The Bar Review

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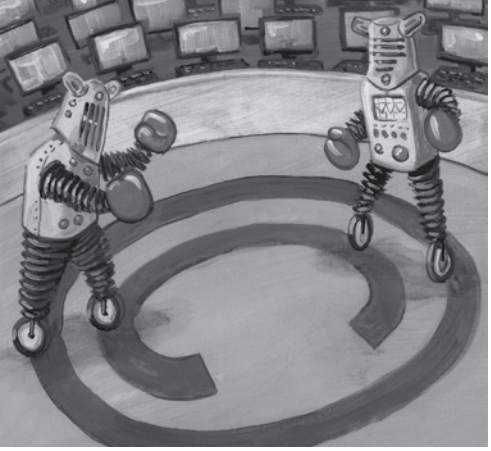
UsedSoft v Oracle and the Impact on Copyright Law

ROUND HALL



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Personal Insolvency Act, 2012: Paving the way for the Enforcement of Lender's Rights

Stuart Connolly BL

Introduction

On December 1st, 2009, the Land and Conveyancing Law Reform Act was signed into law and brought with it a number of hugely significant reforms. The Act repealed a plethora of previous legislation and in turn, brought a particular difficulty for lenders. Under the legislation, banks could apply to the court for a possession order over a property in which it had a registered charge when payment under the charge "*became due*".[1] On July 25th, 2011, Dunne J., in *Start Mortgages & Ors v. Gunn & Ors*[2], was asked to consider the ability of a creditor to apply for a possession order notwithstanding the repeal of the express statutory power to do so by the 2009 Act.

The learned Judge ruled that the right to apply for an order of possession pursuant to s.62(7) of the Registration of Title Act, 1964 did not accrue on the initial date of the registration of the property's title but rather, on the issue of the first demand for the principal sum owing which, if not demanded prior to the repeal of the 1964 Act on December 1st, 2009, could not then vest in the bank and as such, the bank would be unable to seek an order for possession. This difficulty has since been substantially alleviated by a series of High Court decisions[3] and it appears that the only outstanding shortfall is that it remains impossible for a creditor to apply to a court on a summary basis for possession of registered land. This limited problem could easily be solved with legislative intervention which would provide for summary procedures for the repossession of property subject to a charge. However, before that could be done, adequate protection for debtors' principal private residence was needed and this came in the form of the Personal Insolvency Act, 2012.

Personal Insolvency

After recommendations by both the Inter-Departmental Working Group on Mortgage Arrears Report of October 2011 and the Law Reform Commission's December 2010 Report for a complete and radical overhaul in this area, the Bill was approved by Cabinet on 26th June, 2012.

Prior to the enactment of the 2012 Act on December 26th, 2012, the only relief available for distressed debtors was bankruptcy under the Bankruptcy Act of 1988. The provisions were extreme in that any relief sought had to be brought in the High Court which incurred the requisite costs and made the prospect of any recovery or return to business for the debtor most difficult. Under the 2012 Act, there has been a radical overhaul including a number of innovative changes to assist in the balance of both creditors and debtors' interests. Now, the maximum period for the duration of bankruptcy has been reduced from 12 years to 3 years, new criteria have been laid out in which a debtor must have debts of at least €20,000 (which is up from €1,900) and the debtor must have considered alternatives provided for under the new Act, which are outlined below, in order to claim relief.

Insolvency Service of Ireland

Part 2 of the Insolvency Act, 2012 establishes the Insolvency Service of Ireland whose function is to operate the new debt settlement arrangements provided for in the Act. Section 9 lists those specific functions as being responsible for monitoring the operation of the arrangements relating to personal insolvency, considering applications for debt relief and preparing and issuing guidelines as to what constitutes a reasonable standard of living and reasonable living expenses. The functions also include regulating personal insolvency practitioners, contributing to the development of policy in the area of personal insolvency and reporting to the Minister on matters relating to its functions.

Insolvency Arrangements

Part 3 of the Act provides for three new personal insolvency procedures which provide practical and cost-effective ways for debtors to resolve their indebtness without resorting to bankruptcy. These procedures are voluntary arrangements between a debtor and their creditor which are to be overseen by the Insolvency Service and will subsequently culminate in a judicial order. Such arrangements, however, are the cause of considerable concern as the success or failure of the regime is solely dependent on the creditors' acceptance of the proposals advanced by the debtor in conjunction with the Insolvency Service. Generally, these arrangements will not apply to secured debts such as mortgages but to unsecured debts only such as personal loans or credit card debts, assuming they are not rolled up into the mortgage.

Depending on the type on arrangement invoked and providing the debtor complies with the terms of the arrangement and the statutory requirements therein, the debtor will be protected from the commencement and continuance of proceedings by its creditor for a period of 3 to 7 years. On completion, the debtor will be discharged

1 Section 62(7), Registraton of Title Act, 1964.
2 [2011] IEHC 275.
3 *Kavanagh & Anor v. Lynch & Ors*, [2011] IEHC 348; *EBS Limited v. Gillespie* [2012] IEHC 243; *McEnery v. Sheahan* [2012] IEHC 331

from their unsecured debts in their entirety and in some cases, subject to the particular arrangement in place, discharged from secured debts.

Debt Relief Notices

The first available arrangement is a Debt Relief Notice (DRN) pursuant to Part 3, Chapter 1 of the 2012 Act. It provides for a "*write-off of qualifying debts totalling not more than €20,000 for persons with no assets and no income and who are insolvent and have no realistic prospect of being able to pay their debts within the next 3 years*".[4] The purpose of this arrangement is to create an expedient and cost-effective, non-judicial process whereby a debtor can resolve unmanageable debt problems. Qualifying debts are defined in the Act and include credit card debts, unsecured bank loans, rent and utility debts among others.

In order to seek a DRN, a person must meet the following criteria; have a qualifying debt of €20,000 or less, have a net disposable income of €60 or less per month, have non-exempted assets of €400 or less, be domiciled in the State or, within 1 year before the application date, have either been ordinarily resident in the State or had a place of business in the State, be insolvent and unlikely to become solvent within 3 years and they must satisfy a number of other criteria as set out in the Act. Notably, section 25 provides that a qualifying debt for the purposes of a DRN may include secured debts.

Section 27 states that the initiation of the DRN process must be by an "*approved intermediary*" and it is the intermediaries function to review the applicants financial situation and revert to the Insolvency Service who will determine whether to certify the application and where the Insolvency Service is satisfied that the application is in order, it shall furnish a copy certificate to the Circuit Court for the Court to determine whether a DRN should be issued. If the Court issues a DRN, the debtor cannot have their debts enforced for a period of three years, at the end of which time the debts will be written-off in full. It should be noted that Part 6 of the Act provides for the creation of a new cadre of judges of the Circuit Court to hear applications under the Act.

Debt Settlement Arrangements

Debtors may also, depending on their individual circumstances, make use of a Debt Settlement Arrangement (DSA). Chapter 3 provides for a system of Debt Settlement Arrangements between a debtor and one or more creditors to repay an amount of unsecured debt over a period of 5 years (with a possible agreed extension to 6 years). The DSA is a mechanism to be used by persons who have income, assets and debts that fall outside the scope of a Debt Relief Notice but is available for unsecured debts only.

In order to be eligible to apply for relief under this mechanism, a person must be domiciled in the State or, within 1 year before the application date, have either been ordinarily resident in the State or had a place of business in the State, be insolvent and unlikely to become solvent within 5 years and they must satisfy a number of other criteria as set out in the Act.

The procedure to apply for a DSA is by way of application to the Insolvency Service through a personal insolvency practitioner on the debtor's behalf. If the Insolvency Service is satisfied with the application, it is then referred to the Circuit Court in a similar fashion to the DRN procedure and it is for the Court to grand a protective certificate which will be in force for 70 days with a possible extension for a further 40 days. The certificate prohibits the commencement or continuance of proceedings against the debtor. On successful termination of the DSA, debts to the extent specified in the arrangement will be discharged.

Part 5 of the Act provides for the regulation of personal insolvency practitioners by the Insolvency Service and section 163 provides that "an application for an authorisation to carry on practice as a personal insolvency practitioner must be accompanied by certain specified evidence and documents, as well as the prescribed fee. Applicants must provide evidence as to their competence, including details of education, training and experience. In particular, applicants must provide evidence of knowledge of relevant Irish insolvency legislation."

Personal Insolvency Arrangements

The final mechanism that can be invoked by a debtor is a Personal Insolvency Arrangement (PIA) as provided for by Chapter 4 of Part 3 of the Act. The explanatory Memorandum states that "chapter 4 provides for a system of Personal Insolvency Arrangements between a debtor and one or more creditors to repay an amount of both secured and unsecured debt over a period of 6 years (with a possible agreed extension to 7 years). The Personal Insolvency Arrangement would assist those persons who have difficulty in the repayment of both secured debt and unsecured debt".

The procedure is similar to that of a DSA, however, in this case the arrangement is available in respect of secured debts up to €3 million in aggregate but unlimited if every secured creditor agrees and there is no limit on unsecured debts. As with a DSA, a personal insolvency practitioner will make a proposal to the Insolvency Service on behalf of a debtor. In addition to the eligibility criteria for a DSA, a person must show that they owe a debt to at least one secured creditor with security over property of the debtor situated in the State and that they have declared in writing that they have co-operated for a period of at least six months with the secured creditor in relation to the debtor's principal private residence in accordance with any process relating to mortgage arrears approved or required by the Central Bank of Ireland in order to be successful for an application for a PIA.

Commencement

Section 1(2) of the Act states that "*this Act shall come into operation on such day or days as may be fixed by order or orders made by the Minister, either generally or by reference to any particular purpose or provision, and different days may be so fixed for different purposes and different provisions*". The Minister for Justice and Equality has made an order providing for the commencement of certain provisions of the 2012 Act with effect from March 1st. This commencement order included part 2 of the Act and therefore, with the Insolvency Service now established and with the necessary powers to undertake its functions now

4 Explanatory Memorandum of the Personal Insolvency Act, 2012.

conferred by the Act, practical guidelines and its operational policies should be issued in the near future.

Family Home Protection

The establishment of a PIA could be said to be one of the more innovative measures introduced by the legislation and provides for, in theory, the ability for an insolvent debtor to stay in their principal private residence during the repayment arrangement which may span for several years and the debtor may then resume paying the mortgage in full after the unsecured debt has been written off. It appears to be an obligation of the personal insolvency practitioner, when advancing a proposal to the Insolvency Service on behalf of a debtor in relation to a PIA, to ensure that a debtor remains in their residence where they wish to do so and where it is cost effective to do so.

On November 29th, 2012, the Troika's memorandum of understanding with the Government was published and indicated that the authorities must move to remedy the flawed repossession legislation which was brought to light after the *Start Mortgages* decision once adequate protections for debtors and their principal private residence are enacted via the personal insolvency legislation. The memorandum stated; "Having secured adequate protections for debtors' principal private residence through the enactment of the Personal Insolvency Bill, the authorities will introduce legislation remedying the issues identified by case law in the 2009 Land and Conveyancing Law Reform Act, so as to remove unintended constraints on banks to realise the value of loan collateral under certain circumstances".

As the personal insolvency legislation has now been enacted, the path is clear for the Oireachtas to draft the promised legislation to close the legal loophole exposed by *Start Mortgages*. Any legislation may have specific provisions restricting it to properties other than the family home, however, in light of the protection afforded to the family home through the 2012 Act, this may be unnecessary. In relation to properties other than a debtors' principal private residence, there appears no reason why a repossession action could not be made in a time-efficient and cost-effective manner. The Department of Justice has also noted that legislation would provide that, when considering an action for repossession, the court may adjourn proceedings for up to 60 days to allow the parties to explore whether a PIA for the borrower would assist in reaching an alternative settlement.

Legislative intervention in relation to this issue is overdue and will help to stabilise and finalise the dynamic between lenders and debtors and be of benefit to both. The reform should be straightforward and should reaffirm the rights of a creditor to appoint a receiver, sell assets free from any other charges or judgment mortgages and apply for possession by way of summary procedure. This was the position before the 2009 Act repealed the previous legislation. Finally, whilst the Government has stated that legislation will be introduced to meet the difficulty outlined in this article, it is not clear when and on what terms the legislation will be enacted but one would envisage that it will be within the coming months. ■

Innocence Project at Duke University

Alicia Hayes BL

I was one of the three barristers chosen by the Bar Council to take part in last year's three- month internship with an innocence organization in the United States. I spent my summer in Duke University, Durham, North Carolina with the Wrongful Convictions Clinic based in the University. The Duke Clinic was inspired by the Innocence Project, which is a non-profit organisation based in New York that works to exonerate people who have been wrongfully convicted, including those on death row, primarily through the use of DNA evidence.

The Innocence Project was started just over 20 years ago by two lawyers (and Professors) in the Benjamin Cardozo School of Law, New York, Mr. Barry Scheck and Mr. Peter Neufeld. Mr. Scheck is very well known in the US, having defended OJ Simpson along with Mr. Neufeld. Mr. Scheck also defended Louise Woodward and was advisory counsel to Amanda Knox whose case was before the Italian Courts.

About ten years ago, the Innocence Project asked universities around the US to establish their own projects to help the wrongfully convicted. The Duke Clinic was one of the first to respond and start taking cases, and today there are more than sixty-five projects known collectively as the Innocence Network dotted all over the United States. There are also Innocence Projects throughout the rest of the world, in the UK and a recently founded Irish Innocence Project.[1]

I chose to go to Duke University not only because of its undeniable prestige, but also because of its location in the South. Capital Punishment is one of my areas of interest, and North Carolina is one of the thirty four States[2] in the United States which still have the Death Penalty on its Statute Books.[3] It should be noted however that there is currently a *de*

1 Founded by Griffith College Dublin in March 2010.

2 Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming.

3 Since its reinstatement (the death penalty) in 1976, Kansas and New Hampshire have not performed an execution. Pennsylvania, Oregon and Connecticut have only executed three 'volunteers.' Connecticut abolished the death penalty in April 2012. The law however was not retroactive and 11 people remain on death row.

facto moratorium on executions in North Carolina following a 2009 decision by the State's medical board that physicians cannot participate in executions, which is a requirement under State and Federal law and an execution has not been carried out since August 2006.

What can be gleaned from the statistics is a definite move towards eradication of the death penalty in the US. It can take years to reverse a wrongful conviction and due to the death penalty, sometimes it is too late.

The National Registry of Exonerations

The National Registry of Exonerations was initiated following research by students and Professors at University of Michigan Law School and the Centre for Wrongful Convictions at Northwestern University. It has a complete list of all 1,065 exonerations to date. It also gives a break-down of various details relating to the wrongfully convicted and their alleged crimes. The statistics paint a very bleak picture. The vast majority (93%) of exonerees are male. Minority groups are disproportionately represented. Nearly 70% of exonerees are either Black (50%), Hispanic or of other ethnic minority. The average time in prison is at least 11 years, though often more. The crimes for which the majority were exonerated were murder and rape/sexual assault.[4]

Main Contributing Factors in Wrongful Convictions (usually more than one factor)

(i) Perjury or fabricated evidence on behalf of a 'witness', or false accusations: 51%

'Jail-house fabricators' are a huge factor in wrongful convictions. One of the men I met during my time at Duke, who had been wrongfully convicted and released after 17 years for a murder he did not commit, explained the difference between jail house snitches and jail house fabricators. A jail house snitch (known on this side of the Atlantic as a 'rat') is someone who 'snitches' to the authorities, but crucially tells the truth. A jail house fabricator is someone who fabricates a story, usually a 'confession' made by the accused, for his own gain.

I was very surprised during my time in the States to learn of the level of people convicted on the 'evidence' of fabricators, often at the instigation of the State. Often, such persons, who were responsible for convicting innocent men, were rewarded for their 'cooperation' by having their own sentences commuted or receiving some other benefit.

California imposed a moratorium on the death penalty in December 2006. 13 people were executed between the years 1978 and 2006. California also has the largest number of people on death row at 721. Colorado and Wyoming have executed one person each since 1976.

Alabama, Georgia, Mississippi, Ohio, Oklahoma and Texas are the States which carry out the most executions. Texas having executed 15 prisoners in 2012.

Oklahoma, Texas, Mississippi, Florida, Arizona, Ohio, Delaware, Idaho and South Dakota all carried out executions in 2012. Source: Death Penalty Information Centre.

4 Murder amounted to 48%; rape and sexual assault 35%.

(ii) Misconduct on behalf of Officials including Prosecuting Counsel: 42%

In the United States, Head District Attorneys, Prosecuting Counsel, are elected officials. Prosecutorial misconduct is very much a reality in the United States. Naturally, Prosecutors are motivated, whether consciously or not, to ensure re-election or promotion and often that depends on the level of successful prosecutions over their tenure, their 'hard stance' on crime, the number of life sentences and death penalties they accrue. It has also been my experience that in wrongful conviction cases, vital exculpatory evidence, has been kept from the defence in an effort to secure a conviction. Naturally, this is procedurally (not to mention ethically) prohibited and often later gives rise to what is known as a 'Brady Claim' (evidence of non- disclosure of vital exculpatory evidence with which an alternative outcome would have occurred; named after the US Supreme Court case *Brady v. Maryland*). Many exonerations are secured after it is established that a Brady violation occurred in the original trial.

(iii) Mistaken Eyewitness Identification: 43%

Wrongful convictions result from genuine mistake and error also. Mistaken eyewitness identification is a major factor in wrongful convictions. One case, which I assisted on in my time at Duke (which has not concluded as of yet) included eyewitness evidence where the race, height and weight (the weight difference was approximately 200 lbs) of the alleged defendant (who was convicted) was incorrect.

Another aspect of eyewitness (mis-) identification which is an important factor in wrongful convictions is the notoriously erroneous 'Identity Parade'. Again, both race and official conduct play a major role. In many cases of wrongful convictions, the identity parade has been flawed and/or mishandled. Scientific research has shown that in order to reduce the possibility of error, the parade must be conducted from a 'double-blind perspective', that is where the official conducting the identity parade does not know the identity of the suspect. This practice limits the possibility of the official consciously or subconsciously influencing the outcome.

Research has also shown that it is essential that the victim is told that the suspect may *not* be in the line-up at all; otherwise the person will choose the person who looks most like the perpetrator. Both of the above are routinely not the practice and as a result lead to wrongful convictions.

Of course this only applies if an identity parade is used. Often, due to resources or the practical difficulties of rounding up people of similar race and build, police instead show the victim a range of mug shots, which may well be not up to date or recent. Even more detrimental to the accused is the 'show up', where the accused is placed in the back of a police car or told to wait on the street and the victim is asked to look at him and say whether he is the perpetrator. This of course is irrefutably prejudicial but occurred in the case of 15 year old Brenton Butler.[5] A 65 year old white woman from Georgia visiting Jacksonville, Florida, was shot in broad day-light in front of her husband. Keen to protect the tourist industry, the local police department moved too

5 The story of Brenton Butler was portrayed in a film 'Murder on a Sunday Morning'.

quickly and approached young Brenton as he walked by the hotel (where the woman had been shot), put him in the back of the police car, drove him to the crime scene and asked the victim's husband: 'Is this the man?'. The man was '100%' certain it was him. Thankfully due to efforts of his defence counsel, Pat McGuinness, Master Butler was not convicted but he did spend a number of months on remand.

(iv) False Confessions: 12%

Brenton Butler also falsely confessed to the murder, which occurs in 12% of cases of those who have been wrongly accused. 15 year old Brenton confessed, without having had access to counsel, following a prolonged period of intimidation which included him being physically battered.

Exonerations

Since 1989 there has been 1,065[6] exonerations across the United States and I was lucky enough to work on one of those cases during my time at Duke University Wrongful Convictions Clinic.

Duke University Wrongful Convictions Clinic is headed up by three excellent lawyers, Professor Theresa Newman, Professor Jim Coleman and Attorney- at -law, Mr. Jamie Lau. The Clinic is based at the University and law students take the Clinic as a module where they work and assist on real cases, investigating, drafting the pleadings used in these hearings, known as 'Motions for Appropriate Relief,' and visiting the clients. The Duke Wrongful Convictions Clinic is a very impressive centre built on hard work and dedication. What is more, the Clinic at Duke mainly deals with non- DNA cases, as opposed to the New York Project, which deals only with cases in which there is DNA evidence. This makes an already difficult task all the more so but despite this restriction, they have had a number of success stories since their inception.

LaMonte Armstrong

One such success story is that of LaMonte Armstrong whom I was lucky enough to meet and get to know.

LaMonte Armstrong spent 17 years in prison for a murder he did not commit. He was released on the 29th of June, 2012. In 1989, Ms. Ernestine Compton, a college professor was strangled with an electric flex in her home. The murder was unsolved for almost seven years until seemingly out of the blue LaMonte Armstrong was arrested and convicted of the murder. He always maintained his innocence.

LaMonte was convicted on the evidence of a man named Charles Blackwell. There was a 'crime stoppers' reward of $5,000 for help in solving the murder of Ms. Compton. Blackwell, for reasons best known to himself, called the crime stoppers telephone line, gave the name of LaMonte Armstrong, whom he knew and knew that Armstrong knew Ms. Compton, and a 17 year nightmare commenced. The police soon learned that Charles Blackwell knew nothing about the crime but it appears there was huge pressure to 'solve' it, so, either purposefully or not, he was fed the details over a number of months as he 'cooperated' with the police in the investigation. Blackwell has stated on a number of occasions that he was pressured by police to accuse Armstrong.

The police abandoned LaMonte Armstrong as a suspect in 1989 but renewed interest in him and Charles Blackwell five years later, when the crime still was not solved. They charged Blackwell with the murder and told him he was going to be tried for it unless he testified against Armstrong. He decided to testify but recanted his evidence before the trial by writing to the Prosecutor, but when he did, he was again threatened that he instead would be tried for the murder. He then gave false, perjurous evidence against Armstrong at trial, upon which he was convicted. Blackwell recanted again once Armstrong was convicted but it took 17 years to reverse his conviction. All appeal avenues had been exhausted. An appeal court in 1996 ruled that Armstrong had received a fair trial that was free from error.

He was eventually exonerated due to the efforts of the Duke Wrongful Convictions Clinic. Upon reinvestigating the case, a partial palm print lifted from a door directly above the body was tested and compared to old databases and it revealed the identity of the true killer. That man was a suspect initially. He was a drug addict and had owed Ms. Compton money. It seems she refused to lend him more money and he murdered her. A letter was found on her bureau addressed to him demanding repayment of a loan. This lead was never followed up.

Unfortunately he is now dead. He died following a car accident in 2010. He murdered his own father six months after Ms. Compton and confessed, spending about 12 years in prison. One of the most striking parts of these wrongful conviction cases is not only the wrong perpetrated on the exonerees but also on the victim and their families. Also, if Ms. Compton's killer had been apprehended, the life of his father may well have been spared.

LaMonte Armstrong is now 62 years of age and still lives in North Carolina. He has one daughter. He has not yet received any compensation from the State for his wrongful conviction. In order to receive compensation, a Pardon of Innocence must be granted by the Governor. That has not yet been done, and they are very difficult to secure.

Noe Moreno

During my time at Duke, I was also fortunate enough to work on a case which resulted in an exoneration. Noe Moreno was exonerated of second degree murder and other related crimes on the 31st of August 2012. He was released on the 21st of September 2012 having spent seven years wrongfully incarcerated.

This case was quite unusual in that the murder charge arose from a death resulting from a road traffic accident. (As here, the charge would more usually be one of *dangerous driving causing death* or *vehicular manslaughter* as it is known in the US.) Also, very unusually, Noe Moreno pleaded guilty at trial.

Noe and his brother Jorge, along with two of the brother's friends and employees were travelling in the brother's vehicle, all four had consumed alcohol and none of them was wearing a seatbelt. The car was being driven by Jorge. Noe was in the front passenger seat. The vehicle crashed when the driver lost control, over- corrected and was "T-boned" on the passenger side by an oncoming car. Roberto Casillas, a back seat passenger, was killed on impact.

Due to the fact that the occupants were not wearing seatbelts, they were thrown about the car quite violently and

6 As of the time of writing, February 2013.

when the car came to rest, the two brothers in the front seats were lying across one another. Noe's head came to rest on the driver's side but his feet were still in the passenger foot well. His brother's feet were in the driver's footwell but he was lying across the passenger seat. When the emergency services came to cut them out, they extricated each of the brothers head first. Noe, whose head was now closest to the driver's door, was taken out the driver's side and his brother was taken out on the passenger side. This led to some confusion as to who was the driver.

Noe was an undocumented Mexican immigrant and did not speak any English. His brother had legal papers and spoke fairly good English. Once Noe regained consciousness he told the doctor, who was Spanish speaking, that he was not the driver and it was his brother who was driving. His brother also admitted to driving while in the hospital.

The police however issued a warrant that evening for Noe's arrest without speaking to Jorge. The doctor spoke to police and explained that Noe had told him he was not driving and that his brother had admitted to driving. The police ignored the doctor and arrested Noe for second degree murder.

Unfortunately Jorge changed his story and from then on claimed he could not remember what had happened or who was driving. Even more unfortunately, Jorge then hired a private attorney who demanded $10,000 up front to defend Noe. This lawyer had already been severely disciplined in another State. The lawyer did not speak Spanish and he persuaded Noe to plead guilty, which he did. During his court hearing, the transcript revealed that Noe had stated to the court on a number of occasions that he did not understand the proceedings. The lawyer told Noe he would get 3-7 years if he pleaded guilty and possibly life if he contested it. He also did not negotiate a plea bargain on his behalf.

Noe was sentenced to 18- 22 years in prison and he never saw the lawyer again. He continues to practise in North Carolina. Noe contacted the Wrongful Convictions clinic at Duke who took on his case. It was a very difficult case both because it was a non- DNA case and he had pleaded guilty. Duke re-investigated and located the emergency response team who were in fact first on the scene. Their reports, when located, clearly stated that they believed Jorge was the driver because of the position of his feet in the driver's footwell.

A Consultant of Emergency Medicine gave evidence that it was medically impossible for Noe to have suffered the injuries he did, if he had been sitting in the driver's seat, and an independent accident reconstructionist explained how the occupants in the vehicle would have moved as a matter of physics. Both experts concluded Noe was the front seat passenger, not the driver.

All his injuries were on the right hand side.[7] On the other hand, all of Jorge's injuries were on the left hand side. After hearing the evidence, the court exonerated Noe of second degree murder on the 31st August 2012 and I had the privilege of being there.

Noe was not released immediately as he is undocumented but was released three weeks later on bond whilst awaiting his immigration hearing. The immigration hearing will determine whether he will be allowed remain in the US. He is living with his mother, Robertina, in Lancaster, North Carolina.

Ineffective Assistance of Counsel

The Noe Moreno case is a good example of how the 'ineffective assistance of counsel' can lead to a wrongful conviction. This is often a ground upon which a Motion for Appropriate Relief is based. Noe clearly did not have effective assistance of counsel, to which one is constitutionally entitled in the US. In this case, Noe's counsel was hired privately and operating under a clear conflict of interest. He also failed to investigate the case in any way or negotiate a plea bargain.

The Value of the Experience

My time spent in the States with the Duke Wrongful Convictions Clinic was a truly enriching experience. Were I ever to suffer a miscarriage of justice, I just hope that I would have the grace, dignity and forgiveness that I found in the exonerees, LaMonte Armstrong and Noe Moreno. Lawyers like Theresa Newman, Jim Coleman and Jamie Lau and all the students and staff at Duke Law are working tirelessly to help those that society has not heard. LaMonte Armstrong described the Duke Wrongful Convictions as his A-Team. (A for Armstrong) He said something which really moved me and I often think of since returning to Ireland. When speaking about when the Clinic took on his case after years of protesting his innocence, he prayed:

'Thank God, someone finally *heard* me.' ■

With sincere thanks to the Bar Council, Duke University Wrongful Convictions Clinic, Inga Ryan and Susan Lennox BL.

7 Bearing in mind they drive on the right hand side of the road in the US, the passenger seat would be on the right hand side. The impact from the on- coming car was on the right hand side of Moreno's vehicle.

Charity Dress Sale in Aid of Down Syndrome Centre

Sunday May 26th, 10-5 PM, Serpentine Hall, RDS, Dublin

Ireland's largest Charity Dress Sale in aid of the Down Syndrome Centre, made up of donations from celebrities and the Irish general public. Please help by donating "lightly worn" evening, day or office dresses. Drop your dress down to the reception desk in your Law Library building, where there will be a branded collection bag for all donations from 18th of April to 18 May, 2013.

All funds will go towards the development of a new centre dedicated to providing facilities for people with Down syndrome.

Malawi Court Conducts Trials in Prison

Ruth Dowling BL

Irish Rule of Law International (IRLI) is now in the middle of the second year of its project in Malawi, working on access to justice for those in pre-trial detention. Just before Christmas, the project had its biggest success to date. In an unprecedented move, the High Court of Malawi in the country's capital, Lilongwe, moved into Maula prison to conduct homicide trials. Her Ladyship Justice Chombo President of the High Court, together with Court staff, the Legal Aid Department and the Directorate of Public Prosecutions attended Maula on 5th and 12th December 2012 to start work on the back log of homicide cases.

Maula adult prison is one of Malawi's largest prisons. It was built to house 800 prisoners but now houses 2000 prisoners. A quarter of those are held in pre-trial detention, of which 10% have been held for over 3 years, having never been to Court.

In November 2012, Justice Chombo attended an IRLI human rights workshop for Magistrates. Upon hearing of our experiences in Maula, she suggested we work together to address the backlog.

When IRLI started work in 2011, they found a situation had arisen in Malawi's courts where most of the homicide cases that are brought to court were recent cases from 2011. Cases from 2005 to 2011 were being overlooked. These 'long–term remandees' were the forgotten people, stuck in an overcrowded criminal justice system.

IRLI lawyers since August 2011, together with the Legal Aid Department, have brought many bail applications to the High Court for these 'forgotten prisoners'. All applications were successful and work was done to locate sureties in order to secure the conditional release of these people. In some cases where a person had been waiting over 7 years and had not once been before a court, the High Court granted bail and went as far as to say the State should prosecute the case within 6 months or the court would consider him discharged.

The result was that the IRLI was bringing more bail applications for these old cases than there were trials being held to prosecute the cases. Due to the high volume of people on remand, Justice Chombo thought the best course of action would be to take the court to the prisoners and start work on this backlog.

The courts that are held in prison are known as camp courts. Camp courts are *ad hoc* courts held within the prisons to bring justice directly to pre-trial detainees. They run regularly as an initiative of PASI (Paralegal Advisory Service Institute) for those who are charged with minor offences. A Magistrate and a prosecutor will attend the prison and conduct a court with PASI paralegals assisting those pre-trial detainees. It is unusual for a camp court to be held for homicide trials but the exercise has been a success. The EU Democratic Governance Programme who fund a lot of work within the justice sector in Malawi has agreed to fund the running of these courts.

As a result of these camp courts, 20 persons have been tried. Some were convicted, some acquitted and others discharged for want of prosecution. In one case, where the State failed to obtain a medical report, the court decided that the accused should be discharged after being held in pre-trial detention since October 2006. In another case, the prisoner was sentenced to 4 years, which was backdated. As he had been in custody for 5 years, he had served his time and was released immediately. This is a big step forward in Malawi where now the High Court is actively working to ensure access to justice for all those in pre-trial detention.

IRLI is a small burgeoning charity and we are always looking for volunteers to offer legal assistance both in Ireland and in Malawi. We are planning a training visit by Irish lawyers and Judges to Malawi over the Whit vacation.

If you have any interest, you can contact Ms Rachel Power at 01 817 5331 or see the website www.irishruleoflaw.ie for further details. ■

Pictured at the launch of *Intellectual Property Law* in "The Sheds", Distillery Building is author Eva Nagle BL with The Hon Mr Justice Frank Clarke of The Supreme Court. *Intellectual Property Law* is published by Round Hall, Thomson Reuters.

The prevalence of judicial review in the asylum arena

Shannon Michael Haynes BL*

The Refugee Appeals Tribunal (RAT) is undoubtedly the most judicially reviewed public authority in Ireland. In the five years from 2007 to 2011, judicial review applications in respect of Tribunal decisions accounted for 21.6 per cent of all judicial review cases initiated in the High Court.[1] Since the Tribunal was established on 20 November 2000, a total of 8 per cent of its decisions has been the subject of a High Court judicial review challenge (see Figure 1).[2]

Figure 1: Judicial review applications taken against the RAT as a percentage of total decisions issued, 2001-2011

Year	Decisions Issued	Judicial Review Applications	%
2011	1,330	234	17.6
2010	2,783	475	17.1
2009	3,426	262	7.7
2008	2,460	265	10.8
2007	2,006	319	15.9
2006	2,091	289	13.8
2005	4,156	402	6.7
2004	6,338	314	5.0
2003	4,841	154	3.2
2002	4,951	112	2.3
2001	2,813	91	3.2

Source: Refugee Appeals Tribunal, *Annual Reports* (various years)

The prevalence of judicial review in the asylum arena must be a serious cause for concern. There are competing views on what has caused the tide of judicial review applications taken against the Tribunal. On the one hand, it is felt that:

> "… concerns have been frequently raised in regard to the quality of decision-making at all stages of the asylum procedure … Critics have pointed to the high number of judicial review cases taken following negative asylum decisions as evidence of systematic problems in the asylum process."[3]

It has been argued, at the other extreme, that the volume of judicial review applications is the product of overly-industrious practitioners. In an interview with the *Irish Times* in 2008, the Minister of State for Integration, Conor Lenihan, spoke of an "industry" around asylum appeals and suggested that:

> "The major delays in settling and dealing with asylum applications at the moment is principally focused on the legal challenges that are being taken by a very active and voracious group of barristers down in the Bar library who are representing clients virtually on a 'no foal, no fee' basis … Vulnerable asylum seekers were being given unrealistic hopes by some lawyers when in most cases their chances of a successful appeal were limited."[4]

In a similar vein, Minister of State, Fergus O'Dowd, recently commented:

> "The Minister [for Justice and Equality] has some concerns about the extent to which applicants seek to avail of the judicial review process to stall or prolong their stay in the State ... Deputies may be aware of the large number of cases that often back up, sometimes on tenuous grounds, behind legal challenges to aspects of our protection system."[5]

It would be troubling if either claim had merit. The simplest way to resolve the issue might be to explore the success rate of judicial review applications against the RAT.

Data Deficit

It is unfortunate in that respect that so little is known about the global trends in High Court challenges of this nature. There is no direct source of published data on the success rate of asylum judicial reviews.

The Tribunal's annual reports simply record the

* I am grateful to David Leonard BL for his invaluable guidance and contribution. Any errors remain my own.

1 7,200 judicial review applications were made: Courts Service, *Annual Reports* (various years). 1,555 applications issued in respect of Tribunal decisions: RAT, *Annual Reports* (various years).

2 2,917 judicial reviews were taken in respect of the 37,195 decisions which issued from the RAT during that period: RAT, *Annual Reports* (various years).

3 O'Rourke, "'Frontloading": The Case for Legal Resources at the Early Stages of the Asylum Process' (2009) 62 *Working Notes* 16-23, at p. 17.

4 *Irish Times*, 'Lenihan blames barristers for delays in asylum appeals', 4 January 2008. Stack and Shipsey suggested in 2003 – without citing any empirical data – that: "… the Minister is successful in a majority of [leave] applications…" in 'Chapter 9: Judicial Review and the Asylum Process', in Fraser and Harvey (eds.), *Sanctuary in Ireland: Perspectives on Asylum Law and Policy* (IPA, Dublin, 2003) at p. 175, fn. 21.

