach in determining rights – Applicant married and wife pregnant with Irish citizen child – Respondent unaware – Applicant deported – Application to revoke deportation order – Revocation refused – Whether respondent misunderstood or mischaracterised nature of application to revoke order – *AO & DL v Minister for Justice* [2003] 1 IR 1; *Ruiz Zambrano v Office national de l'emploi (Case C-34/09)* [2012] QB 265; *Dereci v Bundesminister für Inneres (Case C-256/11),* (Unrep, Grand Chamber, 15/11/2011) and *McCarthy v Secretary of State for the Home Department (Case C-434/09),* [2011] All ER (EC) 729; *Fajujonu v Minister for Justice* [1990] 2 IR 151, *Oguekwe v Minister for Justice* [2008] IESC 25, [2008] 3 IR 795; *Dimbo v Minister for Justice, Equality and Law Reform* [2008] IESC 26, (Unrep, Supreme Court, 1/5/2008) and *T.C. v Minister for Justice* [2005] IESC 42, [2005] 4 IR 109 applied – *Üner v the Netherlands* (2007) 45 EHHR 14; *Ajayi v the United Kingdom* [1999] ECHR no. 27663/95, 22 June 1999; *R (Mahmood) v Home Secretary*, [2001] 1 WLR 840; *R v Secretary of State for the Home Department ex parte Isiko* [2001] Imm AR 291; *Abdulaziz v The United Kingdom* (1985) 7 EHRR 471; *Alli (a minor) v Minister for Justice* [2009] IEHC 595, [2010] 4 IR 45; *Asibor v Minister for Justice, Equality and Law Reform* [2009] IEHC 594, (Unrep, Clark J, 2/12/2009); *Pok Sun Shun v Ireland* [1986] ILRM 593 and *Osheku v Ireland* [1986] IR 733 approved – Immigration Act 1999 (No 22), s 3 – European Convention on Human Rights Act 2003 (No 20) – European Convention on Human Rights 1950, art 8 – Constitution of Ireland 1937, arts 41 and 42 – Certiorari granted (2009/334JR – Clark J – 13/10/2011) [2011] IEHC 417
S(B) v Minister for Justice, Equality and Law Reform

Deportation

Interlocutory injunction – Constitutionality of legislative scheme for deportation – Inability to leave State voluntarily where rejection of representations following notification of proposal to make deportation order – Alleged disproportionate interference with personal rights – Right to good name – Right to earn livelihood – Interference with family life – Criteria for grant of interlocutory injunction – Whether fair issue to be tried – Balance of convenience – Whether damages adequate remedy – Whether application premature – Possibility of judicial review or application to revoke – *Campus Oil v Minister for Industry and Energy (No 2)* [1983] 1 IR 88; *FP v Minister for Justice* [2002] 1 IR 164; *Bode (a minor) v Minister for Justice, Equality and Law Reform* [2007] IESC 62, [2008] 3 IR 663; *Osheku v Ireland* [1986] IR 733; *LC v Minister for Justice* [2006] IEHC 36, [2006] IESC 44, [2007] 2 IR 133 and *Crotty v Ireland* [1987] IR 713 considered – Immigration Act 1999 (No 22), s 3 – Application refused (2009/3363P – Laffoy J – 7/72011) [2011] IEHC 459
Nawaz v Minister for Justice, Equality and Law Reform

Deportation

Unborn child – Rights – Role of rights – Family rights – Approach to be taken by first respondent regarding such rights – Irish citizen wife of applicant pregnant at date of deportation – Refusal by respondent to revoke deportation order – Whether respondent erred in treatment of right of unborn child – Whether family rights fairly weighed by first respondent – *T.C. v Minister for Justice* [2005] IESC 42, [2005] 4 IR 109; *A.O. & D.L. v Minister for Justice* [2003] 1 IR 1 and *Buckley and Others (Sinn Féin) v Attorney General and Another* [1950] IR 67 applied – *S v Minister for Justice, Equality and Law Reform*, [2010] IEHC 433, (Unrep, Cooke J, 7/12/2010); *Ugbelase v Minister for Justice* [2009] IEHC 598, [2010] 4 IR 233; *U(MA) v Minister for Justice, Equality and Law Reform (No. 1)* [2010] IEHC 492, (Unrep, Hogan J, 13/12/2010); *S. v Minister for Justice, Equality and Law Reform* [2011] IEHC 92, (Unrep, Hogan J, 23/3/2011); *Omoregie v Norway,* no. 265/07, [2009] Imm AR 170; *I(K) v Minister for Justice, Equality and Law Reform* [2011] IEHC 66, (Unrep, Hogan J, 22/2/2011) and *Irish Trust Bank v Central Bank of Ireland* [1976-77] ILRM 50 approved – *U(H) v Minister for Justice, Equality and Law Reform* [2010] IEHC 371, (Unrep, Clark J, 29/9/2010) distinguished – Immigration Act 1999 (No 22), s 3 – Constitution of Ireland 1937, art 40.3 – Decision quashed (2011/258JR – Hogan J – 25/10/2011) [2011] IEHC 397
A(X) v Minister for Justice, Equality and Law Reform

Family re-unification

Residency by virtue of Irish born child – Family re-unification visa granted to wife and children – Refusal of entry on basis that visa granted in error – Scheme applicable to single immediate family units only not subsequent families – Status of visa – Definition of visa – Decision to refuse – Legitimate expectation of permission to enter – Refusal of permission as contrary to public policy – Concept of public policy – Fixed policy considerations – Operation of legitimate policy in unduly inflexible manner – Absence of opportunity to argue for exception to be made – Entitlement of Minister to change position where objective reasons to justify doing so – Policy interests in controlling immigration – Question of fairness – *VI v Commissioner of An Garda Síochána* [2006] IEHC 30, [2007] 4 IR 47; *Dillon v Minister for Posts and Telegraphs* (Unrep, SC, 3/6/1981); *Orfanopoulous v Land Baden-Württemberg* (Case C-482/01) [2004] ECR 1-5257*; R (Farrakhan) v Home Secretary* [2002] QB 1391; *McCarron v Kearney* [2010] IESC 28, [2010] 3 IR 302; *Fakh v Minister for Justice* [1993] 2 IR 406; *Keogh v Criminal Assets Bureau* (Unrep, McKechnie J, 20/12/2002); *Curran v Minister for Education* [2009] IEHC 378, [2009] 4 IR 300 and *Rowland v Environmental Agency* [2004] 3 WLR 249 considered – Immigration Act 2003 (No 26), s 1 – Immigration Act 2003 (No 1), s 4 – Decision to refuse re-entry quashed and matter remitted to Minister for fresh re-consideration (2008/1433JR – Hogan J – 21/7/2011) [2011] IEHC 328
Ezenwaka v Minister for Justice, Equality and Law Reform

Leave to land

Power of immigration officer – Ordinary residence – Applicant refused leave to land – Applicant restrained and conveyed to garda station before arrest – Applicant detained pending removal from State – Whether applicant ordinarily resident in State – Whether restraint and conveyance lawful –Application to revoke deportation order outstanding at time of arrest – Whether concluded intention to deport applicant within requisite time period of eight weeks – Whether detention lawful – *The State (Goertz) v Minister for Justice* [1948] IR 45 and *GAG v Minister for Justice* [2003] 3 IR 442 applied – *Robertson v Governor of the Dóchas Centre* [2011] IEHC 24, (Unrep, Hogan J, 25/1/2011) approved – *Dunne v Clinton* [1930] IR 366; *The People v O'Loughlin* [1979] IR 85 considered – *B.F.O. v Governor of Dóchas Centre* [2005] 2 IR 1 and *Om v Governor of Cloverhill Prison* [2011] IEHC 341, (Unrep, Hogan J, 1/8/2011) distinguished – Immigration Act 1999 (No 22), ss 3 and 5 – Immigration Act 2003 (No 26), s 5 – Immigration Act 2004 (No 1), ss 4 and 5 – Constitution of Ireland 1937, art 40 – Detention lawful (2011/2112SS – Hogan J – 23/10/2011) [2011] IEHC 395
Toidze v Governor of Cloverhill Prison

Naturalisation

Citizen – Refusal – Restriction on mother's right of residence – Recognition of refugee status – Reckonable residence – Construction of legislation– Whether applicant Irish citizen – Whether restriction on mother's right of residence at time of birth – Whether reckonable residence – Irish Nationality and Citizenship Acts 1956 (No 26), s 6 to 2004 (No 38) – Refugee Act 1996 (No 17), ss 3, 4, 5, 8, 9, 17(1)(a) and 18 – Application refused (2010/776JR – Feeney J – 21/12/2011) [2011] IEHC 526
K(B) v Minister for Justice, Equality and Law Reform

Naturalisation

Mandamus – Public power granted by statute – Order compelling respondent to issue decision on naturalisation application – Duty to act in accordance with law – Duty to make decision in reasonable time – Delay – Executive discretion – Costs – Whether delay unreasonable – Whether *mandamus* appropriate – Whether ministerial discretion subject to rule of law – *Nawaz v Minister for Justice* (Unrep, HC, Clarke J, 29/7/2009); *Laurentiu v Minister for Justice, Equality and Law Reform* [1994] 4 IR 26; *Berkut v Minister for Justice, Equality and Law Reform* (Unrep, HC, Ryan, 12/10/2011); *Hussain v Minister for Justice, Equality and Law Reform* [2011] IEHC 171, (Unrep, HC, Hogan J, 13/4/2011); *O'Neill v Governor of Castlerea Prison* [2004] IESC 7 & 73, [2004] 1 IR 298; *R v Tower Hamlets London Borough Council* [1988] AC 858; *K(M) v Minister for Justice, Equality and Law Reform* [2007] IEHC 234, (Unrep, HC, Edwards J, 17/7/2007); *Nearing v Minister for Justice, Equality and Law Reform* [2009] IEHC 489, [2010] 4 IR 211; *Matta v Minister for Justice and Law Reform* [2010] IEHC 488, (Unrep, HC, Clarke J, 21/7/2010) and *Saleem v Minister for Justice, Equality and Law Reform* [2011] IEHC 223, (Unrep, HC, Cooke J, 2/6/2011) considered – Irish Nationality and Citizenship Act 1956 (No 26), s 15 – Irish Nationality and Citizenship Act 1986 (No 23) – Irish Nationality and Citizenship Act 1994 (No 9) – Irish Nationality and Citizenship Act 2001 (No 15) – Irish Nationality and Citizenship Act 2004 (No 38) – Constitution of Ireland, 1937, Art 9.1.2° – United Nations Convention on the Status of Refugees and Stateless Persons 1951, art 34 – Costs awarded (2011/425JR – Kearns P – 16/12/2011) [2011] IEHC 481
Salman v Minister for Justice and Equality

Subsidiary protection

Absence of appeal mechanism – Failure of respondent to personally consider application – Delegation of power – Fear of persecution or serious harm – Whether fair issue raised – Whether damages for wrongful deportation adequate – Application to restrain deportation – *A(BJS)(Sierra Leone) v Minister for Justice, Equality and Law Reform* [2011] IEHC 381, (Unrep, Cooke J, 12/10/2011); *T(LA) v Minister for Justice* [2011] IEHC 404, (Unrep, Hogan J, 2/11/2011) and *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701 considered – Immigration Act 1999 (No 22) – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Refugee Act 1996 (No 17), s 5 – Council Directive 2004/83/EC, art 4.1 – Application refused (2011/1085JR – Cooke J – 14/12/2011) [2011] IEHC 474
C(MH)(Bangladesh) v Minister for Justice and Equality