5 Statement by Minister of State Fergus O'Dowd TD, 6 February 2013, available at www.justice.ie/en/JELR/Pages/SP13000052 (accessed on 3 March 2013).

number of applications brought against it in any given year. Curiously, the chapter in the Tribunal's annual report which would address the significant developments flowing from recent judicial review proceedings disappeared after 2002. Subsequent annual reports have been content to reproduce a stock paragraph on the role of its Judicial Review Unit along with the number of applications filed that year.[6]

After the 2005 annual report, the practice of recording the number of judicial review cases 'on hand' ceased as the caseload spiralled from 61 in 2001 to 419 in 2005. Nevertheless, it is no secret that approximately 1,400 cases linger in the High Court's asylum, immigration and citizenship list awaiting a hearing date[7] (not to mention the cases that have issued but are not ready for the list to fix dates or the cases that have already been assigned a hearing date). Somewhere around a third of that total must represent 'on hand' cases against the Tribunal.[8] The lack of information regarding 'on hand' judicial review cases in the annual reports is regrettable and it is suggested that a breakdown of such information would lead to greater transparency.

The Courts Service's annual reports have on occasion recorded the number of judicial review applications where leave was refused or granted as well as the number of final orders made with reliefs refused or granted. There is also a record of 'miscellaneous orders' and 'strike out (no order)'. The recording has been sporadic but some figures are available. It is hoped that the practice can be regularised in subsequent reports so that concrete data becomes available on the success rate of asylum judicial review applications. One important proviso is that the data available from the Court Service relates to all cases in the High Court's asylum, immigration and citizenship list and so also includes cases against the Office of Refugee Applications Commissioner (ORAC) and the Minister for Justice and Equality (MJE).

Success Rate of Asylum Judicial Reviews

The dearth of published data makes it impossible to analyse in any great depth the trends in the success rate of asylum-related judicial reviews although the random figures that are available offer an interesting view of the landscape (see Figure 2).

In the five years for which figures are available, leave was granted (on at least one ground) in 68.1 per cent of all asylum, immigration, nationality and citizenship cases that were heard. In the three years for which figures are available, decisions were quashed in 49.5 per cent of all cases that proceeded to a substantive hearing.

Figure 2: Asylum, immigration and citizenship list case outcomes

Year	Liberty to apply granted	Liberty to apply refused	Final relief granted	Final relief refused
2011	129	40	29	21
2010	135	120	42	49
2009	-	-	-	-
2008	288	188	-	-
2007	263	56	-	-
2006	139	44	21	24

Source: Courts Service, *Annual Report* (various years)

As already noted, these figures relate to all cases in the High Court's asylum, immigration and citizenship list and so it is possible that judicial reviews are more often successful against the Minister or against the Commissioner than against the Tribunal. Anecdotal evidence would suggest, however, that there is no apparent disparity in success rates depending on the respondent. The tentative conclusion which one must draw is that judicial reviews against the Tribunal are granted leave more often than not and there are equal odds of a decision being quashed after the substantive hearing.

The success rate of leave applications is of even greater significance given that the threshold for the majority of asylum and immigration cases and of all judicial review proceedings against the RAT (bar the rare challenge to a procedural ruling rather than a substantive decision) is that of 'substantial grounds'. Section 5 of the Illegal Immigrants (Trafficking) Act 2000 sought to curtail the use of judicial review in the area by introducing a 14-day time-limit in which proceedings must be initiated, requiring the application for leave to be on notice and requiring the High Court to be satisfied that there are substantial grounds for contending that the relevant measure is invalid or ought to be quashed before leave is granted.

In view of the tentative data which indicates a considerable degree of success in the High Court for asylum applicants in cases that make it to the leave or substantive hearing stage, one must take issue with the notion that there is a practitioner-led industry in the asylum area. Only the Tribunal can shed light on what happens to the cases initiated against it but which are ultimately disposed of prior to being heard. One must conclude in the meantime that the Tribunal is frequently subject to judicial reviews of substance on issues that go to the fundamental nature of its decision-making process.

Judicial Review Beyond Asylum

The high number of judicial reviews brought against the RAT becomes clearer when the number of judicial reviews against other public bodies is examined (see Figure 3).

The volume of judicial review applications brought against the RAT is only marginally surpassed by applications brought against the MJE or the Director of Public Prosecutions (DPP). The MJE is the single most prevalent respondent in Irish judicial review proceedings although only a fraction of

6 "The Judicial Review Unit considers the response to judicial review proceedings. It records and monitors progress of all judicial reviews, considers all legal documents received and co-ordinates a reply with the Chairperson, the Attorney General's Office, the Chief State Solicitor's Office and the Members. There were some [X] applications for judicial review against Tribunal decisions filed during [20XX]."

7 McDonagh, Costello and Kelly, 'Challenging Times in Asylum and Immigration Judicial Review: Is The System Stretched To Breaking Point?' (2012) 17(6) *Bar Review* 127-130, at p. 130.

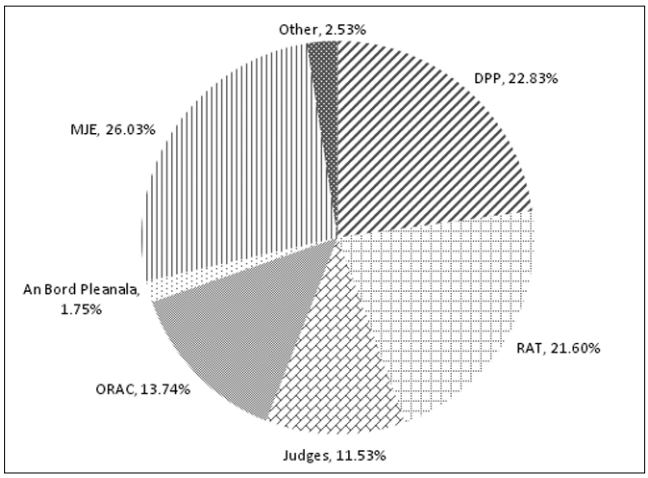
8 Given that RAT judicial reviews account for over a third of the total number of applications made in the asylum, immigration and citizenship list: between 2007 and 2011, 1,555 of the 4,197 (37.05 per cent) judicial review applications that issued during that period were challenges to RAT decisions.

the decisions made by the Minister are subject to a judicial review challenge.[9]

An average of 329 applications per year was taken against the DPP between 2007 and 2011. By comparison, the RAT's average was 311. However, the DPP deals with a far greater caseload and, in the scheme of things, less than 3 per cent of the directions it issued during that period were subject to a High Court judicial review challenge.[10]

A considerable proportion (13.74 per cent) of the total judicial review applications made during 2007-2011 related to ORAC recommendations. However, the High Court's 2009 judgment in *BNN v. Refugee Applications Commissioner*[11], which restricted the scope of judicial review against ORAC due to the availability of an appeal to the RAT, has had a dramatic impact on the judicial review rate against the Commissioner and the 2009-2011 rate in fact dropped to 6.92 per cent of all High Court judicial review applications[12].

Figure 3: Proportion of judicial review applications, 2007-2011



Source: Courts Service, *Annual Reports* (various years); DPP, *Annual Reports* (various years); RAT, *Annual Reports* (various years), ORAC, *Annual Reports* (various years), and An Bord Pleanala, *Annual Reports* (various years).

District and Circuit Court judges are next in line with an average of 166 judicial review applications each year naming a judge as respondent between 2007 and 2011.[13] Beyond the 'big five', judicial reviews are taken against a wide and varied list of public bodies from city and county councils, to government ministers, to prison governors, An Garda Siochana, the Parole Board, to agencies such as the Environmental Protection Agency and the Health Service Executive. What becomes apparent from the High Court's ordinary judicial review list is that no other state authority is so frequently subject to judicial review as is the RAT.

An Bord Pleanala is an interesting body to compare with the RAT as planning judicial reviews are subject to a similar statutory regime of procedural hurdles in the form of the 'substantial grounds' test at the leave stage.

Between 2005 and 2011, a total of 185 judicial review applications were brought in respect of the 33,643 cases determined by the Bord during that period.[14] That is less than one per cent. It must be acknowledged that the risk of a costs order will often bear more reality to an applicant wishing to challenge a planning decision than an asylum applicant.

It is of note that An Bord Pleanala scrutinises in its annual reports the disposal of all judicial review challenges it is faced with. The annual report will state in detail how many cases were withdrawn and how many decisions it consented to being quashed. It will then record the number of court judgments that found in its favour and how many against. In that fashion, ABP becomes astutely aware of the weaknesses in its decision-making process and can reform itself in such a way that the mistakes are not repeated. Such an approach is not apparent from the annual reports of the RAT.

The Repetition of Mistakes

It must be accepted that judicial review is not an ideal mechanism for asylum seekers. A successful High Court challenge simply means that the case is remitted back to the Tribunal to be heard by a different Tribunal Member. The result is that, unless the RAT refines its attitude towards High Court supervision, no volume of judicial reviews will achieve any fundamental reform.

The practice of the Tribunal is that, after a decision has been quashed by the High Court, it will not necessarily include the court's judgment in the file and so the new Tribunal Member could proceed to hear the case unaware of the error that her predecessor fell into on the previous occasion. It is hardly surprising, therefore, that the Tribunal is at risk of repeating the error at a fresh hearing.

In *AAS v. Refugee Appeals Tribunal*[15], MacEochaidh J was confronted with a post-leave case where the applicant was challenging his fourth RAT decision. MacEochaidh J was concerned that the issue in the proceedings before him was an apparent repeat of the error impugned in the third decision and for which Birmingham J had granted leave to challenge over two years previously. MacEochaidh J stated:

> "It is regrettable that the decision maker in this case does not appear to have had access to the decision of Birmingham J. or to take any account of it. It seems to me that in any case which is remitted to a decision maker from the High Court, the decision maker ought to be concerned with the views of the High Court on how the matter was first handled. Unless this happens, the mistake or error which led to the first set of proceedings might be repeated. This appears to be what happened in this case."[16]

9 Almost 169,000 decisions in respect of visa, residence, protection and citizenship applications were issued by the Immigration and Naturalisation Service on behalf of the Minister in 2011. The Minister also made in excess of 3,000 deportation, removal and transfer orders in that year (*Annual Report 2011,* pp. 25-28). Despite the considerable volume of decisions made, the sum total of 390 judicial review applications issued.

10 1,644 judicial reviews were taken in respect of the 61,412 directions which were issued by the DPP during that period: DPP, *Annual Reports* (various years).

11 [2008] IEHC 308.

12 ORAC, *Annual Report* (various years).

13 Figures obtained from High Court search facility. Search results obtained using proceedings as 'JR – Judicial Review', defendant as 'judge' and the given year.

14 An Bord Pleanala, *Annual Report* (various years).

15 [2013] IEHC 44.

16 [2013] IEHC 44 at para. 21.

It is to be welcomed that the High Court is alive to the repetition of errors once a case is remitted to the Tribunal. However, there must be some concern that MacEochaidh J's solution in the *AAS* case will not necessarily bring an underlying change to the decision-making process generally. To provide the new Tribunal Member with the High Court's judgment is only a local-level cure whereby that Tribunal Member in that asylum appeal is apprised of the High Court's disapproval of what occurred.

The central issue in the *AAS* case was the Tribunal's failure to make a finding in relation to the applicant's claimed Bajuni ethnicity when that was the single most important fact in his application for international protection. There was nothing ground-breaking in the decision being quashed on that basis as the High Court has consistently held that the issues of nationality or ethnicity must be dealt with clearly.[17]

The Tribunal also continues to struggle with making valid negative credibility findings despite authoritative guidance on the issue in *IR v. Minister for Justice, Equality and Law Reform*[18].

In 2007, in *Khazadi v. Minister for Justice*[19], the court set out the proper approach to be taken to medico-legal evidence yet decisions continue to be quashed for the failure to give adequate consideration to medical reports.[20]

There is nothing novel in the High Court's position on how supporting documents and county of origin information should be treated, or how future risk needs to be assessed independent of credibility, or when it is appropriate to make an internal relocation finding, yet these are still recurring issues in judicial review applications.

Conclusion

The volume of refugee cases that end up in the High Court must be a serious cause for concern. The prevalence of judicial review in the area seems to suggest an informal acceptance that it is more of a quasi-appeal function. However, in light of the initial indications that asylum judicial reviews that proceed to either a leave or substantive hearing are met with a considerable degree of success, the notion that an industry has taken hold within the legal profession must be ill-conceived.

It seems that the questions arising as to the manner of decision-making at the Tribunal could be explored to some degree by understanding the factors at play in the extraordinary number of judicial review challenges brought against it. That process could begin with the Tribunal publishing in its annual reports the outcome of all cases which resolve prior to being heard and formulating a policy for the benefit of all Tribunal Members in the aftermath of each case which results in a court judgment (or, indeed, a settlement) so that lessons can be learned. The judicial review record of Tribunal Members should also be a factor to be considered in the allocation of cases at the Tribunal.[21]

Ultimately, only a more sophisticated response by the Tribunal to High Court jurisprudence will curb the volume of judicial review applications taken against it. ■

17 *ES v. Refugee Appeals Tribunal* [2009] IEHC 335 (Cooke J); *AMSJ v. Minister for Justice (No. 2)* [2012] IEHC 453 (Clark J); *MTTK v. Refugee Appeals Tribunal* [2012] IEHC 155 (Cross J).

18 [2009] IEHC 353 (Cooke J). See for example *SR v. Refugee Appeals Tribunal* [2013] IEHC 26 (Clark J); *EPA v. Refugee Appeals Tribunal* [2013] IEHC 85 (Mac Eochaidh J); *MMA v. Refugee Appeals Tribunal* (Unreported, High Court, Mac Eochaidh J, 13 February 2013); *MB v. Refugee Appeals Tribunal* (Unreported, High Court, Hanna J, 1 March 2013).

19 Unreported, High Court, Gilligan J, 19 April 2007.

20 *AMN v. Refugee Appeals Tribunal* [2012] IEHC 393 (McDermott J). See also *NM v. Minister for Justice* [2008] IEHC 130 (McGovern J); *TMAA v. Minister for Justice* [2009] IEHC 23 (Cooke J).

21 According to McDonagh, writing as a Tribunal Member at the time, "It is possible to have been a member of the Refugee Tribunal since its inception and to have heard over 600 cases and never to have been successfully judicially reviewed, nor to have had any case settled prior to trial.": 'Assessing the Refugee Appeals Tribunal: The Case for the Publication of Decisions' (2005) 10(2) *Bar Review* 43-47, at p. 43. If the judicial review record of Tribunal Members was a factor considered in the allocation of cases, it could have a dramatic consequence on the current judicial review rate.

Pictured at the Launch of *Employment Equality Law* are The Hon Ms Justice Mary Finlay Geoghegan of The High Court with the authors of this new book published by Round Hall/Thomson Reuters: Marguerite Bolger SC, Cliona Kimber BL and Claire Bruton BL.

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 18, Issue 2, April 2013

A directory of legislation, articles and acquisitions received in the Law Library from the 1st February 2013 up to 28th March 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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Signed 7th February 2013

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In re Mr Binman

Practice and procedure

Oppression – Petition – Application for redaction of petition – Legal professional privilege – Whether communication between respondent and petitioner privileged – Whether petitioner acting as lawyer – Whether petitioner acting as director of company – Whether petitioner entitled to communication by virtue of being director – Whether communication was for

purpose of seeking legal advice – Whether petitioner agreed to act as lawyer to respondent or company – Whether respondent attempting to use privilege as a cloak for appropriation of company monies – Whether privilege would undermine proper conduct of administration of justice – Fraud – Whether allegations were of type of moral turpitude or dishonest conduct which precluded attachment of privilege – Application for *in camera* hearing – Administration of justice in public – Jurisdiction – Whether court had jurisdiction to direct s. 205 proceedings be heard *in camera* otherwise than pursuant to statutory section – Whether public proceedings would be seriously prejudicial to legitimate interests of company – Whether public proceedings would prevent justice being done – *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd* [1990] 1 IR 469, *Fyffes plc v DCC plc* [2005] IESC 3, [2005] 1 IR 59, *Murphy v Kirwan* [1993] 3 IR 501 and *Irish Press plc v Ingersoll Irish Publications Ltd (No 1)* [1994] 1 IR 176 applied – *Miley v Flood* [2001] 2 IR 50 and *Doe v Revenue Commissioners* [2008] IEHC 5, [2008] 3 IR 328 followed – Companies Act 1963 (No 33), s 205 – Application refused (2010/162COS – Laffoy J – 9/7/2010) [2010] IEHC 531
In re Skytours Travel Ltd; Doyle v Bergin

Practice and procedure

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Security for costs – Unlimited company – Jurisdiction – Whether statutory power to order security for costs confined to limited companies – Whether rules of court for security for costs confined to persons resident outside jurisdiction – Whether central control and management of company actually abided and was exercised overseas – Whether court could order security for costs against unlimited company pursuant to inherent jurisdiction – Whether policy considerations – Separation of powers – Whether extension of jurisdiction by court would be to usurp legislative function – Whether reason to believe company would not be able to furnish security for costs if ordered – *Jirehouse Capital v Beller* [2008] EWCA Civ 908, [2009] 1 WLR 751 considered – *Pitt v Bolger* [1996] 1 IR 108 and *Salthill Properties Ltd v Royal Bank of Scotland plc* [2010] IEHC 31 [2011] 2 IR 441 followed – *In re Little Olympian Each Ways Ltd* [1995] 1 WLR 560 approved – *G McG v DW (No 2) (Joinder of Attorney General)* [2000] 4 IR 1 applied – *Braithwaite Sons Ltd Anley Maritime Agencies Ltd* [1990] NI 63 and *R v Bothwell* [2006] NICA 35, [2007] NI 58 distinguished – Companies Act 1963 (No 33), s 390 – Rules of the Superior Courts 1986 (SI 15/1986), O29 – Application refused (2011/255MCA – Laffoy J – 15/2/2012) [2012] IEHC 61
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Charge – Directions – Receiver appointed by bank having first legal charge over lands – Bank having benefit of covenant precluding company from giving any interest in lands to third parties without bank's permission – Third party claiming that company granted him possession of property on lands as payment for services – Status of receiver in relation to properties – Whether receiver entitled to possession of properties – Companies Act 1963 (No 33), s 316 – Directions given (2011/404COS – Clarke J – 28/10/2011) [2011] IEHC 497
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Debenture – Validity – Appointment of receiver – Breach of s 60 – Financial assistance for purchase of own shares – Beneficial ownership – Disclosure of directors' interests – Duty to inform company of acquisition of interest – Whether receiver entitled to possession without resistance from company director – Whether breach of s. 60 – Whether debenture valid – Whether debenture voidable – Whether beneficial ownership in shares – *CH(Ireland) Inc (in liquidation) v Credit Suisse Canada* [1999] 4 IR 542 considered – Companies Act 1963 (No 33), ss 60 and 316 – Companies Act 1990 (No 33), ss 53, 59 and 64 – Central Bank Act 1971 (Approval of Scheme of First Active Plc and Ulster Bank Ireland Ltd) Order 2009 (SI 481/2009) – Application allowed (2010/679COS – Laffoy J – 27/1/2012) [2012] IEHC 37
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Real property – Bank – Security – Mortgage – Whether bank released security over real property – Evidence – Matrix of fact principle – Agency – Whether agreement to release security concluded – Whether extrinsic evidence as to contract admissible – Whether court could draw inferences from failure to call certain witnesses – Whether agent given authority by principals to deal on their behalf – Whether agreement to vary terms of bank's security – Whether receiver validly appointed over property – Whether received entitled to possession of real property – *Wisniewski v Central Manchester HA* [1998] Lloyd's Rep Med 223 approved – Companies Act 1963 (No 33), s 316 – Relief granted (2010/519COS – Murphy J – 23/8/2011) [2011] IEHC 430
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Costs – Petition to wind up – Petitioner consenting to voluntary liquidation – Whether petitioner entitled to costs – Whether petitioner's costs should rank *pari passu* with costs of liquidator – *Re Balbradagh Developments Ltd* [2008] IEHC 329, [2009] 1 IR 597 distinguished – Rules of the Superior Courts 1986 (SI 15/1986), O 74, r 138 – Order for costs granted, order that costs to rank *pari passu* with those of liquidator refused (2011/505COS – Laffoy J – 10/11/2011) [2011] IEHC 424
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Insolvency – Judgment – Failure to pay – Garnishee order – Whether representation by petitioner that judgment would not be pursued – Whether petitioner stopped from seeking to wind up – Whether company insolvent – *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd* [1996] 1 IR 12 considered; *Re Bula Ltd* [1990] 1 IR 440 distinguished – Companies Act 1963 (No 33), s 214 – Winding up order made (2011/735COS – Laffoy J – 12/3/2012) [2012] IEHC 121
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Winding up

Petition – Creditor – Debt – Jurisdiction – Whether debt disputed by company – Whether petition abuse of process – Whether company capable of disputing petition where shareholders deadlocked – Whether court could have regard to wishes of contributories – Whether 50% shareholder entitled to dispute petition – Whether exceptional circumstances required – Whether necessary for contributory to show that company was solvent – Whether possible for court to determine legitimacy of engagement of petitioner – Whether possible for court to determine adequacy of services provided by petitioner – Whether fundamental conflict of fact – Whether response received to statutory demand – Whether disingenuous for petitioner to aver that Company did not dispute debt was due and owing – Whether debt *bona fide* disputed by company – Whether petitioning creditor had status of creditor and *locus standi* to present petition – Whether debt actually in respect of services provided to partnership between company shareholders – *Bowes v Hope Life Insurance and Guarantee Company* (1865) 11 HL Cas 389 distinguished – *In re Rodencroft Ltd* [2004] 1 WLR 1566, *In re Rica Gold Washing Company* (1879) 11 Ch D 36 and *In re La Plagne Ltd* [2011] IEHC 91 (Unrep, Laffoy J, 17/1/2011) considered – *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd* [1996] 1 IR 12 followed – *In re Bula Ltd* [1990] 1 IR 440 and *In re WMG (toughening) Ltd (No 2)* [2003] 1 IR 389 applied – Companies Act 1963 (No 33), ss 214 & 309 – Petition dismissed (2011/176COS – Laffoy J – 24/8/2011) [2011] IEHC 523
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Restriction – Fraudulent preference – Irresponsible conduct – Winding up order – Purchase of properties with company funds for own benefit – Property held in trust for company – Resulting trust –Whether defendant wrongfully and in breach of fiduciary duties used company funds for own benefit – Whether properties beneficially owned by company – Whether legal interest held on trust for company – Whether transaction constituted fraudulent preference – Whether invalid – Whether counterclaim could be set off – Whether defendant should be restricted from

acting as director – Whether defendant acted responsibly in relation to conduct of affairs of company – Whether conduct irresponsible – Whether conduct exacerbated insolvency – *Re Greendale Developments Ltd (No 2)* [1998] 1 IR 8; *Re Squash (Ireland) Ltd* [2001] 3 IR 35 and *La Moselle Clothing Ltd v Soualhi* [1998] 2 ILRM 345 considered – Companies Act 1963 (No 33), ss 220(2), 231 and 286 – Companies (Amendment) Act 1990 (No 33), ss 29 and 150 – Land and Conveyancing Law Reform Act 2009 (No 27), s 31 – Relief granted (2008/6883P – Laffoy J – 20/6/2012) [2012] IEHC 246
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Directors

Restriction – Insolvency – Failure to discharge capital gains liability – Test to be applied – Whether directors acted honestly – Whether directors acted responsibly – Whether other reason why just and equitable to restrict directors – Whether objective standard – Whether directors ensured substantial compliance with Companies Acts obligations – Whether proper books of account maintained – Whether proper financial systems in place – Whether selective discharge of liabilities – Whether directors placed personal interests ahead of company – Whether directors intended to discharge tax liability – Whether insolvency of company a result of unforeseen collapse of property market – Whether court should consider actions of directors in context and time at which occurred – *In Mitek Holdings Ltd: Grace v Kachkar* [2010] IESC 31, [2010] 3 IR 374 applied; *La Moselle Clothing Ltd v Soualhi* [1998] 2 ILRM 345, *Business Communications Ltd v Baxter* (Unrep, Murphy J, 21/7/1995), *In re Squash (Ireland) Ltd* [2001] 3 IR 35 and *McLaughlin v Lannen* [2005] IEHC 341, [2006] 2 ILRM 217 followed – Company Law Enforcement Act 2001 (No 28), s 56(1) – Companies Act 1963 (No 33), s 150 – Application refused (2009/499COS – Finlay Geoghegan J – 20/4/2012) [2012] IEHC 144
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Insolvency – Reasonable prospect of survival – Protection of court – Test to be applied – Whether company insolvent – Whether company had reasonable prospect of survival – Whether fact that debt restructuring proposals already voted on by some classes of creditors should be taken into account – Whether better outcome likely from examinership as opposed to receivership or winding up – Interim examiner – Whether interim examiner should be appointed – Whether appointment of interim examiner should be exception rather than rule – Pre-petition liabilities – Whether payment of pre-petition creditors critical to continuation of business and provision of uninterrupted service – Whether risk of prejudice to secured creditors or other parties – Companies (Amendment) Act 1990 (No 27), s 2 – Orders granted (2012/175COS – Kelly J – 30/3/2012) [2012] IEHC 158
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Creditors' voluntary winding up – Liquidator – Appointment– Proxy vote – Whether proxy form submitted by applicant invalid – Whether chairperson correct to reject proxy – *In re Hayes Homes Ltd (in voluntary liquidation)* [2004] IEHC 124 (Unrep, Ó Néill J, 8/7/2004); *Rationel Vindeur Ltd v Butler* [2009] IEHC 592 (Unrep, Laffoy J, 15/12/2009); *Tyner v Lafferty* [2010] IEHC 318, [2010] 3 IR 821 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 74, r 75 – Application dismissed (2011/590COS – Laffoy J – 12/3/2012) [2012] IEHC 122
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Fraudulent preference – Dominant intention to prefer – Onus of proof – Rule in *Clayton's case* – Whether payment made to creditor – Whether company unable to pay debts as they fell due – Whether view to giving creditor preference over other creditors – Whether dominant intention to prefer respondent – Whether winding up commenced within 6 months of making of payment – Whether payments constituted fraudulent preference – *Re M Kushler Ltd* [1943] Ch 248; *Station Motors Ltd v AIB Ltd* [1985] IR 756; *Re Oxford Pharmaceuticals Ltd* [2009] EWHC 1753 (Ch), [2009] 2 BCLC 485 and *Re Daniel Murphy Ltd* [1964] IR 1 considered – Companies Act 1963 (No 33), ss 214, 266, 286, 287 and 288 – Companies Act 1990 (No 33), ss 135 and 136 – Bankruptcy (Ireland) Amendment Act 1872 (35 & 36 Vict, c 58) – Companies (Consolidation) Act 1908 (c 69), s 212 – Application dismissed (2010/709COS – Laffoy J – 1/10/2012) [2012] IEHC 386
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Winding up

Insolvency – Ability to meet debts – Disputed debt – Whether company indebted to petitioner – Whether company unable to pay debts – Whether debt disputed *bona fide* on substantial grounds – Whether s 214 demand could be served by registered post – Whether company had full details of outstanding amount – Whether abuse of process – *Re WMG (Toughening) Ltd (No 2)* [2003] 1 IR 389; *Stonegate Securities v Gregory* [1980] Ch 576 and *Re Pageboy Couriers Ltd* [1983] ILRM 510 considered – Companies Act 1963 (No 33), s 214(a) – Winding up order made (2012/355COS – Laffoy J – 1/10/2012) [2012] IEHC 392
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Liquidator – Duties – Voluntary winding up – Liquidator seeking order fixing time within which creditors obliged to prove debts – Personal injuries claims against company received by liquidator after advertisement of notice to creditors – Whether all reasonable steps taken by liquidator to establish debts of and claims against company – Whether all reasonable steps taken by liquidator to establish position regarding employer's liability insurance – *Pulsford v Devenish* [1903] 2 Ch 625; *In re Armstrong Whitworth Securities Co Ltd* [1947] Ch 673; *Austin Securities Ltd v Northgate & English Stores Ltd* [1969] 1 WLR 529 considered – Civil Liability Act 1961 (No 41), s 62 – Companies Act 1963 (No 33), ss 241 & 280 – Orders made, application adjourned (2011/303COS – Laffoy J – 16/3/2012) [2012] IEHC 114
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Jurisdiction

Company law – Liquidation – Recognition of winding up and liquidator – Jurisdiction – Whether court had inherent jurisdiction to recognise foreign liquidation – Contract – Terms – Bank – Whether Irish or Dutch laws applied to contractual terms of bank account – Banking law – Place of performance of payment obligation – Whether bank obliged to pay in place where account held – European Union law – Recognition and enforcement of judgments – Whether Dutch orders of conservatory attachment should be recognised in Ireland – Whether Dutch legal process constituted "complete system" – Whether existence of separate process for lift *ex parte* order constituted incomplete system – Whether Dutch orders of conservatory attachment granted *ex parte* were judicial decisions which were or were capable of being subject of enquiry in contested proceedings – Reference to European Court of Justice – Whether court should exercise discretion to refer matters to European Court of Justice – Whether recognition of Dutch orders of conservatory attachment contrary to Irish public policy – Whether principle of *pari passu* distribution amongst unsecured creditors in liquidation a fundamental principle of Irish law – Whether recognition of conservatory attachment orders manifestly contrary to public policy of Ireland – *Banco Ambrosiano SPA v Ansbacher Co* [1987] ILRM 669, *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508, *Clare & Co v Dresdner Bank* [1915] 2 KB 576, *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, *Walsh v National Irish Bank* [2007] IEHC 325 (Unrep, McKechnie J, 4/5/2007), *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110, *Richardson v Richardson* [1927] P 228 approved – *Denilauler v SNC Couchet Frères (Case 125/79)* [1980] ECR 01553, *Reichert v Dresdner Bank AG (Case C261/90)* [1992] ECR I-02194, *Hengst v Campese (Case C-474/93)* [1995] ECR I-02113, *Maersk Olie & Gas A/S v Firma M de Haan en W de Boer (Case C-39/02)* [2004] ECR I-09657, *Komback v Bamberski (Case C-7/98)* [2000] ECR I-01935 and *Apostolides v Drams (Case C-420/07)* [2009] ECR I-03571 considered – Brussels Convention on Jurisdiction and the Enforcement of Judgment in Civil and Commercial Matters 1968, arts 2, 5, 18, 24 & 25 – Regulation 44/2001/EC, arts 2, 4, 22, 23, 31, 32, 33 & 34 – Treaty on the Functioning of the European Union, art 267 – Winding up and liquidation recognised, declarations that Dutch orders of conservatory attachment not entitled to recognition refused (2010/6631P

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Jurisdiction

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Lartigue Enterprises Ltd v Three Lions Underwriting Ltd

Recognition of foreign judgment

Requirements at common law – Right *in personam* – Presence of debtor in jurisdiction at time of institution of proceedings giving rise to judgment – Whether judgment secured in another jurisdiction by or against third party in course of bankruptcy proceedings created right *in personam* – Whether appropriate to modify criteria at common law for recognition of foreign judgments – *In re Lines Bros Ltd* [1983] Ch 1 followed; *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26; [2007] 1 AC 508 and *Beals v Saldanha* [2003] 3 SCR 416 not followed – Applicants' appeal dismissed (284/2006 – SC – 23/2/2012) [2012] IESC 12
Re Flightlease Ltd: McCann & Akers

CONSTITUTIONAL LAW

Administration of justice

Public – Exception – Practice and procedure – *In camera* hearing – Reporting restrictions – Applicant denying medical condition – Whether hearing being urgent justified in camera hearing – Whether reporting restrictions applied – Courts (Supplemental Provisions) Act 1961 (No. 39), s. 45(1)(a) – Civil Law (Miscellaneous Provisions) Act 2008 (No. 14), s. 27 – Constitution of Ireland 1937, Article 3.1º – Reporting restrictions applied (2012/488JR- Hogan J – 8/6/2012) [2012] IEHC 224
Y(X) v Clinical Director St Patrick's University Hospital

Legality of detention

District Court – Jurisdiction – Maintenance payments – Default – Sentence – Penal endorsement – Whether defaulter given warning that liable to be jailed for contempt – Whether defaulter given any real opportunity to discharge monies due – Whether custodial sentence last resort in contempt jurisdiction – *McCann v Monaghan District Judge* [2009] IEHC 276 [2009] 4 IR 200, *Monaghan UDC v Alf-a-Promotions* [1980] ILRM 64, *State (Holland) v Kennedy* [1977] IR 193 applied; *Hampden v Wallace* (1884) 26 ChD 746 and *Ulster Bank v Whitaker* [2009] IEHC 16 considered – Enforcement of Court Orders Act 1940 (No 23), ss 6(2) & 8(1); Enforcement of Court Orders (Amendment) Act 2009 (No 21), s 2; Family Law (Maintenance of Spouses and Children) Act 1976 (No 11), s 9A – Rules of the District Court (SI 93/1997), O 48B, r 6(2) – Release ordered (2011/1824SS – Hogan J – 23/12/2011) [2011] IEHC 492
H(D) v Governor of Wheatfield Prison

Legality of Detention

Inquiry – Jurisdiction – Practice and procedure – Whether application ought properly to have been made by way of judicial review – Whether inquiry procedure only available where unlawfulness of detention obvious – Whether distinction between patent and non patent legal errors – Whether court obliged to construe Article 40.4.2° in light of guarantees to protect person and liberty – Courts – *Stare decisis* – Precedent – Whether Supreme Court authority subsequently followed – Whether Supreme Court authority singular and exceptional – Whether Supreme Court authority binding – Fair procedures – Notice – Whether giving of notice fundamental to proper administration of justice – Whether conviction without adequate notice a nullity – *Sheehan v Reilly* [1993] 2 IR 81 and *McDonagh v Governor of Cloverhill Prison* [2005] IESC 4, [2005] 1 IR 394 applied; *McSorley v Governor of Mountjoy Prison* [1997] 2 IR 258 not followed; *In Re Haughey* [1971] IR 217, *DK v Crowley* [2002] 2 IR 744 and *Dellway Investment Ltd v National Asset Management Agency* [2011] IESC 14, (Unrep, SC, 12/4/2011) and *The State (Royle) v Kelly* [1974] IR 249 considered; *The State (Quinn) v Ryan* [1965] IR 70 approved – Constitution of Ireland 1937, Articles 34.1, 40.3.2°, 40.4.1° and 40.4.2° – Preliminary issue decided for applicant (2012/1468SS – Hogan J – 31/7/2012) [2012] IEHC 366
Bailey v Governor of Mountjoy Prison

Liberty

Inquiry – Costs – Discretion – Failure to produce applicant on three occasions – Inquiry into lawfulness of detention – Temporary release before inquiry heard – Whether reasonable to commence inquiry – Whether application for inquiry *bona fide* – Whether *prima facie* grounds for arguing that detention unlawful – *Dempsey v The Member in Charge of Tallaght Garda Station* [2011] IEHC 257, (Unrep, HC, Herbert J, 1/6/2011) followed – Road Traffic Act 1961 (No 24), s 56 – Constitution of Ireland 1937, Art 40 – Costs awarded (2011/1425SS – Peart J – 2/2/2012) [2012] IEHC 33
Rostas v Governor of Mountjoy Prison

Detention

Application for inquiry – Abuse of process – Repeated applications – Whether further applications for inquiry pursuant to Article 40.4.2° could be made to different judges where initial application for inquiry refused – Whether decision on legality of detention final – *Re McDonagh* (Unrep, Henchy J, 24/11/1969) and *The State (Gallagher) v Governor of Portlaoise Prison* (Unrep, SC, 25/7/1983) followed; *The State (Dowling) v Kingston (No 2)* [1937] IR 699 considered; *GE v Governor of Cloverhill Prison* [2011] IESC 41, (Unrep, SC, 28/10/2011) applied, *Ex parte Terraz* (1878) 4 Ex Div 63 and *Gosset v Howard* (1845) 10 QB 411 followed – Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Supreme Court of Judicature Act (Ireland) 1877 (40 & 41 Vict, c 57) – Constitution of Saorstát Éireann, article 6 – Second Amendment of the Constitution Act 1941 – Constitution of Ireland 1937, Articles 34.1, 40, 40.4.2°, 40.4.3°, 40.4.4°, 51.1 and 51.2 – Inquiry carried out and release directed (2012/1359SS – Hogan J – 11/7/2012) [2012] IEHC 326
Joyce v Governor of the Dóchas Centre

Detention

Lawfulness – Remedy – Immediate release – Stay –Habeas corpus – Mental health – Accused detained as unfit to plead, suffering from mental disorder and in need of in-patient care – Statutory requirements followed – Detention unlawful – Whether stay can be put on order for release – *N v HSE* [2006] IESC 60, [2006] 4 IR 374 applied; *JH v Russell (Mental Health)* [2007] IEHC 7, [2007] 4 IR 242 and *Doyle v Central Mental Hospital* [2007] IEHC 100, (Unrep, Finlay Geoghegan J, 20/3/2007) followed; *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88 and *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235, [2011] 2 ILRM 509 considered; *SC v Jonathan Swift Clinic, St James's Hospital* (Unrep, SC, 5/12/2008) distinguished – Constitution of Ireland 1937, Article 40.4.2° – Release directed but with stay (2012/1258SS – Hogan J – 8/7/2012) [2012] IEHC 272
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Family rights

Right to marry – Applicants engaged to be married – Second applicant arrested for deportation – Right of applicants to apply to any High Court judge for Article 40 inquiry – Court declining to order production of second applicant – Whether marriage to Irish national conferring automatic right on foreign national to reside in State – Whether deportation of second applicant unlawful – *O'Shea v Ireland* [2006] IEHC 305, [2007] 2 IR 313 considered – *Izmailovic v Garda Commissioner* [2011] IEHC 32, [2011] 2 IR 522 distinguished – Constitution of Ireland 1937, Article 40 – Application refused (2012/435SS – Hogan J – 9/3/2012) [2012] IEHC 110
McHugh v Minister for Justice and Equality

Liberty

Legality of detention – Article 40 inquiry – *Certiorari* – Grounds – Insufficient information furnished – Application dismissed (2012/131JR – Cross J – 1/3/2012) [2012] IEHC 102
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Personal rights

Interlocutory injunction – Inviolability of dwelling – Right to enter and depart from home without hindrance – Protection of person – Harassment by third defendant – Demand for payment of alleged debt – Picketing of private dwelling house – Right of free speech and free expression – Balance of convenience – Whether demands intended to subject plaintiff to alarm, distress or humiliation – Whether damages adequate – *Damache v Director of Public Prosecutions* [2012] IESC 11, [2012] 13 ILRM 153; *People (Director of Public Prosecutions) v Cunningham* [2012] IECCA 64, (Unrep, CCA, 11/5/2012); *People (Director of Public Prosecutions) v O'Brien* [2012] IECCA 68, (Unrep, CCA, 2/7/2012); *Attorney General v Lee* [2000] 4 IR 65; *Lovett v Gogan* [1995] 3 IR 132; *Pierce v Dublin Cemetaries Committee (No 1)* [2009] IESC 47, [2010] 2 ILRM 73; *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235, (Unrep, Hogan J, 12/6/2011); *Heeney v Dublin Corporation*

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Cornec v Morrice

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Right to property

Right to religious freedom – Principle of proportionality – Prohibition on diversion of religious property – Discrimination –Whether possible to assess effect of measure on rights in absence of reasons for measure – Whether zoning was diversion of religious property – Planning and Development Act 2000 (No 30), ss 9, 10, 11, 12, 34 and first sch – Constitution of Ireland 1937, Articles 28A, 40.3, 43, and 44.2.6° – European Convention on Human Rights and Fundamental Freedoms 1950 – Portions of development plan quashed (2011/56JR – Clarke J – 27/4/2012) [2012] IEHC 163
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CONTRACT

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Sale of goods – Monies owed – Terms – Evidence – Whether sufficient evidence to conclude that defendant agreed to be liable for additional charges incurred in discounting letters of credit – Warranty – Whether warranty as to quality and fitness products commenced on receipt by defendant or on purchase by consumer – Whether plaintiff's accountancy evidence sufficient to grant judgment – Whether plaintiff entitled to judgment on foot of invoices raised – Counterclaim – Defective products – Whether evidential basis for defective products claim – Whether evidential basis for quantification of defective products claim – Judgment granted, counterclaim dismissed (1998/4338P – Laffoy J – 29/7/2011) [2011] IEHC 413
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Commercial Court

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Supreme Court

Appeal – Mootness – Whether Supreme Court should hear appeal which had become moot – Whether issues raised in appeal relevant to significant number of other cases – *Condon v Minister for Labour* [1981] IR 62 and *O'Brien v Personal Injuries Assessment Board (No 2)* [2006] IESC 62, [2007] 1 IR 328 followed – Applicants' appeal allowed (481/2011 – SC – 16/10/2012) [2012] IESC 49
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Supreme Court

Constitution – Validity of law – Single judgment of court – Whether interpretation of law distinct from decision on validity of law – Whether single judgment of court required – Constitution of Ireland 1937, Article 34.4.5° – Plaintiff's appeal allowed (292/2006 – SC – 2/2/2012) [2012] IESC 5
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People (DPP) v Byrne

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Acquittal- Anti-competitive behaviour – Central Criminal Court – Jurisidiction – Award costs following acquittal – Whether acquitted persons entitled to costs – Whether the rule that costs follow event applies to acquittal – Whether acquittal confers entitlement to costs – Whether presumption against awards of costs in criminal cases – Nature of Court's discretion to award costs – Whether Court's discretion allows part-award of costs – Whether failure to investigate notes of meeting between contractors amounted to culpable investigative failure – Whether delay in court procedure relevant to award of costs – *People (DPP) v Bell* [1969] IR 24 followed; *DPP v Kelly* [2008] 3 IR 202 approved; *DPP v Bourke* (Unrep, McKechnie J, 12/3/2010) considered; *Dunne v Min for the Environment* [2008] 2 IR 775 considered; *Shelly-Morris v Bus Átha Cliath* [2003] 1 IR 232 followed – Courts (Supplemental Provisions) Act 1961 (No 39) s 14(2) – Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 1 (1), (2), (3), (4) – Application allowed in part – (2010/57CC – Cooke J – 20/12/2011) [2011] IECCC 2
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Sexual offences – Evidence – Trial after long period – Absence of corroborating or contradicting evidence – Credibility of witnesses – Islands of fact – Whether collateral evidence irrevocably lost – Prejudice – Whether loss of relevant personal and documentary records prejudicial – Whether death of material witnesses prejudicial – Whether real or serious risk of unfair trial – Whether risk of unfair trial consequence of delay – Whether rulings or directions could be given by trial judge to remedy disadvantage – Whether specific prejudice rendered case wholly exceptional – Whether offence of buggery known to law – Whether blameworthy prosecutorial delay – Exercise of discretion – Factors to be taken into account – Gravity and seriousness of offence – Public interest in ensuring prosecution of crime – Whether applicant's position perilous – Whether possible to show complainant's account was inconsistent with objectively provable facts – Whether applicant's old age and poor health were factors to be taken into account in considering prohibition – *MU v DPP* [2010] IEHC 156 (Unrep, MacMenamim J, 28/4/2010) followed – *JO'C v DPP* [2000] 3 IR 478, *PT v DPP* [2007] IESC 39, [2008] 1 IR 701, *SH v DPP* [2006] IESC 55, [2006] 3 IR 575, *Devoy v DPP* [2008] IESC 13, [2008] 4 IR 235 considered – Relief granted (2010/1573JR – Hedigan J – 6/10/2011) [2011] IEHC 378
C(M) v DPP

Evidence

Recognition evidence – Privilege – Garda surveillance – Whether trial unfair due to hindering of cross-examination about location – Whether trial judge's warning about consequences of restricted cross-examination sufficient – *R v Rankine* [1986] 2 WLR 1075; *R v Johnson* [1988] 1 WLR 1377; *R v Patel* [2002] Crim LR 304 mentioned; *R v Hennessy* (1978) 68 CrAppR 419 followed – Appeal dismissed (303/2010 – CCA – 20/12/2011) [2011] IECCA 102
People (DPP) v Kavanagh

Judicial review

Sentencing – Imprisonment – Credit for time in custody pending appeal – Whether applicant should have been given credit for time in custody pending first trial – Whether sentence in excess of six month statutory maximum – Whether sentencing judge required to give credit for time spent in custody – Judicial review – *Certiorari* – Whether order challenged had been spent – Whether appropriate to refuse *certiorari* on discretionary grounds – Whether injustice from quashing valid conviction due to minor error in sentence – *People (DPP) v Fitzpatrick* [2010] IECCA 2 (Unrep, CCA, 26/4/2010) and *Barry v District Judge Fitzpatrick* (Unrep, SC, 20/12/1995) applied – Relief refused (2011/296JR – Charleton J – 20/3/2012) [2012] IEHC 67
Yeagar v Judge O'Sullivan

Jurisdiction

Special Criminal Court – Non-scheduled offences – Certificate of DPP – Whether DPP obliged to give reasons for certificate – *Locus standi* – Failure to demonstrate grounds for application – Failure to engage with facts – Failure to demonstrate basis for concern that decision flawed – *Cahill v Sutton* [1980] IR 269 and *Osmanovic v DPP* [2006] IESC 50, [2006] 3 IR 504 applied – Offences Against the State Act 1939 (No 13), s 46(2) – Application refused (20089/139P – Herbert J – 16/11/2011) [2011] IEHC 536
Murphy v Ireland

Prosecution

Decision not to prosecute – Lack of reasons – Proportionality – Requirements of fairness and fair procedures – Delay in garda investigation – Duty of care – Whether exceptional circumstances – Whether requirement to give reasons – Whether decision proportional – Whether applicant deprived of fair procedures – Whether arguable case – Whether duty of care owed by gardaí to victim of crime –Whether breach of fundamental right – *Meadows v Minister for Justice, Equality and*

Law Reform [2010] IESC 3, [2010] 2 IR 701; *Efe v Minister for Justice* [2011] IEHC 214, [2011] 2 IR 798; *Eviston v DPP* [2002] 3 IR 260; *E(G) v DPP* [2008] IESC 61, (Unrep, SC, 30/10/2008); *G(A) v K(A)* [2011] IEHC 65, (Unrep, HC, Hedigan J, 25/2/2011); *M(L) v Commissioner of An Garda Síochána* [2011] IEHC 14, (Unrep, HC, Hedigan J, 20/1/2011) and *L(B) v Ireland* (Unrep, HC, Kearns P, 10/12/2010) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Leave refused (2011/511JR – Peart J – 31/1/2012) [2012] IEHC 41
H(H) v DPP

Road Traffic Offences

Evidence – Intoxilyser – Certificate – Presumption of accuracy – Refusal of prosecution to call rebuttal evidence – Humidity levels – Whether within recommended levels –Whether prosecution entitled to call rebuttal evidence on technical issues drink driving cases – Whether evidence adduced sufficient to rebut presumption of accuracy – *DPP v Collins* [1981] ILRM 447 followed – *DPP v Walsh* [2005] IEHC 77, (Unrep, Macken J, 16/3/2005), *DPP v O'Connor* [2005] IEHC 422*, Markey v Minister for Justice* [2011] IEHC 39, (Unrep, Kearns P, 4/2/2011) considered – Road Traffic Act 1994 (No 7), ss17 and 21(1) – Questions answered in negative – (924 SS 2011 – Kearns – 16/11/2011) [2011] IEHC 418
Director of Public Prosecutions v Nash

Search warrants

Application for warrant – Failure to keep record – Fair trial – Whether search warrant invalid due to failure to take notes of application for warrants – Whether search warrant invalid due to lack of record of oral evidence given or questions asked – Whether failure to make or keep record of application breached right to fair trial – Whether the failure to keep a record of an application for search warrant rendered trial unfair – Whether English decisions relied upon persuasive – Whether failure to record evidence given and questions asked fatal to warrant – When accomplice warnings appropriate – Definition of accomplice – *Redknapp v Commissioner of Police* [2009] 1 All ER 229; *R v North Haven Magistrates Court* [2009] EWHC 3614*; Davies v DPP* [1954] AC 378; *People (AG) v Carney* [1955] IR 324; *AG v Linehan* [1929] IR 19 – Leave to appeal – Point of law of exceptional public importance – Whether Court could certify question of law which was not argued at the application for leave to appeal – Courts of Justice Act 1924 (No 10), s 29 – Application refused (101/2008 – CCA – 21/12/2011) [2011] IECCA 98
People (DPP) v Morgan

Sentence

Drugs – Possession – Intent to supply – Severity – 10 year sentence – Plea of not guilty but all proofs admitted save *mens rea* – Whether sufficient weight given to fact that defence was confined to issue of *mens rea* – Whether sufficient weight given to co-operation with Gardaí and customs authorities – Whether sufficient weight given to applicant's personal circumstances including her age, her naivety, her lack of previous convictions, and her precarious financial position in a foreign country – Sentence reduced to seven years with 4 suspended – Appeal allowed (289/2010 – CCA – 21/12/2011) [2011] IECCA 99
People (DPP) v Malric

Sentence

Manslaughter – Convicted by jury – Matters to be taken into account in sentencing for manslaughter – Plea of guilty to manslaughter proffered but refused by DPP – Whether Court should treat accused as though he had pleaded guilty – Weight to be given to rehabilitation – *DPP v Kelly* [2004] IECCA 14 [2005] 2 IR 321 considered; *DPP v M* [1994] 3 IR 306 followed; *DPP v McGinley* (Unrep, CCA 11/7/2011) followed – 10 year sentence imposed (2010/69 CC – Sheehan J – 29/7/2011) [2011] IECCC 3
People (DPP) v D(D)

Trial

Judge's charge – Evidence – Inconsistencies – Whether inconsistencies between statement of evidence and evidence given sufficient to merit direction to acquit – Whether combination of inconsistencies and significant delay in prosecuting sufficient to merit direction – Duty of trial Judge to consider general delay – Whether lack of specific prejudice factor to be considered – Whether error in principle to refuse to amend counts – Nature of appropriate warning to jury to be given in delay cases – *R v Galbraith* [1981] 1 WLR 1039; *R v Shippey* [1988] CLR 767; *DPP v Barnwell* (Unrep, Flood J, 24/1/1997*); DPP v Morrissey* (Unrep, Barron J, 10/7/1998); *DPP v M* (Unrep, CCA, 15/2/2001); *DPP v Dunbar* [2011] IECCA 32, (Unrep, CCA, 12/4/2011) ; *DPP v RB* (Unrep, CCA, 12/2/2003) – Leave to appeal refused (320/2010 – CCA – 20/12/2011) [2011] IECCA 101
People (DPP) v Walsh

Delay

Sexual abuse – Fair trial – Complainant delay – Culpable prosecutorial delay – Offences allegedly occurring in 1970s and 1980s – Mental health condition – Ability to defend –Unavailability of potential witnesses Whether applicant prejudiced – Whether warning from trial judge sufficient to prevent unfair trial – Whether public interest favouring prosecution of allegations – *SH v DPP* [2006] IESC 55, [2006] 3 IR 575 applied – Criminal Law (Insanity) Act 2006 (No 11), s 4 – Application dismissed (2009/962JR – Hanna J – 10/2/2012) [2012] IEHC 98
Nolan v DPP

Evidence

Appeal – Admissibility of new evidence – Test to be applied – Whether exceptional circumstances to justify admission of new evidence – Whether new evidence capable of being believed – Whether new evidence ought to be admitted – *People (DPP) v O'Regan* [2007] IESC 38, [2007] 3 IR 805 applied; *People (DPP)* v *Willoughby* [2005] IECCA 4, (Unrep, CCA, 18/2/2005) approved – Misuse of Drugs Act 1977 (No 12), s 15A – (192/2009 – CCA – 21/10/2011) [2011] IECCA 77
People (DPP) v Dutton

Evidence

Right to silence – Privilege against self incrimination – Inferences – Direction to appellant to answer questions put to him by garda – Failure to inform gardaí of information where not detained and no access to solicitor – Whether direction breached right to silence – Whether breach led to unfair hearing – Whether entitled to take into account failure to deny offence where such evidence not given by prosecution – Whether entitled to draw inferences – Whether accused's failure to previously deny offence was pivotal to judge's decision – *People (DPP) v Finnerty* [1999] 4 IR 364 followed – Summary Jurisdiction Act 1857 (c 43), s 2 – Criminal Damage Act 1991 (No 31), s 2 – Constitution of Ireland 1937, Art 38.1 – Questions answered in the negative and case dismissed (2011/2461SS – Hedigan J – 7/6/2012) [2012] IEHC 421
DPP (Sweeney) v Roibu

Insanity

Detention – Legality – Jurisdiction – *Ultra vires* – Mental health – Fitness to be tried – In patient treatment – Procedure where accused found unfit to be tried – Procedure where court ordered detention for in patient treatment – Whether court required to remand accused following finding of unfitness to be tried – Whether court required to consider fresh evidence of approved medical officer before detaining accused for in patient treatment – Whether failure to consider fresh report rendered order for detention *ultra vires* – Whether detention unlawful – Whether fact that invalid order for detention could be rectified could validate order for purpose of Article 40 inquiry – Mental Health (Criminal Law) Review Board – Whether referral of patient to Board superseded original District Court order – Whether Board made subsequent order for detention – Statutory interpretation – Purposive approach – Interests and welfare of patient – Whether court should interpret act purposively to protect interests and welfare of patient – *JB v Mental Health (Criminal Law) Review Board* [2008] IEHC 303, [2011] 2 IR 15 considered; *L v Kennedy* [2010] IEHC 195, [2011] 2 IR 124 not followed; *Ejerenwa v Governor of Cloverhill Prison* [2011] IESC 41, (Unrep, SC, 28/10/2011), *Liu v Governor of the Dóchas Centre* [2011] IEHC 372, (Unrep, Hogan J, 6/10/2011), *J O'G v Governor of Cork Prison* [2006] IEHC 236, [2007] 2 IR 203 approved; *BG v District Judge Murphy (No. 1)* [2011] IEHC 359, (Unrep, Hogan J, 20/9/2011) distinguished; *In re Philip Clarke* [1950] IR 235, *MR v. Byrne* [2007] IEHC 73, [2007] 3 IR 211 approved – Criminal Law (Insanity) Act 2006 (No 11), ss 4 and 13 – Constitution of Ireland 1937, Article 40.4.2° – Release ordered (2012/637SS Hogan J – 5/4/2012) [2012] IEHC 152
C(E) v Central Mental Hospital

Sentence

Aggravated burglary – False imprisonment – Imprisonment– Aggravating factors – Violent offence – Damage to victims – Mitigating factors – Plea of guilty – Limited co-operation with Gardaí – Personal circumstances of applicant – Medical history – Previous convictions – Whether appropriate for sentencing judge to suspend 6 years of 18 year sentence for 12 years – Whether real likelihood that applicant would be able to observe conditions of suspension for 12 years – Whether overall sentence appropriate – Whether error in principle – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 13 – Non-Fatal Offences Against the Person Act 1997 (No 26), s 15 – Criminal Justice Act 2006 (No 26), s 99 – Sentence varied (2011/76 – CCA – 15/2/2012) [2012] IECCA 55
People (DPP) v Delaney

Sentence

Assault causing harm – Gravity of offence – Significant injury – Imprisonment – Whether act spontaneous as distinct from pre-planned – Mitigating factors – Absence of previous convictions – Whether probability that applicant would re-offend – Personal circumstances – Whether length and structure of sentence wrong in principle – Prospects of rehabilitation – Non-Fatal Offences Against the Person Act

1997 (No 26), s 3 – Appeal allowed, sentence varied (2011/201 – CCA – 26/3/2012) [2012] IECCA 63
People (DPP) v Whelan

Sentence

Assault causing harm – Maximum term – Consecutive sentences – Plea of guilty – Whether sentencing judge should have taken account of plea of guilty – Whether offence justified imposition of maximum term – Whether portion of sentence should be suspended – Whether principle of totality should be taken into account – Non-Fatal Offences Against the Person Act 1997 (No 26), s 3 – Application granted, sentence varied (2010/310 – CCA – 30/1/2012) [2012] IECCA 12
People (DPP) v McDonagh

Sentence

Assault causing harm – Maximum term of imprisonment – Whether maximum sentence should be reserved for highest level capable – Whether fact that offence could have been worse prevented offence from being treated at highest level – Whether applicant showed any remorse – Previous convictions – Whether applicant's alcoholism taken into account – Whether applicant's personal circumstances taken into account – Whether significant effect of assault on victim should be taken into account – Whether error in principle – Non-Fatal Offences Against the Person Act 1997 (No 26), s 3 – Appeal dismissed (2011/98 – CCA – 17/2/2012) [2012] IECCA 57
People (DPP) v Hunter

Sentence

Assault of peace officer – Imprisonment – Plea of not guilty – Whether applicant under influence of drugs – Whether drugs cause of applicant's criminal behaviour – Previous convictions – Whether applicant had attempted to free himself from influence of drugs – Whether sentencing judge gave specific consideration to possibility of suspension of part of sentence – Whether error in principle – Appeal allowed, sentence varied (2011/79 – CCA – 20/2/2012) [2012] IECCA 40
People (DPP) v Landy

Sentence

Burglary – Attempted burglary – Possession of firearm – Imprisonment – Totality of sentences – Consecutive sentences – Whether sentencing judge took account of applicant's personal history and background – Whether sentencing judge took account of applicant's drug addiction – Previous convictions – Whether exercise of constitutional right to silence could be treated as aggravating factor – Whether sentencing judge treated failure to co-operate with Gardaí as aggravating factor – Whether sentencing judge entitled to impose consecutive sentence where concurrent sentence would not have resulted in longer imprisonment – Whether sentencing judge had regard for totality principle – Whether error in principle – Appeal dismissed (2011/328 & 329 – CCA – 20/2/2012) [2012] IECCA 42
People (DPP) v Carton

Sentence

Burglary – Criminal damage – Imprisonment – Plea of guilty – Whether application in possession of weapons – Whether burglary well planned – Personal circumstances of applicant – Whether applicant committed offence due to financial circumstances – Whether explanation only – Whether previous convictions relevant – Whether error in principle – Whether sentence at lower end of appropriate range – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 12 – Criminal Damage Act 1991 (No 31), s 2 – Appeal dismissed (2011/74 – CCA – 15/2/2012) [2012] IECCA 53
People (DPP) v Manning

Sentence

Drugs offence – Possession of controlled drugs for sale or supply – Aggravating factors – Value of drugs – Mitigating factors – Coercion of applicant – Age of applicant – Health of applicant – Plea of guilty – Co-operation with Gardaí – Whether statement of sentencing judge that offences merited sentence "well in excess of ten years" uncertain – Whether presumptive statutory minimum sentence should be applied – Whether sentencing judge gave sufficient consideration to totality of mitigating factors – Whether error in principle – Misuse of Drugs Act 1977 (No 12), s 15A – Appeal allowed, sentence varied (2010/299 – CCA – 1/2/2012) [2012] IECCA 14
People (DPP) v Dowling

Sentence

Drugs offence – Possession of controlled drug for sale or supply – Dangerous driving – Imprisonment – Whether large volume of cocaine – Whether high speed car chase – Whether applicant knew he was being pursued by Gardaí – Whether applicant had attempted to dispose of drugs during car chase – Mitigating factors – Plea of guilty – Co-operation with Gardaí – Whether applicant addicted to cocaine – Whether applicant had very high risk of re-offending – Consecutive sentences – Whether serious of driving offence warranted separate sentence – Whether sentence left open possibility of rehabilitation – Whether portion of sentence should be suspended – Whether error of principle – Misuse of Drugs Act 1977 (No 12), s 15 – Road Traffic Act 1961 (No 24), s 53 – Appeal allowed, sentence varied (2011/84 – CCA – 6/2/2012) [2012] IECCA 34
People (DPP) v O'Mahony

Sentence

Drugs offence – Possession of controlled drug for sale or supply – Imprisonment – Plea of guilty – Co-operation with Gardaí – Previous convictions – Whether applicant was chronic drug addict – Offences committed while on bail – Consecutive sentences – Totality of sentences – Whether court should suspend part of sentence – Whether court should direct attendance with Probation Services – Misuse of Drugs Act 1977 (No 12), s 15 – Appeal allowed, sentence varied (2011/49 – CCA – 8/2/2012) [2012] IECCA 48
People (DPP) v O'Sullivan

Sentence

Drugs offence – Possession of controlled drug for purpose of sale or supply – Whether applicants operating at low level in drug operation – Whether applicants addicted to drugs – Whether risk of re-offending – Whether mitigating features – Whether early plea of guilty – Whether applicants previously of good character – Whether expressions of remorse made – Whether applicants provided material assistance to Gardaí – Whether error in principle – Whether sentencing judge failed to take into account material assistance provided to Gardaí – Whether portion of sentences should be suspended – Misuse of Drugs Act 1977 (No 12), s 15A – Appeals allowed, sentences varied (2010/319 & 2011/66 – CCA – 6/2/2012) [2012] IECCA 32
People (DPP) v Cleary; People (DPP) v Brown

Sentence

Robbery – Unlawful taking of motor vehicle – Production of offensive weapon – Imprisonment – Mitigating factors – Pleas of guilty – Early pleas – Co-operation with Gardaí – Expressions of remorse – Previous convictions – Whether large number of previous convictions as serious as offence in question – Whether applicants were drug abusers – Whether applicants providing clear urinalysis – Whether sentencing judge should have suspended portion of sentences – Whether error in principle – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 14 – Road Traffic Act 1961 (No 24), s 112 – Firearms and Offensive Weapons Act 1990 (No 12), s 11 – Appeals allowed, sentences varied (2011/47 & 48 – CCA – 8/2/2012) [2012] IECCA 61
People (DPP) v Nolan and King

Sentence

Sexual offence – Gross indecency against mentally impaired person – Guilty plea – Whether sentence of 15 months imprisonment within correct range – Whether sentencing judge considered imposition of suspended sentence – Principle of mitigating factors – Whether guilty plea should be taken into account – Whether prosecution would have been difficult due to mentally impaired status of complainant – Whether absence of previous convictions should be taken into account – Whether absence of risk of reoffending should be taken into account – Whether sentencing judge erred in principle – Criminal Law (Sexual Offences) Act 1993 (No 20), s 5(2) – Appeal allowed, remainder of sentence suspended (2011/179 – CCA – 20/2/2012) [2012] IECCA 41
People (DPP) v MR

Sentence

Suspended sentence – Reactivation – Breach of terms of suspended sentence – Whether sentencing judge correct in reactivating entirety of suspended sentence – Whether applicant failure to engage with probation services – Whether minor offence of theft could be regarded as *de minimum* – Whether applicant had kept of good behaviour – Whether court should take account of applicant's clear urinalysis – Whether court should take account of applicant's availing of education facilities, career guidance and anger management in prison – Appeal allowed, reactivation of suspended sentence varied (2011/1 – CCA – 8/2/2012) [2012] IECCA 46
People (DPP) v Boyne

Sentence

Suspended sentence – Re-activation – Offences committed during course of suspended sentence – Whether conduct could be regarded as *de minimis* – Whether justice required re-activation of suspended sentence in full or in part – Whether time spent in custody should be taken into account – Criminal Justice Act 2006 (No 26), s 99 – Suspended sentence re-activated (2009/50 – CCA – 8/2/2012) [2012] IECCA 45
People (DPP) v Connors

Sentence

Suspended sentence – Reactivation – Robbery – Public order offences – Offences committed

during course of suspended sentence – Test to be applied – Proportionality – Whether offences could be regarded as *de minimis* – Whether sentencing judge erred in re-activating entirety of suspended sentence – Whether disproportionate to re-activate four year sentence for public order offences – Whether error in principle – Whether court should take account of applicant's serious drug and alcohol problems and psychiatric history – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 12 – Criminal Justice (Public Order) Act 1994 (No 2), ss 4 & 6 – Appeal allowed, re-activation of suspended sentence varied (2011/43 – CCA – 8/2/2012) [2012] IECCA 47
People (DPP) v Pakker

Sentence

Theft – Aggravated burglary – Pleas of guilty – Imprisonment – Aggravating factors – Offences committed while on bail – Consecutive sentences – Mitigating factors – Personal circumstances – Drug and alcohol abuse – Whether offences related to drug use – Whether possible to have regard for prospects of rehabilitation – Whether sentencing judge wrongfully took into account offences for which *nolle prosequi* entered – Whether error in principle – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), ss 4 & 12 – Appeal allowed, sentences varied (2010/227 & 2011/111 – CCA – 3/2/2012) [2012] IECCA 29
People (DPP) v Moorehouse

Sentence

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People (DPP) v Mason

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People (DPP) v McInerney

Sentence

Undue leniency – Robbery – Unlawful seizure of vehicle – Imprisonment – Concurrent sentences – Offences committed while on bail – Previous convictions – Personal circumstances of respondent – Aggravating factors – Serious nature of offences – Serious menace or threat of violence – Breach of bail – Mitigating factors – Plea of guilty – Co-operation with Gardaí – Whether sentences unduly lenient – Whether error in principle – Criminal Justice Act 1993 (No 6), s 2 – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 14 – Criminal Law (Jurisdiction) Act 1976 (No 14), s 10 – Application allowed, sentence varied (2010/133CJA – CCA – 25/1/2012) [2012] IECCA 3
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Agency worker – Contract of service – PRSI contribution – Whether agency entitled to refund – Social welfare – Appeal – Standard of review – Jurisdiction – Whether court should interfere with decision of appeals officer on appeal – Whether court should defer to expertise and experience of expert administrative tribunal – Whether decision based upon error of law – Whether decision based upon unsustainable finding of fact – Control – Whether appeals officer correct in applying

control test in conclusion that worker was employed under contract of service – Whether control important factor in determination – Whether appeals officer considered whether agency possessed power to direct manner in which work carried out – Whether appeals officer erred in interpreting application of previous decision – Contract *sui generis* – Whether other characters of employment contract existed beyond contract of service and contract for services – Whether appeals officer erred in law in failing to consider existence of alternative category of contract – Mutuality of obligation – Whether mutuality of obligation between parties – Whether mutuality of obligation test acted as filter – Whether mutuality of obligation key component of contract of service – Whether single composite test for determining nature of employment contract – Whether appeals officer erred in law in failing to properly consider issue of mutuality of obligation – Whether court could remit matter for re-hearing – *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34, *National University of Ireland Cork v Ahern* [2005] IESC 40, [2005] 2 IR 577, *Roche v Kelly* [1969] IR 100, *In re Sunday Tribune* [1984] IR 505, *Construction Industry Training Board v Labour Force Ltd* [1970] 3 All ER 220, *Minister for Labour v PMPA Insurance Company* (Unrep, Barron J, 16/4/1986), *Minister for Agriculture v Barry* [2008] IEHC 216, [2009] 1 IR 215, *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 *Carmichael v National Power plc* [1999] 1 WLR 2042, *Dacas v Brook Street Bureau (UK) Ltd* [2004] ICR 1437, *James v Greenwich London Borough Council* [2008] ICR 545, *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 2 QB 497, *Diageo Global Supply v Rooney* [2004] ELR 133 and *Flynn v Primark* [1997] ELR 218 considered – Social Welfare (Consolidation) Act 1993 (No 27), s 9 and first schedule – Social Welfare (Miscellaneous Provisions) Act 2003 (No 4), s 19 – Social Welfare Consolidation Act 2005 (No 26), ss 318 & 327 – Rules of the Superior Court 1986 (SI 15/1986), O 38, r 9 – Appeal granted, matter remitted to appeals officer (2010/459SP – Gilligan J – 27/7/2011) [2011] IEHC 510
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European Arrest Warrant

Charges – Offence – Interpretation – Exceptional circumstances – Ill-treatment – Whether it is necessary for charges to have been preferred – Reading words in context – Whether ambiguity resolved – Whether presumption rebutted – Ticked offence – Whether necessary to provide particulars of ticked box offences – Whether surrender prohibited due to exceptional circumstances – Whether interference with article 8 rights proportionate – Whether real risk of ill-treatment – *MJELR v Adams* [2011] IEHC 366 (Unrep, Edwards J, 3/10/2011) followed; *MJELR v DL* [2011] IEHC 248, (Unrep, Edwards J, 9/6/2011); *Norris v Government of the USA* (No 2) [2010] AC 487; *MJELR v Bednarczyk* [2011] IEHC 136, (Unrep, Edwards J, 5/4/2011) followed; *MJELR v Mazurek* [2011] IEHC 204, (Unrep, Edwards J 13/5/2011) and *MJELR v Rettinger* [2010] IESC 45 [2010] 3 IR 783 followed – European Arrest Warrant Act 2003 (No 45), ss 21A and 37 – Surrender ordered (2011/73 EXT – Edwards J – 18/11/2011) [2011] IEHC 386
Minister for Justice v Mihai

European arrest Warrant

Evidence – Oral evidence – Conflict of fact – Expert evidence – Compellability – Prison conditions – Whether respondent entitled to call expert oral testimony about prison conditions – Whether serious conflict of evidence existed to merit departure from normal rule – Whether Court has power to compel applicant to adduce oral expert evidence or to submit written evidence – Whether Court obliged to proceed on presumption that factual information provided by issuing state correct – Whether presumption rebuttable – Extent of presumption – Whether legitimate for respondent to comment on lack of engagement by informants and inability to test their views – Whether weight to be attached to views matter for Court – *Minister for Justice, Equality and Law Reform v Sliczynski* [2008] IESC 73 considered – European Arrest Warrant Act 2003 (No 45), ss 20(3) and 20(4)- Motion refused (2008/37 EXT – Edwards J – 9/12/2011) [2011] IEHC 514
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European Arrest Warrant

Surrender – Offence of burglary – Specificity – Whether warrant specified degree of involvement of respondent – Whether sufficient detail – Whether warrant deficient – Whether nature of respondent's involvement or participation clear from warrant – Right to fair trial – Previous conviction – Whether contrary to respondent's right to fair trial that law of England and Wales would allow respondent's previous conviction to be put into evidence – Whether real risk that respondent's previous conviction would be put into evidence – Whether disparity of procedures – Whether fundamental differences of law concerning admissibility of evidence – Whether court had jurisdiction to subject laws of another jurisdiction to constitutional scrutiny – Whether respondent demonstrated he would be subjected to an egregious breach of his rights amounting to a fundamental defect in the system of justice of the issuing state – *Minister for Justice v Desjatnikovs* [2008] IESC 53, [2009] 1 R 618, *Minister for Justice v Stafford* [2009] IESC 83, *Minister for Justice v Hamilton* [2005] IEHC 292, [2008] 1 IR 60, and *Minister for Justice v Kaprowicz* [2010] IEHC 207 (Unrep, Peart J, 13/5/2010) considered – *Minister for Justice v Brennan* [2007] IESC 21, [2007] 3 IR 732, *Minister for Justice v Stapleton* [2007] IESC 30, [2008] 1 IR 669, *Nottinghamshire County Council v B* [2011] IESC 48 (Unrep, SC, 15/12/2011) and *Clarke v*