Subsidiary protection

Deportation order — Leave application – Substantial grounds – Stateable case – Humanitarian grounds – Country of origin information – Whether substantial grounds – Whether stateable case – Whether applications properly considered – Whether s 3 of Act of 1999 disproportionate and unconstitutional – Whether incompatible with Convention – Whether Directive properly transposed into domestic law – Whether applicant's claim considered in accordance with SI 518/2006 – Whether

effective remedy – *A(MM) v* (Unrep, Birmingham J, 24/3/2011); *M(IM) v Minister for Justice and Equality* (Unrep, Cooke J, 27/7/2011); *L(S) v Minister* (Unrep, Cooke J, 6/10/2011) and *A(BJS)(Sierra Leone) v Minister for Justice, Equality and Law Reform* [2011] IEHC 381, (Unrep, Cooke J, 12/10/2011); *N(F) v Minister for Justice* [2008] IEHC 107, [2009] 1 IR 88 and *A(F)(Iraq) v Secretary of State for Home Department* [2011] UKSC 22, [2011] 4 All ER 503 considered – Illegal Immigrants (Trafficking) Act 2000 (No 29) – Immigration Act 1999 (No 22), s 3 – Criminal Justice (United Nations Convention against Torture) Act 2000 (No 11), s 4 – Rules of the Superior Courts 1986 (SI 15/1986), O 84 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – EU Directive 2004/83/EC, art 4 – European Convention on Human Rights, art 8 – Treaty on the Functioning of the European Union, art 267 – Leave refused (2011/474JR – Ryan J – 14/12/2011) [2011] IEHC 472

O(N) v Minister for Justice and Equality

Transfer order

Asylum – Interlocutory injunction – Family – Islamic marriage by proxy to person with asylum status – Validity of Islamic marriage by proxy – Member state responsible – Appropriate place to apply for asylum – Transfer from United Kingdom – Applicant's conduct – Failure to disclose material facts – Dignity of applicant – Whether case falls within scope of article 7 – Whether entitled to rely on art 7 to impeach validity of transfer order – Whether Islamic marriage by proxy considered valid by Irish law – Whether forfeited legal rights – *The State (Byrne) v Frawley* [1978] IR 326 followed; *Nottinghamshire County Council v B* [2011] IESC 48, (Unrep, SC, 15/12/2011); *Hamza v Minister for Justice, Equality and Law Reform* [2010] IEHC 427, (Unrep, 25/11/2010) and *S(N) v Home Secretary (Case 411/00)* [2002] ECR I-19567 considered – Civil Registration Act 2004 (No 3) – Refugee Act 1996 (No 17), s 18 – Refugee Act 1996 (Section 22) Order 2003 (SI 423/2003), arts 2, 5, 6, 7 – Council Regulation (EC) No 343/2003, art 9(4) – Constitution of Ireland 1937, Arts 29.1, 40.3.2 and 40.3.3 – EU Charter of Fundamental Rights, art 1 – Injunction partly granted (2011/1145JR – Hogan J – 29/12/2011) [2011] IEHC 512

Aslam v Minister for Justice and Equality

Subsidiary protection

Serious harm – Interpretation – Transpose EU Directive – Adequacy of medical treatment – Subsidiary protection refused – Finding by respondent serious harm could only be carried out by actors of serious harm – Whether substantial ground to grant leave – Argument applicant would not secure adequate medical treatment in Nigeria – Whether substantial ground to grant leave – *Bupa (Ireland) v HIA* [2008] IESC 42, [2009] 1 ILRM 81; *Albatros Feeds Ltd v Minister for Agriculture* [2006] IESC 51, [2007] 1 IR 221 and *Pfeiffer v Deutsches Rotes Kreuz (Cases C-397/01 to C-403/01),* [2004] ECR I-8835 applied – *Maher v An Bord Pleanála* [1999] 2 ILRM 198; *Environmental Protection Agency v Neiphin Trading Ltd.* [2011] IEHC 67, [2011] 2 IR 575; *O(ME) v Minister for Justice, Equality and Law Reform*, (Unrep, Hogan J, 25/9/2011) and *D v United Kingdom* (1997) 24 EHRR 423 approved – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 2 and 5 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Interpretation Act 2005 (No 23), ss 2 and 20 – European Convention on Human Rights 1950, art 3 – Council Directive 2004/83/EC, arts 6 and 7 – Constitution of Ireland 1937, art 40 – Leave granted on one ground (2010/1492JR – Hogan J – 11/10/2011) [2011] IEHC 393

M(JT) v Minister for Justice, Equality and Law Reform

Statutory Instrument

Immigration act 2004 (registration certificate fee) regulations 2012
SI 444/2012

INJUNCTIONS

Interlocutory injunction

Immigration – Deportation – Pending judicial review – Appropriate principles to be applied – Interpretation of Ord 84 r 20 – Whether Ord 84 r 20 applied to applications to quash administrative decisions – Whether *Campus Oil* principles applied to grant of stay under Ord 84 – Whether special circumstances to refuse stay – Finding of respondent medical treatment available in Nigeria challenged – Whether proceedings unsustainable – *Campus Oil v Minister for Energy (No. 2)* [1983] IR 88; *Bank of Ireland v Purcell* [1989] IR 327; *Adebayo v Commissioner of An Garda Síochána* [2006] IESC 8, [2006] 2 IR 298 and *The State (Goertz) v Minister for Justice* [1948] IR 45 applied – *Reg. v Education Sec., Ex p. Avon C.C.* [1991] 1 Q.B. 558; *R(H) v Ashworth Hospital Authority* [2002] EWCA Civ 923, [2003] 1 W.L.R. 127; *Efe v Minister for Justice* [2011] IEHC 214, [2011] 2 IR 798; *A(L) v Minister for Justice, Equality and Law Reform* [2010] IEHC 523, (Unrep, Hogan J, 21/12/2010) December, 201; *Agbonlahor v Minister for Justice* [2007] IEHC 166, [2007] 4 IR 309; *O(ME) v Minister for Justice, Equality and Law Reform*, (Unrep, High Court, 20/9/2011); *T(JM) v Minister for Justice, Equality and Law Reform* (Unrep, Hogan J, 7/10/2011) and *Alli (a minor) v Minister for Justice* [2009] IEHC 595, [2010] 4 IR 45 approved – *Min. of Foreign Affairs v Vehicle & Supplies Ltd.* [1991] 1 W.L.R. 550 and *A(PA) v Minister for Justice, Equality and Law Reform* [2010] IEHC 297, (Unrep, Cooke J, 20/7/2010) distinguished – The Rules of the Superior Courts 1986 (SI 15/1986), O 84 r 20 – Aliens Act 1935 (No 14), s 5 – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000, (No 29), s 5 – European Convention on Human Rights 1950, arts 3 and 13 – Constitution of Ireland 1937, arts 40.3.2 and 41 – Stay pending outcome of leave application granted (2011/806JR – Hogan J – 19/10/2011) [2011] IEHC 443

J(P) v Minister for Justice, Equality and Law Reform

Interlocutory injunction

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Test case – Dismissal of claim – Appropriate costs order – Discretion to depart from general principle that costs follow event – Vicarious liability of Minister for Education for sexual assaults on pupils by teachers – Whether special circumstances – Principles applicable to costs in test cases – Test case to which State party – *Cork County Council v Shackelton* [2007] IEHC 334, (Unrep, Clarke J, 12/10/2007) considered — No order as to costs in High Court and Supreme Court (174/2006 – Murray CJ – 6/5/2009) [2009] IESC 39
O'Keeffe v Hickey

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Wasted costs – Jurisdiction to make wasted costs order – Immigration – Judicial review – Discretionary remedy – Whether litigation pointless and destined to fail – Whether continuation of litigation wasteful or vexatious – Whether failure to deal meaningfully with offer made – Whether critique of written submissions could form basis of application – *Tomlinson v Criminal Injuries Compensation Tribunal* [2005] IESC 1, [2006] 4 IR 321 and *O'Donnell v Tipperary (South Riding) County Council* [2005] IESC 18, [2005] 2 IR 483 applied – Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 7 – Costs awarded but wasted costs refused (2009/423JR – Hogan J – 13/6/2012) [2012] IEHC 231
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Inordinate delay – Application to strike out – Want of prosecution – Inherent jurisdiction – Balance of justice – Claim of abuse in residential institution – Psychological and

psychiatric problems – Deceased witnesses – Public interest – Delay in issuing statement of claim – Notice of intention to proceed – Pre-commencement delay – Acquiescence – Withdrawal of application from Board – Whether inordinate delay inexcusable – Whether prejudice – Whether delay justified dismissal of action – Whether unfair in all circumstances – *Rainsford v Limerick Corporation* [1995] 2 ILRM 561; *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459; *Gilroy v Flynn* [2005] 1 ILRM 290; *Donnellan v Westport Textiles Ltd (In Voluntary Liquidation)* [2011] IEHC 11, (Unrep, HC, Hogan J, 18/1/2011); *O'Domhnaill v Merrick* [1984] IR 151; *Toal v Duignan (No 1)* [1991] ILRM 135; *Toal v Duignam (No 2)* [1991] ILRM 140; *McBrearty v North Western Health Board* [2010] IESC 27, (Unrep, SC, 10/5/2010); *Quinn v Faulkner* [2011] IEHC 103, (Unrep, Hogan J, 14/3/2011); *Hogan v Jones* [1994] 1 ILRM 512; *Calvart v Stollznow* [1982] NSWLR 749; *K v Deignan* [2008] IEHC 407, (Unrep, HC, Dunne J, 2/12/2008); *Stephens v Paul Flynn Ltd* [2008] IESC 4, [2008] 4 IR 31; *Desmond v MGN Ltd* [2008] IESC 56, [2009] 1 IR 737; *Birkett v James* [1977] 2 All ER 801 and *Byrne v Minister for Defence* [2005] IEHC 147, [2005] 1 IR 577 considered – European Convention on Human Rights Act 2003 (No 20) – Residential Institutions Redress Act 2002 (No 13), s 13(10) – Rules of the Superior Courts 1986 (SI 15/1986), O 20, r 2 and O 122, r 7 – Rules of the Superior Courts (Personal Injuries) 2005 (SI 248/2005), r 11 – Rules of the Superior Courts (Order 27 (Amendment) Rules) 2004 (SI 63/2004) – European Convention on Human Rights, art 6 – Application refused (1999/9063P – Hanna J – 15/12/2011) [2011] IEHC 530
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Discovery

Intellectual property – Trademark infringement – Relevance – Necessity – Whether discovery should be ordered of documents evidencing use of trade mark – Whether discovery should be ordered where use of trademarks admitted – Whether category to broad – Whether category too onerous – Whether speculative – Whether fishing expedition – Whether order of discovery would impose too serious a burden on a small business – *Framus Ltd v CRH plc* [2004] IESC 25, [2004] 2 IR 20 applied – *Schneider (Europe) GmbH v Conor Medsystems Ireland Ltd* [2007] IEHC 63, (Unrep, Finlay Geoghegan J, 2/2/2007) and *Medtronic Inc v Guidant Corporation* [2007] IEHC 37, (Unrep, Kelly J, 23/2/2007) approved – Rules of the Superior Courts 1986 (SI 15/1986), O 31, r 12 – Partial discovery ordered (2010/11125P – Gilligan J – 14/12/2011) [2011] IEHC 509
Bayerische Moteren Werke Aktiengesellschaft v Edward Ronayne t/a BMWCare

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Privilege – Legal professional privilege – Documents already in possession of defendant – Proceedings part of number of proceedings case managed together – Whether entitled to rely on privilege – Whether issue of privilege of documents relevant to other proceedings – Whether hearing involving parties to other proceedings appropriate – *Smurfit Paribas Bank Ltd. v A.A.B. Export Finance Ltd.* [1990] 1 IR 469 applied – *Kalix Fund Ltd. v HSBC Institutional Trust Services (Ire) Ltd.* [2009] IEHC 457, [2010] 2 IR 581and *CAS (Nominees) Ltd and others v Nottingham Forest plc and others* [2001] 1 All ER 954 approved – Hearing directed (2008/10983P – Clarke J – 17/10/2011) [2011] IEHC 495
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Dismissal of proceedings

Lease – Forgery – Cause of action – Previous proceedings – Inherent jurisdiction of court – Legal professional privilege – Whether claim frivolous and vexatious – Whether claim disclosed no cause of action – Whether forgery – *Barry v Buckley* [1981] IR 306 – Rules of the Superior Courts 1986 (SI 15/1986), O 19, rr 3, 27 and 28 – Proceedings dismissed (2011/386P – Charleton J – 20/12/2011) [2011] IEHC 521
Mulrooney v John Shee & Company

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Lodgment

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PRIVATE SECURITY

Statutory Instrument

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PROFESSIONS

Dentists

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Al-Sukhun v The Dental Council

Medical profession

Nursing – Fitness to practise – Judicial review – Objective bias – Composition of fitness to practice committee – Expert witness – Test to be applied – Whether reasonable, well informed person would reasonably have apprehended that nurse would not receive fair and impartial hearing – Whether personal, social or professional relationship between decision maker and witness sufficient to prove objective bias – Whether community of interest directly related to subject matter of proceedings – Whether cogent reason to believe that decision maker would prefer evidence of witness with whom the decision maker worked – Whether failure to disclose connection was evidence of objective bias – Whether objection could be based on decision maker's social, education, service or employment background or history – Whether court could define list of factors which give rise to real danger of bias – Whether duty on decision maker to disclose associations which could give rise to apprehension of bias – Whether cautious or good practice should be elevated to legal principle – Whether failure to disclose associations which could give rise to apprehension of bias could be ground to set aside decision – *Bula v Tara Mines (No 6)* [2000] 4 IR 412 and *Orange Communications Ltd v Director of Telecoms (No 2)* [2000] 4 IR 159 followed – *Smits v Roach* [2006] HCA 36, (2006) 228 ALR 262, *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 135 ALR 753, *In re Ebner* [2000] HCA 63, [2000] 176 ALR 644, *Locobail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 and *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 WLR 781 considered – Nurses Act 1985 (No 18), s 38 – Appeal dismissed (450/09 – SC – 21/12/2011) [2011] IESC 50
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Medical profession

Nursing – Fitness to practise – Professional misconduct – Suspension from register pending hearing of allegations of professional misconduct – Jurisdiction – *Audi alterem partem* – Prior participation – Whether statute implied meaningful participation by party against who order sought during consideration process – Whether statute required higher threshold – Whether threshold met – Whether public interest in suspending nurse pending hearing – Whether right to participate – Whether obligation to give prior notification of intention to seek suspension – Whether statutory section enacted to prevent immediate danger to public – Whether fitness to practise hearing should have granted adjournment – Whether sufficient reason given for non attendance at hearing – Whether withdrawal undertaking of nurse not to practice relevant – Whether order for suspension proportionate – Whether disproportionate to suspend nurse from general nursing and not simply domiciliary midwifery – Liberty to apply – Whether appropriate to refuse liberty to apply in respect of suspension order – *Ó Ceallaigh v An Bord Altranais* [2000] 4 IR 54 followed – Nurses Act 1985 (No 18), s 44 – Appeal dismissed (202/10 – SC – 12/12/2011) [2011] IESC 51
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Appointment of special advisers (minister for agriculture, food and the marine) order 2012
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Relevant property – Level of control exercised by Minister – Sport – Government policy – Whether relevant property – Whether property occupied by State – Whether rateable – Whether notice party liable to pay rates – Whether sport at core of government policy – *Health Services v Commissioner for Valuation,* [2008] IEHC 178, (Unrep, MacMenamin J, 13/6/2008) considered – Valuation Act 2001 (No 13), s 15 – National Sports Campus Development Authority Act 2006 (No 19), ss 4, 7, 8, 9, 12, 19, 20, 24, 27 and 28 – State Authorities (Public Private Partnership Arrangements) Act 2002 (No 1) – Questions answered in affirmative (2011/1077SS – Peart J – 21/12/2011) [2011] IEHC 506
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REVENUE

Proceeds of crime

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O'N v Criminal Assets Bureau

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Environmental levy – Plastic bag levy – Assessment – Fair procedures – Validity of legislation – *Locus standi* – Whether levy applied only to bags supplied at point of sale – Whether unlawful attempt to apply levy to bags supplied otherwise than at point of sale – Whether regulations invalid or unconstitutional – Whether breach of fair procedures or natural and constitutional justice – Whether ambiguity in provision – Whether impermissible delegation of legislative power – Whether breach of fair procedures by failing to provide basis of calculation of money due – Whether *locus standi* to challenge validity of provision – *Howard v Commissioners of Public Work* [1994] 1 IR 101; *Fortune v Revenue Commissioners* [2009] IEHC 28, (Unrep, Ó Néill J, 23/1/2009); *Cahill v Sutton* [1980] IR 269 and *A v Governor of Arbour Hill* [2006] IESC 45, [2006] 4 IR 88 followed; *B(D) v Minister for Health and Children* [2003] 3 IR 12; *Inspector of Taxes v Kiernan* [1981] IR 117; *Dunnes Stores v Director of Consumer Affairs* [2005] IEHC 242, [2006] 1 IR 355; *Cork County Council v Whillock* [1993] 1 IR 231; *People (DPP) v Corcoran* [1995] 2 IR 259; *Cityview Press Ltd v An Chomhairle Oiliuna* [1980] IR 381; *Maher v Attorney General* [1973] IR 140; *Keogh v Criminal Assets Bureau* [2004] IESC 32, [2004] 2 IR 159; *McDonald v Bord nag Con* [1965] IR 217; *Cityview Press v Anco* [1980] IR 381; *J(T) v Criminal Assets Bureau* [2008] IEHC 168, (Unrep, Gilligan J, 1/5/2008); *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, (Unrep, Charleton J, 26/2/2010) and *John Grace Fried Chicken Ltd v Catering Joint Labour Committee* [2011] IEHC 277, (Unrep, Feeney J, 7/7/2011) considered – Waste Management Act 1996 (No 10), ss 2, 4, 7 and 72 – Waste Management (Amendment) Act 2001 (No 36), s 9 – European Convention on Human Rights Act 2003 (No 20), s 3 – Interpretation Act 2005 (No 23) – Taxes Consolidation Act 1997 (No 39), s 954(5) – Waste Management (Environmental Levy) (Plastic Bag) Regulations 2001 (SI 605/2001) – Waste Management (Environmental Levy) (Plastic Bag) (Amendment) (No 2) Regulations 2007 (SI 167/2007) – Restrictive Practices (Groceries) Order 1987 (SI 142/1987) – Constitution of Ireland, 1937, Arts 15.2 and 29.4 – European Convention on Human Rights, art 6 – Directive 91/156/EEC, art 4 – Reliefs refused (2010/56JR – Hedigan J – 13/12/2011) [2011] IEHC 469
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SALE OF GOODS

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SHIPPING

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SOCIAL WELFARE

Act

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Act No. 43 of 2012
Signed on 21st December 2012

Statutory Instruments

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SOLICITORS

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STATUTORY INTERPRETATION

Interpretation

National Asset Management Agency – Decision to acquire loans – Timing – Decision made prior to establishment of Agency – Whether decision capable of subsequent ratification – Exercise of discretion – Relevant considerations – Whether obligation to take certain factors into account –Whether absence of criteria for exercise of discretion – Presumption of constitutionality – Whether definition of eligible asset sufficiently precise – Whether loans impaired – Whether scheme permitted transfer of loans notwithstanding contention that loans were not impaired – National Treasury Management Agency Act 1990 (No 18), s 4 – Credit Institutions (Financial Support) Act 2008 (No 18) – Interpretation Act 2005 (No 23), s 17 – National Asset Management Agency Act 2009 (No 34), ss 4, 69, 84 and 87 – National Asset Management Agency (Establishment Day) Order 2009 (SI 547/2009) – National Asset Management Agency Act 2009 (Commencement) Order 2009 (SI 545/2009) – National Asset Management Agency (Designation of Eligible Assets) Regulations 2009 (SI 568/2009), reg 2 – Appeal allowed (396/2010 – SC – 12/4/2011) [2011] IESC 14
Dellway Investments Ltd v National Asset Management Agency

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SUCCESSION

Personal representatives

Powers – Settlement of proceedings – Children – Proper provision –Settlement of proceedings to detriment of beneficiary under will – Power of personal representatives

to compromise proceedings – No consent from beneficiary under will – Powers of personal representatives at common law – Statutory powers of personal representatives – Jurisdiction of court to approve settlement – Whether personal representatives had power to compromise proceedings where no consent from beneficiary – Whether court had jurisdiction to approve settlement – Whether power to compromise proceedings at common law – Whether statutory power to compromise proceedings – *XC v RT (Succession: Proper provision)* [2003] 2 IR 250 applied; *In Re Earl of Strafford, Decd* [1980] 1 Ch 28 followed; *Richard v Mackey* (1897) 11 Tru LI 23 distinguished; *Chapman v Chapman* [1954] AC 429 considered – Succession Act 1965 (No 27), ss 60 and 117 – Application to approve settlement dismissed (2002/22Sp – Laffoy J – 16/4/2010) [2010] IEHC 530
A v D(T)

TAXATION

Act

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Act No. 52 of 2012
Signed on 26th December 2012

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SI 549/2012

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SI 491/2012

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SI 459/2012

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SI 527/2012

Value-added tax (amendment) regulations 2012
SI 458/2012

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Personal Injuries

Fraud – False or misleading evidence – Exaggeration – Future care – Psychological *sequelae* – Affidavit of verification – Application to dismiss proceedings – Test to be applied – Onus of proof – Whether onus of proving applicability of statutory section fell on defendant – Standard of proof – Whether standard of proof for application to dismiss claim for false or misleading evidence was proof on the balance of probabilities – Whether claim for future care false or misleading – Whether claim exaggerated – Whether false or misleading evidence adduced where claim for future care abandoned – Whether evidence was knowingly false or misleading – Whether plaintiff had deliberate intention to mislead – Whether *sequelae* alleged were subjectively believed by plaintiff – Whether plaintiff was honest witness – Whether Supreme Court could interfere with findings of trial of judge in relation to honesty of plaintiff – *Hay v O'Grady* [1992] 1 IR 210 followed – Civil Liability and Courts Act 2004 (No 31), s 26(1) & (2) – Appeal dismissed (201/2006 – SC – 2/12/2011) [2011] IESC 44
Ahern v Bus Éireann

TRANSPORT

Act

Transport (Córas Iompair Éireann and Subsidiary Companies Borrowings) Act 2012
Act No. 49 of 2012
Signed on 26th December 2012