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European Arrest Warrant

Surrender – Offence – Correspondence – Penal provision – Statutory interpretation – Whether Polish offence corresponded to Irish offence of being unlawfully at large – Whether Irish offence related only to person temporarily released from imprisonment – Whether court should interpret provision in manner which least unfavourable to accused – Whether non-corresponding offence severable – European Arrest Warrant Act 2003 (No 45), s 16 – Criminal Justice Act 1960 (No 27), ss 2, 3, 6 & 60 – Surrender refused (2009/334EXT – Edwards J – 17/2/2012) [2012] IEHC 64
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European Arrest Warrant

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Minister for Justice and Equality v Bartold

European arrest warrant

Presumption – Decision to charge in issuing state – Prison conditions in Hungary – Constitutional and convention rights – Whether presumption rebutted – Whether Hungarian domestic criminal proceedings in being – Whether court obliged to refuse to surrender respondent – Whether risk of exposure to inhuman and degrading treatment – Whether breach of right to bodily integrity – *Minister for Justice, Equality and Law Reform v Mazurek* [2011] IEHC 204, (Unrep, Edwards J, 13/5/2011) and *Miklis v Deputy Prosecutor General of Lithuania* [2006] EWCA 1032, [2006] 4 All ER 808 followed – *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16, (Unrep, SC, 1/3/2012); *Szél v Hungary* [2011] ECHR 898; *Kovács v Hungary* [2012] ECHR 58 and *Attorney General v O'Gara* [2012] IEHC 179, (Unrep, Edwards J, 1/5/2012) considered – European Arrest Warrant Act 2003 (No 45), ss 3(1), 4A, 13, 16, 21A and 37 – Criminal Justice (Terrorist Offences) Act 2005 (No 2), ss 69 and 79 – European Arrest Warrant Act 2003 (Designated Member States)(No 3) Order 2004 (SI204/2004), art 2 – European Convention on Human Rights, arts 3 and 8 – Respondent surrendered (2011/174EXT – Edwards J – 21/6/2012) [2012] IEHC 270
Minister for Justice and Equality v Rajki

European arrest warrant

Surrender – Circumstances of offence – Request for additional information – Public interest – Fair procedures – Whether compliance with s 11(1)(A) – Whether warrant sets out circumstances in which offences committed – *Minister for Justice, Equality and Law Reform v Desjatnikovs* [2008] IESC 53, [2009] 1 IR 618; *Minister for Justice, Equality and Law Reform v Hamilton* [2005] IESC 292, [2008] 1 IR 60; *Minister for Justice, Equality and Law Reform v Stafford* [2009] IESC 83, (Unrep, SC, 17/12/2009); *Minister for Justice and Equality v Shannon* [2012] IEHC 91, (Unrep, Edwards J, 15/2/2012); *Minister for Justice and Equality v Baron* [2012] IEHC 180, (Unrep, Edwards J, 4/5/2012); *Attorney General v Dyer* [2004] IESC 1, [2004] 1 IR 40 and *Minister for Justice, Equality and Law Reform v Fil* [2009] IEHC 120, (Unrep, Peart J, 13/3/2009) considered – European Arrest Warrant Act 2003 (No 45), ss 11(1)(A), 16 and 20(1) – Framework decision, arts 2 and 8 – Hearing adjourned (2011/300EXT – Edwards J – 19/7/2012) [2012] IEHC 315
Minister for Justice and Equality v Cahill

European Arrest Warrant

Trial *in absentia* – Undertaking from issuing state – Polish trial process – Jurisdiction – Whether "trial and conviction" should be interpreted as understood in Irish law – Whether plea of guilty before Polish police and State prosecutor a part of Polish trial process – Whether Irish law permitted recording of conviction as a result of plea of guilty before police or prosecutor – Whether respondent actually arraigned – Whether respondent tried *in absentia* – Whether surrender should be refused – *Minister for Justice v Sliczynski* [2008] IESC 73 (Unrep, SC, 19/12/2008) applied – European Arrest Warrant Act 2003 (No 45), ss 16 & 45 – Surrender refused (2011/328EXT – Edwards J – 9/3/2012) [2012] IEHC 148
Minister for Justice and Equality v Tokarski

European arrest warrant

Voluntary surrender – Correspondence – Minimum gravity – Assault causing harm – Whether minimum gravity met – European Arrest Warrant Act 2003 (No 45), ss 13, 15, and 38 – Non-Fatal Offences Against the Person Act 1997 (No 26), s 3 – Constitution of Ireland 1937, Art 40.4.2 – Framework Decision art 2 – Respondent surrendered (2011/212EXT – Edwards J – 11/7/2012) [2012] IEHC 310
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Children

Child care – Welfare of child – Extension of interim care orders – Objection to extension – Absence of oral hearing – Presumption that welfare of child met within family – Whether custody unlawful – Whether extension orders invalidly made – Whether interim care order could be made in absence of evidence – Whether judge entitled to take account of evidence given on previous occasions – *In re JH (An Infant)* [1985] IR 375 and *N v Health Service Executive* [2006] IESC 60, [2006] 4 IR 374 followed – Child Care Act 1991 (No 17) – Guardianship of Infants Act 1964 (No 7), s 3 – Constitution of Ireland 1937, Articles 40.4, 41 and 42 – Extension orders invalid (2012/1268SS – O'Malley J – 3/7/2012) [2012] IEHC 288
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FISHERIES

Licences

Eel management plan – Recovery measures – Depletion in stock of European eel species – Complete ban on eel fishing – Fair procedures – Proprietary rights – Whether consultative process required – Whether public inquiry should have been held – Whether public inquiry necessary to determine cause and extent of decline in stock arrive and equitable and effective solution – Whether decision to close fishery unreasonable and disproportionate – Whether decision objectively justifiable – Whether process reasonably fair – Whether applicant given sufficient opportunity to make reasonable representations – *Needham v Western Regional Fisheries Board* (Unrep, Murphy J, 6/11/1999); *Director of Public Prosecutions v O'Connor* (Unrep, Morris J, 22/7/1998); *Minister for Justice v Altaravicius* [2006] IESC 23, [2006] 3 IR 148; *Teahan v Minister of Communications, Energy and Natural Resources* [2009] IEHC 399, (Unrep, Hedigan J, 18/8/2009); *International Fishing Vessels Ltd v Minister for Marine (No 2)* [1991] 2 IR 93; *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317; *Dunne v Minister for Fisheries and Forestry* [1984] IR 230 and *Maxwell v Minister for the Marine and Natural Resources* (Unrep, McCracken J, 13/12/2000) considered – Fisheries (Consolidation) Act 1959 (No 14), ss 8, 9, 11(1)(d) and 67 – Constitution of Ireland 1937, Art 10 – Fisheries (Amendment) Act 1962 (No 31), s 3(b) and 33 – Eel Fishing Bye-Law No CS 303/2009 – Eel Fishing (Prohibition on Issue of Licences) Bye-Law No CS 858/2009 – Rules of the Superior Courts 1986 (SI 15/1986), O 93 – Council Regulation (EC) No 1100/2007, arts 2, 4, 5 and 9 – Relief refused (2009/705SP – Herbert J – 6/3/2012) [2012] IEHC 118
McArdle v Minister for Communications, Energy and Natural Resources

Quotas

Legitimate expectation – Property rights – Approval from Licensing Authority for modification of boat – Mackerel quota – Whether discriminating unlawfully in quota allocation – Whether breaching legitimate expectation – Whether infringing property rights – Whether infringing right of access to court to obtain *quia timet* injunction – *Glencar Exploration v Mayo County Council* [2002] 1 IR 84 applied – Sea-Fisheries and Maritime Jurisdiction Act 2006 (No 8), s 13 – Proceedings dismissed (2010/471P – Laffoy J – 15/11/2011) [2011] IEHC 427
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Damages

Ultra vires act of public authority – Recognised tort – Trespass – Losses – Unlawful imposition of charge – Interruption of business – Costs incurred – Loss of profits – Revocation of permits – Detention of vessel – Entitlement to damages – Compensatory damages – Exemplary damages – Whether damages recoverable – Whether actionable trespass – Whether exemplary damages should be awarded – Whether punishable behaviour – Whether outrageous breach of rights – Whether abuse of dominant position – *Pine Valley Developments v Minister for Environment* [1987] IR 23; *Glencar Exploration Plc v Mayo County Council (No 2)* [2002] IR 112; *Rookes v Barnard* [1964] AC 1129; *McIntyre v Lewis* [1991] 1 IR 121; *Conway v INTO* [1991] 2 IR 305 and *Shortt v Commissioner of An Garda Síochána* [2007] IESC 9, [2007] 4 IR 587 considered – Fishery Harbour Centres Act 1968 (No 18), s 4(2)(b) – Fishery Harbour Centres Act 1980 (No 22) – Competition Act 2002 (No 14), ss 5 and 14 – Civil Liability Act 1961 (No 41), s 2 – Fishery Harbours Centres (Rates and Charges) Order 2003 (SI 493/2003) – Fishery Harbour Centre (Rossaveel) Bye-Laws 1999 (SI 250/1999) – Treaty on the Functioning of the European Union, art 106 – Damages awarded (2005/3195P – Cooke J – 26/6/2012) [2012] IEHC 256
Island Ferries Teo v Minister for Communications, Marine and Natural Resources

Judicial review

Offences – Failure to correctly fill in log book – Failure to correctly make landing declaration – Whether offences void or of no legal effect – Whether offences committed within exclusive fishery limits of State – Whether impermissible delegation of power – Whether second respondent had power to create offence – Whether offence should have been created by Oireachtas – *Faherty v Attorney General* [2011] IEHC 222, (Unrep, Hedigan J, 3/6/2011) followed – *Browne v Attorney General* [2003] 3 IR 205 and *Cityview Press Ltd v An Chomhairle Oiliúna* [1990] IR 381 considered – Fisheries (Consolidation) Act 1959 (No 14), ss 224B and 232 – Fisheries (Amendment) Act 1983 (No 27), s 5 – Sea Fisheries (Control of Catches) Regulations 2003 (SI 345/2003) – Council Regulation 2847/93(EEC), arts 6, 8(1) – Commission Regulation 2807/83, art 2– Relief refused (2009/825JR – Hedigan J – 5/10/2012) [2012] IEHC 404
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GARDA SÍOCHÁNA

Complaints

False imprisonment – Assessment of evidence – Demeanour – Credibility – Whether plaintiff falsely imprisoned – Whether plaintiff driven against his will – Whether injuries occurred during car journey – Damages awarded (2004/12893P – Irvine J – 9/3/2012) [2012] IEHC 130
Byrne v O'Halloran

HEALTH

Statutory Instruments

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HOUSING

Eviction

Tenancy terminating – Death of applicant's aunt – Applicant considered trespasser by respondent – Respondent alleging anti-social behaviour by applicant – Allegations not put to applicant by respondent – Fair procedures – Credibility of applicant –
Whether respondent obliged to put allegations to applicant before eviction – Whether respondent failing to respect applicant's right to protection of home and right to family life – Housing (Miscellaneous Provisions) Act 1997 (No 21), s 20 – *Certiorari* granted, mandatory injunction refused (2011/1183JR – Peart J – 2/3/2012) [2012] IEHC 94
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HUMAN RIGHTS

Privacy

Right to privacy – Illegal downloading and uploading of copyright material – Whether internet subscribers engaging in copyright infringement having right to privacy – Factors when considering whether to grant injunctive relief to prevent infringement of copyright online – European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (SI 336/2011) – Data Protection Act 1988 (No 25) – Copyright and Related Rights Act 2000 (No 28) – Communications Regulation Act 2002 (No 20) – Data Protection (Amendment) Act 2003 (No 6) – Constitution of Ireland 1937, Article 40.3 – Directives 2000/31/EC, 2001/29/EC, 2002/21/EC, 2002/58/EC & 2004/48/EC – European Convention on Human Rights and Fundamental Freedoms, articles 8 & 10 – Notice quashed (2012/167JR – Charleton J – 27/6/2012) [2012] IEHC 264
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Asylum

Fear of persecution – Lack of state protection – Internal flight option – Credibility – Assessment of demeanour – Failure to give reasons – Whether substantial grounds – Whether tribunal member erred – Whether decision based on subjective reasons – Whether reasonably possible to travel to another part of Nigeria in safety – *R(I) v Minister for Justice, Equality and Law Reform* [2009] IEHC 353, (Unrep, HC, Cooke J, 24/7/2009) followed – *Lek v Matthews* (1926) 25 Lloyd's Rep 525; *E(SB) v Refugee Appeals Tribunal* [2010] IEHC 133, (Unrep, HC, Cooke J, 25/2/2010) and *R v Home Secretary , ex p Robinson* [1997] EWCA Civ 2089 considered – Refugee Act 1996 (No 17) – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 7 – Leave granted (2008/386JR – Hogan J – 2/2/2012) [2012] IEHC 46
O(FO) v Refugee Appeals Tribunal

Asylum

Judicial review – Credibility – Failure of applicant's husband to apply for asylum – Whether failure of spouse to apply for asylum could impact on credibility – Whether applicant would be at greater risk than husband in Gaza strip – Whether husband's explanation for not seeking asylum valid – Whether refusal on grounds of credibility reasonable – Whether conclusion flowed logically from facts – Whether level of applicant's husband's salary relevant – Whether newspaper interview with applicant's husband relevant – Whether finding that applicant travelled to Ireland for purpose of ensuring child was Irish citizen relevant – *IR v Refugee Appeals Tribunal* [2009] IEHC 353 (Unrep, Cooke J, 24/7/2009) followed – *The State (Lynch) v Cooney* [1982] IR 337 considered – Relief granted (2010/37JR – Hogan J – 7/10/2011) [2011] IEHC 392
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Asylum

Judicial review – Ethnic minority – Credibility – Fair procedures – Pre-determination – Medical evidence – Whether determination of asylum application before time allowed to submit medical evidence valid – Whether breach of fair procedures – Prejudice – Whether report would have been submitted within time – Whether applicant prejudiced by breach of fair procedures – Exercise of discretion – Whether explanation offered for breach of fair procedures – Whether integrity and credibility of asylum process would be served by refusing relief – Material errors of fact – Whether unwarranted reliance placed on applicant's mistake as to date – Whether respondent made error of fact in relation to time taken by applicant to seek medical treatment – Whether adequate regard had for country of origin information – Test to be applied for refusal of asylum on grounds of credibility – Whether decision should be viewed as a whole – Whether decision unreasonable or irrational – Whether errors of fact vitiated conclusion on credibility – *IR v Refugee Appeals Tribunal* [2009] IEHC 353 (Unrep, Cooke J, 24/7/2009) approved – Relief granted (2008/978JR – McDermott J – 17/7/2012) [2012] IEHC 283
K(B) v Refugee Appeals Tribunal

Asylum

Judicial review – Refugee Appeals Tribunal – Refusal of refugee status – Homosexual – Whether tribunal correct in refusing refugee status on basis that no specific act of harassment or discrimination identified – Whether test prospective – Whether tribunal correct in finding applicant would come to no harm if he adopted a discreet lifestyle and not flaunt his homosexuality – Whether sexual orientation an intrinsic and immutable feature of human identity – Whether homosexuals could be expected to sublimate or conceal identity to escape wrath of state of societal forces – Whether applicant's livelihood as musician consistent with living discreetly – Whether substantial grounds – Whether failure to apply for asylum in France and Spain a ground for refusing refugee status – Whether failure to apply for asylum relevant to credibility – Whether credibility in issue – *MA v Minister for Justice* [2010] IEHC 519 (Unrep, Ryan J, 12/11/2010) followed – *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596 approved – *OE v Refugee Appeals Tribunal* [2011] IEHC 149 (Unrep, Smyth J, 30/3/2011) distinguished – United Nations Convention Relating to the Status of Refugee 1951, art 1A – Directive 2004/83/EC, art 9 – Decision quashed (2008/1194JR – Hogan J – 24/1/2012) [2012] IEHC 78
A(S) v Minister for Justice, Equality and Law Reform

Asylum

Persecution – Credibility – Failure to claim asylum in first country – Subsidiary protection – Fair procedures – Principle of equivalence – Failure to furnish applicant with documents considered – Medical report – Evidence of previous harm – *Audi alteram partem* – Whether decision made in cooperation with applicant – Whether breach of fair procedures – Whether failure to consider report – Whether decision reasonable and rational – Whether issue of equivalence arose – *Panda v Refugee Appeals Tribunal* (Unrep, Cooke J, *ex tempore,* 19/5/2009) followed – *Eduardo v Refugee Appeals Tribunal* [2010] IEHC 139, (Unrep, Cooke J, 16/3/2010); *S v Secretary of State for Home Development* [2005] Imm AR 1; *Nendah v Minister for Justice and Law Reform* (Unrep, Cooke J, 16/2/2012); *A(BJS) (Akila) v Minister for Justice, Equality and Law Reform* [2011] IEHC 381; *Elgafaji v L(M)*; *Ahmed v Minister for Justice, Equality and Law Reform* (Unrep, Birmingham J, 24/3/2011) and *N(F) v Minister for Justice, Equality and Law Reform* [2008] IEHC 107, [2009] 1 IR 88 considered – *C(R) v Swedden* (Application No 41827/07) (Unrep, ECHR, 9/3/2010) and *Mibanga v Secretary of State for Home Department* [2005] EWCA Civ 367, (Unrep, CA, 17/3/2005) distinguished – European Communities (Eligibility for Protection) Regulations (SI 518/2006), reg 5 – Council Directive 2004/83/EC – Application dismissed (2011/533JR – Cross J – 23/3/2012) [2012] IEHC 126
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Asylum

Persecution – Individual assessment – Complicity in crimes against humanity – Country of origin information – Applicant formerly member of Afghanistan Taliban – First respondent finding that applicant's fear of harm attributable to fear of prosecution for past activities – First respondent finding applicant not to be a refugee – First respondent additionally finding that exclusion clause in art 1F of Geneva Convention applied to applicant based on membership of Taliban – Whether first respondent failed to conduct individualised assessment of applicant's alleged complicity in Taliban crimes against humanity – Whether first respondent's finding that art 1F exclusion clause applied to applicant operative basis of decision to refuse refugee status – Whether court entitled to take into account grounds for which leave not granted – *LR v Minister for Justice* [2002] 1 IR 260 followed – Geneva Convention on the Status of Refugees, art 1F – *Certiorari* refused, declaratory relief granted (2008/667JR – Cooke J – 10/11/2011) [2011] IEHC 412
B(A) v Refugee Appeals Tribunal

Asylum

Readmission to process – Refusal – Judicial review – Unreasonableness – Irrelevant considerations – Country of origin information – Discrimination – Persons with HIV – Whether reasonable prospect of favourable review of new asylum claim – Whether new application potentially contained ingredients required to establish refugee status – Whether requirement to provide new information onerous – Whether respondent stated in mechanical fashion that new country of origin information considered – Whether evidence to counter respondent's statement that information had been considered – Whether discrimination described in county of origin information amounted to persecution – Whether decision affected by irrelevant consideration – Whether respondent obliged to analyse country of origin information in forensic manner – Whether previous decisions of Refugee Appeals Tribunal indicated asylum could be granted based on HIV status – *LH v Minister for Justice* [2011] IEHC 406 (Unrep, Cooke J, 28/10/2011), *OH (a minor) v Minister for Justice* [2008] IEHC 405 (Unrep, McCarthy J, 28/11/2008) and *OOO-A v Minister for Justice* [2011] IEHC 78 (Unrep, Clark J, 28/1/2011) followed – *GK v Minister for Justice* [2002] 2 IR 418, *The State (Keegan) v Stardust Victims Compensation Tribunal* [1986] IR 640 and *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 applied – *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701 considered – Relief refused (2010/910JR – Cross J – 31/1/2012) [2012] IEHC 63
A(A) v Minister for Justice, Equality and Law Reform

Asylum

Re-entry – Identity – Bonafides – Application for re-entry to asylum process – Applicant having previously used two false identities – New evidence as to identity – Whether new elements making successful application for asylum significantly more likely – Whether non-presentation of new elements attributable to fault on part of applicant – Whether application for judicial review bound to fail – *EMS v Minister for Justice, Equality and Law Reform* [2004] IEHC 398 (Unrep, HC, Clarke J, 21/12/2004); *AA v Minister for Justice, Equality and Law Reform* [2009] IEHC 436, [2010] 4 IR 197 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 19, r 28 – European Communities (Asylum Procedures) Regulations 2011 (SI 51/2011) – Refugee Act 1996 (No 17), s 17 – Council Directive 2005/85/EC – Respondent's application allowed (2011/405JR – Cooke J – 22/11/2011) [2011] IEHC 436
Ncube v Minister for Justice and Equality

Deportation

Appeal – Certificate to appeal to Supreme Court – Adequacy of judicial review proceedings – Right to effective remedy – Obligation to vindicate personal rights – Institutional guarantees – Point of law of exceptional public importance – Desirable in public interest – Proper interpretation of requirements of effective remedy in article 39 – International protection – Whether denied effective remedy – Whether Refugee Appeals Tribunal lacked institutional guarantees – Whether judicial review inadequate method of challenging international protection decisions – Whether certificate should be granted – *M(P) v Minister for Justice and Law Reform* [2011] IEHC 409, (Unrep, Hogan J, 28/10/2011); *Wilson (Case C-506/04)* [2006] ECR I-8613; *D(HI)(A minor) v Refugee Applications Commissioner* [2011] IEHC 33 (Unrep, HC, Cooke J, 9/2/2011); *Diouf v Ministre du Travail, de l'Emploi et de l'Immigration (Case C-69/10)* (Unrep, 28/7/2011); *Efe v Minister for Justice* [2011] IEHC 214, [2011] 2 IR 798; *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *F(ISO) v Minister for Justice, Equality and Law Reform* [2010] IEHC 457, (Unrep, Cooke, 17/12/2010), *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701 and *U(MA) v Minister for Justice (No 3)* [2011] IEHC 59, (Unrep, Hogan, 22/2/2011) considered – Illegal Immigrants (Trafficking) Act 2000 (No 29) s 5(3)(a) – Refugee Act 1996 (No 17) – Constitution of Ireland 1937, Arts 40.3.2 and 40.3.1 – Directive 2005/85/EC, art 39(1) – Certificate not granted (2011/147JR – Hogan J – 31/1/2012) [2012] IEHC 34
M(P)(Botswana) v Minister for Justice and Law Reform

Deportation

Judicial review – *Certiorari* – Substantial grounds – Minor applicant – Medical treatment – Sickle cell anaemia – Whether respondent conducted adequate inquiry as to whether deportation would breach applicant's rights – Whether risk of death – Whether inferior medical treatment in home state constituted ground for preventing deportation – Whether exceptional circumstances – Whether respondent considered medical report – Whether medical report actually a plea against deportation – Whether any deficiency in decision – *D v United Kingdom (App No 32024/65)* [1997] ECHR 25 approved – *CUH (a minor) v Minister for Justice* [2011] IEHC 93 (Unrep, Cooke J, 10/3/2011) distinguished – European Convention on Human Rights 1950, art 3 – Relief refused (2011/637JR – Cross J – 1/3/2012) [2012] IEHC 100
E(DO) v Minister for Justice

Deportation

Order – Judicial review – Delegated powers – Order made by Director General of Irish Naturalisation and Immigration Service – *Caltrona* principle – Whether deportation order had to be made personally by respondent – *Caltrona Ltd v Commissioner of Works* [1943] 2 All ER 560; *Tang v Minister for Justice* [1996] 2 ILRM 46; *Devanney v Shields* [1998] 1 IR 230; *R v Home Secretary, ex p. Oladebinde* [1991] 1 AC 254 considered – Immigration Act 1999 (No 22), s 3 – Application refused (2011/796JR – Hogan J – 2/11/2011) [2011] IEHC 404
AT(L) v Minister for Justice and Equality

Deportation

Proposal to deport – Service – Statutory requirement – Whether applicant properly served with proposal to deport – Whether proposal served personally on applicant in prison – Whether proposal served on last place of address furnished by applicant – Whether proof of service integral feature of deportation system – Whether court could permit deportation order to stand – Whether special circumstances – Whether failure trivial or insubstantial – Judicial review – Leave – Substantial grounds – Extension of time – Whether applicant moved as quickly as possible in circumstances – Whether applicant formed intention to challenge deportation within 14 day period – *Monaghan UDC v Alf-A-Bet Promotions Ltd* [1980] ILRM 64 applied – *Fitzwilton Ltd v Mahon* [2007] IESC 27, [2008] 1 IR 712 and *Walsh v Garda Síochána Complaints Board* [2010] IESC 2, [2010] 1 IR 400 considered – Immigration Act 1999 (No 22), s 3(6) – Interpretation Act 2005 (No 23), s 25 – Leave granted (2010/1508JR – Hogan J – 19/9/2011) [2011] IEHC 529
MM (Georgia) v Minister for Justice, Equality and Law Reform

Deportation

Revocation – Interlocutory injunction – Restraint of deportation pending decision on revocation – Principle of *refoulement* – Whether allegation of *refoulement* operated as automatic stay on deportation – Country of origin information – Citizenship – Whether new information – Whether doubt concerning eligibility of applicant for citizenship of Ghana raised *refoulement* considerations – Whether potential breach of rights under European Convention on Human Rights – Whether right of access to courts infringed – Whether citizenship issue could have been raised earlier in process – Whether fair issue to be tried – Whether combination of citizenship issue and alleged persecution warranted injunction restraining deportation – *Irfan v Minister for Justice* [2010] IEHC 422 (Unrep, Cooke J, 23/11/2010) and *Kouaype v Minister for Justice* [2005] IEHC 380, [2011] 2 IR 1 approved – *Campus Oil v Minister for Industry (No 2)* [1983] IR 88 applied – *Čonka v Belgium (App No 51564/99)* [2011] ECHR 2135 distinguished – Immigration Act 1999 (No 22), ss 3(11), 5 – European Convention on Human Rights 1950, art 3 – Injunction granted (2011/759JR – Cross J – 14/2/2012) [2012] IEHC 73
S(AD) v Minister for Justice

Establishment rights

Permanent residency – Qualifying family member – Continuous residency – Error of law and fact – Assessment of weight of documentary evidence – Whether continuous residency for five years in conformity with regulations – Whether EU citizen resided in conformity with reg 6(2) – Whether entitled to permanent residency card – Whether respondent erred in law – Whether respondent misdirected himself in assessing facts – European Communities (Free Movement of Persons) (No 2) Regulations 2006 (SI 656/2006), regs 6, 7, 13 and 21 – Council Directive 2004/38/EC – Leave granted (2012/179JR – Cooke J – 12/3/2012)
Babington v Minister for Justice and Equality

Family reunification

Judicial review – Fair procedures – Proportionality – Ability to support family – Burden on social welfare – Refusal on grounds of inability to support to family members and where family members would become unreasonable burden on social welfare system – Whether proportionality of refusal on constitutional rights considered – Whether proportionality of refusal on European Convention on Human Rights rights considered – Whether essential rationale of decision disclosed – Whether respondent exercised discretion correctly – Whether decision flowed from premises on which it was based and was in accord with fundamental reason and common sense – Whether formulaic decision – Whether respondent operated a fixed policy – Whether respondent introduced "sponsorship requirement" not contemplated in legislation – Whether delegation of decision valid – *ISOF v Minister for Justice* [2010] IEHC 457 approved – *Ali v Minister for Justice* [2011] IEHC 115 (Unrep, Cooke J, 25/3/2011) considered – *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701 applied – Refugee Act 1996 (No 17), s 18 – Constitution of Ireland 1937, art 41 – European Convention on Human Rights 1950, art 8 – Decisions quashed (2011/630 & 904JR – Cross J – 14/2/2012) [2012] IEHC 72

S(AM) v Minister for Justice and Equality

Injunction

Restraint of deportation – Guardianship of or access to Irish born child – Constitution – Family rights – Fair issue to be tried – Whether absence of full appeal from refusal to challenge to subsidiary protection constituted denial of effective remedy – Whether court should view application from perspective of applicant's child – Whether in interests of child that applicant would enjoy right of access or guardianship – Whether deportation should be restrained pending determination of guardianship and access proceedings by District Court – *AO v Minister for Justice* [2012] IEHC 1 (Unrep, Hogan J, 6/1/2012), *Nottinghamshire County Council v B* [2011] IESC 48 (Unrep, SC, 15/12/2011), *In re Baby AB; Children's University Hospital, Temple Street v CD* [2011] IEHC 1, [2011] 2 ILRM 262, *The State (Nicolau) v An Bord Uchtála* [1966] IR 567, *In re M (an infant)* [1946] IR 344, and *G v An Bord Uchtála* [1980] IR 32 considered – *Efe v Minister for Justice* [2011] IEHC 214, [2011] 2 IR 798 and *Oboh v Minister for Justice* [2011] IEHC 102 (Unrep, Hogan J, 2/3/2011) followed – *Zambrano v Belgium (Case C-34/09)* [2011] All ER (EC) 491 and *Dereci v. Bundesministerium für Inneres (Case C-256/11)* distinguished – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 20 – Constitution of Ireland 1937, art 41 & 42 – Injunction granted (2011/972JR – Hogan J – 17/1/2012) [2012] IEHC 79

O(A) v Minister for Justice, Equality and Law Reform (No 2)

Interlocutory injunction

Leave to apply for judicial review – Subsidiary protection – Deportation order – Test for granting of interlocutory injunction – Whether applicant seeking leave to apply for *certiorari* of deportation order entitled as of right to interlocutory injunction restraining deportation until application for leave determined – Whether applicants raising fair issue to entitlement to obtain leave to apply for order quashing refusal to grant subsidiary protection – Whether applicants raising fair issue of substantial ground for quashing of deportation order – Whether applicants facing risk or likelihood of irreversible change of circumstances if deported – Whether applicants entitled to interlocutory injunction restraining deportation – *Campus Oil v Ministry for Industry (No 2)* [1983] IR 88 applied – *A(AP) (A Minor) v Minister for Justice, Equality and Law Reform* [2010] IEHC 297 (Unrep, HC, Cooke J, 20/7/2010); *J(P) v Minister for Justice, Equality and Law Reform* [2011] IEHC 443 (Unrep, HC, Hogan J, 19/10/2011) considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Applications refused (2011/739JR – Cooke J – 22/11/2011 & 2/12/2011) [2011] IEHC 441

O(OC) v Minister for Justice and Equality

Judicial review

Leave – Substantial grounds – Refugee – Extension of time – Whether fourteen day time period applicable – Whether principle of judicial comity applicable – Whether time limits under O. 84 applicable – Whether application made within 6 months – Whether application made promptly – Whether applicant seeking to collaterally impugn validity of Refugee Appeals Tribunal by way of appeal – Whether applicant estopped from impugning validity of decision of Refugee Appeals Tribunal by applying for subsidiary protection – Subsidiary protection – Credibility – County of origin information – Whether respondent entitled to rely on adverse credibility findings – Whether respondent adequately analysed subsidiary protection application – Deportation – Time limit – Extension of time – Test to be applied – Whether new information submitted in relation to decision to deport – Whether merits of application sufficient to grant extension of time – Injunction – Whether deportation should be restrained pending conclusion of proceedings – Whether applicant could introduce new information in judicial review proceedings – *TD v Minister for Justice* [2011] IEHC 37 (Unrep, Hogan J, 25/1/2011), *Jerry Beades Construction Ltd v Dublin City Council* [2005] IEHC 406 (Unrep, McKechnie J, 7/9/2005), *Lennon v Cork City Council* [2006] IEHC 438 (Unrep, Smyth J, 19/12/2006) and *KIK v Minister for Justice* [2011] IEHC 444 (Unrep, Cooke J, 25/11/2011) followed – *PM v Minister for Justice* [2011] IEHC 409 (Unrep, Hogan J, 28/10/2011) not followed – *In re Worldport (Ireland) Ltd* [2005] IEHC 189 (Unrep, Clarke J, 16/6/2005) approved – *White v Dublin City Council* [2004] IESC 35, [2004] 1 IR 545, *Obuseh v Minister for Justice* [2010] IEHC 93 (Unrep, Clark J, 14/1/2010), *O'Driscoll v Law Society of Ireland* [2007] IEHC 352 (Unrep, McKechnie J, 27/7/2007) and *Muresan v Minister for Justice* (Unrep, Finlay Geoghegan J, 8/10/2003) considered – Rules of the Superior Courts 1986 (SI 15/1986), O84 – Refugee Act 1996 (No 17), s 17 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Relief refused (2011/636JR – Cross J – 14/2/2012) [2012] IEHC 74

L (BMJ) v Minister for Justice and Equality

Residence

Refusal of permission to reside – Judicial review – Unreasonableness – Irrelevant considerations – South African parents of Irish citizen adult – Constitution – European Convention on Human Rights – Family rights – Whether entitlement to remain in the State – Whether constitutional and convention rights could be invoked in respect of parents of adult citizens – Whether definition of family included more than nuclear family – Whether decision proportionate to family rights – Whether decision vitiated by illegality due to unreasonableness, disproportionality or inadequate explanation – Whether decision maker more concerned with articulating grounds supporting refusal rather than giving an overall assessment in a fair and balanced manner – Whether undue emphasis placed on absence of legislative provision providing for indefinite permission to reside – Whether finding of improper motive and lack of good faith consistent with relevant material – Whether undue emphasis placed on financial dependency – Whether respondent abdicated duty – Whether respondent gave necessary consideration to personal involvement of applicant in lives of their children and grandchildren – *Caldaras v Minister for Justice* (Unrep, O'Sullivan J, 9/12/2003), *Olenczuk v Minister for Justice* (Unrep, Smyth J, 25/1/2002), *Jordan v O'Brien* [1960] IR 363, *McCombe v Sheehan* [1954] IR 183, *RX v Minister for Justice* [2010] IEHC 446 (Unrep, Hogan J, 10/12/2010) considered – Immigration Act 2004 (No 1), s 4 – Constitution of Ireland 1937, art 41 – European Convention on Human Rights 1950, art 8 – Decision quashed (2010/1148JR – Cooke J – 24/2/2012) [2012] IEHC 80