TRIBUNAL OF INQUIRY

Evidence

Admissibility – Findings of tribunals of inquiry – Whether evidence from tribunal of inquiry admissible – Whether defendant entitled to refer to tribunal findings to establish possible defence – *In re Haughey* [1971] IR 217 and *Goodman International v Hamilton* [1992] 2 IR 542 and *Re Bovale Developments: Griffin v Sunday Newspapers* [2011] IEHC 331, (Unrep, Kearns P, 9/8/2011); *Lewis v Daily Telegraph Ltd.* [1964] AC 234 and *Mapp v News Group Newspapers Ltd* [1998] QB 520 considered – Relief refused (2011/18CA – Kearns P – 10/2/2012) [2012] IEHC 22
Lowry v Smyth

TRUSTS

Library Acquisition

Kessler, James
Sartin, Leon
Drafting trusts and will trusts: a modern approach
11th ed
London : Sweet & Maxwell, 2012
N210

WARDS OF COURT

Jurisdiction

Child – Medical treatment – Irreversible brain damage –No prospect of recovery – Longevity and quality of life – Inherent pain and suffering in proposed treatment – Views of parents and doctors – Nature of medical treatment to be administered to ward – Presumption in favour of life saving treatment – Exceptional circumstances – Whether life saving treatment should be withheld – Whether exceptional circumstances – Whether deliberate steps should be taken artificially to prolong life whatever pain and suffering caused to child – Test to be applied in assessing course to be adopted in best interests of child –Best interests of child to be determined subjectively – *In re a Ward of Court (Withholding Medical Treatment) (No 2)* [1996] 2 IR 79 applied; *Re J. (a minor) (wardship: medical treatment)* [1990] 3 All ER 930, *In Re B (A Minor) (wardship: medical treatment)* [1981] 1 WLR 1421, *Re J (a minor) (wardship: medical treatment)* [1991] Fam 33, *Re T (a minor) (wardship: a medical treatment)* [1997] 1 WLR 242 and *Re Superintendent of Family and Child Services v Dawson* (1983) 145 DLR (3d) 610 followed; *Re C (a minor)* [1998] 1 FCR 1considered – Courts (Supplemental Provisions) Act 1961 (No 39), s 9 – Do not resuscitate order granted (WOC6680 – Kearns P – 11/1/2012) [2012] IEHC 2
Re R(S): An Irish Hospital v H(R)

WILDLIFE

Statutory Instruments

Wildlife (wild birds) (open seasons) (amendment) order 2012
SI 402/2012

Wildlife (wild mammals) (open seasons)

(amendment) order 2012
SI 398/2012

BILLS INITIATED IN DÁIL ÉIREANN DURING THE PERIOD 18TH NOVEMBER 2012 TO THE 31ST JANUARY 2013

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

Companies Bill 2012
Bill No. 116 of 2012

Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2013
Bill No. 7 of 2013

Euro Area Loan Facility (Amendment) Bill 2013
Bill No. 2 of 2013

Further Training and Education Bill 2013
Bill No. 5 of 2013

Industrial Development (Science Foundation Ireland) (Amendment) Bill 2012
Bill No. 113 of 2012

Mortgage Restructuring Arrangement Bill 2013
Bill No. 4 of 2013

National Lottery Bill 2012
Bill No. 117of 2012

Public Health (Tobacco) (Amendment) Bill 2013
Bill No. 3 of 2013

Broadcasting (Television Licence Fees Recovery) Bill 2012

Bill No. 102 of 2012
[pmb] *Deputy Emmet Stagg*

Education (Welfare) (Amendment) (No.2) Bill 2012
Bill No. 112 of 2012
[pmb] *Deputy Jonathan O'Brien*

Electoral Commission Bill 2012
Bill No. 100 of 2012
[pmb] *Deputy Ciaran Lynch*

Medical Treatment (Termination of pregnancy in case of risk to life of pregnant woman)(No.2) Bill 2012
Bill No. 103 of 2012
[pmb] *Deputy Clare Daly*

Misuse of Motor Vehicles (Public Spaces) Bill 2012
Bill No. 106 of 2012
[pmb] *Deputy Dessie Ellis*

Mortgage Restructuring Amendment Bill 2013
Bill No. 4 of 2013
[pmb] *Deputy Joan Collins*

Reform of Judicial Appointments Procedures Bill
Bill No. 6 of 2013
[pmb] *Deputy Pádraig Mac Lochlainn*

Road Traffic (Amendment) Bill 2012
Bill No. 114 of 2012
[pmb] *Deputy Anthony Lawlor*

Thirty-Second Amendment of the Constitution (Dáil Éireann) Bill 2012
Bill No. 104 of 2012
[pmb] *Deputy Brendan Griffin*

BILLS INITIATED IN SEANAD ÉIREANN DURING THE PERIOD 18TH NOVEMBER 2012 TO THE 31ST JANUARY 2013

Defence Forces (Second World War Amnesty and Immunity) Bill 2012
Bill No. 118 of 2012

Taxi Regulation Bill 2012
Bill No. 107 of 2012

Water Services Bill
Bill No. 1 of 2013

Employment Permits (Amendment) Bill 2012
Bill No. 101 of 2012
[pmb] *Senators Feargal Quinn, Sean D. Barrett and John Crown*

Medical Practitioners (Amendment) Bill 2012
Bill No. 119 of 2012
[pmb] *Senator Colm Burke*

Water Services Bill
Bill No. 1 of 2013

PROGRESS OF BILL AND BILLS AMENDED DURING THE PERIOD 18TH NOVEMBER 2012 TO 31ST JANUARY 2013

Animal Health and Welfare Bill 2012
Bill No. 31 of 2012
As amended in the Select Committee on Agriculture, Food and the Marine

Criminal Justice (Spent Convictions) Bill 2012
Bill No. 34 of 2012
Seanad Committee Amendments

Education and Training Boards Bill 2012
Bill No. 83 of 2012
As amended in the Select Committee on Education and Skills

Houses of the Oireachtas Commission Amendment Bill 2012
Bill No. 77 of 2012
As amended in the Select Sub-Committee on Arts, Heritage and the Gaeltacht
Report Amendments

Personal Insolvency Bill 2012
Bill 58/2012
Committee Stage – Dáil

Road Traffic (Amendment) Bill 2012
Bill 114/2012
Order for 2nd Stage – Dáil

Taxi Regulation Bill 2012
Bill 107/2012
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Water Services Bill
Bill No. 1 of 2013
Seanad Committee Amendments

FOR UP TO DATE INFORMATION PLEASE CHECK THE FOLLOWING WEBSITES:

Bills & Legislation

http://www.oireachtas.ie/parliament/

Government Legislation Programme updated 15th January 2013

http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Special edition

ISSUE 20A | FEB | 2013

Library News

LIBRARY SERVICES: SIMPLIFYING RESEARCH

WESTLAW IS BACK!

The Library Services and RoundHall are delighted to announce that Westlaw IE and Westlaw UK are back in the Law Library! Read more about how you can access them and what is available on their platform in this special edition of the Library Newsletter.

The Library and Information Service has taken a site-based subscription to Westlaw IE and Westlaw UK for the use of members. If you are located in the Library and connected to the Library network simply go to the following addresses, or copy and paste them into your Web browser:

Westlaw IE:
http://login.westlaw.ie/maf/wlie/ext/app/tocectory?sp=ielawlib-1

Westlaw UK:
http://login.westlaw.co.uk/maf/wluk/ext/app/tocectory?sp=ielawlib-1

Access is automatic and you will not need a username and password.

The Law Library network is available from the Four Courts, Distillery building, the CCJ, Church Street building and Cork bar Library.

Training on Westlaw has been organised for members of the Bar, please see overleaf for more details. 1 CPD point will be awarded for attendance

For further information on Westlaw IE or Westlaw UK, please contact the Library Help Desk: 01 817 2889 or email: information-desk@lawlibrary.ie

WESTLAW TRAINING

In order to mark the return of Westlaw in the Law Library, we have organised three training sessions.

Wednesday 27th February
Westlaw IE & UK training
Distillery Building
Conference Room 12
1st session: 2pm—3pm
2nd session: 3pm—4pm
3rd session: 4pm—5pm
1 CPD point awarded for attendance
No need to book in advance

For further information, please contact Magalie Guigon: 01 817 5541 or email mguigon@lawlibrary.ie

Westlaw IE

CASE REPORTS COVERAGE
Employment Law Reports from1990
Irish Law Reports Monthly from 1976
Irish Law Times Reports from 1871
Sweet & Maxwell's Human Rights Law Reports from 2000
Sweet & Maxwell's European Human Rights Law Reports from 1979
Unreported Judgments from 2002

CASE DIGESTS COVERAGE
Case Digests from Irish Law Times from 1983
Irish Current Law Monthly Digest from 1995

JOURNALS COVERAGE
Commercial Law Practitioner from 1994
Conveyancing and Property Law Journal from 1996
Dublin University Law Journal from 1994
Irish Criminal Law Journal from 1991
Irish Employment Law Journal from 2004
Irish Planning and Environmental Law Journal from 1994
Irish Law Times from 1983
Irish Journal of Family Law from 1998
Journal of Civil Practice and Procedure from 2005
The Hibernian Law Journal from 1999
The Irish Jurist from 1966
Medico-Legal Journal of Ireland from 1995

LEGISLATION COVERAGE
Annotated Statutes from 1984

CONSOLIDATED RULES OF THE COURTS

CONSOLIDATED LEGISLATION
Up-to-date Consolidated Acts and Statutory Instruments from 1537

Westlaw UK

SOME OF THE CASE REPORTS COVERAGE
Admiralty and Ecclesiastical Cases
Appeal Cases
British Company Cases
Business Law Reports
Chancery Appeals
Chancery Division
Civil Procedure Reports
Commercial Law Cases
Common Market Law Reports
Common Pleas
Consumer and Trading Law Cases
Costs Law Reports
Criminal Appeal Reports (Sentencing)
Criminal Appeal Reports
Crown Cases Reserved
English Reports
Entertainment and Media Law Reports
Environmental Law Reports
Equity Cases
European Commercial Cases
European Copyright and Design Reports
European Human Rights Reports
European National Patent Reports
European Patent Office Reports
European Trade Mark Reports
Exchequer Reports
Family Division
Family Law Reports (Scotland)
Fleet Street Reports
Fraser's Session Cases, 5th Series
Housing Law Reports (Scottish)
Housing Law Reports
Human Rights Law Reports - UK Cases.
Industrial Cases Reports
International Litigation Procedure
Justiciary Cases (Scotland)
King's Bench
Landlord and Tenant Reports
Pensions Law ReportsPens
Personal Injury and Quantum Reports
Planning Appeal Decisions
Planning Law Case Reports
Privy Council
Probate Division
Probate and Divorce
Professional Negligence and Liability
Property, Planning and Compensation Reports
Public and Third Sector Law Reports
Queen's Bench
Reparation Law Reports (Scottish)
Reparation Law Reports, Quantum Cases (Scottish)
Reports of Patent Cases
Retties Session Cases, 4th Series
Road Traffic Reports
Scotch and Divorce Appeals
Scots Law Times
Scottish Criminal Law
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The Deputy Master of the High Court

Gary Hayes BL

Certain judicial functions together with functions of the Master of the High Court have been passed to Court Registrars. Each of these appointed Court Officers has become a Deputy Master. This article examines the alterations to the High Court lists which are now in place and the functions exercisable of the new officers.

The statute grounding the new powers arises in the course of a number of acts and subsequent amendments. The end result is that the Deputy Masters now exercise the functions of the Master of the High Court and specifically the additional functions set out in the ten sections (i) to (x) below. The statutory bases of the powers are an essential aspect and are therefore also set out below.

These functions are a combination of powers previously within the remit of the Master of the High Court and of High Court judges in the Non-Jury, Judicial Review and Personal Injuries lists. Both Deputy Masters now have the power to make certain orders on foot of the application of the Courts and Court Officers Act 1995, the Courts (Supplemental Provisions) Act 1961 and the Court Officers Act 1926 as amended. The new arrangements have allowed a more fluent use of time and as a result, both courts are frequently in a position to commence hearing proceedings at 11am rather than having to deal with a series of procedural applications. To further supplement the alterations, in contested applications to fix hearing dates, both Deputy Masters can now give additional directions in relation to any outstanding pre-trial matters so as to provide the parties with a firmer timetable for the balance of their case.

Section 10(3) of the Courts (Supplemental Provisions) Act 1961 contains the statutory basis for Practice Direction HC52. The section allocates to the President of the High Court (or any senior ordinary judge of the High Court who is for the time being available) the function of arranging the distribution and allocation of the business of the High Court.[1] The Direction refers to the powers under section 27(1A) of the Court Officers Act 1926 (as amended) which states that:

> (1) In the event of the temporary absence or the temporary incapacity through illness of the Master of the High Court or any Taxing-Master or in the event of the office of such Master or Taxing-Master being vacant, the Minister may appoint a deputy to execute the office of such Master or Taxing-Master during such absence, incapacity, or vacancy.

The Civil Liability and Courts Act 2004 amended Section 27 of the Court Officers Act 1926 by inserting the following sections (1) and (1A) in place of section (1). The effect of this amendment was to give to the Court Service the power to delegate functions where previously that power had been exclusively within the remit of the Minister for Justice. The amended section reads:

> (1) In the event of the temporary absence or the temporary incapacity through illness of any Taxing-Master or in the event of the office of any Taxing-Master being vacant the Courts Service may appoint a deputy to execute the office of such Taxing-Master during such absence, incapacity or vacancy
>
> (1A) In any of the following cases, namely—
>
> *(a)* the temporary absence or the temporary incapacity through illness of the Master of the High Court,
>
> *(b)* the office of the Master of the High Court being vacant, or
>
> *(c)* any other case in which the Courts Service considers it desirable that the following power be exercised,
>
> the Courts Service may appoint one or more than one deputy to execute the office of the Master of the High Court or, as the case may be, to execute such office concurrently with the Master of the High Court.

As is clear from section (1A)(c) above, there is explicit reference to the ability of the Courts Service to appoint any number of Deputy Masters to execute the functions of the Master of the High Court or, as the case may be, to execute such office concurrently with the Master of the High Court.

The Courts Service Act 1998 (as amended by section 40 of The Courts and Courts Officers Act 2004 specifying the functions of the Courts Service referred to in section 29 of the Courts Service Act 1998 and listed in the Second Schedule to that Act) sets out the functions of the Courts Service regarding the power to appoint a Deputy Master under s.27 (1) of The Courts Service Act 1926.

In accordance with section 27(1), a determination of the Courts Service Board in 2002 was made which enabled the placing of Deputy Masters in their current posts.

Utilising the newly amended sections (1) and (1A) above, HC52 sets out powers of the Deputy Master in Practice Direction HC52 on which the Deputy Master may adjudicate, namely:

(a) Applications for the recognition or enforcement in the State of maintenance orders under section 7(2) of the Maintenance Act 1974, as amended, refers

(b) Applications for a European order for payment pursuant to Regulation (EC) No 1896/2006 of the European Parliament and of the Council of the 12th December 2006 creating a European order

1 Section 10(3) of the Courts (Supplemental Provisions) Act 1961

for payment procedure and Corrigendum of the 25th January 2007;

(c) Applications pursuant to Order 63 rule 1(18) of the Rules of the Superior Courts for the payment out of Court of funds standing to the credit of an infant, which are received by post and which the Deputy Master concerned does not require be made *ex parte* on affidavit pursuant to rule 12 of that Order;

(d) Requests for service of a document pursuant to Order 121B of the Rules of the Superior Courts; and

(e) The issuing and transmission pursuant to Order 39 rule 42 of the Rules of the Superior Courts of certificates in respect of depositions taken under the Foreign Tribunals Evidence Act 1856.

It is easy to see that HC52 clearly deals with matters with which many practitioners need not be concerned on a regular basis. However these are matters which are also within the remit of the Deputy Master. More relevant however are the newest alterations to the powers endowed upon the registrars of the High Court Non-Jury and Personal Injury list.

The alteration of these powers arose out of the regular review by both the President of the High Court, Mr. Justice Nicholas Kearns (having carriage of the non-jury and judicial review lists) and Ms Justice Mary Irvine, (having carriage of the personal injury list) with the senior registrars in the High Court regarding the operation of their respective lists. As many practitioners will have been aware, the amount of time spent by Judges managing administrative matters for several hours per week meant a substantial reduction in the actual hearing of cases. In order to increase the amount of time available to those Judges to hear High Court actions, the registrars of those lists were delegated additional roles in carrying out certain case management functions.

The result of this delegation was that in June of this year, Ms. Gráinne O'Loghlen and Ms. Angela Denning were appointed as deputies with the same jurisdiction as the Master of the High Court to deal with matters listed before them. In addition, the following specific business has been assigned to the Deputies:

(i) To fix dates for the hearing of cases by agreement or on notice (including specially fixed dates) in non jury and personal injury actions

(ii) To specially fix cases by agreement or on notice in non jury and personal injury actions

(iii) To adjourn any case to which a date has been allocated on consent or on notice in non jury and personal injury actions

(iv) To reinstate in the non jury and personal injury list, on notice, any proceedings previously struck out

(v) To allocate a priority date to any motion returnable to the common law or non jury Motion Lists

(vi) To strike out proceedings by consent other than proceedings to which an infant is a party, with or without an order for costs

(vii) Applications to extend time to issue and serve notices of motion in judicial review matters

(viii) Applications to extend time for delivery of affidavits, statements of opposition, written submissions in judicial review matters

(ix) Applications to fix dates for interim and substantive motions in judicial review matters

(x) Applications to adjourn any judicial review case to which a date has been allocated on consent or on notice

While the powers of the Master of the High Court have been delegated to both Deputies, an important point to note is that neither Deputy will deal with matters which should be more properly listed before the Master of the High Court and they will only exercise the functions as they arise in relation to matters in the lists concerned.

As a practical guide, the sitting times and the functions of both Deputies are set out below.

Deputy Master Ms. Grainne O'Loghlen takes all applications in relation to the Dublin Personal Injury list on Monday morning at 10.30 o'clock in the Master's Court.

Reviews of these applications are made to Ms. Justice Mary Irvine at 10.00 o'clock each Tuesday.

Applications before Deputy Master Ms. Angela Denning in the non jury/judicial review list are on the following days:

At 10.00 o'clock on Monday - Non jury matters and circuit court appeals for mention, judicial review motions for directions

At 10.00 o'clock on Tuesday - Non jury matters for mention, judicial review motions for directions

At 10.00 o'clock on Wednesday - Applications in relation to the non jury list (including the fixing of dates)

At 10.00 o'clock on Thursday - The call over of non jury/judicial review cases listed for hearing the following week

Review of these applications are made to Mr. Justice Nicholas Kearns, President of the High Court at 10.45 o'clock on Thursday. ■

Pensions Litigation: An Update

Karl Sweeney BL

Introduction

Pensions litigation is not the most topical subject amongst general practitioners. However, the outcome of recent cases together with the potential outcome of contemporaneous cases has the potential to affect thousands of people in Ireland in the current economic climate.

The Commercial Division of the High Court delivered a judgment which provides some welcome clarity on the extent to which pension fund assets may be attached by creditors whom of course were seeking repayment by whatever means available. This topic has been extensively debated in the pensions and banking industries since a High Court decision in 2010 saw Mr. Brendan Murtagh lose his approved retirement fund to judgment creditors.

The judgment was made on foot of an application by Eversheds Solicitors acting on behalf of two individuals who are judgment debtors of a bank. The Applicants were members of small, self-administered trust-based occupational pension schemes. They had yet to retire and no benefits had been paid out of their respective schemes.

In March 2012, the bank made a successful *ex parte* application appointing a receiver by way of equitable execution over the Applicants' pension funds. The traditional view within the pensions industry has been that pension fund assets in a pre-retirement scenario are generally ring-fenced from attachment by creditors. The Applicants sought to discharge the order appointing the receiver.

In discharging the order appointing the receiver, Mr Justice McGovern held that pension fund assets are not amenable to attachment via the appointment of a receiver by way of equitable execution. His reasoning was principally based on the following conclusions:

1. under the terms of the pension deeds, neither of the Applicants had legal or beneficial ownership of the assets within the pension funds pending retirement;
2. under terms of the scheme rules, the Applicants' right to receive a pension on retirement is subject to the agreement of the pension fund trustees;
3. the pension funds were established under irrevocable trusts for the sole purpose of providing retirement benefits;
4. the pension funds were established in accordance with the relevant requirements of the Taxes Consolidation Act, 1997 and have been approved by the Revenue Commissioners as being established under irrevocable trusts; and
5. the terms of the pension deeds expressly prohibit the assignment of benefits from the pension funds themselves.

This decision represents a significant legal precedent. It confirms that assets within occupational pension schemes in a pre-retirement scenario are not capable of attachment by creditors. It identifies clear boundaries on the extent to which lenders may pursue a borrower's pension fund assets in a default situation.

This decision is a welcome development for a pensions industry which is facing significant challenges on a number of fronts. The features of these schemes, on which Justice McGovern based his reasoning, are common to the vast majority of Revenue approved occupational pension schemes in Ireland. As such, the judgment is likely to draw a line under attempts by creditors seeking to pursue borrowers' pension fund assets pre-retirement in loan default situations.

Interestingly for lenders, it also provided certainty surrounding what assets may not be in play when it comes to enforcing judgments against defaulting borrowers; something which had been uncertain when it came to pension fund assets before this decision.

Greene & Others v. Coady & Others 2012/7254 P

Another recent case of interest involved some 124 pension scheme members taking High Court proceedings claiming that they are owed €50 million in connection with the wind-up of the scheme. *Greene & Ors v. Coady & Ors* 2012/7254 P was entered in to the Commercial list of the High Court on 10 July 2012 and the next return date is set for 18 February 2013.

While this case will not be heard until 2013, the issuing of proceedings by these members is significant and any judgment in the case may have a very strong impact on the future conduct of trustees and sponsors of defined benefit schemes in Ireland.

There are news reports indicating that the members' claim is that the trustees failed to exercise their power under the trust deed and rules to demand a full deficit contribution from Element Six (the "Company"). The members are also alleging that the trustees should have referred the matter to the High Court for directions once the Company had given notice of its decision to wind-up the scheme.

In 2009, the Company made approximately 207 staff redundant. As part of the redundancy process, an agreement was entered into with the Labour Relations Commission referred to as the "2009 Shannon Sustainability Plan". This included a funding proposal approved by the Pensions Board.

In October 2011, the Company issued a wind-up notice and indicated to the trustees that the funding proposal was unsustainable. The Company proposed that the plan be wound up subject to conditions, including a Company payment of €30 million. It claimed that the wind up of the

scheme was necessary in order to secure the sustainability of the Company's Shannon operation.