O'Leary v Minister for Justice, Equality and Law Reform

Subsidiary protection

Deportation order – Fear of persecution – Religious grounds – Risk of serious harm – Right to effective remedy – Absence of appeal – Right of equivalence – Constitutionality of deportation order made under s 3 – Declaration of incompatibility – Proportionality – Right of family – Whether denied effective remedy – Whether violation of principle of equivalence – Whether s 3 incompatible with European Convention of Human Rights Act 2003 – Whether expulsion proportional – Whether fair balance between interests of family life and effective immigration control– *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701; *K v Minister for Justice* [2011] IEHC 99, (Unrep, Hogan, 9/2/2011); *F(ISO) v Minister for Justice (No 2)* [2010] IEHC 457, (Unrep, Cooke, 17/12/2010); *Efe v Minister for Justice (No 2)* [2011] IEHC 214, [2011] 2 IR 798; *Albion Properties Ltd v Moonblast* [2011] IEHC 107, (Unrep, Hogan J, 16/3/2011); *Diouf v Ministre du Travail, de l'Emploi et de l'Immigration (Case C-69/10)* (Unrep, 28/7/2011); *M(P)(Botswana) v Minister for Justice* [2012] IEHC 34, (Unrep, Hogan J, 31/1/2012); *L(S)(Nigeria) v Minister for Justice* [2011] IEHC 370, (Unrep, Cooke J, 6/10/2011); *A(BJS)(Sierra Leone) v Minister for Justice* [2011] IEHC 381, (Unrep, Cooke J, 12/10/2011); *U v Minister for Justice* [2010] IEHC 492; *Emre v Switzerland (No 1)* (App No 42034/04), (Unrep, ECHR, 22/5/2008); *Emre v Switzerland (No 2)* (App No 5056/10), (Unrep, ECHR, 11/10/2011); *Radovanovic v Austria* [2004] ECHR 169, (2005) 41 EHRR 6; *M(M) v Minister for Justice (No 1)* (Unrep, Hogan J, *ex tempore,* 18/5/2011) and *M(M) v Minister for Justice (No 2)* [2011] IEHC 346, (Unrep, Hogan J,) considered – Refugee Act 1996 (No 17), s 5 – Immigration Act 1999 (No 20), s 3 – European Convention on Human Rights Act 2003 (No 20) – Directive 2005/85/EC, art 39 – Directive 2004/83/EC, art 4(1) – European Convention on Human Rights, arts 8 and 13 – Constitution of Ireland 1937, Arts 40.3.2 and 41 – Application adjourned (2011/512JR – Hogan J – 31/1/2012) [2012] IEHC 47

Z(S) v Minister for Justice and Law Reform

Subsidiary protection

Effective remedy – Adequacy of judicial review – Fair procedures – Cooperation – Principle of equivalence – Right of appeal – Arguable grounds –Prejudice – Proportionality – Whether arguable grounds – Whether Qualifications Directive incorrectly transposed into Irish law – Whether breach of principle of equivalence – Whether right of appeal – Whether effective remedy – Whether prejudice suffered by alleged failure – Whether remedy of judicial review sufficient to vindicate rights – *Ahmed v MJELR* (Unrep, Birmingham J, 24/3/2011); *Mujyanama v MJELR* (Unrep, Hogan J, 18/5/2011); *A(BJS)(Sierra Leone) v MJELR* [2011] IEHC 381, (Unrep, Cooke J, 12/10/2011); *Jayeola v Minister for Justice and Equality* (Unrep, Cross J, 3/2/2012); *Nendah v MJELR* (Unrep, Cooke J, 16/2/2012); *L(S) v MJELR* (Unrep, Cooke J, 6/10/2011); *O(N) v MJELR* (Unrep, Ryan J, 14/12/2011); *I v MJELR* (Unrep, Hogan J, 11/1/2011); *Paquay (C-460/06)* [2007] ECR I-8511; *M(P) v MJELR* [2011] IEHC 409, (Unrep, Hogan J, 28/10/2011); *Efe v MJELR* [2011] IEHC 214, [2011] 2 IR 798 and *Donegan v Dublin City Council* [2012] IESC 18, (Unrep, SC, 27/2/2012) considered – Refugee Act 1996 (No 17) – Housing Act 1966 (No 21), s 62 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – European Charter of Fundamental Rights, art 47 – Procedures Directive, art 39 – Application

refused (2011/739JR – Cross J – 30/3/2012) [2012] IEHC 134
Okunade v Minister for Justice and Equality

Subsidiary protection

Effective remedy – Deportation order – Extension of time – Democratic Republic of Congo –Equivalence – Credibility – Whether arguable grounds – Whether lack of effective remedy in Irish law – Whether breach of principle of equivalence – Whether delay between hearing and decision irrational or unreasonable – Whether rational grounds provided for decision – *Jayeola v MJELR* (Unrep, Cross J, 3/2/2012); *Mujyanama v MJELR* (Unrep, Hogan J, 18/5/2011); *Ahmed v MJELR* (Unrep, Birmingham J, 24/3/2011); *A(BJS)(Sierra Leone) v MJELR* [2011] IEHC 381, (Unrep, Cooke J, 12/10/2011); *Efe v MJELR* [2011] IEHC 214, [2011] 2 IR 798; *I v MJELR* (Unrep, Hogan J, 11/1/2011); *F(ISO) v MJELR* [2010] IEHC 457, (Unrep, Cooke J, 17/12/2010); *N(F) v MJELR* [2008] IEHC 107, [2009] 1 IR 88; *Obuseh v MJELR* [2010] IEHC 93, (Unrep, Clark J, 14/1/2010); *M(H) v MJELR* [2011] IEHC 16 (Unrep, Hogan J, 21/1/2011); *Dhisi v Minister for Justice* (Unrep, HC, Cooke J, 2/2/2012); *Blogun v Refugee Appeals Tribunal* (Unrep, HC, Charleton J, 29/1/2008); *S v Secretary of State for the Home Department* [2007] Imm AR 2; *E(H) (DRC CG)* [2004] UK IAT 000321; *C(R) v Sweden* (App No 41827/07) (Unrep, ECHR, 9/3/2010) and *Mibanga v Secretary of State for the Home Department* [2005] EWCA Civ 367, (Unrep, CA, 17/3/2005) considered – Immigration Act 1999 (No 22), s 3(6) – Refugee Act 1996 (No 17), s 5 – Criminal Justice (United Nations Convention Against Torture) Act 2000 (No 11) – European Convention on Human Rights, art 8 – Qualification Directive, art 4.1– European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Application refused (2011/766JR – Cross J – 23/3/2012) [2012] IEHC 125
Ninga Mbi v Minister for Justice and Equality

Subsidiary protection

Effective remedy – Requirement of cooperation – Principle of equivalence – Lack of appeal – Fear of serious harm – Availability of State protection – Extension of time – Amendment – Whether Qualification Directive properly transposed – Whether effective remedy available – Whether breach of principle of equivalence – Whether failure to provide mechanism of appeal – Whether risk of serious harm – Whether arguable grounds – *N(F) v Minister for Justice, Equality and Law Reform* [2008] IEHC 107, [2009] 1 IR 88; *Ahmed v Minister for Justice, Equality and Law Reform* (Unrep, Birmingham J, 24/3/2011); *Mayie v Minister for Justice and Equality* (Unrep, Cooke J, 27/7/2011); *A(BJS)(Sierra Leone) v Minister for Justice and Equality* [2011] IEHC 381, (Unrep, Cooke J, 12/10/2011); *Ozieghe v Minister for Justice and Equality* (Unrep, Ryan J, 14/12/2011); *I v Minister for Justice, Equality and Law Reform* (Unrep, Hogan J, 11/1/2011); *Jayeola v Minister for Justice and Equality* (Unrep, Cross J, 3/2/2012); *Nendah v Minister for Justice, Equality and Law Reform* (Unrep, Cooke J, 16/2/2012); *B(J)(A minor) v Minister for Justice and Equality* [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); *Donegan v Dublin City Council* [2012] IESC 18, (Unrep, SC, 27/2/2012); *Lukombo v Minister for Justice and Equality* [2012] IEHC 129, (Unrep, Cross J, 27/3/2012); *Okunade v Minister for Justice and Equality* [2012] IEHC 134, (Unrep, Cross J, 30/3/2012); *M(JT) v Minister for Justice and Equality* (Unrep, Cross, 1/3/2012) and *K(G) v Minister for Justice, Equality and Law Reform* (Unrep, SC, 17/12/2001); *O'Driscoll v Law Society of Ireland* [2007] IEHC 352, (Unrep, McKechnie J, 27/7/2007) and *G(MY) v Minister for Justice, Equality and Law Reform* [2010] IEHC 127, (Unrep, Herbert J, 28/4/2010) considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(1) – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 21 – Directive 2004/83/EEC, art 4.1 – Application refused (2011/592JR – Cross J – 20/4/2012) [2012] IEHC 153
Osaghe v Minister for Justice and Equality

Subsidiary protection

Judicial review – *Certiorari* – Eligibility for subsidiary protection – Serious harm – Compelling reasons – Consistency of injuries – Whether applicant suffered serious harm – Whether injuries consistent with applicant's account – Whether medical reports strongly suggested applicant was a victim of intentional infliction of injuries – Whether respondent required to consider eligibility for subsidiary protection based on serious harm alone – Whether regulations included counter-exception proviso – Whether respondent fully considered regulations – Whether respondent considered counter-exception proviso – Whether respondent considered whether repatriation would reinforce negative impressions of applicant as a result of traumas – Whether regulations went further than requirement pursuant to European Union directive – *SK v Minister for Justice* [2011] IEHC 301 (Unrep, Hogan J, 7/7/2011) – *MST v Minister for Justice* [2009] IEHC 529 (Unrep, Cooke J, 4/12/2009) approved – European Communities (Subsidiary Protection) Regulations 2006 (SI 518/2006), arts 2(1), 5(1) & 5(2) – Council Directive 2004/38/EC – Decision quashed (2010/952JR – Hogan J – 27/7/2011) [2011] IEHC 451
N(S) v Minister for Justice, Equality and Law Reform

Subsidiary protection

Unaccompanied minor – Credibility – Language analysis report – Question over nationality – Country of origin information – Whether arguable grounds – Whether error in failing to give weight to corroborative evidence – Whether error in rejecting evidence without reasons – *R(I) v Minister for Justice, Equality and Law Reform* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) followed – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Decision quashed (2011/585JR – Cross J – 23/3/2012) [2012] IEHC 123
Murkhtar v Minister for Justice and Equality

Asylum

Credibility – Authenticity of documentation – Whether tribunal member failing to direct appropriate enquiries into documentation – Whether onus of proof on applicant to corroborate supportive documentation – Whether grounds of appeal to tribunal corresponded with ground of appeal set out in refusal – Whether tribunal required to identify *verbatim* particular grounds – Whether grounds of appeal not referred to in refusal relevant to decision to refuse – Whether grounds of appeal not referred to in refusal relevant to finding of lack of credibility – Whether tribunal entitled to have regard to failure of applicant to apply for asylum in other countries – Whether tribunal decision addressed essential issue of asylum claim – Refugee Act 1996 (No 17), s 13 – Application refused (2008/954JR – Cooke J – 19/4/2012) [2012] IEHC 157
T(S) v Minister for Justice, Equality and Law Reform

Asylum

Error of law – Clear and intelligible reasons for decision – Hypothesis as to tribunal's reasoning – Credibility – Internal relocation – International protection – Subsidiary protection – Temporary permission to remain – Whether error of law – Whether decision unlawfully flawed and unsound – Whether inadequate adjudication of applicant's appeal – Whether legal incompatibility between application for refugee status and temporary permission to remain – *Ruiz Zambrano v Office National d'Emploi Case C-34/09* [2011] ECR I-01177; *Clare Co Council v Kenny* [2008] IEHC 177, [2009] 1 IR 22; *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701; *O'Donoghue v An Bord Pleanála* [1991] ILRM 750 and *Delacre v Commission (Case C-350/88)* [1990] ECR I-395 considered – Refugee Act 1996 (No 17), s 13 – Immigration Act 1999 (No 22), s 3 – Guardianship of Infants Act 1964 (No 7), s 6A – Decision quashed (2008/708JR – Cooke J – 18/7/2012) [2012] IEHC 308
A(DD) v Minister for Justice, Equality and Law Reform

Asylum

Error of law and fact – Credibility – Religious persecution – State protection – Reasonableness – Proportionality – Effective remedy – Whether tribunal erred in law and fact – Whether decision legally sound and not vitiated by material error of law – Whether conclusions so unreasonable as to be contrary to common sense – Whether decision disproportionate – Whether unfair or fundamentally flawed – Whether appropriate process and procedures applied – Whether decision within jurisdiction – Whether effective remedy – *D(HI) v Refugee Applications Commissioner (Case C-175/11)* (Unrep, ECJ, 31/1/2013) and *R(I) v Minister for Justice, Equality and Law Reform* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) considered – European Convention on Human Rights Act 2003 (No 20) – Refugee Act 1996 (No 17), ss 2, 11 and 17(1) – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), art 2 – Council Directive 2005/85/EC – European Convention on Human Rights, art 13 – Charter of Fundamental Rights of the European Union – Relief refused (2011/259 – McDermott J – 17/7/2012) [2012] IEHC 284
M(T) v Refugee Appeals Tribunal

Asylum

Fair procedures – Premature decision – Prejudice – Discretion – Fear of persecution – Shooting incident – Medical evidence – Failure to produce further medical report – Country of origin information – Credibility assessment – Geographical inconsistencies and inaccuracies – Whether breach of fair procedures – Whether making decision before expiration of time for additional medical report violation of right to fair procedures – Whether prejudice suffered – Whether material errors of fact – Whether assessment legally sound – Whether undue weight given to error of fact – Whether unreasonable or irrational – *R(I) v Minister for Justice, Equality and Law Reform* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) followed – Refugee Act 1996 (No 17), ss 11 and 13 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5 – Decision quashed (2008/978JR – McDermott J – 17/7/2012) [2012] IEHC 283

K(B) v Hurley

Asylum

Fear of persecution – Ethnicity – Whether respondent considered ethnicity as a separate and distinct point – Whether finding of lack of credibility amounted to sufficient consideration of ethnicity point – Failed asylum seeker – Whether respondent should have considered situation for failed asylum seekers in Democratic Republic of Congo – Whether respondent had jurisdiction to consider situation for failed asylum seekers – County of origin information – Whether cogent, objective and authoritative evidence of persecution of failed asylum seekers – Whether court confined to examining existence of cogent information without engaging with merits – Whether respondent made error of jurisdiction – Whether respondent unreasonable in deciding applicant could have applied for protection in South Africa – Whether conclusions went beyond credibility findings – Whether errors rendered entire decision irrational – *FV v Refugee Appeals Tribunal* [2009] IEHC 268 (Unrep, Irvine J, 28/5/2009) approved – *Muia v Refugee Appeals Tribunal* [2005] IEHC 363 (Unrep, Clark J, 11/11/2005) and *Talbot v An Bord Pleanála* [2008] IESC 46, [2009] 1 IR 375 distinguished – Decision quashed, rehearing ordered (2008/1337JR – Cross J – 20/4/2012) [2012] IEHC 155
K (MTT) v Refugee Appeals Tribunal

Asylum

Refugee status – Fear of persecution – Threats to life – Murder of father – Credibility – Natural and constitutional justice – Whether appropriate principles and procedures applied by tribunal – Whether determination unreasonable, irrational or disproportionate – *R(I) v Minister for Justice, Equality and Law Reform* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) followed – Refugee Act 1996 (No 17), ss 2, 11, 11B and 13(1) – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 7 – Relief refused (2008/1325JR – McDermott J – 3/8/2012) [2012] IEHC 384
O(BA) v Minister for Justice, Equality and Law Reform

Asylum

Refugee status – Negative credibility findings – Demeanour of first applicant – Whether negative credibility findings against applicants incorrect and irrational – Whether insufficient consideration of documentation submitted by applicants – Whether failure to adequately consider applications of second, third and fourth applicants – *D(T) v Refugee Appeals Tribunal* [2010] IEHC 125 (Unrep, Cooke J, 28/4/2010) followed – *R(H) v Refugee Appeals Tribunal* [2011] IEHC 151 (Unrep, Cooke J, 15/4/2011); *W(FG) v Refugee Appeals Tribunal* [2011] IEHC 205 (Unrep, Cooke J, 5/5/2011) considered – Leave granted (2009/978JR – Cross J – 3/1/2012) [2012] IEHC 101
A(S) v Refugee Appeals Tribunal

Asylum

Revocation of refugee status – Criminal conviction – Statutory appeal – Standard to be applied – Whether jurisdiction of court wider than in judicial review – Whether respondent's decision reasonable – Whether totality of respondent's consideration constituted a fair and accurate summary of facts – Whether respondent in error in considering drugs conviction to be for "crack" cocaine as distinct from cocaine – Whether respondent in error in considering convictions as distinct from single conviction – Whether respondent in error in considering that applicant was in possession of drug dealing paraphernalia when no charge brought – Whether respondent's conclusion that applicant was "serious player in the drug scene" constituted an unsupported conclusion – *Gashi v Minister for Justice* [2010] IEHC 436 (Unrep, Cooke J, 1/12/2010) followed – Rules of the Superior Courts 1986 (SI 15/1986), O84 & 84C – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 11 – Refugee Act 1996 (No 17), s 21 – Immigration Act 1999 (No 22), s 11 – Illegal Immigrant (Trafficking) Act 2000 (No 29), s 5 – Misuse of Drugs Act 1977 (No 12), ss 6, 15, & 27 – Directive 2004/83/EEC, art 14 – Directive 2005/86/EEC, art 38 – Convention relating to the Status of Refugees 1951, arts 1, 32 & 33 – Appeal allowed (2010/92MCA – O'Keeffe J – 1/3/2012) [2012] IEHC 149
Ali v Minister for Justice, Equality and Law Reform

Deportation

Natural justice – Fair procedures – Absence of discernible rationale – Failure to state reasons – Prohibition of *refoulement* – Fear of persecution – Relocation – Credibility – Whether consideration of applicant's rights inadequate , unlawful and in breach of natural justice and fair procedures – Whether consideration of prohibition of refoulement flawed – *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701; *Rawson v Minister for Defence* [2012] IESC 26, (Unrep, SC, 1/5/2012); *Clare County Council v Kenny* [2008] IEHC 177, [2009] 1 IR 22 and *Abuka v Minister for Justice* (Unrep, Cooke J, 20/6/2012) considered – Refugee Act 1996 (No 17), ss 5, 13 – Immigration Act 1999 (No 22), s 3 – Criminal Justice (United Nations Convention Against Torture) Act 2000 (No 11), s 4 – European Convention on Human Rights, art 8 – Decision quashed (2010/260 & 261JR – Cooke J – 11/7/2012) [2012] IEHC 291
S(JD) v Minister for Justice, Equality and Law Reform

Deportation

Revocation – Second application to revoke refused – Family rights – Whether second application based upon new fact or change in circumstances – Whether analysis of applicants' right to family life carried out – Whether stateable case for grant of leave – Conduct of applicant – Discretion – *Zambrano v Office national de l'emploi (Case C-34/09)* [2012] QB 265; *Sanade v Home Secretary* [2012] UKUT 00048 (IAC) considered – Immigration Act (No 22), s 3 – Leave refused (2012/12JR – Cooke J – 5/3/2012) [2012] IEHC 113
Smith v Minister for Justice and Equality

Injunction

Stay – Interlocutory relief – Public law – Test to be applied – Whether distinction in criteria to be applied to stay and injunction – Whether distinction in form of relief only – Whether "Campus Oil" test for interlocutory injunctions appropriate in judicial review proceedings – Whether arguable case established – Whether risk of injustice – Whether weight should be afforded to measures which were prima facie valid – Whether public interest in orderly operation of statutory scheme – Whether weight should be afforded to particular circumstances of individual case – Whether weight should be afforded to consequences of compliance with measure which might be found invalid – Whether adequacy of damages relevant to interlocutory relied in public law proceedings – Whether judicial review involved investigation of issues of fact – Whether weight should be placed on strength or weakness of substantive proceedings – Whether importance should be attached to exercise by state of its right to control its borders and implement an orderly immigration policy – Whether default position that applicant not entitled to injunction restraining deportation pending hearing of leave to seek judicial review – Whether due weight should be afforded to disruption of family life involving children – *PJ v Minister for Justice* [2011] IEHC 443, (Unrep, Hogan J, 19/10/2011) overruled; *B & S Ltd v Irish Auto Trader Ltd.* [1995] 2 IR 142, *Campus Oil v Minister for Industry (No 2)* [1983] IR 88, *Maha Lingam v HSE* [2005] IESC 89, (2005) 17 ELR 137, *Allied Irish Banks plc v Diamond* [2011] IEHC 505, (Unrep, Clarke J, 14/10/2011), *Shepherd Homes Ltd v Sandham* [1971] Ch 340, *American Cyanamid v Ethicon Ltd* [1975] AC 396 and *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 84 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Refugee Act 1996 (No 17) – Immigration Act 1999 (No 22) – Illegal Immigrants (Trafficking) Act 2000 (No 29) – Council Directive 2004/83/EC – Applicants' appeal allowed (481/2011 – SC – 16/10/2012) [2012] IESC 49
Okunade v Minister for Justice, Equality and Law Reform

Naturalisation

Refusal – Reasons – Civil or criminal "proceedings" – "Good character" – Absolute discretion of Minister to grant certificate of naturalisation – Whether Minister's decision amenable to judicial review – Constitutional justice – Fair procedures – Obligation on Minister to put matters to applicant before making adverse determination on "good character" – *Ryan v O'Callaghan* (Unrep, Barr J, July, 1987) considered; *Dillon v Minister for Posts and Telegraphs* (Unrep, SC, 3/6/1981) applied; *Jiad v Minister for Justice* (Unrep, Cooke J, 19/5/2010) and *Maguire v Ardagh* [2002] 1 IR 385 considered; *The State (Lynch) v Cooney* [1982] IR 337 applied; *LGH v Minister for Justice* [2009] IEHC 78 (Unrep, Edwards J, 30/1/2009) considered – Irish Nationality and Citizenship Act 1956 (No 26), s 15 – *Certiorarai* granted (2010/2JR – Hogan J – 13/4/2011) [2011] IEHC 171
Hussain v Minister for Justice, Equality and Law Reform

Subsidiary protection

Asylum application – Fear of persecution – Credibility – International protection – Arguable case – Whether arguable case – Whether real risk of serious harm – Whether failure to provide effective remedy – Whether irrelevant considerations taken into account – Whether failure to take account of relevant considerations – Whether decisions proportionate or reasonable – Whether determination defective – *Mayie v Minister for Justice* (Unrep, Cooke J, 27/7/2011); *O(N) v Minister for Justice* [2012] IEHC 472, (Unrep, Ryan J, 14/12/2011); *J(O) v Minister for Justice* [2012] IEHC 71, (Unrep, Cross J, 3/2/2012); *M(M) v Minister for Justice* (Unrep, HC, 18/5/2011); *M(M) v Minister for Justice (Case C-277/11)* (Unrep, ECJ, 22/11/2012); *A(BJS) v Minister for Justice* [2011] IEHC 381, (Unrep, Cooke J, 12/10/2011); *A(MA) v Minister for Justice* (Unrep, Birmingham J, 24/3/2011); *N(V) v Minister for Justice* [2012] IEHC 62, (Unrep, Cooke J, 16/2/2012); *D(HI) v Refugee Applications Commissioner* [2011] IEHC 33, (Unrep, Cooke J, 9/2/2011); *A(B) v Refugee Applications Commissioner* (Unrep, Cooke J,

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O'Malley Construction Company Ltd v Galway County Council

Development plan

Invalid zoning – Zoning quashed – Referral back – Directions to be given to decision maker – Costs – Undecided and unsuccessful issues – *Prima facie* entitlement to costs – Whether matter should be remitted back – Whether applicants entitled to costs on undecided or unsuccessful issues – Whether additional issues added to costs of litigation – Whether inability to decide certain issues fault of respondent – *Tristor Ltd v Minister for the Environment* [2010] IEHC 397, (Unrep, Clarke J, 11/11/2010); *Tristor Ltd v Minister for the Environment* [2010] IEHC 454, (Unrep, Clarke J, 10/12/2010); *Usk & District Residents Association Ltd v An Bord Pleanála* [2007] IEHC 86, (Unrep, Kelly J, 14/3/2007); *Veolia Water UK Plc v Fingal County Council* [2006] IEHC 240, [2007] 2 IR 81 considered – Planning and Development Act 2000 (No 30), ss 12 and 13 – Directions for referral given and costs with small deduction awarded to applicants (2011/56JR – Clarke J – 27/6/2012) [2012] IEHC 309
Christian v Dublin City Council

Local government

Development plan – Zoning –Duty to give reasons – Elected members – Powers – Material contravention of development plan – *Locus standi* – Class – Whether local authorities entitled to have planning policies – Whether elected members of local authorities could give reasons – Whether adequate reasons given for zoning decision – Whether lawfulness of zoning decision could be assessed in absence of reasons – Whether elected members of local authority could exclude, by way of zoning, power to permit development in material contravention of development plan – Whether party who was member of class of persons had *locus standi* to challenge measure alleged to be discriminatory against class – *Attorney General (McGarry) v Sligo County Council* [1991] 1 IR 99 applied; *Tristor Ltd v Minister forEnvironment*

[2010] IEHC 397, (Unrep, Clarke J, 11/11/2010) and *Mulholland v An Bord Pleanála (No 2)* [2005] IEHC 306, [2006] 1 IR 453 approved; *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701 and *Cahill v Sutton* [1980] IR 269 – Portions of development plan quashed (2011/56JR – Clarke J – 27/4/2012) [2012] IEHC 163
Christian v Dublin City Council

Permission

Defective permission – Environmental impact assessment – Discretionary powers – Manifest error – Whether permission defective – Whether potentially significant effects on environment – *Hereford Weight Watchers Ltd v Hereford Council* [2005] EWHC 191, (Unrep, QBD, 18/2/2005); *Sweetman v An Bord Pleanála* [2007] IEHC 153, [2008] 1 IR 277; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39; *SIAC Ltd v Mayo County Council* [2002] IESC 39, [2002] 3 IR 148 and *Commission v Ireland (Case C-215/06)* [2008] ECR I-04911 considered – Planning and Development Regulations 2001 (SI 600/2001), arts 94 and 111 – Directive 85/337/EEC – Directive 2011/92/EU – Challenge dismissed (2011/1079JR – Hogan J – 18/7/2012) [2012] IEHC 324
Keane v An Bord Pleanála

Planning permission

Conditions – Financial contributions – Dispute between developer and local authority – Referral to An Bord Pleanála – *Locus standi* – Substantial interest – Whether applicants disadvantaged by decision challenged – Whether respondent determined *quantum meruit* dispute between applicants and local authority – Whether decision of respondent on *quantum meruit* dispute *res judicata* – Whether substantial interest – Jurisdiction – Whether respondent limited by planning conditions referred – Whether tribunal with special expertise – Whether respondent acted outside jurisdiction – Whether respondent exceeded scope of referral – Whether traffic generation methodology appropriate and reasonable – Fair procedures – Whether traffic generation methodology notified to applicants prior to hearing – Whether respondent permitted local authority to double charge for infrastructure improvement – Whether respondent entitled to distinguish planning conditions applied to nearby development – Whether decision of respondent rational – Whether applicants seeking to launch collateral attack on planning conditions – *Boland v An Bord Pleanála* [1996] 3 IR 435 and *Belton v Carlow County Council* [1997] 1 IR 172 applied – *O'Connor v Dublin Corporation* (Unrep, O'Neill J, 3/10/2000) and *Frank Harrington Ltd v An Bord Pleanála* [2010] IEHC 428 (Unrep, Hedigan J, 23/11/2010) followed – Planning and Development Act 2000 (No 30), ss 34(5) & 50A(3) – Leave refused (2010/1250JR – Hedigan J – 30/3/2012) [2012] IEHC 146
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PRACTICE AND PROCEDURE

Abuse of process

Planning law – Judicial review – Judicial review of decision of An Bord Pleanála – Grounds not raised in prior judicial review – Whether applicant precluded from relying on grounds not previously raised – Whether special circumstances relieving applicant of requirement to have raised grounds in first judicial review proceedings – Whether prohibition on raising grounds contrary to European Union law – Whether prohibition on raising grounds contrary to European Convention on Human Rights 1950 – Whether reference to European Court of Justice appropriate – *Henderson v Henderson* (1843) 3 Hare 100 and *AA v Medical Council* [2003] 4 IR 302 applied – Treaty on the Functioning of the European Union, Article 267 – European Convention on Human Rights 1950, article 6 – Applicant's appeal dismissed (161/2008 – SC – 21/7/2011) [2011] IESC 29
Arklow Holidays Ltd v An Bord Pleanála

Contempt

Leave to attach and commit – Journalists and newspapers – Freedom of speech – Freedom of press – Right of party to fair hearing – Whether newspaper articles misrepresented events – Whether articles created prejudice to administration of justice – *Wong v Minister for Justice* [1994] 1 IR 223 and *Attorney General v Times Newspapers* [1974] AC 273 considered – Motion dismissed (2007/52CA – Hedigan J – 30/3/2012) [2012] IEHC 145
Kelly v National University of Ireland

Costs

Apportion costs – Liability for costs – Plaintiff successful overall but not on all issues – Length of trial increased by additional issues – Additional claim pursued until first day of trial – Large sum claimed – Whether pursuit of abandoned claim until opening of case affected overall costs of litigation to a material extent – Whether significant extra expenditure incurred by defendants in meeting abandoned claim and defending issues where plaintiff was unsuccessful – *Veolia Water plc v Fingal County Council (No 2)* [2006] IEHC 240, [2007] 2 IR 81 followed – Plaintiff awarded costs minus one day and defendant awarded costs of preparing to defend abandoned claim (2009/3969P – Laffoy J – 27/1/2012) [2012] IEHC 40
Bates v Minister for Agriculture, Fisheries and Food

Costs

Claim amended – Nature of claim – Equitable easement – Relief obtained similar in nature to offer made prior to commencement of proceedings – Whether unjust to defendant to grant plaintiff entire costs – Rules of the Superior Courts 1986 (SI 15/1986), O 99 – Plaintiff granted half of costs, defendant granted costs of unsuccessful application for interlocutory injunctions, to be set off against each other (2011/409P – Peart J – 22/11/2011) [2011] IEHC 434
Board of Managament of All Saints Church of Ireland National School v Courts Service

Costs

Follow event – Plaintiff succeeding in one element of its claim – Successful claim within jurisdiction of Circuit Court – Plaintiff seeking Circuit Court costs – Whether plaintiff entitled to costs – Whether second defendant entitled to differential costs order for unsuccessful elements of plaintiff's claim – *O'Connor v Bus Átha Cliath* [2003] 4 IR 459 considered – Courts Act 1981 (No 11), s 17 – Courts Act 1991 (No 20), s 14 – Plaintiff awarded Circuit Court costs (2006/5683P – Laffoy J – 16/11/2011) [2011] IEHC 423
Hollybrook (Brighton Road) Management Co Ltd v All First Property Management Co Ltd

Costs

Taxation – Review – Taxing master – Obligations – Instruction fees – Inspection of file – Error in principle – Burden of proof – Work actually done – Time estimates – Comparator cases – Natural justice – Irrelevant considerations – Whether costs proper and reasonable – Whether figure excessive – Whether error in principle – Whether taxing master departed from established jurisprudence – Whether full and proper assessment of nature and extent of work carried out – Whether regard to comparator cases or defendants' submissions – Whether costs necessary or proper for attainment of justice – Whether family background relevant consideration – *Dunne v Fox* [1999] 1 IR 283; *Minister for Finance v Goodman* [1999] 3 IR 333; *Superquinn v Bray UDC (No 2)* [2001] 1 IR 459; *Mahony v KCR Heating Supplies* [2007] IEHC 61, [2007] 3 IR 633 and *Attorney General (McGarry) v Sligo County Council* [1991] 1 IR 88 followed – *Cafolla v Kilkenny* [2010] IEHC 24, (Unrep, Ryan J, 5/2/2010); *D(C) v Minister for Health and Children* [2008] IEHC 299, (Unrep, Herbert J, 23/7/2008) and *Minister for Finance v Taxing Master Flynn* (Unrep, Herbert J, 31/7/2003) considered – Courts and Court Officers Act 1995 (No 31),

s 27(3) – Rules of the Superior Courts 1986 (SI 15/1986), O 99, rr 10(2), 27 and 38(3) – Matter remitted to new Taxing Master (1995/7751P – Kearns P – 17/2/2012) [2012] IEHC 30
Bourbon v Ward

Costs

Taxation – Taxing master – Review of taxation – Test to be applied – Environmental and planning law – Whether principles of Aarhus Convention should have been taken into account by taxing master – Whether taxing master should have departed from usual rules of taxation of costs – Whether Aarhus Convention applicable to proceedings in which costs orders made – Whether proceedings in which costs orders made related to the environment – Whether taxing master in error – Whether injustice –Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 2 – Court and Court Officers Act 1995 (No 31), s 27 – Directive 85/337/EC, art 10a – Directive 2003/35/EC, art 3 – Application refused (2—9/6638P – Ryan J – 24/2/2012) [2012] IEHC 77
Kenny v Trinity College Dublin

Disclosure

Confidential information – Telecommunications – Statutory regulation – Emergency call answering system – Charges – Decision of regulator to determine amount charged to operators – Judicial review – European Union law – Standard of review – Whether disclosure sought relevant – Whether wider standard of review applicable under European Union law – Whether legitimate public interest in maintenance of confidentiality – Whether proportionality between breadth of discovery sought and likelihood of disclosure having meaningful bearing on proceedings – Whether disclosure sought necessary for proper resolution of proceedings – Whether appropriate for court to defer decision on disclosure where not clear whether disclosure necessary at time of application – Whether possible for court to determine standard of review in interlocutory disclosure application – Whether modular trial appropriate – Whether issue of disclosure should be left over until later stage of modular trial – *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39, *Independent Newspapers (Ireland) Ltd v Murphy* [2006] IEHC 276, [2006] 3 IR 566, *National Irish Bank v Radió Teilifís Éireann* [1998] 2 IR 465, *Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Ltd* [2010] IEHC 19 (Unrep, Clarke J, 26/1/2010) and *Uniplex (UK) v NHS Business Services Authority (Case C-406/08)* [2010] ECR I-00817 considered – Directive 2002/21/EC, art 4(1) – Application adjourned, modular trial ordered (2011/225JR – Clarke J – 30/6/2011) [2011] IEHC 265
Telefonica O2 Ireland Ltd v Commission for Communications Regulation

Leave to appeal

Immigration – Deportation – Judicial review – Refusal of leave to apply – Point of law of exceptional public importance – Public interest in appeal – Whether law stood in state of uncertainty – Whether public interest in appeal – Whether point intended to be raised in appeal could be raised in appeal for which leave not required – Whether official working on subsidiary protection file would be biased by having worked on deportation file – *OO v Minister for Justice* [2011] IEHC 175 (Unrep, Cooke J, 4/5/2011) followed – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 4(5) – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(3) – Leave to appeal refused (2011/129JR – Cooke J – 28/2/2012) [2012] IEHC 86
D(N) v Minister for Justice and Equality (No 2)

Leave to appeal

Judicial review – Immigration – Asylum – Refusal to readmit applicant to asylum process – Refusal of leave to seek judicial review – Point of law of exceptional public important – Public interest in appeal – Jurisdiction – Test to be applied – Whether point of law of exceptional public important – Whether jurisdiction should be applied sparingly – Whether law in state of uncertainty – Whether where leave to apply for judicial review refused same material could constitute point of law of exceptional public important – Whether point of law arose of out of decision of High Court – Whether requirements cumulative – Whether point of law transcended facts of case – Whether affirmative public benefit from appeal likely to resolve other cases – Whether applicant delayed in seeking leave to appeal – European Union law – Preliminary reference to European Court of Justice – Charter of Fundamental Rights – Whether respondent under duty to consider best interests of child in considering application to readmit to asylum process – Whether court one against whose decision there was no judicial remedy under national law – Whether reference necessary to enable court to give judgment – Whether discretion to make reference should be exercised – *Acte clair* doctrine – Whether opinion of European Court of Justice would have utility in case – Whether case pending – Whether respondent aware that interests under consideration were those of a child – Whether respondent applied correct test – Whether question of European Union law raised prior to refusal of leave – *Glancré Teoranta v An Bord Pleanála* [2006] IEHC 250 (Unrep, MacMenamin J, 13/7/2006), *IR v Minister for Justice* [2009] IEHC 510 (Unrep, Cooke J, 26/11/2009), *FKS v Refugee Appeals Tribunal* [2010] IEHC 136 (Unrep, Cooke J, 26/3/2010), *Lancefort Ltd v An Bord Pleanála* [1998]2 IR 511, *Kelly v National University of Ireland* [2008] IEHC 464 (Unrep, McKechnie J, 14/3/2008) followed – *McNamara v An Bord Pleanála* [1998] 3 IR 453 applied – *EMS v Minister for Justice* [2004] IEHC 398 (Unrep, Clarke J, 21/12/2004) considered – Application refused (2010/1102JR – Smyth J – 27/7/2011) [2011] IEHC 323
A(M) v Minister for Justice, Equality and Law Reform

Motion

Particulars – Discovery – Guarantee – Guarantee denied – Counterclaim for declaration of mutual mistake – Request for particulars – Discovery of documentation regarding possible retention of solicitor in relation to entering into guarantee – Motions to compel particulars and make discovery – Rules of the Superior Courts 1986 (SI 15/1986), O 19, r 7 – Orders made (2009/2280S – Murphy J – 17/11/2011) [2011] IEHC 426
Danske Bank A/S v Rockridge Developments Ltd

Particulars

Further and better particulars – Whether issues adequately defined – Whether necessary particulars contained in defence – Whether further particulars reasonably required by plaintiff – *Quinn Insurance Ltd v Tribune Newspapers plc* [2009] IEHC 229, (Unrep, Dunne J, 13/5/2009) followed – Motion refused (2010/6827P – Ryan J – 30/3/2012) [2012] IEHC 132
Griffin v Sunday Newspapers Ltd

Pleadings

Statement of claim – Particulars – Court allowing plaintiffs to deliver re-amended statement of claim – Court ordering that re-amended statement of claim be pleaded so as to make request for further particulars unnecessary – Whether re-amended statement of claim in compliance with order – Statement of claim struck out (2010/11862P – Clarke J – 9/11/2011) [2011] IEHC 504
IBB Internet Services Ltd v Motorola Ltd

Security for costs

Competition law – Unlimited company – Incorporated in state – Purposive approach – Corporate veil – Right of access to courts to vindicate and defend legal rights – Whether jurisdiction to order security for costs – Whether inherent jurisdiction – Whether s 390 applied to unlimited company using purposive approach – Whether s 390 ambiguous or unclear – Whether O 29 applied to company ordinarily resident within jurisdiction – Whether defence to claim – Whether inability to pay caused by wrongdoing of plaintiffs – Whether special circumstances – *Usk District Residents Association v EPA* [2006] 1 ILRM 363; *Carlisle Trust Ltd v Dublin Corporation* [1965] IR 465; *Power Supermarkets Ltd v Crumlin Investments Ltd* (Unrep, Costello J, 22/6/1981); *Re Bray Travel Ltd* (Unrep, SC, 13/7/1981); *Poroetta v Neil* [1996] 1 IR 100; *Pitt v Bolger* [1996] 2 ILRM 68; *Harlequin Property (SVG) Ltd v O'Halloran* [2012] IEHC 13, (Unrep, Clarke J, 19/1/2012); *Stad v Williams* 5 CB 528; *Kenealy v Keane* [1901] 2 IR 640; *Cook v Whellock* (1890) 24 QBD 658; *Cowell v Taylor* [1885] 31 Ch D 34; *Sykes v Sykes* (1869) LR 4 CP 645; *AG (Cahill) v Allman* [1906] 1 IR 473; *Greener v E Kahn* (1906) KB 374; *Blair v Crawford* [1907] 41 ILTR 5; *Semler v Murphy* [1967] 1 Ch 183; *George Bell Ltd v Nethercott* [1988] NI 299; *Fallon v An Bord Pleanála* [1992] 2 IR 380; *McAuley v Minister for Posts and Telegraphs* [1966] IR 345; *Re Illegitimate Children (Affiliation Orders) Act 1930*; *Dome Telecom Telecom Ltd v Eircom* [2007] IEHC 59, [2008] 2 IR 726; *Barry v Buckley* [1981] IR 306; *Kenny v An Bord Pleanála* [2010] IEHC 321, (Unrep, HC, Cooke J, 23/7/2010) and *Collins v Doyle* [1982] ILRM 495 considered – Competition Act 2002 (No 14), ss 4 and 5 – Companies Act 1963 (No 33), ss 2, 5, 20 and 390 – Companies (Amendment) Act 1983 (No 13), ss 52 and 53 – Courts Act 1971 (No 36) – Common Law Procedure Amendment (Ireland) Act 1853 (16 & 17 Vict), s 52 – Supreme Court of Judicature Act (Ireland) 1877 (40 & 41 Vict) – Courts of Judicature Act 1924 (No 10), s 36 – Rules of the Superior Courts 1986 (SI 15/1986), O 29 – Rules of the Supreme Court (Ireland) 1891 – Supreme Court (Ireland) Rules 1905 – Treaty on the Functioning of the European Union, arts 101 and 102 – Constitution of Ireland 1937, Art 40.3 – Limited security granted (2010/10685P – Cooke J – 21/3/2012) [2012] IEHC 116
Goode Concrete v CRH plc

Statutory interpretation

Recapitalisation of credit institution – Direction of High Court – Set aside – Application to dismiss or strike out certain applicants – *Locus standi* – Meaning of "member of relevant institution" – Owners of beneficial interest in shares – Whether "member" defined in relevant legislation – Whether meaning specific and well understood – Whether definition in Companies Acts applicable – Whether meaning within Companies Acts consistent with relevant legislation – Whether legislation *sui generis* – Whether plain meaning rule applicable – Whether

court should examine context of legislation as a whole – Whether obvious or one meaning – Whether literal approach applicable – Whether court should derive intention of Oireachtas – Whether "member" should be assigned technical or legal meaning – Whether Companies Acts *in pari material* – Whether purposive interpretation applicable – Whether strict time limit necessitate broad definition of "member" – Whether purpose and intend of providing statutory basis to set aside direction was to allow person or entity whose property rights affected to seek review – Whether beneficial owners of shares had *locus standi* – Whether broad interpretation would lead to uncertainty – *Crilly v T & J Farrington Ltd* [2001] 3 IR 251 and *Adam v Minister for Justice* [2001] 2 IR 53 considered – *Monahan v Legal Aid Board* [2008] IEHC 300, [2009] 3 IR 458 followed – *Howard v Commissioners of Public Works* [1994] 1 IR 101 and *The State (Sheehan) v The Government of Ireland* [1987] IR 550 applied – *In re Via Net Works (Ireland) Ltd* [2002] 2 IR 47 distinguished – Companies Act 1963 (No 33), ss 31 and 205 – Interpretation Act 2005 (No 23), s 5 – Credit Institutions (Stabilisation) Act 2010 (No 36) – Application to dismiss or strike out applicants refused (2011/239MCA – Feeney J – 2/3/2012) [2012] IEHC 89
In re Irish Life and Permanent Group Holdings plc; Dowling v Minister for Finance

Strike out

Abuse of process – *Res judicata* – Succession law – Decision of High Court on appeal from Circuit Court – Whether principle of *res* judicata applicable – Whether previous decision of High Court binding – Whether evidence of fraud – Whether unchallenged wills duly probated – Whether purchase by plaintiff of reversionary interest in property resulted in trust for beneficiaries of estate – Whether plaintiff had acquired property by adverse possession – Whether proceedings stature barred – Whether 6 or 12 year time limit applicable – Whether proceedings were abuse of process – Bias – Whether judge should accede to application to recuse – Isaac Wunder order – Jurisdiction – Whether making of Isaac Wunder order appropriate – Whether repeat litigation – Whether litigation resulted in frustration of orderly distribution of estate – *Eamonn Andrews Productions Ltd v Gaiety Theatre Enterprises Ltd* [1973] IR 295, *LP v MP (Appeal)* [2002] 1 IR 219, *Charalambous v Nagle* [2011] IESC 11 (Unrep, SC, 31/3/2011), *Gabbett v Lawder* (1881) 11 LR Ir 295, *Gleeson v Feehan* [1993] 2 IR 113, *Riordan v Ireland (No 4)* [2001] 3 IR 365 applied – *Drohan v Drohan* [1984] IR 311 and *Burke v Judge Fulham* [2010] IEHC 448 (Unrep, Irvine J, 23/11/2010) approved – Courts of Justice Act 1936 (No 48), s 39 – Statute of Limitations 1957 (No 6), ss 13 and 45 – Proceedings struck out, Isaac Wunder order granted (2012/10220P – Hogan J – 28/2/2012) [2012] IEHC 88
Gunning v Sherry

Strike out

Disclosure of cause of action – Frivolous or vexatious claim – Settlement of previous proceedings – Whether proceedings were an attempt to re-litigate settled proceedings – Loan – Purchase of property – Charge – Whether proceedings disclosed a cause of action – Whether proceedings frivolous or vexatious – Whether proceedings bound to fail – Whether agreement between parties void – Whether settlement void – Whether settlement of previous proceedings constituted implicit acknowledgement that charge valid – Whether plaintiff precluded from re-opening issue of validity of charge – Whether allegations of fraud substantiated – *Charalambous v Nagle* [2011] IESC 11 (Unrep, SC, 31/3/2011) considered – Proceedings declared bound to fail (2011/6428P – Laffoy J – 27/2/2012) [2012] IEHC 87
Malone v Allison

Strike out

Failure to disclose cause of action – Frivolous claim – Vexatious claim – Abuse of process – Jurisdiction – Whether pleadings disclosed cause of action – Whether proceedings frivolous or vexatious – Whether jurisdiction under rules limited to consideration of pleadings – Whether inherent jurisdiction extended beyond pleadings – Statutory body – Garda Síochána Complaints Board – Plenary proceedings – Immunity from suit – Whether liability in negligence attached to statutory body – Whether statutory body acting in exercise of its function immune from suit – Whether immunity from suit attached in case of malice – Pleadings – Whether sufficient for pleadings to merely describe behaviour as being in *mala fides* – Whether abuse of process to attempt to relocate burden of proof to defendant by describing behaviour as being in *mala fides* – Whether factual basis for claims – Whether pleadings disclosed cause of action – Whether any facts pleaded which could establish malicious motive – *Barry v Buckley* [1981] IR 306 followed – *Beatty v Rent Tribunal* [2005] IESC 66, [2006] 2 IR 191 applied – *Sirros v Moore* [1975] QB 118 approved – Rules of the Superior Court 1986 (SI 15/1986), O19, r28 – Application granted, claim struck out as against third defendant (2010/4993P – Ryan J – 10/10/2011) [2011] IEHC 377
Bennett v Egan

Summary judgment

Real or *bona fide* defence – Arguable defence – Reasonable prospect of success – Power to amend summons – Defect in summons – Ambiguity – Whether defence had reasonable prospect of success – Whether very clear that defendants had no defence – Whether issues of fact required to be explored – Whether no issues or issues easily determined – Whether risk of injustice – Whether power to amend summons – Whether defect in summons – Whether ambiguity – Whether appropriate to allow amendment– *Dublin Docklands Development Authority v Jermyn Street Ltd* [2010] IEHC 217, (Unrep, Clarke J, 1/6/2010) and *Kiely v Massey* (1880) 6 LR Ir 445 followed – *Danske Bank v Durkan New Homes Ltd* [2010] IESC 22, (Unrep, SC, 22/4/2010); *Bank of Ireland v Educational Building Society* [1999] 1 IR 220; *Aer Rianta cpt v Ryanair Ltd* [2001] 4 IR 607; *McGrath v O'Driscoll* [2006] IEHC 195, [2007]1 ILRM 203; *Stokes v Kerwick* [1921] 56 ILTR 24; *Gold Ores Reduction Company Ltd v Parr* [1892] 2 QB 14; *Caulfield v Bolger* [1927] 1 IR 117considered – Rules of the Superior Courts 1986 (SI 15/1986), O 37, r 7 – Judgment granted (2011/3257S – Charleton J – 23/2/2012) [2012] IEHC 35
Bank of Scotland v Sholvin

Cause of action

Slander – Whether publication of alleged defamation – Whether proceedings statute barred – Whether special damage pleaded – Whether pleadings disclosing cause of action – Statute of Limitations 1957 (No 6), s 11 – Proceedings dismissed (2011/186CA – Hedigan J – 5/3/2012) [2012] IEHC 111
Moram v Bell

Costs

Mootness – Appeal – Judicial review – Application to prohibit criminal trial – Nolle prosequi entered – Judicial review proceedings rendered moot – Whether proceedings rendered moot by unilateral act of second respondent – Whether applicant entitled to costs of judicial review proceedings – *Telefonica O2 Ireland Ltd v Commission for Communications Regulation* [2011] IEHC 380, (Unrep, Clarke J, 11/10/2011) approved – Costs of hearing and appeal granted (233/2007 – SC – 21/6/2012) [2012] IESC 39
Cunningham v President of the Circuit Court

Costs

Order – Discretion – Interim and interlocutory relief – Application to appoint receiver and manager – Whether costs should follow event – Whether possible to justly adjudicate upon costs of application – *Veolia Water UK Plc v Fingal County Council (No 2)* [2006] IEHC 240, [2007] 2 IR 81 and *Allied Irish Banks Plc v Diamond* [2011] IEHC 505, (Unrep, Clarke J, 7/11/2011) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 1(4A) – Costs awarded to plaintiff with stay of execution on order until outcome of substantive proceedings (2011/8823P – Laffoy J – 8/10/2012) [2012] IEHC 403
Haughey v Synnott

Costs

Solicitors – Complex litigation – Settlement – Statutory entitlement of solicitor to charge property recovered or preserved – Whether solicitors employed to prosecute suit in court – Whether wording of section mandatory – Whether order could be made where money recovered or preserved by reason of compromise – Whether property recovered through instrumentality of solicitors – Whether order would give solicitor priority over other creditors – Equity – Whether countervailing considerations of equitable nature which made making of order inequitable – Whether court should take into account fact that solicitor was beneficial owner of plaintiff – Whether inequitable to allow claim for full costs – Whether reality to prospect of recovery of all solicitor client costs – Whether court should take account of indebtedness of solicitors to party who appointed received to plaintiffs – Whether court should distinguish between solicitors as equity partners in firm and as debtors – Whether appropriate for court to consider debt between parties – Delay – Whether solicitors delayed in seeking order – Whether prospect of recovery of property at time of judgment – Whether culpable delay – Whether making of order sought would be in vain – Whether recovery of costs should be proportionate to reduced settlement – Whether court set formula for recovery of proportionate costs – *Mount Kennett Investment Co v O'Meara* [2007] IEHC 420, (Unrep, Smyth J, 21/11/2007), *Mount Kennett Investment Co v O'Meara* [2010] IEHC 216 (Unrep, Clarke J, 1/6/2010) and *Mount Kennett Investment Co v O'Meara* [2011] IEHC 210 (Unrep, Clarke J, 9/3/2011) considered – *Roche v Roche* (1892) 29 LR Ir 339, *M'Larnon v Carrickfergus UDC* [1904] 2 IR 44, *Cole v Eley* [1894] 2 QB 350, *Hamer v Giles* (1897) 11 Ch D 942 approved – Legal Practitioners (Ireland) Act 1876, s 3 – National Asset Management Agency Act 2009 (No 34), s 149 – Orders granted (2005/1657P – Clarke J – 29/3/2012) [2012] IEHC 167
Mount Kennett Investment Co v O'Meara

Costs

Winding up – Liability for costs – Whether company bore any liability for costs – Whether petitioner should have mitigated costs – Whether costs should follow event – Whether petitioner materially added to costs of proceedings – Whether late amendment to proceedings increased costs – *ACC Bank Plc v Johnston* [2011] IEHC 500, (Unrep, Clarke J, 24/10/2011); *Veolia Water UK Plc v Fingal County Council (No 2)* [2006] IEHC 240, [2007] 2 IR 81; *Mennolly Homes Ltd v Appeal Commissions* [2010] IEHC 56, (Unrep, Charleton J, 9/3/2010); *Kavanagh v Ireland* [2007] IEHC 389, (Unrep, Smyth J, 21/1/2007) and *McAleenan v AIG (Europe) Ltd* [2010] IEHC 279, (Unrep, Finlay Geoghegan J, 16/7/2010); *Roache v Newsgroup Newspapers Ltd* (1992) CAT 1120 considered – Companies Act 1963 (No 33), s 205 – Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 1 – Costs awarded to petitioner (2008/402COS – Laffoy J – 31/7/2012) [2012] IEHC 305
Re Charles Kelly Ltd

Discovery

Procurement – Related company – Proportionality – Meaning of "possession", "power", "custody" and "procurement" – Statutory interpretation – Whether defendant had documents in its procurement – Whether entitled to documents from related company – Whether power to make order sought – Whether proportionate – Whether relevant and necessary – Whether within power of High Court – Whether burdensome or oppressive – *Hansfield Development Ltd v Irish Asphalt* [2009] IESC 4, (Unrep, SC, 23/1/2009); *Compagnie Financiere du Pacifique v Peruvian Guano Company* [1882] 11 QBD 55; *Brooks Thomas Ltd v Impac Ltd* [1999] ILRM 171; *Ryanair Plc v Aer Rianta* [2003] 4 IR 264; *Taylor v Anderton* [1995] 1 WLR 447; *JC Savage Supermarket Ltd v An Bord Pleanála* [2011] IEHC 488, (Unrep, Charleton J, 22/11/2011); *Iarnród Eireann v Hallbrooke* [2001] 1 IR 237; *Cork County Council v Whillock* [1993] 1 IR 231; *Northern Bank Finance Corporation Ltd v Charlton* (Unrep, Finlay P, 26/5/1977); *Yates v Ciba Geigy Agro Ltd* (Unrep, HC, Barron J, 29/4/1986); *B v B* [1979] 1 All ER 801; *Rafidain Bank v Agom Universal Sugar Trading Co Ltd* [1987] 1 WLR 1606; *Johnson v Church of Scientology* [2001] 1 IR 682; *Bula Ltd (in receivership) v Tara Mines Ltd* [1994] 1 ILRM 111; *Inspector of Taxes v Kiernan* [1981] IR 117; *Health Service Executive v Brookshore Ltd* [2010] IEHC 165; *Framus Ltd v CRH Plc* [2004] IESC 25, [2004] 2 IR 20; *Brooks Thomas Ltd v Impac Ltd* [1999] 1 ILRM 171; *Irish Nationwide Building Society v Charlton* (Unrep, SC, 5/3/1997); *Swords v Western Proteins Ltd* [2001] 1 IR 324 and *Murphy v J Donohue Ltd* [1996] 1 IR 123 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 31 – Rules of the Superior Courts (Discovery) 2009 (SI 93/2009) – Discovery ordered (2008/10983P – Charleton J – 27/7/2012) [2012] IEHC 298
Thema International Fund Plc v HSBC Institutional Trust Services (Ireland) Ltd

Dismissal of action

Action to set aside transfer of land – Validity of deed of transfer – Undue influence – Limitation of action – *Locus standi* – Inordinate and inexcusable delay in instituting, prosecuting and maintaining claim – Inherent jurisdiction to dismiss – Motion to amend statement of claim – Whether claim bound to fail – Whether pleadings failed to disclose reasonable cause of action – Whether abuse of process – Whether *locus standi* – Whether inordinate and inexcusable delay – *McGlynn v Gallagher* [2007] IEHC 329, (Unrep, Edwards J, 8/10/2007); *Barry v Buckley* [1981] IR 306; *McMahon v WJ Law & Co Ltd* [2007] IEHC 51, (Unrep, MacMenamin J, 2/3/2007); *Fay v Tegral Pipes Ltd* [2005] IESC 34, [2005] 2 IR 261; *Carroll v Carroll* [1999] 4 IR 241; *Prendergast v McLaughlin* [2009] IEHC 250, [2011] 1 IR 102; *Sun Fat Chan v Osseous* [1992] 1 IR 425 and *Monaghan v Greensmyth* [1977] IR 55 considered – Succession Act 1965 (No 27), ss 10, 45, 48, 117 and 121 – Supreme Court of Judicature (Ireland) Act 1877 (40 & 41 Vict, c 57) – Civil Liability Act 1961 (No 41), s 9(2) – Rules of the Superior Courts 1986 (SI 15/1986), O 19, rr 27 and 28 and O 122, r 7 – Action dismissed (2004/2719P – Murphy J – 10/2/2012) [2012] IEHC 75
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Dismissal of proceedings

Delay – Want of prosecution – Renewal of summons – Medical negligence – Interests of justice – Balance of justice– Whether inordinate or inexcusable delay – Whether good grounds for renewing summons – *Chambers v Kenific* [2005] IEHC 402, [2007] 3 IR 526; *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459; *Desmond v MGN* [2008] IESC 56, [2009] 1 IR 737 [2004] IESC 98; *Gilroy v Flynn* [2004] IESC 98, [2005] 1 ILRM 290; *Stephens v Paul Flynn Ltd* [2005] IEHC 148, (Unrep, Clarke J, 28/4/2005); *Baulk v Irish National Insurance Company* [1969] IR 66; *McCooey v Minister for Finance* [1971] IR 159, *O'Brien v Fahy* (Unrep, SC, 21/3/1997); *Rainsford v Limerick Corporation* [1995] 2 ILRM 561 and *Cunningham v Neary* [2004] IESC 43, [2004] ILRM 498 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 8 – Reliefs refused (2008/7434P – Birmingham J – 10/7/2012) [2012] IEHC 274
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Dismissal of action

Inordinate delay – Prejudice – Claim for damages for personal injuries – Alleged assault and sexual assault in institutions – Complaint after 42 years – Balance of justice – Want of prosecution – Inherent jurisdiction – Fairness – Whether inordinate delay – Whether inordinate and inexcusable delay – Whether defendant contributed to delay – Whether delay unjust in circumstances – Whether prejudice – Whether real and serious risk of unfair trial – Whether clear and patent unfairness to defendant– Whether claim should be dismissed in interests of justice – *Domhnaill v Merrick* [1984] IR 151; *Toal v Dignan (No 1)* [1991] ILRM 135; *Toal v Dignan (No 2)* [1991] ILRM 140; *Primor v Stokes Kennedy Crowley* [1996] 2 IR 459; *R(J) v Minister for Justice, Equality and Law Reform* [2007] IESC 7, [2007] 2 IR 748; *Gilroy v Flynn* [2004] IESC 98, [2005] 1 ILRM 290; *McBrearty v North Western Health Board* [2010] IESC 27, (Unrep, SC, 10/5/2010); *Rainsford v Corporation of Limerick* [1984] IR 151; *Manning v Benson & Hedges Ltd* [2004] IEHC 316, [2004] 3 IR 556; *K(P) v Deignan* [2008] IEHC 407, [2009] 4 IR 39; *Kelly v O'Leary* [2001] 2 IR 526; *McH(J) v M(J)* [2004] IEHC 112, [2004] 3 IR 385; *O'S v O'S* [2009] IEHC 161, (Unrep, Dunne J, 2/4/2009); *W(M) v W(S)* [2011] IEHC 201, (Unrep, Kearns P, 6/5/2011); *W(F) v W(J)* [2009] IEHC 542, (Unrep, Charleton J, 18/12/2009); *Hayes v McDonnell* [2011] IEHC 530, (Unrep, Hanna J, 15/12/2011); *Killeen v Thornton Waste Disposal Ltd* [2009] IEHC 131, [2010] 3 IR 457 considered – Statute of Limitations (Amendment) Act 2000 (No 13), s 3 – Claim dismissed (2007/309P – McDermott J – 17/8/2012) [2012] IEHC 383
C(J) v D(S)

Dismissal of proceedings

Solicitor's undertakings – Plaintiff alleging negligence and breach of duty by directors of credit union – Professional conduct – Whether undertakings binding the plaintiff – Whether plaintiff aware of undertakings – Whether defendants owing duty of care to plaintiff – Whether proceedings bound to fail – Whether abuse of process – *Shangan Construction Ltd v TP Robinson & Co* (Unrep,HC, 10/7/1990); *United Bank of Kuwait Ltd v Hammoud* [1988] 1 WLR 1051 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 19, r 28 – Proceedings dismissed (2011/3035P – Murphy J – 8/3/2012) [2012] IEHC 112
Coleman v O'Neill

Ex-parte notice

Re-enter proceedings – Child abduction – Disclosure – Material fact – Set aside – Test to be applied – Whether fact that summons had been served constituted material fact – Whether failure to disclose fact that summons had been served – Whether consequences of failure to disclose automatic – Whether applicant culpable for failure to disclose – Whether deliberate misleading or innocent mistake – Whether overall circumstances of case required re-entry to be set aside – Whether non-disclosure of material fact contributed to by error in court order – Whether objective intention of order granting liberty to re-enter to permit re-entry if children located within jurisdiction – Whether respondent should have been put on notice of application for re-entry – *Tate Access Floors Inc v Boswell* [1991] 1 Ch 512 and *Lloyds Bowmaker Ltd v Britannia Arrow Holdings Ltd* [1988] 1 WLR 1337 approved – *Bambrick v Cobley* [2005] IEHC 43 (Unrep, Clarke J, 25/2/2005) followed – Child Abduction and Enforcement of Custody Orders Act 1991 (No 6), ss 36 & 37 – Regulation 2201/2003/EC – Hague Convention on the Civil Aspects of International Child Abduction 1980 – Application to set aside re-entry refused (2010/39HLC – Finlay Geoghegan J – 25/4/2012) [2012] IEHC 171
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Building defect – Date of contract for sale – Facts – Evidence – Whether facts in preliminary issue required to be either agreed facts or facts as pleaded – Whether court could admit affidavit evidence of date of contract for sale – Whether court would require factual evidence to determine date of contract for sale – Whether facts giving rise to point of law in dispute between parties – *Byrne v Hall Pain & Foster* [1999] 1 WLR 1849 considered; *McCabe v Ireland* [1999] 4 IR 151 followed; *Nyembo v Refugee Appeals Tribunal* [2007] IESC 25, [2008] 1 ILRM 289 applied – Rules of the Superior Courts (SI 15/1986), O 25, r1 – Preliminary issue determined in favour of plaintiff (2006/1352P – Peart J – 30/3/2012) [2012] IEHC 164
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Negligence – Economic loss – Accrual of action – Claim that induced to enter unsuitable financial transaction – Whether claim in tort statute barred – Whether actual loss suffered at time of entry into transaction or at later date – Whether immediate loss even though difficulties with quantification and other uncertainties and contingencies – *Hegarty v O'Loughran* [1990] 1 IR 148, *Darby v Shanley* [2009] IEHC 459, (Unrep,

Irvine J, 16/10/2009), *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 and *Read v Brown* (1888) 22 QBD 128 considered – Statute of Limitation 1957 (No 6), s 11(2)(a) – Statute of Limitations (Amendment) Act 1991 (No 18), s 3(2) – Defendant's appeal allowed (433/2011 – SC – 7/6/2012) [2012] IESC 35
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Joinder – Application to join co-defendant – Test to be applied – Standard of proof – Discretion – Whether possible to join party against whom claim potentially statute barred – Stage of proceedings at which question should be determined – *O'Reilly v Granville* [1971] IR 90 and *Ó Domhnaill v Merrick* [1984] IR 151 considered; *Allied Irish Coal Supplies Ltd v. Powell Duffryn International Fuels Ltd* [1998] 2 IR 519 distinguished; *Hynes v Western Health Board* [2006] IEHC 55, (Unrep, Clarke J, 8/3/2006) approved – Statute of Limitations 1957 (No 6) – Rules of the Superior Courts 1986 (SI 15/1986), O 15, rr 4, 5, 7, 13 and 14 – Plaintiff's appeal allowed (226/2011 – SC – 12/6/2012) [2012] IESC 36
O'Connell v Building and Allied Trades Union

Pleadings

Ament – New cause of action – Defeat Statute – Road traffic accident – Defendant deceased – Claim that plaintiff committed suicide as result of road traffic accident – Whether plaintiff's estate entitled to pursue claim that death came about as result of injuries sustained – Whether plaintiff's estate could claim damages for loss of earnings due to "lost years" – Limitation of actions – Fatal injuries claim by family of deceased plaintiff – Whether new and separate fatal injuries claim would be statute barred – Whether amendment of pleadings would prevent defendant relying on defence that proceedings statute barred – Whether court could permit amendment of pleadings to allow claim which would otherwise be statute barred – Jurisdiction – Test to be applied – Whether just to allow amendment – Whether amendment necessary for determining real questions in controversy between parties – Whether plaintiff seeking to rely on same or substantially same facts as originally pleaded – Whether amendment altered nature or essence of claim – Whether injuries necessarily required updating in personal injuries proceedings – Whether applying absolute bar on new causes of action would result in injustice – Whether just and fair to permit amendments – *Croke v Waterford Crystal Ltd* [2004] IESC 97, [2005] 2 IR 383, *Allen v Irish Holemasters Ltd* [2007] IESC 33 (Unrep, SC, 27/7/2007) and *Smyth v Tunney* [2009] IESC 5, [2009] 3 IR 322 applied – *Krops v The Irish Forestry Board Ltd* [1995] 2 IR 113 followed – *Doherty v Bowaters Irish Wallboard Mills Ltd* [1968] IR 277, *Gammell v Wilson* [1982] AC 27 and *Weldon v Neal* (1887) 19 QBD 394 considered – *Farrell v Coffey* [2009] IEHC 537 (Unrep, Dunne J, 1/12/2009) distinguished – Rules of the Superior Courts 1986 (SI 15/1986), O28, r1 – Civil Liability Act 1961 (No 41), ss 7, 8 & 9, parts II & IV – Leave to amend granted (2007/4853P – Feeney J – 23/1/2012) [2012] IEHC
Carberry v McKenna

Security for costs

Non-European Union national – Test to be applied – Discretion of court – Impecuniosity – Enforcement of costs order – Whether foreign residence of plaintiff precondition to exercise of jurisdiction – Whether foreign residence or impecuniosity of plaintiff gave rise to right to security – Whether grant of security matter of discretion of court – Whether impossibility or difficulty of enforcement determinative factor – Lugano Convention – Proportionality test – Whether Lugano Convention provided effective enforcement process – Whether court should apply proportionality test to exercise of discretion – Whether disproportionate to grant security where defendant could avail of effective enforcement mechanism – Whether grant of security would breach requirement of judicial notice of Lugano Convention – Whether impermissible judicial extension of law – Consititution – Equality – Whether principle of equality before law required irrelevance of impecuniosity of Irish resident be extended to foreign residents – *Proetta v Neil* [1996] 1 IR 100 and *Berkeley Administration Inc v McClelland* [1990] 2 QB 407 considered; *Collins v Doyle* [1982] 2 ILRM 495 and *Maher v Phelan* [1996] 1 IR 95 approved; *Malone v Brown Thomas & Co. Ltd.* [1995] 1 ILRM 369 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 29, rr 1 to 4 – Jurisdiction of Courts and Enforcement of Judgments Act 1998 (No 52), s 18 – Constitution of Ireland 1937, Article 40.1 – Lugano Convention 1988 and 2007 – Application refused (2009/861S – O'Neill J – 20/7/2012) [2012] IEHC 312
Ditt v Krohne

Security for costs

Termination of oral planning hearing – Plaintiff seeking damages for negligence – Defendant applying for security for costs – Plaintiff accepting inability to pay defendant's costs if unsuccessful – Whether defendant having reasonably sustainable defence – Whether special circumstances so as not to award security for costs – Application refused (2011/11382P – Charleton J – 30/3/2012) [2012] IEHC 103
County Monaghan Anti-Pylon Ltd v Eirgrid plc

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Lis pendens – Abuse of process – Action based on interest in land – Consent order for possession – Failure by plaintiff to advance basis of claim – Whether proceedings abuse of process, unsustainable or bound to fail – Whether *lis pendens* should be vacated – Whether action not being prosecuted *bona fide* – Whether *lis pendens* registered solely to frustrate sale of property – *O'Malley v Irish Nationwide Building Society* (Unrep, Costello J, 21/1/1994); *McCauley v McDermott* [1997] 2 ILRM 486 and *Reichel v Magrath* (1889) 14 AC 665 considered – Land and Conveyancing Law Reform Act 2009 (No 27), ss 121 and 123 – *Lis pendens* vacated and relevant part of claim struck out (2012/7193P – Ryan J – 26/9/2012) [2012] IEHC 401
Kelly v Irish Bank Resolution Corporation

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Claim for contribution – Delay – Time of service of third party notice – Third party notice served more than six years after plaintiff's accrual of cause of action – Third party notice served before liability of defendants established – Delay between service of statement of claim and service of third party notice – Whether third party proceedings statute barred – Whether third party notice issued and served as soon as reasonably possible – *Staunton v Toyota (Ireland) Ltd* (Unrep, Costello J, 15/4/1988) *Buckley v Lynch* [1978] IR 6 and *Moloney v Liddy* [2010] IEHC 218, [2010] 4 IR 653 followed; *Board of Governors of St. Laurence's Hospital v Staunton* [1990] 2 IR 31, *Neville v Margan Ltd* [1988] IR 734, *Gilmore v Windle* [1967] IR 323 and *McElwaine v Hughes* (Unrep, Barron J, 30/4/1997) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 16, r 1(3) – Statute of Limitations 1957 (No 6), s 11(2) – Civil Liability Act 1961 (No 41), ss 27(1) and 31 – Motions refused (2008/7770P – Kearns P – 13/7/20120 [2012] IEHC 294
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Fee, Kevin
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Kirby v Governor of Limerick Prison