The Pensions Act 1990 imposes very few obligations on employers with respect to contributing to a defined benefit scheme. Section 58A(1) of the Act provides that an employer who deducts any sum from the wages or salary of an employee for remittance to the trustees of a scheme shall remit every such sum to the trustees within 21 days following the end of the month in which the deduction was made. A breach of this requirement is a criminal offence under section 3 of the Act. The Pensions Board also has the power to bring an application before the High Court for an order directing an employer to pay arrears of contributions due by that employer to a scheme.

The relationship between employer and trustee under a pension scheme is primarily governed by the trust deed and rules of the scheme. Under most Irish defined benefit schemes, the primary contribution obligation falls on the sponsoring employer to meet the balance of the funding cost.

An immediate deficit contribution can be demanded by trustees from a sponsoring employer in appropriate circumstances once the trustees have the power to do so under the trust deed. Once a demand is validly made, the employer is bound by its covenant under the deed.

From the trustees' perspective, their duty is to fulfil the main purpose of the scheme which is normally to provide for the payment of relevant benefits in accordance with the trust deed. In fulfilling this duty, they must act in the best interests of beneficiaries, and have equal regard to the interests of different categories or classes of beneficiaries. Under the Act, the main obligations imposed on trustees are to ensure that contributions payable to the scheme are received (insofar as reasonable), provide for the investment of scheme assets and provide for the payments of scheme benefits as they fall due.

While a scheme may provide the trustees with a strong power to demand a certain level of contributions from the employer, the employer will normally have the ability to unilaterally terminate its contribution obligations either with or without notice to the trustees. This termination power must be exercised by the employer in good faith so as not to destroy or seriously damage the employee/employer relationship, but the limits of this principle have not been tested before the Irish courts in a pensions context.

If an employer decides to unilaterally terminate its contributions, the main legal issue this raises for the trustees is whether they should make a contribution demand to make good any deficit in the scheme before the end of the notice period, if they have the ability to do this under the trust deed.

It is not possible to indicate at this stage what approach the High Court will take, due to the lack of both Irish case law in this area and background information on this case.

Waterford Crystal

Another significant case was taken against the State by former Waterford Crystal workers, over pension protection legislation. This case was heard by the European Court of Justice on Wednesday, October 3, 2012.

While the two pension schemes at the crystal company, which went insolvent in 2009, have just very recently entered the State's Pensions Insolvency Payment Scheme (PIPS), this move is not seen as a replacement for what is being sought in the case, which is being supported by Unite and SIPTU.

Under the PIPS scheme – which was established in early 2010 – the trustees of the two pension schemes paid €40.8 million of their remaining assets to the State. In return, the State has taken on the responsibility for making future pension payments to those who were already pensioners at the time the company was wound up in 2009.

The only alternative for the pension schemes would have been to purchase annuities (i.e. a stream of income for life) for the pensioners from a commercial provider such as an insurance company, which would have had to charge a profit margin.

Since the State can provide a similar product without a profit margin (albeit on a cost-neutral basis to the Exchequer) the cost of these annuities is lower, so there is more left in the scheme for the remaining deferred members (i.e. those members who had not yet retired by the time the company closed in 2009).

The ten former Waterford Crystal workers involved in the case (Hogan and others) first took their claim to the High Court in 2010. But when it came up for hearing in 2011, the case was adjourned after two days of hearing, as ECJ referral was seen as necessary. This was because key issues in the case depended on a proper interpretation of the EU 'insolvency' directive, which aims to protect workers whose employers go insolvent.

The ten workers argued that following the receivership of Waterford Crystal in 2009, and the winding up of the pension scheme with a €100 million deficit, they were left with payments representing just 18-30% of their entitlements under the scheme.

They argued that following an ECJ decision in 2007, they are entitled to at least 49%. In this 2007 '*Robins*' case, the ECJ had ruled that the UK pension protection scheme's limit – of 49% of the benefits under the scheme - did not amount to sufficient protection of employees under the insolvency directive.

At the High Court hearing in 2011, the then Department of Finance secretary general Kevin Cardiff had said the State's economic crisis prevented it from committing to pay the estimated €13 billion actuarial cost of a full State guarantee of workers' pension rights in cases of employer insolvency.

Since the PIPS scheme provides only a marginal improvement on the level of pension benefits remaining from the insolvent scheme, the workers are seeking a more significant pension protection system.

Such a system had been under discussion in 2009 at one point, as part of an attempt to revive social partnership. This was called PIMS (Pension Insolvency Minimum Guarantee Scheme) and it would have provided a top-up on a PIPS situation if a significant shortfall had remained.

For the existing scheme pensioners, this would have meant a top-up to the value of 100% of their pension promise, or €12,000 per annum, whichever is the lesser. Active and deferred members would be eligible for a top-up to 50%

of their accrued entitlements or the equivalent of €6,000 per annum, whichever is the lesser.

However, since the social partnership talks at the time did not proceed, the PIMS proposal was not taken any further. While some solvent companies now are considering winding up their defined benefit pension schemes, such schemes would only be able to enter a PIPS scheme if the sponsoring employer is also insolvent. Therefore, PIPS does not provide a general solution to the problems of DB pension schemes.

Conclusion

Although presently not a highly litigious area, in light of the aforementioned it would be wise for practitioners to stay abreast of Pensions Law progression as there is a potential for the area to become somewhat more popular in the near future. ■

Copyright Law in Ireland: Redressing the Balance by Reassessing Core Principles

Brian Hallissey BL

I. Introduction

This article will consider the Irish copyright legislation and the importance of a number of discrete issues which are currently being considered by the Copyright Review Group. It will posit some suggestions for reforming the law with a view to redressing the balance between the right-holders and the public.

II. Irish Legislation - The Copyright and Related Rights Act 2000 (CRRA)

Originality

Originality remains the starting point for copyright protection around the world. The law will only grant an author copyright protection where the work in question is original. In Ireland originality is not expressly defined in the legislation. The only reference to originality is Section 17 which reads:

> "Copyright subsists, in accordance with this Act, in (a) original literary, dramatic, musical or artistic works."

Case law from both Ireland and the UK has provided some clarity on the interpretation of the test for originality. The traditional starting point is *University of London Press Ltd v University Tutorial Press Ltd*[1] where Peterson J. famously stated "what is worth copying is prima facie worth protecting."[2] *Ladbroke (Football) Ltd. v William Hill (Football) Ltd.* expanded upon this definition of originality, and required a "substantial degree of skill, industry or experience employed by him."[3] In the same case Lord Reid states that skill, judgment *or* labour is needed. Therefore the Court considered a simple expenditure of labour to be sufficient to grant protection. When taken to its limit, one can argue that copying a play, with little or no intellectual skill or judgment, will still fall within Lord Reid's pronouncement, as slavish copying is labour.[4] The most recent adjudications on the issue are found in *Designers Guild v Russell Williams*[5] where Lord Hoffman and Lord Scott both endorsed a test based on "skill *and* labour", a test which also applied in *Baigent and Leigh v The Random House Group Limited* (The "Da Vinci Code" case)[6].

In Ireland, the Courts addressed the issue in *RTE v McGill (No. 2)*[7] where Lardner J. considered whether TV listings could qualify for copyright protection. The learned judge stated that;

> "if such a printed or written work is an original composition and involves labour and time and skill … he will be entitled to copyright …"[8]

Therefore, the current position taken by the UK and Ireland is that there is no enquiry into the intellectual input of the author, thereby setting originality to a minimalist level.

A brief contrast with other jurisdictions quickly illustrates that there are alternate tests for assessing originality. In France protection is only granted where the work is *œuvre de l'esprit*, or "a work of the mind".[9] Similarly in Italy, an author must show that their work is of a creative character to be

1 [1916] 2 Ch 601
2 Ibid at pg. 610.
3 [1964] 1 WLF 273 at p.289
4 See comments of Pumfrey J., *Cantor Fitzgerald International v Tradition* (UK) Ltd [2000] RPC 95 at pg. 133.
5 [2001] 1 All ER 700
6 [2006] EWHC 719 (Ch) at para. 141
7 [1989] 1 IR 554
8 *ibid* at 563. For further discussion, see Langwallner, "Originality in Copyright Law after Feist and CCH Canadian", (2007) 2 (1) IBLQ 16
9 French Intellectual Property Code (Article L112-1).

afforded protection.[10] The German Copyright legislation requires "*Werke im Sinne dieses Gesetzes sind nur persönliche geistige Schöpfungen*" which translates to works of the personal creation of the mind.[11]

The courts in the America have also taken a more subjective approach. In *Feist Publications, Inc., v. Rural Telephone Service Co.*[12] the Supreme Court decided that originality in copyright law required a "minimal degree of creativity". In *CCH Canadian Limited* the Canadian Supreme Court held that the concept of originality lies between the "two extremes" of industriousness and creativity.[13] An original, copyrightable work "must be more than a mere copy of another work," but it "need not be creative, in the sense of being novel or unique".[14] Rather, in order to be protected, an author's expression must also involve a more than trivial amount of "skill and judgment".[15] Indeed, recent European legislation can be read as signalling the likely approach for future legislation, and this is reflected in both the Software Directive[16] and the Database Directive[17]. Both Directives refer to the "authors own intellectual creation".

Infringement

To enforce his rights under the CRRA, a right-holder must prove the right was infringed. Section 37 provides that the right holder must show rights expressed in the legislation has been breached, the work is derived from the protected work (the causal connection), and that the restricted act was carried out in relation to the work or a *substantial part* thereof.

Up to recently, substantiality was interpreted as meaning importance. If the part taken was not important, *and therefore not substantial*, no liability would follow. However in *Designers Guild v Russell Williams*[18], Bingham L. inversely equated substantiality with a *de minimus* doctrine. The net result of this approach is that if the alleged infringer took anything other than an insignificant, or *de minimus* amount of protected work, he would be found to have infringed the copyright of the right holder. This obviously weighs heavily in favour of the author, as the test for infringement is now set extraordinarily low. Only trivial, valueless and insignificant aspects of the work remain outside of the scope of protection.

This author suggests a different approach is required here, one which was first advocated in *Scott v Stanford.*[19] Here the court said the factors to be considered when evaluating whether or not the copied material was a substantial part of the original work were:

> "the nature and objects of the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work"[20]

This may be a better means of considering whether copied work is in fact substantial as it actually considers the effect the copied material has on the original work. An obvious criticism is that this places a large degree of subjectivity in the hands of the judge. However it is arguable that in light of the ham-fisted alternate tests as outlined, a more nuanced and methodical approach is to be welcomed.

Moral Rights

Another important provision is found in Part IV of the CRRA where moral rights have been included for the first time. Whilst not as "begrudging" as the English legislation,[21] the moral rights in Ireland are still glaringly sparse when compared to a French author.[22] Although the E.C. legislation in relation to moral rights is all derived from the same source - Article 6bis of the Berne Convention - enough discretion was afforded to the member states to allow them to introduce moral rights in a manner which best reflects their Copyright tradition. The Continental countries have always recognised the special bond between an author and his work, and so moral rights are zealously protected. In contrast the common law tradition favours the economic model.