Transfer of prisoners

Warrant – Validity – Whether transfer of sentenced prisoner to another prison valid – Whether new committal warrant required to detain sentenced prisoner after transfer to another prison – Criminal Justice Administration Act 1914 (c.58), s17(3) – (2011/2006SS – Irvine J – 24/10/2011) [2011] IEHC 398
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Will – Charitable bequest – Intention of testatrix – Construction of will – Extrinsic evidence – Whether bequest demonstrating general charitable intent – Whether true construction of will demonstrating non-equivocal intention of testatrix – Whether extrinsic evidence admissible to demonstrate true intention of testatrix – Whether defendant entitled to benefit of bequest – *In re Julian* [1950] IR 57; *Heron v Ulster Bank Ltd* 1974 NI 44; *Bennett v Bennett* (Unrep, HC, Parke J, 24/1/2977); *In re Curtin* [1991] 2 IR 562; *Howell v Howell* [1992] 1 IR 290 considered – Succession Act 1965 (No 27), s 90 – Determinations made (2010/353SP – Murphy J – 11/11/2011) [2011] IEHC 525
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Action to prove will in solemn form – Testamentary capacity – Entitlement of unsuccessful party to probate action to costs – Successful opposition to plaintiff acting as executrix – Conflict of interest – Whether reasonable ground for litigation – Whether conducted *bona fide* – Whether costs should be awarded against plaintiff personally or out of estate – Whether plaintiff acted unreasonably in fiduciary capacity in contesting second issue – *In bonis Morelli; Vella v Morelli* [1968] IR 11; *Elliot v Stamp* [2008] IESC 10, [2008] 3 IR 387; *Re ELO & R Trusts* [2008] JRC 150; *Re Y Trust* [2011] JRC 135; *Bristol & West Building Society v Mothew* [1998] Ch 1; *Hunter v Hunter* [1938] NZLR 520 and *Re Beddoe* [1892] 1 Ch 547 considered – Succession Act 1965 (No 27), ss 10(3), 27(4), 78 and 120 – Rules of the Superior Courts 1986 (SI 15/1986), O 99 – Costs of first module awarded to both parties out of estate and costs of second module awarded to defendant out of estate (2009/3286P – Laffoy J – 1/10/2012) [2012] IEHC 387
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Capital gains tax – Sale of licensed premises in 2003 – Incorrect return – Penalty – Respondent claiming that sale completed in 2004 – Standard of proof beyond reasonable doubt or on balance of probabilities – Whether contract for sale completed in 2003 or 2004 – Whether costs of refurbishment incorrectly claimed – Whether entitled to claim for payment to auctioneer where no invoice issued – Whether deduction for legal fees untrue – Whether steps taken to satisfy herself that tax return was correct – *Revenue and Customs Commissioners v Khawaja* [2009] 1 WLR 398 considered – Taxes Consolidation Act 1997 (No 39), ss 1053, 1077, 1077B, 1077C – Application granted – penalties imposed (2011/24MCA – Peart J – 22/11/2011) [2011] IEHC 432
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Vehicle registration tax

Condemnation of vehicle – Detention and seizure of motorised vehicle – Claim for damages – Counterclaim for forfeiture – Change of use – Failure to declare conversion – Definition of mechanically propelled vehicle – Pleadings – Statutory interpretation – Whether vehicle liable for vehicle registration tax – Whether correct registration tax paid – Whether vehicle improperly seized – *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936; *McGrath v McDermott* [1988] IR 258 and *Devanney v Shields* [1998] 1 IR 251 considered – Finance Act 2001 (No 7), ss 127, 140, 141, 142 and 143 – Finance Act 1992 (No 9), ss 130, 131, 136, 139 and 142 – Finance (No 2) Act 1992 (No 28) – Vehicle Registration and Taxation Regulations 1992 (SI 318/1992) – Finance Act 2009 (No 12), s 127 – Rules of the Superior Courts 1986 (SI 15/1986), O 19, r 3 – Plaintiff's claim dismissed and forfeiture directed (2010/3230P – White J – 7/2/2012) [2012] IEHC 53
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Appeal

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Article

Cotter, John
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Social welfare (consolidated claims, payments and control) (amendment) (no. 1) (overpayments) regulations 2013
EA Social welfare consolidation act, 2005 s4, s341(7), s342
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Social welfare (consolidated claims, payments and control) (amendment) (No.2) (night workers) regulations 2013
EA Social welfare consolidation act, 2005 sections 4, 62(9) and 141(7)

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exaggerate consequences of accident – Whether evidence false and misleading – Whether evidence given with intention of misleading court – *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403 considered – Civil Liability and Courts Act 2004 (No 31), s 26 – Claim dismissed (2009/6904P – Murphy J – 16/11/2011) [2011] IEHC 487
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Personal injuries

Conflict of laws – Injury incurred in France – Assessment of damages – Choice of law – French law – Whether practice of French judges to have regard to book of previous awards non-obligated practice – Whether court bound by previous awards of French judges – Whether assessment of damages matter of practice – Whether court could have regard to levels of compensation in Irish courts – Categories of compensation – Temporary disablement – Pain and suffering – Deprivation or disruption of specific practices or activities – Permanent non pecuniary loss – Aesthetic injury – Sexual damage – European Communities (Fourth Motor Insurance Directive) Regulations 2003 (SI 651/2003) – Regulation 864/2007/EC – Damages awarded (2010/5675P – O'Neill J – 20/4/2012) [2012] IEHC 177
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B(G) v Minister for Health and Children

Compensation

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M(J) v Minister for Health and Children

Compensation

Death of father – Loss of society – Nervous shock – Loss of opportunity – Dependant – Consequences of psychiatric injuries sustained as a result of father's death – Whether sums awarded insufficient – Whether appellant sustained nervous shock in accordance with the Act – Whether right to compensation – Whether appellant would have pursued different career – *Kelly v Hennessy* [1995] 3 IR 253; *Mullally v Bus Éireann* [1992] ILRM 722; and *Byrne v Southern and Western Railway Company* (1884) 26 LR Ir 428 considered – Hepatitis C Compensation Tribunal Act 1997 (No 34), ss 4 and 5 –Damages awarded (2011/10CT – Irvine J – 8/2/2012) [2012] IEHC 49
C(S) v Minister for Health and Children

Compensation

Death of father – Loss of society – Post traumatic stress disorder – Loss of opportunity – Dependant – Whether sum awarded adequate – Whether PTSD developed due to father's death – Whether financial loss – Whether pregnancy caused by father's death – *C(S) v Minister for Health and Children* [2012] IEHC 49, (Unrep, HC, Irvine J, 8/2/2012) considered – Hepatitis C Compensation Tribunal Act 1997 (No 34), ss 4 and 5 – Hepatitis C Compensation Tribunal (Amendment) Act 2002 (No 21) – Damages awarded (2011/9CT – Irvine J – 8/2/2012) [2012] IEHC 50
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TRUSTS

Constructive trusts

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BILLS INITIATED IN DÁIL ÉIREANN DURING THE PERIOD 1ST FEBRUARY 2013 TO THE 28TH MARCH 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.

Irish Bank Resolution Corporation Bill 2013
Bill No. 9 of 2013 *(enacted)*

Finance Bill 2013
Bill No. 11 of 2013

Finance (Local Property Tax) (Amendment) Bill 2013
Bill No. 12 of 2013 *(enacted)*

Motor Vehicles (Duties and Licences) Bill 2013
Bill No. 14 of 2003

Health (Alteration of Criteria for Eligibility) Bill 2013
Bill No. 27 of 2013

Climate Change Bill 2013
Bill No. 8 of 2013
[pmb] *Deputy Brian Stanley*

Cemetery Management Bill 2013
Bill No. 15 of 2013
[pmb] *Deputy Eamonn Maloney*

Judicial Sentencing Commission Bill 2013
Bill No. 17 of 2013
[pmb] *Deputy Niall Collins*

Public Holidays (Lá na Poblachta) Bill 2013
Bill No. 18 of 2013
[pmb] *Deputy Aengus Ó Snodaigh*

Employment Equality (Amendment) Bill 2013
Bill No. 19 of 2013
[pmb] *Deputy Jonathan O'Brien*

Credit Institutions (Stabilisation) (Amendment) Bill 2013
Bill No. 20 of 2013
[pmb] *Deputy Michael McGrath*

Poor Relief (Ireland) (Amendment) Bill 2013
Bill No. 22 of 2013
[pmb] *Deputy Paudie Coffey*

Criminal Law (Sexual Offences) (Amendment) Bill 2013
Bill No. 24 of 2013
[pmb] *Deputy Thomas Pringle*

Social Welfare Appeals Bill 2013
Bill No. 25 of 2013
[pmb] *Deputy Willie O'Dea*

Maternity Protection (Members of the Houses of the Oireachtas) Bill 2013
Bill No. 26 of 2013
[pmb] *Deputy Seán Ó Fearghaíl*

Food Safety Authority of Ireland (Amendment) Bill 2013
Bill No. 28 of 2013
[pmb] *Deputy Martin Ferris*

Retention of Newborn Screening Cards Bill 2013
Bill No. 31 of 2013
[pmb] *Deputy Billy Kelleher*

Scrap and Precious Metal Dealers Bill 2013
Bill No. 32 of 2013
[pmb] *Deputy Mattie McGrath*

BILLS INITIATED IN SEANAD ÉIREANN DURING THE PERIOD 1ST FEBRUARY 2013 TO THE 28TH MARCH 2013

Child Care (Amendment) Bill 2013
Bill No. 10 of 2013 *(enacted)*

Courts Bill 2013
Bill No. 30 of 2013

Civil Law (Missing Persons) Bill 2013
Bill No. 16 of 2013
[pmb] *Senator Colm Burke*

Seanad Electoral Reform Bill 2013
Bill No. 21 of 2013
[pmb] *Senator John Crown*

Employment Equality (Amendment) (No.2) Bill 2013
Bill No. 23 of 2013
[pmb] *Senator Ivana Bacik*

EU Scrutiny and Transparency in Government Bill 2013
Bill No. 29 of 2013
[pmb] *Senator Mark Daly*

Civil Registration (Marriage Equality) Bill 2013
Bill No. 33 of 2013
[pmb] *Senator Ivana Bacik*

PROGRESS OF BILL AND BILLS AMENDED DURING THE PERIOD 1ST FEBRUARY 2013 TO THE 28TH MARCH 2013

Criminal Justice (Spent Convictions) Bill 2012
Bill 34 of 2012
Committee Amendments

Health (Pricing and Supply of Medical Goods) Bill 2012
Bill 63 of 2012
Committee Amendments

Houses of the Oireachtas Commission (Amendment) Bill 2012 [Seanad]
Bill 77 of 2012
Amendment made by the Dáil
(Enacted)

Education and Training Boards Bill 2012
Bill 83 of 2012
As passed by Dáil Éireann

Electoral (Amendment) (Dáil Constituencies) Bill 2012
Bill 84 of 2012
(Enacted)

Taxi Regulation Bill 2012
Bill 107 of 2012
Committee Amendments

Industrial Development (Science Foundation Ireland) (Amendment) Bill 2012
Bill 113 of 2012
Passed by Seanad Éireann

Defence Forces (Second World War Amnesty and Immunity) Bill 2012
Bill 118 of 2012
Committee Amendments

Water Services Bill 2013
Bill 1 of 2013
(Enacted)

Further Education and Training Bill 2013
Bill 5 of 2013
Referred to Select Committee

Irish Bank Resolution Corporation Bill 2013
Bill 9 of 2013
Committee and Remaining Stages
(Enacted)

Finance Bill 2013
Bill 11 of 2013
Committee Recommendations

Finance (Local Property Tax) (Amendment) Bill 2013
Bill 12 of 2013
Passed by Dáil Éireann
(Enacted)

Motor Vehicle (Duties and Licences) Bill 2013
Bill 14 of 2013
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/

The Oracle Speaks Case C-128/11

Peter Charleton and Sinéad Kelly*

This case note discusses the implications of the decision in *UsedSoft GmbH v. Oracle International Corporation* delivered by the Grand Chamber of the Court of Justice of the European Union on 3 July 2012.

Some see the case as interference in contractual liberty, claiming that since Oracle contracted with its customers merely to licence its products, the European Court re-wrote that agreement in favour of an outcome based on the concept of sale. Others would argue that the provisions of the applicable Directive mandated a strong warning that a first sale would dissolve rights to claim copyright in any way that would inhibit any further distribution of a product that had already been paid for. Legal advisors might look at the actual decision in the case and say: "Well, they have decided that – but I know a way around it!" One wonders at that since the decision has at least the germ of some policy principles that cannot be ignored.

It is the purpose of this note to discuss these implications. We feel, however, that perhaps the most significant aspects of the case are: firstly, the emphasis placed by the European Court on appropriate economic remuneration for copyright; and, secondly, the rewriting of the form of a transaction to reflect its true underlying reality. This may be an approach that simply withers on the vine in future years or it may lead to a trend in future European Court decisions. Indeed, these principles could develop into a legal principle akin to fair use in the United States of America. It is how the case law develops as a result of this decision that will determine whether it is a founding pillar of a new attitude to copyright.

The facts

Oracle, the plaintiff, is typical of many software companies. It can be supposed that it writes software to order but it also has stock software that it sells to customers. This comes in CD format only rarely. More often it is downloaded from the Internet under an agreement, the price for which includes updates and patch fault corrections. This is what the agreement actually said:

> "With the payment for services you receive, exclusively for your internal business purposes, for an unlimited period a non-exclusive non-transferable user right free of charge for everything that Oracle develops and makes available to you on the basis of this agreement."

Hence, the agreement was unlimited. Further, the licence was explicitly "*non-transferable*"; this meant that the licence could not be sold, a lawyer reading it might think. As time passes, the software if not corrected and updated becomes less useful. Hence, while the customer of Oracle is getting a product for the price paid, in the shape of the download or the CD, he is also getting an ongoing service of correction and improvement to the software. The cost of the software is determined in blocks; 25 users are required and if a business needs 26 but no more, then it has to buy two blocks of 25 of which 24 are surplus to requirement. This is where UsedSoft came into the picture. That company took already-used licences and marketed them. In effect, and this is not explicitly stated in the judgment, what was for sale was a set of numbers and letters whereby a customer of what might be called the second-hand licence used the Internet to become entitled to the software and to the patches and corrections which came with any lawful relationship to Oracle. That development was litigated. In Germany, the Bundesgerichtshof (the Federal Court of Justice) held on appeal that UsedSoft's customers could not rely on what was claimed to be the valid transfer of a right to use the software. In this decision, one might note the absence of any notion that a sale had taken place, as in the sale of a book that one might pass to another when read. Instead it was held that the actions were a breach of the exclusive right of Oracle to control any permanent or temporary reproduction of a computer programme under the Computer Programmes Directive.[1] That right, however, was subject to an exception in the Directive. We will not reproduce the legislation since the judgment, available at *www.curia.eu (*enter Case C-128/11) has it all. This note concentrates on the key sections.

The key aspects of the legislation

Computer programs have been treated as literary works in Europe since the WIPO Copyright Treaty of December 1996. The U.S. and most major economies are party to it. Under Article 8, the authors of literary works enjoy the exclusive

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Note: For a copy of any Irish judgment mentioned in this paper, please see www.courts.ie or www.bailii.org. For judgments of the European Court of Justice, please see http://curia.europa.eu/jcms/jcms/j_6/; and for judgments of the courts of England and Wales, please see www.bailii.org.

1 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, O.J. L111/16, 5.5.2009. This Directive codifies Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, O.J. L122/42, 17.5.1991.

right to authorise the communication of such works to the public. Under Article 6(1), this right extends to making available "*the original and copies… through sale or other transfer of ownership.*" An exception to this unfettered privilege arises under Article 6(2) and the exception is that the right can be extinguished through exhaustion of the right. This specifies that the parties to the Treaty may "*determine the conditions… under which the exhaustion of the right… applies after the first sale or other transfer of ownership…*" This exception is explicitly taken up in the European Copyright Directive; apparently more strictly, since Article 3 provides authors with the exclusive right to "*authorise or prohibit any communication to the public of their works…",* coupled with a declaration that such rights *"shall not be exhausted by any act of communication to the public".*[2] The Computer Programs Directive sensibly recited that actions of loading and running a copy of a lawfully acquired program cannot "*be prohibited by contract.*" Article 4 of that Directive is crucial. It gives exclusive rights "*to do or to authorise*": "*the permanent or temporary reproduction of a computer program*"; "*the translation, adaptation, arrangement and any other alteration of a computer program*"; and "*any form of distribution to the public, including the rental, of the original computer program or of copies thereof."* Article 5 provides that "*in the absence of specific contractual provisions*" no such authorisation is needed for the necessary use of a computer program "*by the lawful acquirer in accordance with its intended purpose…"* These rights, on an ordinary reading except where there is a contract to the contrary, are subject to a defence under Article 4(2), which is the exhaustion of right defence. This provision needs to be quoted:

> "The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof."

Read this Article on its own and the *UsedSoft v. Oracle* decision of the European Court appears correct. Once you sell a copy of a program your distribution rights are over as regards a sale. The program may be resold but, because you retain as a matter of apparent policy the right to make a living out of your intellectual property, the purchaser cannot rent out the program thus depriving the creator of the possibility of selling further copies. A sale is thus a sale, a transfer of property in perpetuity or as the Oracle contract said "*for an unlimited period*", and rental is different. The difference being that in a sale one person gets the copy forever and can do what he wants with it, a bit like buying a book and reading it and then passing it to a friend, in contrast to a rental where the person has the copy for a limited time. It might be some consolation for rightholders to know that neither sale nor rental authorises the making by the purchaser or renter of a further copy. That remains so despite this decision.

Sale as an independent concept

In European legislation, a concept may be expressly left to the member states to be defined; in which case varying national definitions may implement the duty of effective cooperation under the Treaty on European Union to achieve a consistent result. If there is no such derogation, in the absence of specific definition within the legislation, the Court of Justice of the European Union will provide an independent and uniform interpretation for the entire European Union.[3] This is what the Court in *UsedSoft v. Oracle* proceeded to do. Sale, as a central concept to the exception in Article 4(2) of the Computer Programs Directive, was to be an autonomous concept throughout Europe so that it would be interpreted in each member state uniformly.[4] And this is the European Court definition of a sale:

> "According to a commonly accepted definition, a 'sale' is an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him. It follows that the commercial transaction giving rise, in accordance with Article 4(2) of Directive 2009/24, to exhaustion of the right of distribution of a copy of a computer program must involve a transfer of the right of ownership in that copy."[5]

So, was the arrangement whereby a customer bought a licence from Oracle and used it to download a program from the Oracle website a sale? Without the user-licence agreement that went with that sale by download, it would seem that access would be denied. Under the contract to obtain the licence, not a sale, Oracle argued that all that was obtained was "*a non-exclusive and non-transferable user right for an unlimited period…"* where the copy of the program was described as "*free of charge";* the licence being what the customer paid for. Would not such an arrangement constitute "*specific contractual provisions*" pursuant to Article 5 of the Computer Programs Directive whereby authorisation to transfer would be needed to effect a lawful transfer? The European Court founded its answer on its own construction of the legal attributes of a sale: if a CD-ROM is transferred, that is a physical sale coupled with an agreement to use it; the act of downloading should be no different. It took the view that a sale by way of access or by way of the delivery of a physical copy cannot be divorced from the agreement as to how it might be used; in looking at a transaction, and here following the reasoning in tax avoidance analysis to uncover the true nature of a scheme, the elements cannot be considered piecemeal but as a whole.[6] Sale, the European Court reasoned, encompasses "*both*

2 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, O.J. L167/10, 22.6.2001.

3 Case C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* [2009] E.C.R. I-6569 at para. 27.

4 Case C-510/10 *DR, TV2 Danmark A/S v. NCB – Nordisk Copyright Bureau* [2012] E.C.R. I-0000 at para. 34.

5 Para. 42.

6 The foundation of the principle whereby an abusive process identifies and then nullifies a purported compliance of law has been part of the jurisprudence of the European Court of Justice since 1974; Case C-33/74 *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] E.C.R. 1229. For a case applying that to a domestic transaction, see *Cussens v. Brosnan* [2008] IEHC 169, (Unreported, High Court, Charleton J., 11 June 2008). The cases relied on by the European Court in the *Oracle* judgment were Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki & Others* [2010] E.C.R. I-4165, paras 48 and 49.

tangible and intangible copies of a computer program". Further, the elements of passing a copy in physical form or by download and licence are inseparable:

> "In this respect, it must be observed that the downloading of a copy of a computer program and the conclusion of a user licence agreement for that copy form an indivisible whole. Downloading a copy of a computer program is pointless if the copy cannot be used by its possessor. Those two operations must therefore be examined as a whole for the purposes of their legal classification…
>
> As regards the question whether, in a situation such as that at issue in the main proceedings, the commercial transactions concerned involve a transfer of the right of ownership of the copy of the computer program, it must be stated that, according to the order for reference, a customer of Oracle who downloads the copy of the program and concludes with that company a user licence agreement relating to that copy receives, in return for payment of a fee, a right to use that copy for an unlimited period. The making available by Oracle of a copy of its computer program and the conclusion of a user licence agreement for that copy are thus intended to make the copy usable by the customer, permanently, in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work of which it is the proprietor…
>
> In those circumstances, the operations… examined as a whole, involve the transfer of the right of ownership of the copy of the computer program in question."[7]

Key to this concept of what constitutes a sale is what a sale is not. It is not what a transaction is dressed up as that identifies its true nature. Parties may contract for a particular arrangement; but the arrangement may turn out to be what they have agreed their mutual rights and obligations are. Under contract, the purchasers of the Oracle product, let us call it that just for the moment, had to: buy in blocks; not sell on; not transfer; not copy; use only within the business identified as that was described as the licence holder; and enter into an arrangement for patches and updates as an identified customer. In other words, the relationship was a development of early computer services and sales whereby a plan was worked out for a specific customer with particular needs. This is identifiable and continues today as a vital part of the industry. In contrast, general models for accounting, analysis, word search as a legal analysis tool, and countless other services are now available to buy as a package. In effect, following the logic applied by the European Court, where a customer buys a package, rights under an ongoing relationship by the provider are exhausted. Where does that leave freedom to contract?

But, first, a brief word on the U.S. position.

A word on the U.S. position

In 2010, the United States Court of Appeals for the Ninth Circuit had occasion to consider the sale/licence distinction in *Vernor v. Autodesk, Inc.*[8] Timothy Vernor sought to sell copies of Autodesk Inc's AutoCAD Release 14 software on the auction website, eBay. Mr. Vernor acquired the software from CTA, which had itself acquired ten copies of Release 14 from Autodesk. CTA later upgraded to a newer version of the software, paying a special upgrade fee offered to existing customers. The Software Licence Agreement for the upgrade required the destruction of copies of previous versions of the software, and gave Autodesk the right to require proof of such destruction. However, rather than destroying its copies of Release 14, CTA sold them to Mr. Vernor, who later listed them for sale on eBay.

It would seem that Mr. Vernor made his living on eBay. He had previously sold copies of Release 14 there. Autodesk's response each time Mr. Vernor listed its software for sale was to file a copyright infringement and take-down notice with eBay, inconveniencing Mr. Vernor; on one occasion leading to the suspension of his eBay account. After receiving a letter from Autodesk's lawyers warning of "*further action*" if he did not cease his eBay sales, Mr. Vernor decided to seek declaratory relief to establish that his re-sales did not infringe Autodesk's copyright. He relied on the first sale doctrine[9] and the essential step defence[10], the former being equivalent to the European doctrine of exhaustion and the latter to the Article 5 defence in the Computer Programs Directive. These defences can only be relied on by the owner of a copy of a copyright work, and not by a licensee. To get the relief he required, Mr. Vernor had to persuade the Court that Autodesk had sold, and not licensed, the software to CTA. Mr. Vernor was successful before the District Court, which viewed the fact that CTA was entitled to keep its copies of Release 14 for an indefinite period in return for a single upfront payment as indicative of a sale. It regarded the transaction as a "*sale with contractual restrictions on use and transfer of the software*" and as a sufficient basis to invoke the first sale doctrine. Mr. Vernor's success was short-lived.

The Court of Appeals took that view that the absence

7 At paras. 44 to 46. The authors would also like to mention two decisions of the German courts which pre-date the *Oracle* decision. The authors have been unable to obtain an official English report of these decisions and rely here only on what they could ascertain from various Internet searches. In *Usedsoft v. Microsoft* (2008), a Hamburg Court reportedly granted an injunction prohibiting Microsoft from publishing misleading allegations regarding the legality of the trade in used software. In *Susensoftware v. SAP* (2009), Susensoftware reportedly obtained injunctive relief against SAP after one of its employees apparently advised a customer that it could not lawfully purchase second-hand software without the consent of SAP. It is also reported that, following the *Oracle* decision, the Federation of German Consumer Organisations (VZVB) issued proceedings against computer game distributor, Valve, in the District Court of Berlin, for prohibiting users from reselling its game, Steam. This case is understood to be ongoing.

8 621 F. 3d 1102 (9th Cir. 2010).

9 The first sale doctrine allows "*the owner of a particular copy*" of a copyrighted work to sell or otherwise dispose of his copy without the copyright owner's authorisation. See 17 U.S.C. § 109(a).

10 The "essential step defence" provides that the "*owner of a copy*" of a copyrighted software program does not infringe copyright by making a copy of the computer program, if the new copy is "*created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner.*" See 17 U.S.C. § 117(a)(1).

of a requirement on Autodesk's customers to return the copies of the software could not be dispositive. It held that a software user is a licensee rather than an owner of a copy where the copyright owner (i) specifies that the user is granted a license; (ii) significantly restricts the user's ability to transfer the software; and (iii) imposes notable use restrictions. The Release 14 licence agreement did all these things. Autodesk's direct customers, including CTA, were, therefore, licensees of their copies of the software, rather than owners. It followed that Mr. Vernor did not receive title to the copies of Release 14 he acquired from CTA and he could not pass ownership on to others. Both CTA's and Mr. Vernor's sales were found to have infringed Autodesk's exclusive right to distribute copies of its work.[11]

On behalf of Mr. Vernor, it was said the decision raised policy considerations in that: (i) it did not vindicate the law's aversion to restraints on alienation of personal property; (ii) it could force those purchasing copyrighted property to trace the chain of title to ensure that a first sale had occurred; and (iii) it ignored the economic realities of the relevant transactions, in which the copyright owner permanently released software copies into the stream of commerce without expectation of return in exchange for upfront payment of the full software price. eBay, which had been joined as an *amicus curiae*, contended that a broad view of the first sale doctrine was necessary to facilitate the creation of secondary markets for copyrighted works, which would ultimately contribute to the public good. The Court recognised these and other policy concerns, but said it was constrained by precedent.[12] It added that Congress was free to modify the first sale doctrine if it deemed a different approach is required.[13]

The integrity of contractual arrangements

In Europe, to call a sale a licence undermines the effectiveness of the exhaustion of rights principle through first sale encompassed in Article 4(2) of the Computer Programs Directive. Although there is logic behind the concept of a sale which equates downloading a computer program with purchasing a copy of a CD ROM in a shop, the European Court seemed to balk at any notion that what is in truth a sale can be turned into an act of rental or a service agreement. One remembers that Article 5 of the Computer Programs Directive provides that "*in the absence of specific contractual provisions"* a purchaser who is a "*lawful acquirer*" of a computer program does not need permission to run the program "*in accordance with its intended purpose…"* Where does this leave the distinction between rental and purchase?

The answer appears to be precisely where it was before, with the exception that while you can pretend to contract to restrict what the purchaser of a program can do with it, once the transaction in itself amounts to a sale, no seller can hope to tag on restrictions that stop resale. This is because sale is of its nature under the Computer Programs Directive the exhaustion of the distribution right. What this means is that the copyright holder by selling a copy, sells with that copy the package of uses that go with that copy; the entitlement to use the copy, to pass on the copy, to sell the copy. What is not passed on is the right to copy the copy. In other words, reproduction is limited to the holder for the purpose of use. Rental and sale cannot be intermingled. This is not simply because under the Directive, the control of rental of copies is specifically reserved to the copyright owner, but also because the approach of the European Court was to define sale as a standalone concept. Often definitions are of what a legal concept is not. Since a sale is a sale, a rental must be a rental. One would need to be very clear that sale is the exhaustion of the individual distribution rights of a copy and that rental, incorporating the entitlement to be given back the thing, is not.

Here, the temptation may be to do as Oracle did: to take advantage of the concept of sale while at the same time reserving such rights as are equivalent to rental. What then are the "*specific contractual provisions*" that are allowed in a sale? One might speculate that other rights might appropriately come into play in some circumstances. What if, for example, the program is experimental and passing a copy is pursuant to a relationship between interconnected companies for development or research? Privacy rights or commercial confidence rights might dictate that contractual provisions restricting the passing of the copy might thereby be upheld. That is only a speculation, but the tendency in European case law has been to identify competing and shared rights within a concept and to re-balance what otherwise would be the ordinarily understood nature of a transaction into something else because of the tension between fundamental entitlements.[14] If a company, for instance, manufactures a

11 On 18 January 2011, the Ninth Circuit denied Vernor's request to have the case reheard *en banc* (*i.e.* before the entire bench). In October 2011, the Supreme Court denied Vernor's petition for *certiorari.*

12 The following cases were cited: *United States v Wise* 550 F. 2d 1180 (9th Cir. 1977); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993); *Triad Sys. Corp. v. Se. Express Co.*, 64 F. 3d 1330 (9th Cir. 1995); and *Wall Data, Inc. v. Los Angeles County Sheriff's Dep't*, 447 F. 3d 769 (9th Cir. 2006).

13 See also the Report of the U.S. Copyright Office on the Digital Millennium Copyright Act (2001), which recommended against amending section 109 to include a digital first sale doctrine on the basis that a real need for the change had not been demonstrated. The Report used the term '*digital first sale doctrine'* to denote a proposed copyright exception that would permit the transmission of a work from one person to another, generally via the Internet, provided the sender's copy was destroyed or disabled (whether voluntarily or automatically by virtue of a technological measure).

14 Here, one might think of the tension between Internet use, the entitlement to run a business, the desire to remain anonymous whilst perhaps making untrue and vicious comments about people on the Internet, which have had the effect in some cases of bullying people into suicide, and the entitlement to copyright. The authors have previously referenced a range of possible views for the 2012 Fordham IP Conference: see Copyright as One of Several Competing Rights in European Law, http://fordhamipconference.com/wp-content/uploads/2010/08/Charleton.Kelly_Competing-Rights-Final.pdf. Case C-70/10 *Scarlet Extended S.A. v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM*) is a good example of how matters may extend since there the tension between copyright and the right to communicate led to the view that there is a right always to be anonymous on the Internet. Why? The European Court of Justice did not take up that idea: opinion of the Advocate General at para. 71: "Articles 7, 8 and 11 of the Charter guarantee, respectively, as we know, the right to respect for private and family life, the right to protection of personal data and freedom of expression and information. It is hardly necessary to point out that other fundamental rights are at issue in the present case, and in particular the right to property, guaranteed by Article

program and then sells it at considerable cost to a related company in a tax planning scheme was to identify one of the pillars of economic development of the European Union, such as research, the concept would perhaps become arguable. Some might say that this would be dangerous and why take the risk. The exception of exhaustion of right by sale is there and that is that. A better solution would be to rent. Rent is rent because it is not sale.

Cloud computing and other apparent solutions

It may reasonably be predicted that rental of a computer program continues to preserve the right of the copyright holder. If sale is a concept, then so is rental. Of its nature, rental involves the retention of ownership in the program in the lessor and the right of that party to specify what the article to be rented may be used for. Thus, rental agreements are of their nature detailed documents specifying the conditions of use and how long and in what circumstances the relationship is to continue and how it may be ended. It might also be pointed out that sale agreements are detailed only in ensuring that property passes without recourse to the seller. You can have reservation of title pending payment, a common precaution in sales, but once the sale is made, however, that is the end of the rights in the owner. A rental is the preservation of those rights.

Instead of sale, a computer program might be rented. In return for payment, a lessor allows certain reserved rights to be shared. A program might be put on a cloud of computers and accessed on the payment of a fee. If such rights are, as in the Oracle licence agreement, made unlimited as to duration, then there is a problem. That would be a sale. If the rental agreement is to access and use the software for a particular period, say month to month or year to year, then more of the characteristics of rental are present. If patching and updating are part of the rights of the lessee of the program, problems potentially emerge because thereby the true nature of the transaction looks more like a sale. If those services are specifically what are hired out, then the transaction is no more than a service agreement. As a matter of law, under the Computer Programs Directive, once the agreement is for rental, then the decision in *Oracle* does not apply.[15] You cannot rent something under an agreement which specifies that the rental is to the lessee alone and then distort that relationship by judicial decision to turn it on its head. Commercial transactions would not then be predictable. Certainty of law is at the foundation of European law.

David Sweeney, of Sweeney Consulting *(www.sweeneyconsulting.com*), in an opinion shared with us shortly after the judgment stated the following as what he called "*positive aspects of the decision":*

1. Exhaustion does not relate to separate contracts for services, such as maintenance agreements (para. 71).
2. The reseller is not authorised by exhaustion to divide the licence and resell only a 'subset' of that licence. If the license acquired by the first acquirer covers a greater number of users than he needs, the acquirer cannot resell those excess licences (para. 69).
3. The reseller of a licence must make his own copy "unusable" at the time of its resale. The Court of Justice of the European Union concludes that right holders can use technical measures to enforce this obligation (para. 79).

It is also to be predicted, however, that tricks to turn the value of immediate return that is fundamental to the economic aspect of sale into something that looks like rental will not be tolerated. European legislation cannot be relied on for abusive or fraudulent ends and cannot be extended to cover abusive practices, *i.e.* practices which are outside the concept of normal commercial operations, but which are effected solely for the purpose of wrongly obtaining an advantage that is otherwise provided in genuine instances by European legislation.[16] This is known as the doctrine of abusive process: it is a principle of general application, which applies to all branches of European law. The doctrine has been part of the jurisprudence of the European Court since 1974,[17] but it is a principle which is within the sphere that has always been exercised by the judiciary of the member states, namely properly characterising transactions according to their true nature and their underlying reality.[18]

Oracle's case was this. It did not sell its software. What it did was make it available free of charge on its website for its customers to download. The customer then entered into a user licence agreement for a non-transferable, non-exclusive right to use the program for an unlimited period of time. For this, he paid a fee. So, you see, two separate steps, neither of which involved a transfer of property rights: it must be a rental, not a sale. This is what Oracle said. But the European Court looked at the reality of the situation. The steps were not independent of each other, rather they formed "*an indivisible whole*." Step 1 had no purpose without step 2 and *vice versa:* if the customer did not enter the user licence agreement, the downloaded copy of the software could not be used; and what would be the point of entering the agreement without downloading the software. Redefined as "*an indivisible whole*", the purported rental became a sale: property in the program, and the associated rights and benefits of ownership, were

17(1) of the Charter, and, more specifically, the right to respect for intellectual property, guaranteed by Article 17(2) of the Charter, the infringement of which owing to unlawful downloading on the internet has reached massive proportions, which are clearly at the heart of the main proceedings. However, in the light of the requested measure and of the filtering and blocking system required and of the terms of the question referred, it is mainly the rights guaranteed by Articles 7, 8 and 11 of the Charter which are involved, since the right to property is only concerned on a secondary basis, in so far as the system must be introduced exclusively at the cost of the ISP."

15 See Case C-200/96 *Metronome Musik v. Music Point Hokamp GmbH* [1998] E.C.R. I-1953, where it was confirmed that exhaustion does not arise in the case of rental.

16 *Van Binsbergen v. Bestuur* , see footnote 6 above. See also *Cussens v. Brosnan* at footnote 6 above, where it is stated that "the effect of European Union measures are not to be set at nought through legal transactions that may be apparently valid on their face but which are entered into with the essential aim of undermining the supremacy of European Legislation."

17 *Van Binsbergen v. Bestuur ,* see above and footnote 6.

18 *Cussens & Ors v. Brosnan,* see footnote 16 above.

transferred to the customer for his permanent use in return for an immediate once-off return to Oracle.

Advocate General Bot viewed it this way in his opinion:

> "… taking into account the purpose of [the doctrine of] exhaustion, which is to limit exclusivity conferred by the intellectual property right once the marketing operation has enabled the rightholder to realise the economic value of his right, the term 'sale' within the meaning of Article 4(2) of Directive 2009/24 must be given a broad interpretation encompassing all forms of product marketing characterised by the grant of a right to use a copy of a computer program, for an unlimited period, in return for the payment of a one-off fee. An excessively restrictive interpretation of that term would undermine the effectiveness of that provision by divesting the exhaustion rule of all scope, since the marketing of computer software most commonly takes the form of user licences and suppliers would only need to call the agreement a 'licence' rather than a 'sale' in order to be able to circumvent that rule.[19]

Economic return as an aspect of safeguarding copyright

What is the foundation of this decision, it might be wondered? What follows can only be speculative, particularly so in light of the 'sale as exhaustion of distribution rights' exception to copyright in the Computer Programs Directive. Some may argue that the entitlement to insert "*specific contractual provisions*" into a sale may have allowed the European Court to go the other way.[20] In *Football Association Premier League Ltd v. Media Protection Services Ltd*[21] the issue was the rebroadcast of football matches that were licensed by the Premier League only to a specific territory. One of the issues for the European Court was whether a sporting event was ever, as a matter of first principle, entitled to copyright protection. To take a traditional view from the Anglo-American standpoint, copyright requires original creative work: sitting down to write a novel,[22] compiling a telephone directory,[23] revising a Bach score from the manuscripts so as to produce an Ürtext edition,[24] and directing a film are all examples. Spontaneous chat between people in a coffee shop or a spur of the moment speech, are not.[25] What at all could be original or creative about bringing a load of cameras to a field and broadcasting fellows belting a ball? Sensible lawyers know that if a point has merit, giving a judge a point on which to hang the right decision should bring them over the line. So this is what the Court in *Premier League* had to say:

> "To be so classified, the subject-matter concerned would have to be original in the sense that it is its author's own intellectual creation (see, to this effect, Case C 5/08 *Infopaq International* [2009] ECR I 6569, paragraph 37).
>
> However, sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright.
>
> Accordingly, those events cannot be protected under copyright. It is, moreover, undisputed that European Union law does not protect them on any other basis in the field of intellectual property.
>
> None the less, sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works, and that protection can be granted, where appropriate, by the various domestic legal orders.
>
> In this regard, it is to be noted that, under the second subparagraph of Article 165(1) TFEU, the European Union is to contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.
>
> Accordingly, it is permissible for a Member State to protect sporting events, where appropriate by virtue of protection of intellectual property, by putting in place specific national legislation, or by recognising, in compliance with European Union law, protection conferred upon those events by agreements concluded between the persons having the right to make the audiovisual content of the events available to the public and the persons who

19 Opinion delivered on 24 April 2012, para. 59. While the Advocate General's view on the concept of a sale was substantially the same as the view ultimately reached by the European Court, his conclusion differed: "in the event of resale of the right to use the copy of a computer program, the second acquirer cannot rely on exhaustion of the right to distribute that copy in order to reproduce the program by creating a new copy, even if the first acquirer has erased his copy or no longer uses it."

20 That is indeed what was argued by Ireland and several other countries intervening in the argument.

21 Case C-403/08, [2011] E.C.R. I – 0000.

22 For example, James Joyces' *Ulysses*, the copyright in which was closely guarded by the Joyce estate: *Sweeney v. National University of Ireland Cork* [2001] 2 I.R. 6; and *Sweeney v. Macmillan Publishers* [2002] R.P.C. 651.

23 *Kelly v. Morris* (1866) L. R. 1 Eq. 697, where copyright was found to subsist in a street directory. This may be contrasted with the decision of the U.S. Supreme Court that copyright cannot subsist in a 'white pages' telephone directory: *Feist Publications Inc v. Rural Telephone Service Co* 499 U.S. 340 (1991); and the decision of the Canadian Federal Court of Appeal to like effect: *Tele-Direct (Publications) Inc v. American Business Information Inc* (1997) 76 C.P.R. (3d) 296, F.C.A.

24 *Sawkins v. Hyperion Records Ltd* [2005] 1 W.L.R. 3281, where copyright was found to vest in a musicologist who prepared performing editions of the musical works of a seventeenth century baroque composer.

25 In *Falwell v. Penthouse International Ltd* 521 F. Supp. 1204 (1981) the United States District Court found that copyright did not subsist in an interview given by the evangelical minister, Reverend Jerry Falwell, to Penthouse magazine. The Court noted that "the actual dialogue, including the unprepared responses of [Reverend Falwell], was spontaneous and proceeded in a question and answer format." This decision was cited to similar effect by the Court of Appeal for Ontario in *Gould Estate v. Stoddart Publishing Co Ltd* (1998) 80 C.P.R. (3d) 161.

> wish to broadcast that content to the public of their choice."[26]

It is striking how merits-based arguments on the return appropriate for economic investment seem to underpin that decision. The merit being that 'communication' as a concept has to take into account what audience was the target of the sale of the licence to broadcast and how any additional public beyond that contracted for was never considered by the entrepreneur in negotiating the price of such rights.[27] This establishes a trend, if not a principle, that economic investment attracts intellectual property rights in contrast to the traditional trend of regard being had only to creative work. As the European Court put the matter:

> "Finally, it is to be observed that it is not irrelevant that a 'communication' within the meaning of Article 3(1) of the Copyright Directive is of a profit-making nature (see, to this effect, SGAE, paragraph 44).
>
> In a situation such as that in the main proceedings, it is indisputable that the proprietor transmits the broadcast works in his public house in order to benefit therefrom and that that transmission is liable to attract customers to whom the works transmitted are of interest. Consequently, the transmission in question has an effect upon the number of people going to that establishment and, ultimately, on its financial results.
>
> It follows that the communication to the public in question is of a profit-making nature.
>
> In light of all the foregoing, the answer to the question referred is that 'communication to the public' within the meaning of Article 3(1) of the Copyright Directive must be interpreted as covering transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house."[28]

That decision followed the approach of the Court in *'The Hotel Bedrooms'* case: *Sociedad General de Autores y Editores de Espana (SGAE) v. Rafael Hoteles SA.*[29] There the European Court had to determine whether the distribution by a hotel proprietor of a broadcast signal received centrally to rooms within the hotel, enabling guests to see protected works on the television sets in their rooms, constituted a '*communication to the public*'. The Court found that, although the hotel proprietor was merely relaying the signal received by the main hotel aerial, it was making protected works available to a new audience not within the contemplation of copyright owners when they licensed the original broadcasts. Using the classic 'but for' formulation, the rationale was as follows: but for the intervention of the hotel proprietor, the hotel guests, although physically within the satellite catchment area, would not have been able to enjoy the protected works. They therefore constituted a "new public". The Court appears to have regarded the presence of a financial motive as somewhat relevant, or more correctly, as not completely irrelevant. It stated:

> "…the action by the hotel by which it gives access to the broadcast work to its customers must be considered an additional service performed with the aim of obtaining some benefit. It cannot be seriously disputed that the provision of that service has an influence on the hotel's standing and, therefore, on the price of rooms. Therefore, even taking the view… that the pursuit of profit is not a necessary condition for the existence of a communication to the public, it is in any event established that the communication is of a profit-making nature…"[30]

A further case is worth mentioning in this context. In 2011, the High Court of England and Wales asked the European Court to consider whether live streaming of television programmes as part of a subscriber service constitutes a 'communication to the public'. The service, operated by TVCatchup Ltd (TVC), permits users to receive *via* the Internet "live" streams of free-to-air television broadcasts. Users must be based in the United Kingdom and must be in possession of a valid television licence: they can only receive access to content which they are already legally entitled to watch. The service, which is free to join, is funded by advertising before and during the live stream; the advertisements actually contained in the original broadcasts are retained unaltered. The English Court asked the European Court whether there is a '*communication to the public*' when an intervening organisation, acting for its own profit, intervenes in full knowledge of the consequences of its acts and in order to attract an audience to its own transmission and advertisements, to communicate the original broadcast signal to members of the public who would in fact be able to access the original broadcast using their own television sets or laptops in their own homes.

The English Court expressed its own provisional view, having regard to the broad interpretation of the term 'communication to the public' mandated by the Copyright Directive. The Court pointed to the following: TVC's activities are an independent exploitation of the works and other subject matter; they are not merely supportive of the original exploitation of the work; the service is an alternative service to that of the original broadcaster; it includes its own advertising content; it is in competition with the service provided by the original broadcaster; it is operated for profit; and it is intended to attract its own public audience. The Court did not accept that the fact that subscribers can receive the broadcasts direct on their domestic televisions means

26 Paras. 97 to 101.

27 Paras. 193 and 198 to 200.

28 Paras. 204 to 207.

29 Case C-306/05, [2006] E.C.R. I-11519. See also Joined Cases C-431/09 and C-432/09 *Airfield NV and Canaal Digital NV v. Belgische Vereniging van Auteurs, Compositien en Uitigevers CVBA (Sabam)* and *Airfield NV v. Agicoa Belgium BVBA.*

30 At para. 44. Advocate General Sharpston stated at para. 57 of her opinion of 13 July 2006 : "It is clear that in the present case first, the circle of potential recipients of the communication is both extensive and of economic significance for the author and, second, the intervening organisation making the communication does so for its own economic benefit. In such circumstances, the communication should be regarded as being made 'to the public'. I do not consider that it is necessary or appropriate to decide in the context of the present case whether economic benefit to the person responsible for making the communication is always required in order for a communication to be regarded as 'to the public'…"

that they are not a 'new public'. It noted that the Directive merely requires that the communication be to 'the public', subject to a narrow exception that the mere provision of facilities for enabling or making a communication does not in itself amount to a communication to the public. If there is a communication to a new class of the public, then that is a clear indication that one is outside the exception. But, the Court suggested, to hold that every communication to the originally contemplated class is exempted, goes much further than warranted by authority.[31]

The European Court delivered its decision on 7 March 2013.[32] It held that each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question. TVC's service makes protected works available through the retransmission of a terrestrial television broadcast over the Internet. It uses a specific technical means different from that of the original communication and is thus itself a 'communication' within the meaning of Article 3(1) of the Copyright Directive. As to whether the works are communicated to a 'public', the Court noted that the service is aimed at all persons resident in the U.K. who have an Internet connection and who claim to hold a valid television licence. Such persons may access the protected works at the same time. It is hard to dispute the Court's finding of a communication to a 'public'. It is not necessary, the Court said, that the communication be to a 'new' public. The fact that TVC was seeking to profit from its venture did not conclusively determine the issue and nor was the fact that it competes directly with the original broadcaster relevant.

It may be that the flip side of economic merit = intellectual property rights that a reasonable economic return is all that the creator of intellectual property has an entitlement to. The purpose of copyright law is to encourage and reward creativity and to prevent free-riding on the creative effort of others. The purpose is not, or at least traditionally it was not, to maximise revenue to rightholders at all costs and to confer on them the power to regulate new technologies that control access to their works. The focus traditionally was on the use of the protected work; not the use of the technology employed to distribute it.[33] Hence, staying with the notion of tradition, before the Internet people shared copies of films and books freely by simply handing over what they had read or seen to a friend. Most of us have loaned books to our students or trainees, for instance. You can still lend your kindle, but you cannot legally download what is on your kindle and email it to someone else who wants it. Is it this idea, the recasting of copyright that so many have called for, that underpins the *Oracle* decision?[34] Some may see an indication of that trend in this passage in the judgment:

> "To limit the application, in circumstances such as those at issue in the main proceedings, of the principle of the exhaustion of the distribution right under Article 4(2) of Directive 2009/24 solely to copies of computer programs that are sold on a material medium would allow the copyright holder to control the resale of copies downloaded from the internet and to demand further remuneration on the occasion of each new sale, even though the first sale of the copy had already enabled the rightholder to obtain an appropriate remuneration. Such a restriction of the resale of copies of computer programs downloaded from the internet would go beyond what is necessary to safeguard the specific subject-matter of the intellectual property concerned (see, to that effect, *Football Association Premier League and Others*, paragraphs 105 and 106)."[35]

Rightholders have a right to an appropriate economic return for their efforts and where their copyright has been infringed they have a right to adequate compensation. The writers discussed the adequacy of damages in their paper for the Fordham 2012 Conference.[36] Here we merely mention an interesting and very recent decision of the High Court of England and Wales.[37] The decision arose out of the Newzbin litigation, referenced in our 2012 Fordham paper.[38] Newzbin was a file-sharing site, the purpose of which was to make available binary content of interest to its users, including infringing copies of films. Following a finding of copyright infringement by the High Court, the company behind the site went into liquidation and the site ceased to operate. Within a matter of weeks, it was replaced by a virtually identical website, Newzbin2, located not in the U.K., but in Sweden. On the application of the copyright owners, referred to for simplicity as 'the Studios', the High Court made an order requiring the Internet service provider, BT, to block access to this sister website. In the most recent instalment of this litigation, the Studios sought an interim proprietary injunction to restrain the apparent operator of the website, Mr. David Harris, and various companies with which he is said to be associated, from dealing with and disposing of various assets, including a McLaren sports car. These assets are already subject to freezing injunctions pending the trial of the action, which is expected to take place later this year. The difference between a freezing injunction and a proprietary injunction is that the former restricts a defendant from dealing with his own assets, while the latter restricts a defendant from dealing

31 *ITV Broadcasting Ltd & Ors v. TV Catchup Ltd* [2011] E.W.H.C. 1874 (Pat); [2011] E.W.H.C. 2977 (Pat).

32 Case C-607/11 *ITV Broadcasting Ltd & Ors v TV Catchup Ltd.*

33 See William Patry, "We need to redefine what copyright means", *The Guardian*, 14 March 2012, at http://www.guardian.co.uk/law/2012/mar/13/how-to-fix-copyright-extract.

34 In an article in The Guardian newspaper, see above, William Patry stated: "A new structure must provide twenty-first-century solutions to getting authors paid and giving the public access to their creations. This will involve in many (but certainly not all) cases changing the fundamental nature of copyright from a grant of exclusive rights into a right of remuneration: a right to be paid through statutory licensing, collective management of rights, and levies."

35 At para. 63.

36 See footnote 14 above.

37 *Twentieth Century Fox Film Corporation & Ors v. David Harris & Ors* [2013] EWHC 159 (Ch) (5 February 2013).

38 *Twentieth Century Fox Film Corporation & Ors v. Newzbin Ltd* [2010] EWHC 608 (Ch) in which the High Court found that the Newzbin site infringed the claimants' copyright in films; *Twentieth Century Fox Film Corporation & Ors v. British Telecommunications plc* [2011] EWHC 1981 (Ch), in which the High Court granted an application requiring the Internet service provider, BT, to take steps to block access to the Newzbin site; *Twentieth Century Fox Film Corporation & Ors v. British Telecommunications plc* [2011] EWHC 2714 (Ch) in which the High Court ruled on the terms of the blocking order.

with assets to which the plaintiff asserts title. To obtain an interim proprietary injunction, the Studios had to establish that there was a serious question to be tried as to whether they had proprietary rights in the relevant assets.

On behalf of the Studios, it was said that where a copyright is infringed, the copyright owner has a proprietary claim to the *whole* proceeds of infringement, such proceeds being held on constructive trust for the copyright owner. It was said that Mr. Harris had profited nicely from his infringing activities and that the Studios were therefore the beneficial owners of all property acquired from revenues generated from his websites. The Court did not think so. Newey J. considered a copyright infringer to be more *akin* to a trespasser than a thief. He used an example:

> "Suppose, say, that a market trader sells infringing DVDs, among other goods, from a stall he has set up on someone else's land without consent. The owner of the land could not, as I see it, make any proprietary claim to the proceeds of the trading or even the profit from it. There is no evident reason why the owner of the copyright in the DVDs should be in a better position in this respect."[39]

Counsel for the defendants said the Studios were arguing for a remedy that had never been awarded by any court in respect of any species of intellectual property and that, if granted, such a remedy could have "*a chilling effect on innovation and creativity"*. The Court seemed to agree:

> "On [the claimant's] case, a copyright owner's claim would not even be limited to the infringer's profits: in principle, the entire proceeds of sale would be held on trust for the copyright owner. That might both be unfair and stultify enterprise. The proceeds of an infringement might be out of all proportion to the profits generated (e.g. because of the cost of raw materials used in the infringing product). It might not seem just for even a deliberate wrongdoer to have to pay the copyright owner the amount of his gross receipts, and an infringer need not have known that he was breaching copyright. Further… a person might be deterred from pursuing an activity if he perceived there to be even a small risk that the activity would involve a breach of copyright or other intellectual property rights… that could have a chilling effect on innovation and creativity."[40]

Moves towards a fair use style doctrine

The law in Europe is differently constructed to that of the U.S. or, for example, Israel. Most striking is the absence of a defence of fair use in Europe.[41] There are now proposals to introduce this concept. Before considering these, we should briefly mention the exceptions to the reproduction right currently recognised under European law. These can be found in Article 5 of the Copyright Directive. The list of exceptions is tightly defined and exhaustive. Member states must provide for an exception for certain temporary acts of reproduction, for example to allow for browsing and caching. After that, member states can choose to implement some or all of the twenty optional exceptions. These include exceptions for educational and scientific purposes, for research and private study, for the benefit of public institutions such as libraries and archives, for the purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings. Member states cannot go beyond this list: further exceptions can only be recognised at E.U. level. Thus while the fair use defence allows U.S. copyright law to absorb high-tech developments as they unfold and to "think on its feet", as it were, E.U. member states are left to "catch up after the event".[42]

It is claimed by some that the total legislative response time in the E.U. to a new technological development may well exceed ten years.[43] This is not surprising given the range of legal systems involved. Even at national level, legislation can never keep pace with changes, even incremental, in technology. Think back to the 1970s/1980s, when the recording of T.V. programmes became popular with the rise of the video recorder. In 1984, the U.S. Supreme Court decided this practice came within fair use,[44] but it was not until 1988 that U.K. copyright legislation responded and it was later still in 2000 when Irish legislation recognised the exception, though the practice had been ubiquitous for decades.[45]

In almost all cases, the exceptions permitted under E.U. law are limited to non-commercial use and are subject to the requirement that the rightholder receive fair compensation. 'Fair compensation' is calculated on the basis of the criterion

39 Para. 18.

40 Para. 19. The Irish Copyright and Related Rights Act 2000, section 134, provides for conversion damages. It states that the owner of any copyright shall be entitled to all such rights and remedies, in respect of the conversion or detention by any person of infringing copies of a work as he would be entitled to if he or she were the owner of every such copy, article or device and had been the owner thereof since the time when it was made. The authors are not aware of any case in which such damages have been awarded under the 2000 Act. A claim for such damages under the Copyright Act 1963 failed in *Allibert S.A. v. James O'Connor & Ors* (Unreported, High Court, Costello J, 18 December 1981).

41 Other jurisdictions with a fair use regime include the Philippines, see section 185 of the Intellectual Property Code of the Philippines (Republic Act No 8293) (1997); and South Korea, see the Copyright Act of South Korea, as revised in 2006.

42 Dnes A, *A Law and Economics Analysis of Fair Use Differences Comparing the US and UK*, Report for the Review of IP and Growth, 2011 at page 27.

43 Mirielle van Eechoud a.o., *Harmonizing European Copyright Law: The Challenges of Better Lawmaking,* Kluwer Law International, 2009 at page 298, cited by Hugenholtz & Senftleben, *Fair Use in Europe. In Search of Flexibilities*, November 2011.

44 *Sony Corp of America v. Universal City Studios Inc* 464 U.S. 417 (1984), often referred to as 'the Betamax case'. The U.S. Supreme Court reaffirmed the finding of the District Court that even when an entire copyrighted programme was recorded, the copying was fair use as there was no accompanying reduction in the market for the plaintiff's original work. The Supreme Court stated that "a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such non-commercial uses would merely inhibit access to ideas without any countervailing benefit."

45 As to the U.K., see the Copyright, Designs and Patents Act 1988, section 70; and as to Ireland, see the Copyright and Related Rights Act 2000, section 101(2).

of the harm caused to the rightholder.[46] The private copying exception is restricted in both these ways, although the possibility of change is being discussed as part of the Digital Agenda for Europe.[47] A mediator appointed by the Commission to lead the process of stakeholder dialogue on private copying levies, Mr. Antonio Vitorino, has stated that copies made by consumers for their private purposes in the context of a service that has been licensed do not cause any harm that would require additional remuneration in the form of levies.[48] Mr. Vitorino called for the private copying regime to be clarified to this extent. A person paying for a download of a song expects the payment to cover not only the first download of that song onto his personal computer, but to also cover the subsequent copying of that song to his iPod, mobile phone, MP3 player and whatever technology the future will bring. This is known as format-shifting. Consumers cannot be expected to pay on the double.

The European Economic and Social Committee has expressed the view that private copying is an integral part of fair use which should be recognised as a right of a legal licence holder under the concept of fair use. While the various institutions of the E.U. seek to grapple with the legitimacy or otherwise of format-shifting, by engaging in mediation and opinion writing, a process which may take years, in the U.S. consumers can be reasonably confident that copying a CD onto an MP3 player comes within the fair use doctrine.[49]

That is the beauty of fair use: it is flexible, adaptable and it keeps the law in line with the changing behaviours and expectations of consumers. While it may be criticised for being unpredictable, fair use has many attractions.[50] An obvious one is that it helps to foster innovation and creativity. The founders of Google are reported to have said that they could never have started their business in Britain in the 1990s as there was no support there at the time for a search engine based on caching. By contrast, the U.S. system offered the comfort that, in the event of a challenge to its business model, an argument based on fair use might succeed. In 2006, Google successfully argued that its copying of cached links was a transformative use, which added something new and did not merely supersede the original work.[51] Fair use of copyright works has also been linked to enhanced growth by "private copying" industries.[52]

Copyright law in Ireland and the U.K. allows for what is known as a 'fair dealing' defence. Many other common law jurisdictions also provide for fair dealing, and in some cases the defence might be said to be analogous to the doctrine of fair use.[53] In Ireland and the U.K., however, the fair dealing defence is narrow in scope and cannot really be said to at all resemble fair use. It is expressly limited to acts permitted for research or private study, criticism or review, and the reporting of current events.[54] Further, neither Ireland nor the U.K. has implemented the full range of exceptions set out in the Copyright Directive. It is in this context that concern has been expressed that the limited scope and range of exceptions in Irish and U.K. copyright legislation might be a barrier to innovation.

In November 2010, the U.K. Prime Minister, David Cameron commissioned Professor Ian Hargreaves to consider whether the U.K.'s intellectual property framework was sufficiently well-designed to promote innovation and growth in the U.K. economy.[55] Professor Hargreaves was specifically asked to consider whether the doctrine of

46 Case-467/08 *Padawan SL v. Sociedad General de Autores y Editores de Espana* [2010] E.C.R. I-10055.

47 The Digital Agenda for Europe aims to reboot Europe's economy and help Europe's citizens and business get the most out of digital technologies. The Digital Agenda was launched in May 2010. A review published in December 2012 identified seven key areas for growth, one of which was an update to the E.U.'s Copyright Framework.

48 Recommendations resulting from the Mediation on Private Copying and Reprographic Levies, 31 January 2013.

49 In *Recording Industry Association of America v. Diamond Multimedia Systems Inc,* 180 F. 3d 1072, (9th Cir. 1999), the Court of Appeals refused to grant an injunction to restrain the manufacture and distribution of the Rio, a digital device manufactured by Diamond that allowed users to download MP3 audio files from a computer and to listen to them elsewhere. The Court held that the Rio's operation was entirely consistent with the main purpose of the Audio Digital Home Recording Act 1992, *i.e.* the facilitation of personal use. It held that the Rio merely made copies in order to render portable, or "*space shift*", those files that already resided on a user's hard drive. Such copying, the Court said, was paradigmatic non-commercial personal use, entirely consistent with the purposes of the Act.

50 As noted at para. 5.12 of *Digital Opportunity: A Review of Intellectual Property and Growth (2011),* commonly known as 'the Hargreaves Review' (see text and footnote at 55): "The US approach enables judges to take a view as to whether emerging activities in relation to copyright works should legitimately fall within the scope of copyright protection or not. Fair use provides a legal mechanism that can rule a new technology or application of technology (like shifting music from a CD to a personal computer) as legitimate and not needing to be regulated, so opening the way to a market for products and services which use it. It has been suggested that this is one of the factors creating a positive environment in the US for innovation and investment in innovation. Fair Use offers a zone for trial and error, for bolder risk taking, with the courts providing a backstop to adjudicate objections from rights holders if innovators have trespassed too far upon their rights."

51 *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

52 Roya Ghafele and Benjamin Gilbert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore,* 2012, available at http://mpra.ub.uni-muenchen.de/41664/1/MPRA_paper_41664.pdf. The study found the positive impacts for growth from the introduction of U.S.-style fair use in Singapore had little or no adverse impact on creative industries.

53 In Singapore, the Copyright Act 1987 sets out, under the heading of fair dealing, what is effectively a fair use defence. In India, the Copyright (Amendment) Act 2012 is said to have introduced an expanded fair dealing exception that goes a very long way down the road to a fair use doctrine (see the Irish Copyright Review Committee, *Copyright and Innovation: A Consultation Paper*, at page 114). In Canada, the Copyright Modernization Act 2012 expanded fair dealing for the purposes of education, parody and satire. The courts in Canada interpret the fair dealing provisions broadly, moving it more towards a fair use approach: see *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* (2012) S.C.C. 37, where the Supreme Court held that photocopying parts of textbooks for classes was a fair dealing for research; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* (2012) S.C.C. 36, where the Supreme Court held that the provision by online music distributors of free previews of musical works, lasting 30 to 90 seconds, to the public was a fair dealing for research. The Court took the view that previews were reasonably necessary to help consumers research what to purchase.

54 Sections 50 and 51 of the Irish Copyright and Related Rights Act 2000; Sections 29 and 30 of the U.K. Copyright, Designs and Patents Act 1988.

55 *Digital Opportunity: A Review of Intellectual Property and Growth*, an

fair use would be beneficial in the U.K. Submissions were invited. Responses from established U.K. business were in the main "*implacably hostile*" to adopting a fair use defence. The reasons cited were that it would bring massive legal uncertainty because of its roots in U.S. case law; would result in an U.S. style proliferation of high cost litigation; and would create yet more confusion for suppliers and purchasers of copyright goods. On the other side, it was recognised that copyright needs to accommodate some unlicensed copying that is considered to be fair in the ordinary sense of the word. It was said that the U.K. Government should firmly resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators.

Advice received from government lawyers was to the effect that significant difficulties would arise in any attempt to transpose U.S. style fair use into European law. The Review looked at alternatives. It concluded that the U.K. could achieve many of the benefits of the U.S. regime by taking up the full range of copyright exceptions permitted under E.U. law, including an exception which permits copying by a lawful owner of an original copy.[56] Exceptions, it was said, should be 'future-proofed', that is to say, implemented in a technology neutral way so that they are capable of adapting to subsequent waves of change, and mandatory, so that copyright is not dictated by contract. In its response to the Review, the U.K. Government indicated it would introduce legislation in 2013 to provide for these new exceptions.[57] The Review also recommended that the U.K. Government press at E.U. level for the introduction of an exception allowing uses of a work enabled by technology which do not directly trade on the underlying creative and expressive purpose of the work, so-called "non-consumptive" uses. This, it was said, would encompass uses of copyright works where copying is really only carried out as part of the way the technology works. The Review identified the alternative as a poor second best, namely a policy process whereby every beneficial new copying application of digital technology waits years for a bespoke legal exception. The U.K. Government has stated that it will aim to secure further flexibilities at E.U. level that enable greater adaptability to new technologies; will support a review of relevant E.U. legislation to this end; and will engage in dialogue with European partners to identify how this can best be achieved.[58]

A Copyright Review Committee established by the Irish Government is considering, among other things, the feasibility of moving towards a fair use style doctrine. As in the U.K., the Committee received submissions and much the same arguments were recited: we will not recount them here. In a Consultation Paper published in February 2012, the Review Committee expressed the view, *albeit* on a preliminary basis, that E.U. law offers a great deal of scope to member states to adopt a fair use doctrine as a matter of national law. The Committee considered that there is nothing in the E.U. Directives or the case law of the Court of Justice of the European Union to suggest that copyright is inviolable and must be absolutely protected. Rather, E.U. case law increasingly suggests that protection of intellectual property rights must be balanced against the protection of other fundamental rights. Fair use is a means of protecting other fundamental rights (*e.g.* the freedom of information, the freedom of expression, the freedom to provide services), and the Copyright Directive, the Committee said, should therefore be interpreted consistently with it.

Further, it noted that the Copyright Directive does not harmonise the definition of copyright at national law and that it is possible to view fair use as a doctrine that defines the ambit of copyrightability, as opposed to infringement. The Review Committee acknowledged, however, that while E.U. law does not necessarily preclude fair use at national level, it certainly does not mandate it. The matter is in reality an issue of politics and policy. The Review Committee tentatively offered a draft 'fair use' clause for Ireland, which it tied as closely as possible to the existing exceptions. It suggested that the exceptions should be exhausted before any claim of fair use can be considered and that an Irish fair use clause should be based not just on the four U.S. criteria, but also on Article 9(2) of the Berne Convention and on the experience of other countries which have adopted a similar doctrine.[59] The Committee is expected to publish its final report in March of this year. The authors also understand that the Dutch Government is interested in introducing a fair use doctrine.[60]

A case to watch

In October of last year, the United States District Court of the Southern District of New York heard oral argument in

Independent Report by Professor Ian Hargreaves, May 2011. Available at: http://www.ipo.gov.uk/ipreview-finalreport.pdf

56 See generally Hugenholtz & Senftleben, see footnote 43 above.

57 The new legislation is to include an exception for private copying. People will be permitted to copy content they have bought onto any medium or device that they own, strictly for their own personal use (such as transferring their music collection from CD to iPod). This will not allow sharing copies with others, but it will allow consumers to copy material to and from private online cloud storage. The U.K. Government has rejected any system of levies to be attached to copying devices as currently exists in many other European countries. The Government considers that levies or other compensation are neither required nor desirable in the context of a narrow provision that causes minimal harm.

58 See *The Government Response to the Hargreaves Review of Intellectual Property and Growth*, at page 8. Available at: http://www.ipo.gov.uk/ipresponse-full.pdf

59 Article 9(2) of the Berne Convention states that "It shall be a matter for legislation in the countries of the Union to permit the reproduction of [literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

60 Kamerstuk (Parliamentary Record) 21501-34, no. 155. See further at: http://www.rijksoverheid.nl/onderwerpen/ict/legaal-downloaden-en-fair-use - "The cabinet wants to include a fair use exception in the law that stimulates reproduction for non-commercial purposes. This is to anticipate the discussion in the European Union on fair use exceptions in the European guideline in copyright. Such a provision is missing right now." (Translation taken from Google's submissions to the Irish Copyright Review Committee). In February 2012, the Australian Attorney-General requested the Australian Law Reform Commission to consider whether Australia's Copyright Act should be amended to include a broader "fair use" style exception. The Australian Law Reform Commission is expected to issue a Discussion Paper in May/June 2013 and the Attorney-General is to deliver a Final Report by 30 November 2013.

a copyright infringement suit filed by Capitol Records LLC against ReDigi Inc.[61] ReDigi describes itself as the *'world's first pre-owned digital marketplace.'*[62] It offers users a platform to stream, buy and sell legally acquired digital media.[63]

Capitol Records, the well-known record company, complains that ReDigi's entire service and business model is "*predicated upon making and assisting users in making multiple, unauthorized copies, distribution, and performances of sound recordings*" owned by it and others.[64] It says that the track "stored" in and offered to consumers from ReDigi's "cloud" is necessarily a copy of the user's original file; a second copy is made when a ReDigi sale is consummated; and the user does not "sell" an original track, but merely agrees to its deletion after it has been copied.[65] Other complaints are also put forward. ReDigi denies any copies are made and is relying on various defences, including the fair use doctrine, the first sale doctrine and the essential step defence.[66] Commentators suggest that if the case was being heard in Europe, the *Oracle* judgment would support ReDigi's case. [67] The authors would not like to intervene with their own views, but await the decision of the New York courts with interest.

Conclusion

European law, hidebound as it is by the goal of predictability, defines everything in such detail that it becomes almost self-defeating. A detailed read of the *Premier League* case perhaps establishes that a principle-based copyright regime or even a principle-based defence might do better. Most recently, courts in Europe have grappled with the introduction of defences based on fundamental rights into copyright protection.[68] In the United States it might be puzzling that the entitlement to run a business, to privacy, to communicate, or even to anonymity could trump the entitlement of return and control of an intellectual property owner. Yet, that is what courts in Europe now deal with. Most recently, a summary was attempted by the High Court in Ireland as to the conflict that such rights pose in the context of an argument that the Internet justifies differing rules:

> "The law does not, however, set intellectual property rights at nought because of the involvement of the internet. In due course, clarity may be brought to the law by a comprehensive ruling where an appropriate case arises before the Court of Justice of the European Union. In the meanwhile, the nature of the injunction sought; the limitation to and the duration of any monitoring; the breadth or narrowness of the scope of any order; the nature of the equipment to be used; the potential for the interference of that equipment with the proper use of the existing systems of the intermediary; the balance of the burden between the parties as to equipment, personnel and cost; the intrusiveness of any remedy into legitimate privacy and the entitlement to communicate; and any potential data protection impingements, together constitute the main factors in a court determining where the proportionality of an injunctive remedy to the mischief of the improper use of intellectual property online is to be struck or whether, on the other hand, an injunction application is to be refused, despite legal compliance, on discretionary grounds."[69]

Obviously, competing rights are nothing new to the law. Few laws are absolute. But, in Europe we tend in that direction. Insofar as a defence is established for copyright, some may argue that it cannot but be applicable to other intellectual property rights. An instance would be the apparently different approach of the European Court to fundamental rights defences where trade marks are involved.[70] Every court seeks a just result based on merits. Recognising in legislation that a legal scheme which allows for reasonable use, on the purchase of copyright material, is perhaps a simpler way of enabling merit to dictate a fair result. ■

61 Case 12 CIV 0095 RJS.

62 It might be noted here that on 29 January 2013, Amazon secured a patent to create a digital resale marketplace for used content, including used e-books and audio downloads.

63 https://www.redigi.com/legal.

64 Complaint against ReDigi, filed on 6 January 2012 at para. 19.

65 Above, at paras. 21 to 25.

66 ReDigi's answer to complaint, filed on 19 January 2012.

67 See ReDigi could defend against copyright infringement claims if EMI case was heard in U.K., says expert: http://www.out-law.com/en/articles/2012/october/redigi-could-defend-against-copyright-infringement-claims-if-emi-case-was-heard-in-uk-says-expert/; The resale of digital music and video files in the E.U. may not be found to infringe copyright, says expert: http://www.out-law.com/en/articles/2013/january/the-re-sale-of-digital-music-and-video-files-in-the-eu-may-not-be-found-to-infringe-copyright-says-expert/.

68 See, for example, Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*.

69 *EMI Records Ireland Ltd & Ors v The Data Protection Commissioner* [2012] I.E.H.C. 264, (Unreported, High Court, Charleton J., 27 June 2012) at para. 8.10.

70 Case C-324/09 *L'Oreal S.A. & Ors v eBay International A.G. & Ors,* [2011] E.C.R. I-0000.

Legal Dramas

Bewley's Lunchtime Cafe Theatre on Grafton Street is presenting the world premiere of 'Under Pressure' written by barrister Rachel Fehily, from the 27th of May until the 8th of June 2013. 'Under Pressure', a play set in the Law Library, dramatises a Senior Counsel's intense consultation with her client, a surgeon accused of murdering his wife. Bookings at www.bewleyscafetheatre.com

There is a special weekend showcase of rehearsed readings of two new plays, 'Bedtime' and 'Blood Test' by Rachel Fehily, on the 17th and 18th of May 2013 at the United Arts Club. Full details are at: www.eventelephant.com/newplays