For example, the French moral right[23] are codified in Articles L121-1 to L121-9 of the French Intellectual Property Code. These rights are much stronger and more useful than the Irish equivalent. A French author is protected by the right of divulgation[24], the right of withdrawal[25], the right of paternity[26] and the right of integrity. In contrast, the Irish author must make do with three moral rights, namely the paternity right, the integrity right and the right of false attribution.[27]

Even more damaging to the Irish author is section 116 of the CRRA which allows an author to waive his or her moral rights. No such provision exists in French, German[28] or Italian

10 Civil Code (art. 2575) and Law no. 633 (Art. 1).
11 German Copyright Act, § 2(2).
12 499 U.S. 340 (1991)
13 *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339 at paragraph 16
14 *ibid* at paragraph 16
15 *Ibid* at paragraph 16
16 Directive 91/250/EEC Article 1(3)
17 Directive 96/9/EC Article 3(1)
18 [2001] 1 All ER 700
19 (1867) LR 3 Eq 718
20 *ibid* at 722, quoting *Folsom v Marsh* 9 F. Cas. 342, No. 4,901 (C.C.D. Mass. 1841).
21 See Chapter IV, Copyright, Designs and Patents Act 1988
22 See Masiyakurima, "The Trouble with Moral Rights", (68) 2005 M.L.R. (3) 411
23 In France moral rights are so developed that they are referred to as the authors "moral right", an all encompassing term.
24 This right gives the author has the exclusive right to 'divulge' the work, with courts holding that the author is the "only judge of the opportunity to publish his work", and that unauthorised exposure of unfinished paintings is an infringement of the right of divulgence. Furthermore, unauthorised reconstruction by another party of a work destroyed by the author is an infringement of this moral right.
25 This right allows the author to go back on an assignment of rights for intellectual or moral reasons, albeit with compensation to that assignee for any damages caused by the withdrawal.
26 This right is also more far reaching than the Irish authors right, as there is no requirement that the work be physically altered, instead the right allows the author to oppose every use of the work in a context that denigrates the meaning of it, even without altering the work.
27 CRRA 2000, Sections 107, 109 and 113 respectively.
28 Cf. White, "The Copyright Tree: Using German Moral Rights As The Roots For Enhanced Authorship Protection In The United States", 9 LOY. L. & TECH. ANN. 30-90 (2009-2010).

law. The net result of the inclusion of the waiver is a hugely watered down system of moral rights because the section 116 waiver will invariably be a term of any standard form contract between the author of a work and a large publisher.

Importantly, the weakening of the authors position with regards to moral rights does not lead to a corresponding benefit to the public interest. Instead the main beneficiary of the watered down moral rights are the big industry players such as record companies and publishers, who can use the section 116 waiver on standard form contracts to improve their own legal position, and so overall the balance remains tipped in favour of the author.

Fair Dealing Defence

The CRRA 2000 does acknowledge that there must be a limitation on the *carte blanche* right of an author to prevent use of protected work without permission and that the public interest must be at least considered. This consideration is given effect under Part 6 of the Act which provides a defence of fair dealing. A respondent can rely on this defence where, briefly, the work is used for the purposes of research or private study, criticism or review, where the protected work is incidentally included, where the work is used for educational purposes or where copied by a library or for an archive, where a computer program is backed up lawfully, transferring copies to electronic form etc.[29]

It is therefore clear that although outlined in exhaustive fashion, the scope of the defence is quite narrow, and does not take account of the fact that the entire area of copyright law has changed dramatically since the evolution of the internet and the remix culture it has nurtured.

Alternative Fair Dealing/Fair Use legislation

In the United States, the doctrine of fair use provides a defence to a claim of copyright infringement. The United States has particularly strong copyright laws, which radiate from the very heart of the American legal system[30]. Some of the most stringent Copyright laws come from the Digital Millenium Copyright Act (DMCA) which was enacted to fulfil the two treaties passed in 1996 by the World Intellectual Property Organisation.[31] The DMCA has been heavily criticised for allowing over-zealous copyright owners to demand the removal of material from websites that may not even be infringing their intellectual property rights. The expense of challenging such a claim, and the potentially devastating effect of a refusal to remove the content and subsequent loss in a lawsuit, means that the majority of webmasters will surrender to the unreasonable requests of such copyright owners.

However, notwithstanding such draconian legislation, American copyright law provides users of protected works with a robust doctrine of fair dealing which serves as a real protection for the public interest. Although it is now enshrined in statute, the fair use doctrine was initially developed by the Courts.[32] In *Folsom v Marsh*,[33] Story J. outlined a 4 step test in order to assess the merits of whether a defence of fair use was available. Later, the defence was incorporated into the Copyright Act of 1976, which restated Story J's test. The relevant section reads:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use...;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.[34]

It is immediately clear that the defence looks acutely at the two works and examines the effect that the derivative work will have on the first. The final step is an important one, as it evaluates the copyright owner's "expectation of gain" and the infringer's "usurpation of the demand" of the copyrighted work.[35]

Recently the fair use defence was scrutinised by the American Supreme Court in *Lenz v Universal Music Corp.*[36] This case turned out to be a landmark case for the public interest as the Court ruled that copyright owners are required to evaluate whether allegedly infringing videos make fair use of their copyrighted works—and thereby are not infringing—before they can send DMCA takedown notices to online service providers like YouTube.[37]

Canadian copyright law also contains a fair use provision under Sections 29, 29.1 and 29.2 of the Copyright Act of Canada. Although "fair" is not expressly defined, the Supreme Court took the opportunity in *CCH Canadian Ltd. v. Law Society of Upper Canada* to do same.[38] The Court cited Lord Denning in *Hubbard v. Vosper*[39] when he described fair dealing as being a "question of degree" that cannot be defined concretely. The Court then outlined six principles, which take an even more systematic consideration of whether the works in question are "fair", namely: (1) The purpose of the dealing; (2) The character of the dealing; (3) The amount of the dealing; (4) Alternatives to the dealing; (5) The nature of the work; and (6) The effect of the dealing on the work. The net effect of the decision is that Canadian copyright law now provides a much more balanced fair use/dealing defence, one which appropriately considers the often conflicting

29 There are further exceptions, none of which need highlighting for the purposes of this article.
30 See Article I, Section 8, Clause 8 of the American Constitution, known as the "Copyright Clause".
31 WIPO Copyright Treaty (WCT) (WIPO, 1996a) and the WIPO Performances and Phonograms Treaty (WPPT) (WIPO, 1996b), collectively known as the "internet treaties".
32 Interestingly, the English Chancery case of *Gyles v Wilcox* in 1740 was the starting point of what was to become the common law introduction of fair use in America.
33 9 F. Cas. 342, No. 4,901 (C.C.D. Mass. 1841).
34 17 U.S.C. § 107
35 M. B. Nimmer & D. Nimmer, *Nimmer On Copyright*, (New York: Matthew Bender Country, 1963) § 3.O5[A][4] (2010).
36 572 F. Supp. 2d 1150 (N.D. Cal. 2008
37 *ibid* at 1154. For more detailed discussion of the case, see Concepcion, "Beyond the Lens of Lenz: Looking to Protect Fair Use During the Safe Harbor Process Under the DMCA", 18 GEO. MASON L. REV. 219 (2010)
38 [2004] 1 SCR 339
39 [1972] 2 Q.B. 84

interests of the right owner and the public. Later cases have emphasised the "move away from an earlier, author-centric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace."[40]

Therefore as the law stands in Ireland, if a person wishes to remix and remash work which is under protection, without the permission of the author, there is very little they can do. While preventing parties using another's work without permission may seem like the whole purpose of copyright law in the first place, it is a blinkered approach to the issue, particularly in light of the advent of Web 2.0. Even as early as 1845, Courts have acknowledged that a strict objective approach to copyright is counterproductive;

> "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout."[41]

III. Copyright and the Internet

The internet has given the public an almost unimaginable access to materials. To a creative mind, the internet has provided infinite resources. Every minute, 72 hours of videos are uploaded to YouTube.[42] With each of these videos comes an opportunity to create derivative works, parodies remixes and re-edits. One can be forgiven for assuming that using an authors protected works is detrimental to the original, and certainly sites such as ThePirateBay.com are hugely damaging to the right holders. However this author contends that this is not always the case and a more nuanced approach is required.

Mash ups, like parodies, almost always rely heavily on the public's recognition and appreciation of the original. It is therefore incorrect to subject a mash up to the long established laws of simple copyright. Obviously slavish reproduction of a book should be prevented as the second author is simply free riding on the effort of the original author. However the incorporation of the first work into a separate work, one which creates a distinct work in itself such as the famous "Keyboard Cat" mash ups should not be treated the same as the lazy author.

With the internet, we have access to an almost infinite database of songs, books, poetry, videos and artistic works. Technology allows us to manipulate these works and create derivative works. The law must acknowledge that these secondary works can, in the correct circumstances be beneficial to the public interest, even if the original author does not agree.[43]

Conclusion

This author suggests that any reform of copyright law must take into account the three issues highlighted above. The legislation should provide a clear definition of originality, preferably one which requires "intellectual creativity" on the part of the author. The concept of infringement must be reformed and the definition of "substantial infringement" given some clarification to ensure a *de minimus* approach is not taken. Finally the legislation must replace the outdated fair dealings with a more flexible test, potentially modelled on either the American or Canadian approach. These relatively straightforward changes will allow Ireland's copyright laws to properly acknowledge the equally important role of the public. ■

40 *SOCAN v Bell Canada* [2012] SCC 36 where the Court referred to its earlier decision in *Théberge v Galerie d'Art du Petit Champlain Inc.* [2002] 2 S.C.R. 336

41 *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436)

42 Statistic provided by Youtube site, last accessed on February 1st 2013. See http://www.youtube.com/t/press_statistics

43 See Rogers and Szamosszegi, "Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use", available at http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000085/FairUseStudy-Sep12.pdf. Site last accessed 1st February 2013.

Thomson Reuters/Round Hall Judicial Review Conference 2012

Stephen Moran BL

This article provides a synopsis of the papers delivered at the biannual Thomson Reuters/Round Hall Judicial Review Conference 2012 which took place on the 1st December 2012 in the Royal College of Physicians of Ireland and which was presided over by the Hon. Mr. Justice Kearns, President of the High Court.

The speakers at the event included James O'Reilly SC who delivered a paper on "The Challenges of Statutory Interpretation in the Modern Era"; Anthony M. Collins SC on "Reasoning – An Essential Procedural Requirement?"; Gordon Anthony BL (Professor of Public Law at Queen's University Belfast) on "Patterns in Judicial Review in Northern Ireland"; Mícheál O'Higgins SC on "Judicial Review – New Developments"; and Conleth Bradley SC on "Asylum: An Update on Both Substantive Law and Practice and Procedure".

The challenges of statutory interpretation in the modern era

To practice law is, in large part, to seek to interpret the law. The challenge therefore posed by the interpretation of statutes is hardly a novel one. It is, however, one that is littered with its own peculiar pitfalls not least because of the sheer volume of statutes being enacted in the form of both Irish and European legislation, be it primary or secondary, and the tendency in many cases for the draftsman to prefer a non-textual approach over the textual.

This is the subject addressed by Mr. O'Reilly. In his paper he sets out both the nature of the challenge and the tools that exist and may be called in aid by a practitioner in unfamiliar territory. He presents the issues involved with particular reference to three areas: the Planning and Development Acts and Regulations; the Valuation Acts; and the Immigration Acts and Regulations.

In seeking to identify the source of the challenge, Mr. O'Reilly addresses how the preparation of legislation and amending legislation is approached by draftsmen. It is on this point that he draws particular attention to the significance of style in legislative drafting. The non-textual amendment of legislation is perhaps best explained by way of an example. Where a statute uses the language "*notwithstanding any other enactment* …", the draftsman has opted for a non-textual approach. The textual approach, conversely, involves the deletion or amendment of old words and/or the substitution of new words from or into a piece of legislation.

Finally, Mr. O'Reilly addressed his suggestions on meeting this challenge in what he described as "a better way" which was illustrated by reference to the approach adopted by the Pensions Board.

Reasoning – An essential procedural requirement?

The existence and nature of a duty to give reasons is a problem which the Superior Courts have grappled with on countless occasions in recent years. The results of which have produced a steady stream of developing jurisprudence on point which may be said to have further entrenched the existence of a right to reasons to such an extent that it may be or come to be regarded as an essential procedural requirement.

This is question posed and sought to be answered by Mr. Collins. At the outset of his paper, the rationale for a duty to give reasons is examined. This was followed by a description of the influence of EU law on the common law approach to the question of reasons. Particular attention is paid to the recent decisions of the Supreme Court in *Rawson v. Minister for Defence* [2012] IESC 26 and of the High Court in *Mallak v. Minister for Justice, Equality & Law Reform* [2011] IEHC 306. In the latter case, at the time of the conference, the decision of the Supreme Court ([2012] IESC 59) had yet to be delivered but its likely outcome and effect were matters of some considerable discussion.

The rationale for the duty to provide reasons was then followed by the question of the adequacy of those reasons. Mr. Collins identifies the intricate nature of these issues by outlining the direct bearing that the rationale has upon the content of the duty. In this regard, the *dicta* of the decision in *Sister Mary Christian & Ors. V. Dublin City Council* [2012] IEHC 163 was scrutinised along with the decision *in Rawson*.

This then leads to, perhaps, a corollary question in how the State seeks to meet the requirement to give reasons. Mr. Collins identifies and assesses statutory intervention as a mechanism open to the State to meet its obligations here before concluding with his view on the challenges faced ahead in this area.

Patterns in judicial review in Northern Ireland

In order to get a better understanding of how the law is developing at home and to seek an insight as to how it may develop into the future, it is often a worthwhile exercise to seek to examine the state of the law in another neighbouring jurisdiction with a similar legal tradition. In setting out the current state of the law on judicial review in Northern Ireland, Professor Anthony offered such an insight.

In his paper, Professor Anthony focused on four areas of judicial decisions namely: the constitutional setting to judicial review; the judicial review procedure; the public-private divide; and the review of lower court decisions.

Two decisions which arose out of, or had specific implications for, the devolution of power in Northern Ireland were described and critically assessed. Those decisions were that of *Robinson v. Secretary of State for Northern Ireland* [2002] NI 390 and *Axa General Insurance* [2011] UKSC 46; [2012] 1 AC 868.

The judicial review procedure applicable in Northern Ireland and its salient features was thereafter set out by reference to both the relevant rules and to caselaw. Professor Anthony then sets out the public-private divide in expanding the reach of judicial review. This issue arises for discussion and consideration in large measure from the increasing privatisation or contracting-out of powers and functions traditionally exercised by public authorities. This section addressed the manner in which the courts have developed a range of tests for amenability to review to meet this challenge. Those tests are said to go beyond the original "source of power" test in an effort to "plug that gap".

Finally, Professor Anthony, addressed the apparent expansion and contraction of the review of lower courts' decisions. This topic arises in the circumstances of the present straitened times which have been marked by a desire to protect the public purse from the cost of unnecessary litigation which has, it was argued, created a tension in the overall body of case law. One particular area in which a judicial aversion is noticeable is towards so-called "satellite litigation". This occurs where you go outside an extant dispute resolution forum to another "satellite" forum to challenge some aspect of the procedure in the original forum. It more often occurs in lower courts such as coroners' courts, county courts and magistrates' couts.

Procedural Changes in Judicial Review and Habeas Corpus in 2012

Insofar as judicial review is focussed at least equally on the manner in which a decision-maker has come to a decision as on that decision itself, it follows that it behoves practitioners to follow developments to and changes in the procedure by which substantive relief by judicial review is sought with

equal diligence as they would changes in and developments to the substantive jurisprudence on the area. It was to this end that Mr. O'Higgins' paper is instructive.

The main focus of his paper are the changes brought about by S.I. 691 of 2011 to Order 84 and to the judicial review list itself, both of which are examined critically. Mr. O'Higgins has organised his paper in three parts. The first deals with the background to the Rules Committee changes and to the Bar Council's objections to some of those changes. The more significant amendments, including the question of time limits, applications to enlarge grounds, and the need for increased precision and care with pleadings are given particular focus as are the granting of stays and interim orders at leave stage.

Particular attention is given to the area of time limits, including the reduction of the time limit for applying for leave for *certiorari*, the removal of the requirement for promptness and to the submissions made by the Bar Council. Mr. O'Higgins identifies a possible area of confusion which may arise on foot of the new time limits and the abolition of the "promptness" requirements. The cases of *AP v. DPP* [2011] IESC 2 and *Keegan v. Garda Siochána Ombudsman Commission* [2012] IESC 29 on the issues of generic and imprecise pleading and applications to amend a statement of grounds respectively were also discussed.

In the second part, entitled "12 months in – how are the new rules working out?", the procedural adjustments to the list itself are addressed as apart from the S.I. 691 changes. This includes an examination of the abolition of the list to fix dates, the creation of the Registrar's 10 o'clock list as well as a number of other case management initiatives which have increased the speed with which judicial review business is disposed of on a daily basis. One of the particularly interesting features of this section are that Mr. O'Higgins sets out a breakdown of cases issued over the past ten years which have been provided by the Judicial Review Registrar, Ms. Angela Denning.

In the third part, Mr. O'Higgins deals with a number of procedural developments in respect of *habeas corpus* which he suggested continue to mark this remedy out as perhaps the greatest example of the Constitution at work in the day to day business of the Courts. A particular focus of this aspect of the paper was the decision of Hogan J. in *Louise Joyce v. Governor of Dóchas Centre* [2012] IEHC 316 on the right to make repeated applications for *habeas corpus*. Thereafter the decision of the Supeme Court in *Ejerenwa v. Governor of Cloverhill Prison and the Min. for Justice and Equality* [2011] IESC 41 on the law of *habeas corpus* governing the validity of Ministerial and Court warrants is assessed. Finally, two landmark decisions of the High Court in *E.C. v. Clinical Director of the Central Mental Hospital* [2012] IEHC 152 and *F.X. v. Clinical Director of the Central Mental Hospital and the DPP* [2012] IEHC 271 on releasing the mentally disturbed are critically described and assessed. It was speculated that on appeal, the Supreme Court, in *F.X.*, may place reliance on its judgment in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27.

A year in "Asylum": emerging trends and challenges

Given that approximately 58% of judicial review cases involve asylum, it was fitting that the final paper of the conference delivered by Conleth Bradley SC dealt specifically with this area of law.

The key focus of Mr. Bradley's paper was the concept of sovereignty in asylum. He addresses this theme by reference to a number of bases. In the first instance he describes the context by reference to which he seeks to explore his theme. In that regard particular attention is paid to the importance of language and definitions, including, for example, the definitions of and applied to asylum seekers and convention refugees. In setting out that context, reference is also here made to the statistics available on asylum applications.

Thereafter, the concept of sovereignty is addressed with particular reference to a selection of leading decisions of the Superior Courts handed down over the past year. These included *Spila & ors v. the Minister for Justice* [2012] IEHC 336 in which Cooke J. confirmed that it was a recognised principle of domestic, EU and international law that, as an incident or aspect of its sovereignty, every sovereign state has the entitlement to determine which third country nationals may enter its territory and to set down the terms and conditions on which they may be granted permission to remain here.

They also included *AO v. Minister for Justice* [2012] IEHC 79, in which Hogan J. considered the application of the Court of Justice's decision in *Ruiz-Zambrano* (Case C-34/08) and his later decision in *EA & PA v. Minister for Justice* [2012] IEHC 371, which was an application for an interlocutory injunction requiring the difficult balancing exercise involved in the principle of sovereignty and the respective obligations on those who govern and those who judge in this difficult area of law. Thereafter attention was drawn to the recent decision of the First Chamber of the Court of Justice in *MM v. Minister for Justice* (Case C-277/11).

Finally, Mr. Bradley addressed the issue of the bifurcated approach required and the resultant anomalies created through the existence of separate procedures for challenging by way of an application for judicial review a deportation order on the one hand and a refusal of subsidiary protection on the other before concluding his paper with a number of observations.

The conference papers, which I understand are available both on loan from the Law Library and also to purchase from the publisher, on their face, are described as "an essential update". The increasing prominence of this area of law in Ireland's evolving legal landscape coupled with the breadth and depth of subjects covered at the conference, to my mind at least, bear out this claim. ■

A bound copy of the conference papers from "The Judicial Review Conference 2012" costs €145.
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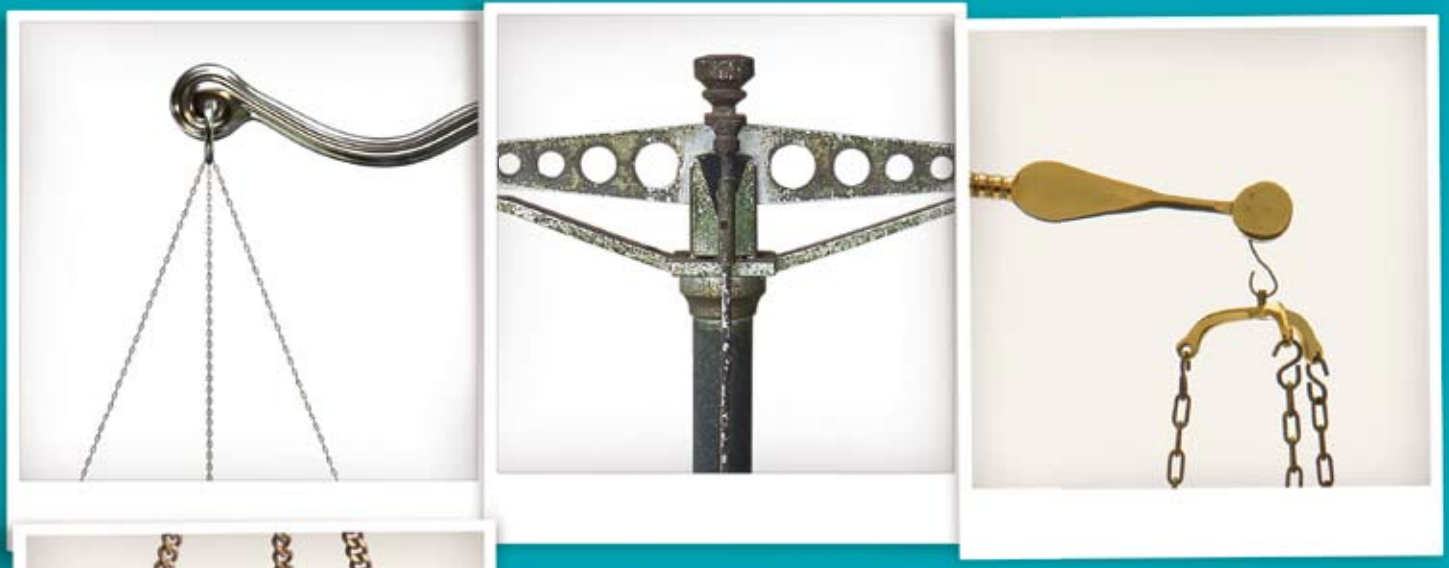

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